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CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

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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.
CARROLL D. WOOD,	
JAMES E. RIDDICK,	
EDGAR A. McCULLOCH,	
WILLIAM F. KIRBY,	ATTORNEY GENERAL.
P. D. ENGLISH,	CLERK.

MEMORANDUM

Chief Justice Hill was absent on account of sickness from January 14, 1907, until April 22, 1907.

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

SOUTHERN EXPRESS COMPANY *v.* HILL.

Opinion delivered November 26, 1906.

1. NEGLIGENCE—EFFECT OF CONTRIBUTORY NEGLIGENCE.—One who is injured by the mere negligence of another can not recover at law or equity any compensation for his injury if he by his own or his agent's ordinary negligence or wilful wrong contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him. (Page 5.)
2. CARRIER—CONTRIBUTORY NEGLIGENCE OF SHIPPER'S AGENT.—An instruction which imposed liability upon the carrier if the shipper delivered a box to the shipper's agent with directions to be shipped to a certain point, and the agent delivered the box to the carrier, and it failed or neglected to deliver the box, was erroneous in ignoring evidence that plaintiff's agent negligently marked the box to be sent elsewhere, and that it was lost in consequence of such misdirection. (Page 5.)
3. SAME—MISCARRIAGE OF GOODS—BURDEN OF PROOF.—In an action against a carrier to recover for failure to deliver a box of goods at their destination, it was error to instruct the jury that the burden was on the carrier to show that the box of goods was misdirected when delivered to it if the consignee's address was properly given in the carrier's receipt, the burden on the whole case being on the plaintiff. (Page 6.)
4. EVIDENCE—PROVING RECEIPT.—A receipt is not admissible in evidence until its execution has been proved. (Page 6.)
5. CARRIER—LIMITATION OF LIABILITY—VALIDITY.—A stipulation in a carrier's receipt limiting its liability to the sum of fifty dollars is invalid where it is not based upon any consideration. (Page 7.)

Appeal from Howard Circuit Court; *James S. Steel,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee sued appellant for the loss of a box of clothing, which he alleged was delivered to appellant at Memphis to be shipped to J. W. Hill at Nashville, Arkansas. Appellee alleged

that appellant refused and neglected to deliver the box of clothing to him at Nashville, Ark. He alleged that the box of clothing was of the value of $210, and prayed for judgment in that sum. Appellant denied all material allegations of the complaint, and set up that the alleged box of clothing was delivered to it marked J. W. Hill, Nashville, Tenn., and that it was by appellant transported to Nashville, Tenn., and that appellant, having made every reasonable effort to locate the consignee, J. W. Hill, at Nashville, Tenn., and having failed, sold the box at "Old Hoss" sale in accordance with the laws of Tennessee.

Appellant also set up "that by the terms, stipulations and conditions of the receipt given by appellant for the said box of clothing the liability of the carrier was limited to the sum of fifty dollars, and that said shipment was made on these terms at a lower charge for transportation than is charged where the maximum liability may exceed this sum."

Appellant also set up that appellee's agent, one Johnson, who delivered the box to appellant, marked it consigned to J. W. Hill, Nashville, Tenn., and that this act of appellee through his agent, Johnson, was a direct contributory cause of the miscarriage of such shipment. Appellee adduced evidence tending to prove that he delivered to appellant the box in controversy through his agent, the Memphis Millinery Company, or T. D. Johnson, who was in its employ; that appellant receipted the Memphis Millinery Company for the box, the receipt reciting that the box was marked "J. W. Hill, Nashville, Ark.;" also that the holder of the receipt would not demand of appellant a sum greater than fifty dollars for the loss or damage to the box, and that in no event should appellant be liable for any loss or damage unless the claim therefor was presented in writing at the Memphis office within ninety days from the date of the receipt, and that the claim must be made in a statement to which the receipt must be attached. Appellee showed that he had never received the box of clothing, and that he had made diligent inquiry for same. He proved that the value of its contents was over $100. Appellant on cross-examination elicited from appellee the information that he (appellee) did not see the receipt executed, and did not know the name signed to it, and did not know that the person signing the receipt was an agent of the company, whereupon appellant ob-

jected to the receipt as evidence, and the objection was overruled.

The appellant adduced evidence tending to prove that appellee left the box of clothing with one T. D. Johnson, who was in the employ of the Memphis Millinery Company, to be sent to appellee at Nashville, Ark., and to be marked or addressed by the said T. D. Johnson accordingly. But, instead, said box was addressed "J. W. Hill, Nashville, Tenn." Appellant also adduced evidence tending to show that the box weighed only twenty pounds, and that it was not worth over twenty-five dollars.

The court, at the request of the appellee, gave the following instructions:

"(1.) The court instructs the jury that if they believe from a preponderance of the evidence that the plaintiff, J. W. Hill, delivered the box of goods sued for in this action to one Mr. Johnson, to be by him addressed to J. W. Hill, of Nashville, Ark., and then to deliver to the express company to be transported and delivered to J. W. Hill, at Nashville, Arkansas, and that said box was delivered to said express company by said Johnson, and that said express company failed or neglected to deliver the same to the plaintiff; you will find for the plaintiff whatever sum the proof shows the clothing was worth.

"(2.) The court instructs the jury that a public carrier is liable for goods lost by misdelivery whether the misdelivery occurs by mistake or by fraud or imposition practiced upon it, unless the fraud, mistake or imposition were the acts of the plaintiff or his agent.

"(3.) The court instructs the jury that the burden of proof is on the defendant in this case to show that the box of goods was addressed to 'J. W. Hill, Nashville, Tenn'., instead of 'J. W. Hill, Nashville, Ark'., provided the express company delivered its bill of lading to the plaintiff or his agent showing that the box of goods was addressed to 'J. W. Hill, Nashville, Ark'."

The appellant properly saved its several exceptions to the giving of every one of said instructions. The court at the instance of appellant gave, among others, the following instructions:

"1. The jury are instructed that the burden of proof is on the plaintiff, J. W. Hill, to show by a preponderance of competent evidence every fact necessary to authorize a recovery.

"3. The jury are instructed that in the shipping and marking the box of clothing in controversy the witness T. D. Johnson acted as agent of the plaintiff, J. W. Hill; and if the jury find from the evidence that in addressing or marking the box in controversy for shipment the said Johnson, either inadvertently or otherwise, marked or addressed the same, 'Nashville, Tenn.', instead of 'Nashville, Ark.', this will be the same in law as though done by the plaintiff, J. W. Hill, in person.

"4. If the jury find from the evidence that the box in controversy was marked 'Nashville, Tenn.', instead of 'Nashville, Ark.', and that, but for it being marked 'Nashville, Tenn.', it would have gone to Nashville, Arkansas, or that the fact of it being marked 'Nashville, Tenn.', contributed to the miscarriage or going astray of the package, then and in that event the plaintiff can not recover. And this is true whether the operating or concurring fault was the act of the plaintiff or his agent, provided you find there was such concurring fault or negligence.

"7. The value of the goods in controversy must be measured by the market value thereof at the time of shipment, taking into consideration all the evidence throwing light on the question of value under this standard."

And the court refused the following asked by appellant:

"5. The jury are instructed that there can be no recovery in this suit for more than fifty dollars and legal interest, even if it be found that the package was properly addressed and was negligently lost by the defendant.

"6. Though the jury may find that the defendant was negligent in not sending the box of clothing in controversy to Nashville, Arkansas, yet there can be no recovery by the plaintiff if either he or his agent addressed it to 'Nashville, Tenn.', instead of 'Nashville, Ark.', and this fact contributed to the loss of the goods."

Proper exceptions were saved to the ruling of the court in refusing instructions Nos. 5 and 6, respectively.

The jury returned a verdict against appellant for $100.

The motion for new trial presenting all the exceptions reserved at the trial was overruled, and this appeal taken.

W. C. Rodgers, for appellant.

1. The fifth instruction asked for by appellant should have been given. The recovery should have been limited to the amount stipulated in the contract.

2. It was error to refuse the sixth instruction asked by appellant. Even if the carrier be negligent in failing to deliver the goods at the proper destination, yet if the loss or miscarriage was contributed to by the fault or negligence of the shipper or his agent, he is not entitled to recover. 36 Ark. 371; 48 Ark. 106; 76 Ark. 356. Certainly the package being addressed by appellee's agent to Nashville, Tenn., was a concurring cause bringing about the loss, and appellee ought not to recover. 120 Mass. 139; 24 Wis. 157; 83 Pa. St. 22; 84 Illl. 239; 22 Ore. 14; 21 Wis. 21; 84 Tenn. (12 Heisk.), 161. See, also, 3 Cliff. (U. S. C. C.) 184; 3 Houst. (Del.) 233; 12 Fed. Cas. No. 6914; 105 Iowa, 335; 170 Ill. 645.

3. The first instruction given for plaintiff was erroneous, because it ignores the rule of concurring fault. *Supra.*

4. The second instruction given for plaintiff was erroneous, in that it practically assumes an improper *delivery,* without proof to support such a contention. 41 Ark. 382; 61 Ark. 549; 70 Ark. 441; 74 Ark. 19; 74 Ark. 468; *id.* 756; 3 *id.* 517. There is no evidence of any fraud and imposition for which appellant could properly be held responsible.

5. The third instruction given for plaintiff was erroneous, in requiring the company to assume the burden of showing that the box was addressed to Nashville, Tenn., whereas there was no evidence contrary to that fact. 90 S. W. 17 *id.* 18; 72 Ark. 471.

Sain & Sain and *W. S. McCain,* for appellee.

WOOD, J. (after stating the facts.) First. One who is injured by the mere negligence of another can not recover at law or in equity any compensation for his injury if he by his own or his agent's ordinary negligence or willful wrong contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him. *Little Rock & F. S. Ry. Co.* v. *Pankhurst,* 36 Ark. 371; *Little Rock & F. S. Ry. Co.* v. *Cavenesse,* 48 Ark. 106; *Kansas City So. Ry. Co.* v. *McGinty,* 76 Ark. 356. This doctrine of contributory negligence, so often announced by this court, was correctly applied to the facts of this record in instruc-

tion numbered four given on motion of appellant. The court, having given this, did not err in refusing appellant's request numbered six, which embodied substantially the same idea. The court however erred in giving instruction number one. This instruction fixed a liability upon appellant if appellee delivered the box to his agent and gave him proper directions for its shipment, and if the agent delivered the box to the appellant and appellant failed or neglected to deliver same to appellee. The instruction in this form wholly ignores the evidence tending to prove that the box was marked by appelllee's agent "Nashville, Tenn." For, although appellee delivered the box to his agent, Johnson, and directed him how to ship same, it appears from the testimony of Johnson himself (read in the motion for continuance and accepted as evidence in the case) that he failed to carry out such instructions. Appellee left the box in controversy with him "to be sent to the plaintiff (appellee) at Nashville, Ark.," and to be marked or addressed accordingly, but the box "was addressed Nashville, Tenn., instead." The conclusive inference from this testimony is that Johnson addressed the box "Nashville, Tenn.", when he should have addressed or marked it "Nashville, Ark." But the instruction overlooks this evidence, and makes appellant liable if appellee directed his agent properly how to ship the box, athough the agent may have failed to carry out his instructions.

The third instruction given at the instance of appellee was also erroneous. It placed the burden of proof upon the appellant to show that the box of goods was addressed to "J. W. Hill, Nashville, Tenn.," provided appellant issued its bill of lading to appellee or his agent showing that the box was addressed to "J. W. Hill, Nashville, Ark:" Appellant on cross-examination objected to the introduction of the receipt as soon as it ascertained that the receipt had not been properly authenticated. The court should then have sustained the objection and excluded the receipt as evidence unless appellee would then or thereafter properly prove its execution. Taking the receipt out of the case as the court should have done, the instruction numbered three for appellee was abstract, there being no evidence upon which to ground it. But, even if it were conceded that the receipt was properly authenticated, and therefore properly in evidence, the instruction would still be erroneous. For the probative effect of the receipt was simply to show that

appellant had received a box of goods marked Nashville, Ark. The receipt tended to contradict appellant's witness, Johnson, who testified that the box was marked "Nashville, Tenn." The receipt was not conclusive evidence of how the box was marked. While a receipt is usual, it is not essential to the duty or contract of carriage. *Southern Express Co.* v. *Kaufman,* 12 Heisk. (Tenn.) 161. It was one of the evidentary facts tending to show that the box was marked in a certain way, while other evidence tended to show that it was marked in a different way.

In such a case, the evidence being all before the jury and conflicting, there was no shifting of the burden of proof. The burden was on the appellee to make out his case by a preponderance of the evidence.

Second. Appellant contends that, if liable at all, it is not liable for more than fifty dollars, under the following provision in the receipt: "If the value of the property is not stated by the shipper at the time of the shipment, and specified in the receipt, the holder thereof will not demand of the company a sum exceeding fifty dollars for the loss or damage to the shipment receipted for." According to the terms of the receipt this provision is applicable in the event the shipment is lost or damaged. Appellee contends with much plausibility that the box in this case was neither lost nor damaged, but was converted by appellant, and that therefore the above provision limiting its liability is not applicable. We need not pass upon that question. For, conceding that the receipt was in the case, the appellant can not claim the benefit of it, because it is not based upon any consideration. *St. Louis, I. M. & S. Ry. Co.* v. *Marshall,* 74 Ark. 597; *St. Louis, I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112.

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

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COLEMAN v. COLEMAN.

Opinion delivered December 3, 1906.

1. ADOPTION—SUFFICIENCY OF ORDER.—Under Kirby's Digest, § 1342, providing that a petition for adoption of a child shall state "whether

such child has either father or mother living, and, if so, where they reside," an order of adoption which recites the mother's death and that "the residence of the father, if living, is unknown to petitioner," shows a substantial compliance with the statute. (Page 11.)

2. APPEAL—PRESUMPTION AS TO SILENCE OF RECORD—Where the transcript on appeal fails to bring up the petition, upon which an order of adoption was based, it will be presumed on collateral attack that the petition complied with the statutory requirements. (Page 12.)

3. SAME—COLLATERAL ATTACK.—Under Kirby's Digest, § 1345, providing that the probate court "shall not adopt such child if it have a father or mother living, unless such father or mother appear in open court and give consent thereto, provided that if such petitioner show by two competent witnesses that the residence of such father or mother be unknown, then such court may order the adoption of such child," an order of adoption is not void on collateral attack because it does not recite that it was shown by two witnesses that the residence of the father was unknown. (Page 12.)

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

STATEMENT BY THE COURT.

In 1895 J. W. Bowlen, the father of John Bowlen, an infant child about a year old whose mother was dead, apprenticed his infant son to D. L. Coleman of Howard County, Arkansas, during the full period of his minority. The articles of apprenticeship specified that D. L. Coleman should furnish the infant, John Bowlen, with board, lodging, medicine and other necessaries, send him to school one-fourth of the time after he arrived at seven years of age, and on the other hand that the apprentice should correctly conduct himself and serve D. L. Coleman until he arrived at the age of twenty-one years.

Coleman and his wife had no children of their own, and, becoming attached to the boy that had been entrusted to their care, they concluded to adopt him. To carry out this purpose, D. L. Coleman in 1900 filed a petition in the probate court asking to be permitted to adopt the child, John Bowlen.

The probate court entered the following judgment on this petition:

"Probate Court of Howard County, July Term July 16, 1900.

"In the matter of the adoption of John Walter Bowlen by D. L. Coleman:

"On this day the court examines the petition filed herein by D. L. Coleman for the adoption of John Bowlen, a resident of said county and State, and having him take the name of John Walter Coleman, and be entitled to all the rights and interest in the estate of the petitioner, D. L. Coleman, by descent or otherwise, to all intents and purposes as if the said John Walter Coleman were the natural heir at law of said petitioner; the age of said child being five years and seven months, and he being possessed of no property of any description; that the mother of said boy died soon after his birth, and the residence of the father, if living, is unknown to petitioner; that, if permitted to adopt said boy, he will occupy the same position towards him as if he were his natural father, and in every way be liable for his proper maintenance, support and education, and the court doth grant said petition. It is therefore considered and ordered by the court that D. L. Coleman have the custody and control of the five-year old male child known heretofore as 'John Bowlen', and that he maintain and educate him, and that the name of the child hereafter be John Walter Coleman, and that to all intents and purposes the said John Walter Coleman shall be an heir at law of the said petitioner D. L. Coleman."

D. L. Coleman died in 1904, and his wife, Ellen Coleman administered on his estate. Afterwards Heenan Coleman, a brother of D. L. Coleman, brought this action in the Howard Chancery Court, in which he claimed to be the next of kin and heir of D. L. Coleman, deceased.

Ellen Coleman appeared, and denied that the plaintiff was the heir of D. L. Coleman, and she further set out the adoption proceedings, and alleged that the adopted child, John Walter Coleman, who survived D. L. Coleman, was his heir, and that plaintiff had no legal interest in the property left by D. L. Coleman.

On the hearing the chancellor sustained the answer, and held that John Walter Bowlen had been legally adopted by D. L. Coleman, and was entitled to inherit his estate. He thereupon dismissed the complaint for want of equity, and plaintiff appealed.

W. C. Rodgers, for appellant.

1. For the law of adoption, see Kirby's Digest, § § 1341, *et seq.* The matter of adoption is not within the common-law nor constitutional jurisdiction of courts of probate; and where jurisdiction is conferred by special statute, which is to be exercised in a special manner, the judgment can only be supported by a record which shows jurisdiction, and no presumptions as to jurisdiction will be indulged. 59 Ark. 483. The court can not adopt the child if its father or mother be alive, unless the parent appear in open court and consent, or unless it is shown by two competent witnesses that the residence of the father or mother is unknown. This is a jurisdictional fact, the absence of which from the record renders the judgment void upon collateral attack. *Id.* Jurisdictional facts can not rest in parol. *Id.*

2. The status of the adopted child must be fixed in the lifetime of the *quasi* parent. In this case the adopted parent asked for no correction or amendment in the form of the order of adoption, and it remained as originally entered until after his death—about five years. The child asked no change in the form of the judgment, and the administratrix was without authority of law to do so. It is conceded that in a proper case a judgment may be made to speak the truth by *nunc pro tunc* entry, but this should never be attempted at the instance of a stranger to the record and without notice to the parties interested.

3. Plaintiff should have been permitted to show that at the time of the adoption proceedings the child's father lived in an adjoining county.

Feazel & Bishop and *D. B. Sain,* for appellee.

1. The child at 18 months of age had been voluntarily apprenticed to D. L. Coleman for a period of 21 years, and the father then disappeared, never having been seen nor heard from, so far as the proof shows, from that time. When, five years thereafter, Coleman asked leave of the probate court to enlarge the child's rights by adopting him, and the order was made, this was manifestly to the interest of the child, of which appellant is in no position to complain. The judgment of adoption will be presumed to have been founded upon sufficient legal evidence. 20 Ark. 85. The probate court is a court of superior jurisdiction, and

where its jurisdiction is rightfully acquired its judgments can not be attacked collaterally. 52 Ark. 341.

2. If there were any omissions in the recitals in the judgment of adoption, the probate court undoubtedly had power to correct it, notwithstanding five years had elapsed, and the judge who made the former order was dead. 75 Ark. 12; 23 Ala. 284; 2 How. (U. S.), 263; 8 Pick. 115; 40 Ark. 224.

3. Appellant, being a stranger to the record, was not entitled to notice of the *nunc pro tunc* proceedings; but it is not conceded that notice was necessary, even if appellant had been a proper party to the proceeding, for the power of courts to correct their records is not dependent upon notice. 35 Ark. 278.

RIDDICK, J., (after stating the facts.) This is an appeal by Heenan Coleman, a brother of D. L. Coleman, deceased, from a judgment of the chancery court of Howard County holding that an order of adoption made by the probate court of that county on the petition of D. L. Coleman was a valid order, and had the effect to make the adopted child the heir of Coleman. The petition upon which this order of adoption was made is not set out in the record, but the recitals in the order itself show all the jurisdictional facts required by the statute.

The language of the statute is that "any person desirous of adopting any child may file his petition therefor in the probate court in the county where such child resides." Kirby's Digest, § 1341.

"Such petition shall specify, first, the name of such petitioner; second, the name of such child, its age, whether it has any property, and, if so, how much; third, whether such child has either father or mother living, and, if so, where they reside." *Id.* § 1342.

This court in the case of *Morris* v. *Dooley,* 59 Ark. 483, held that, in addition to the facts which are expressly required to be stated in the petition, it must be shown either in the petition or in the order of adoption that the child was a resident of the county where the order was made, for that in the opinion of the court was necessary to show that the court had jurisdiction.

The only objection made to the order under consideration here is that it does not show that the father was not living, or state that it was shown by two witnesses that the residence of the

father was unknown. The statute from which we have quoted above requires that the petition for adoption shall, among other matters, state "whether such child has either father or mother living, and, if so, where they reside." As before stated, the petition on which this order was made is not set out, but the order recites on this point "that the mother of said boy died soon after his birth, and the residence of the father, if living, is unknown to petitioner." We understand from this that it was alleged, in substance, that the mother was dead, and that the residence of the father was unknown. This was a substantial compliance with the statute. Moreover, the petition not being set out in the record, it will be presumed that it complied with the statute.

Another section of the statute provides that the court "shall not adopt such child if it have a father or mother living, unless such father or mother appear in open court and give consent thereto, provided, that if such petitioner show by two competent witnesses that the residence of such father or mother be unknown, then such court may order the adoption of such child." *Id.*, § 1345. Appellant contends that the order is void and subject to collateral attack because it does not recite that it was shown by two witness that the residence of the father was unknown. But the jurisdiction of the court did not, in our opinion, depend on such evidence, nor was it necessary to make such a recital in the record. Making the order of adoption without such proof would be error, and might be ground to set such order of adoption aside on petition of the father of the adopted child, but neither D. L. Coleman, on whose petition the order of adoption was made, nor any one claiming through him, as plaintiff does, would be allowed to object to the judgment on that ground. *Nugent* v. *Powell,* 4 Wyoming, 173, 62 Am. St. Rep. 17; *Van Matre* v. *Sankey,* 148 Ill. 553, 39 Am. St Rep. 196, and note; In re *Williams,* 102 Cal. 70; *Appeal of Wolf,* 13 Atlantic Rep. (Pa.), 760.

For the reasons stated, we are of the opinion that the order of adoption was valid, and that the decree of the chancellor upholding same was right.

Judgment affirmed.

DODD *v.* READ.

Opinion delivered December 3, 1906.

1. NEGLIGENCE—FIRE.—Operating a steam engine near a combustible dwelling without a spark arrester or other appliance to prevent the escape of sparks is negligence *per se*. (Page 14.)
2. DAMAGES—EXCESSIVENESS.—Where none of the evidence tended to prove that plaintiff's damages exceeded $200, it was error for the jury to find that they amounted to $300. (Page 15.)

Appeal from Howard Circuit Court; *James S. Steel,* Judge; affirmed.

Action by Nannie Read, administratrix of the estate of C. H. Read, against T. J. Dodd & Co. to recover damages caused by destruction of plaintiff's house by fire alleged to have been communicated from a stationary steam engine which defendants were operating.

The plaintiff recovered judgment for $300 damages, and defendants appealed.

W. C. Rodgers, for appellant.

1. The verdict was excessive. No witness testified that the house was worth over $200, and the jury could not arbitrarily disregard the testimony and award $300 damages.

2. There is no proof that there are any spark arresters which were not used, yet the court in its first instruction assumes that proper appliances were not used by defendant. The instruction as to "the best and latest appliances," therefore, is abstract, and it was erroneous. 41 Ark. 382; 56 Ark. 457; 61 Ark. 549; 74 Ark. 19; 76 Ark. 348; 70 Ark. 441; 58 Ark. 324.

The second instruction given for plaintiff is open to the same objection, besides assuming that defendants are liable if sparks set fire to the house in the absence of the use of a spark arrester. It is also in conflict with another instruction given for defendants. 54 Ark. 588; 61 Ark. 141; 64 Ark. 332; 65 Ark. 64; 72 Ark. 14; 72 Ark. 440; 76 Ark. 69; 76 Ark. 224; 91 S. W. 304; *Id.* 759; 92 S. W. 27.

Feazel & Bishop, for appellee.

1. It was the province of the witnesses to state facts, and from the facts thus detailed it was the province of the jury to

fix the value of the house. 59 Ark. 105. They were not bound by the opinions of witnesses, if such opinions had been competent. They had the right to consider other evidence tending to establish the value of the property.

2. The instructions complained of were justified by the proof and the circumstances, and were properly given.

That the mill was permitted to run while the danger was so apparent without spark arrester or appliances of any kind to prevent the escape of sparks, after their attention had been called to the danger, was gross negligence on the part of appellants, for which they are liable. 30 Mich 181; 34 Wis. 315; 44 Ohio St. 80; 90 N. C. 374; 25 N. Y. 344; 40 Barb. 137; 53 Mich. 607. The burden was on defendants to show due care and diligence in the use of approved appliances to prevent the spread of fire. 90 N. C. 374.

McCULLOCH, J. Plaintiff's house was situated about 70 yards distant from a stave mill operated by defendants, and was destroyed by fire. The testimony was conflicting as to the origin of the fire, the plaintiff's theory being that it was caused by sparks from the engine, and defendants' theory being that it originated from a defect in the chimney of the house. This question was submitted to the jury on evidence sufficient to sustain a finding either way, and the verdict settled that issue.

The evidence is undisputed that defendants operated the steam engine without the use of a spark arrester or other appliance to prevent the escape of sparks, and the court gave instructions which in effect declared the law to be that they were liable for any damages resulting from fire communicated by the engine on account of such failure to provide a spark arrester or other appliance. The court, in other words, declared the failure to provide a spark arrester or other appliance to prevent the escape of sparks to be negligence *per se*. Was that correct, or should it have been submitted to the jury to say whether or not it was negligence? We think the court was correct in its instructions. Ordinarily in this class of cases the question is one for the jury to determine whether proper care has been exercised in providing appliances to prevent the escape of fire; but where, as in this case, no appliances at all have been supplied for that purpose, the court should declare it to be negligence as a matter

of law. Fire is a dangerous agency, and a person or corporation using steam power in the operation of a lawful business must exercise care to prevent the escape of sparks from the smoke-stack of the engine. *Planters' Warehouse & Comp. Co.* v. *Taylor,* 64 Ark. 307.

Where any effort has been made in that direction, it is always a question of fact for the determination of a trial jury whether or not ordinary care has been exercised, but where no precautions at all have been taken, no safety appliances whatever have been provided, and by reason of proximity there is danger to other buildings, then it follows as a matter of law that proper care has not been exercised, and it is negligence *per se.* 1 Thompson on Negligence, § 742; *Lawton* v. *Giles,* 90 N. C. 374; *Hoyt* v. *Jeffers,* 30 Mich. 181; *Webster* v. *Symes,* 109 Mich. 1; *Hauch* v. *Hernandez,* 41 La. Ann. 992.

It is further contended by appellant that the evidence is insufficient to sustain a verdict for more than $200.

The house was totally destroyed, and several witnesses stated their opinions to be that it was worth about $200. One witness —the only one introduced by the plaintiff on the question of value—testified that he was a carpenter, was familiar with the house and that, in his opinion it would cost at least $400 to rebuild it. He gave it as his opinion that the house was worth about $200 at the time it was destroyed. Other witnesses testified that the house was in good condition at the time it was destroyed, and they undertook to describe its condition in detail to the jury. Now, the true inquiry was as to the cash market value of the building, or rather the difference between the market value of the property before and after the destruction of the house; and the witnesses who undertook to state the value placed it at $200. It is manifest, however, that the jury disregarded this testimony, and based the amount of the verdict upon the cost of rebuilding the house anew, less the depreciation on account of age and decay. They either did this, or they arbitrarily rejected the opinions of the witnesses as to the value and substituted their own judgment. In either event they exceeded their powers and rendered a verdict inconsistent with the evidence. It was competent for the witnesses to state their several opinions with reference to the cash value of the building, stating the facts upon which they reached

their conclusions. *Railway Co.* v. *Lyman,* 57 Ark. 512. None of the witnesses who testified on this subject showed any special knowledge of the value of property in that locality, and the testimony, on that account, is far from satisfactory, but the burden was upon the plaintiff to prove the amount of the damages, and the defendant alone reaps all the benefit from the weakness of the testimony. There was no evidence at all that the building was worth $300—all the evidence showed that it was worth only $200—and the jury could not substitute their own judgment for the testimony of witnesses on this point.

The verdict is $100 in excess of what it should have been If the plaintiff shall within fifteen days enter a remittitur as to $100, the judgment as to the remainder will be affirmed; otherwise the judgment will be reversed, and the cause remanded for a new trial.

BELL v. STATE.

Opinion delivered November 26, 1906.

1. TRIAL—INSTRUCTION AS TO REASONABLE DOUBT.—It was not error in a criminal case to instruct the jury that "a reasonable doubt is not a mere captious or imaginary doubt, but a doubt voluntarily arising in your mind, after a fair and impartial consideration of all the evidence in the case, and which leaves your minds in that condition that you do not feel an abiding conviction to a moral certainty of the truth of the charge." (Page 19.)
2. SAME—WHEN INSTRUCTION MISLEADING.—After the court had correctly instructed the jury as to the meaning of the term "reasonable doubt" in a capital case, and the jury had deliberated for 24 hours, they asked the court for further instruction on that point. The court, after an extended definition of reasonable doubt, charged them as follows: "If you are so satisfied of defendant's guilt, it is not necessary for you to be able to put your finger on or point out the particular evidence that convinces you." *Held* misleading, in view of the contradictory and unsatisfactory nature of the evidence upon which the verdict of guilty was based. (Page 21.)
3. SAME—URGING JURY TO AGREE.—In concluding an instruction on the subject of reasonable doubt the court said: "It is not intended to

force you to abandon honest convictions, but to give you ample opportunity to exercise the high qualities of manhood becoming jurors in an important case like this." *Held* not error. (Page 24.)

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

STATEMENT BY THE COURT.

The court, after the jury had been out twenty-four hours, gave the following additional instructions over objection of defendant:

"Gentlemen of the jury, all you know about this case, since you knew nothing about it at the beginning, you have learned from the legitimate evidence in the trial. All your impressions and beliefs must have been derived from the same source. Now, what do you honestly believe about the case from the evidence? What is your belief with reference to the guilt or innocence of the defendant? Do you have a firm, fixed and abiding belief that he is guilty as charged, or do you not? If you have such a firm fixed belief that the defendant is guilty, amounting to an abiding conviction to a moral certainty, then you should convict. If not, you should not convict. If you have a belief that the defendant is guilty, from the evidence, then is your understanding convinced and directed, and your reason and judgment satisfied that defendant is guilty? If so, you are satisfied to a moral certainty or beyond a reasonable doubt, which expressions are here used (to) denote the same state of mind. If you are not thus satisfied, you should acquit the accused. If you are, you should convict him. If you are so satisfied of defendant's guilt, it is not necessary for you to be able to put your finger on or point out the particular evidence that convinces you; and it is also true that, if you are not so satisfied, it is not necessary that you should be able to point out the particular matters giving rise to your mental conditions in that respect. It is enough to convict that on the whole case you are legally satisfied of guilt.

"I am very anxious, gentlemen, for you to reason together honestly, conscientiously and considerately on this case, and for you to see if you can not come to a conclusion. It is not intended to force you to abandon honest conviction, but to give you ample opportunity to exercise the high qualities of manhood becoming jurors in an important case like this. You should have no pride

of opinion that would induce you to adhere to an expressed opinion, if upon further consideration you no longer entertain that opinion. Be true to yourself, to your consciences and to the law, and strive earnestly and honestly to reach a just conclusion, remembering that it is the truth we seek, and the truth only When you have found the truth, then unhesitatingly pronounce the truth in your verdict."

The facts are sufficiently stated in the opinion of the court.

Sam R. Chew, for appellant.

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

RIDDICK, J., (after stating the facts.) This is an appeal by Henry Bell from a judgment convicting him of murder in the first degree and sentencing him to be hung. The facts, in brief, are that one William Jones, a constable of Crawford County, was waylaid, shot down and killed in that county on the night of the 12th day of July, 1896. The defendant, Henry Bell, and several other negroes were arrested and charged with the crime. Bell was afterwards indicted for murder in the first degree. On his application a change of venue was taken to Franklin County, where he was tried and convicted and sentenced to be hung.

The evidence tended to show that a number of men, most of them negroes, had been engaged in gambling in the neighborhood where the crime was committed, and that Jones went to the neighborhood on the night he was killed for the purpose of arresting some of these men. He was probably waylaid and shot down by one or more of them, for no other motive is shown for the crime.

The evidence points very clearly to the guilt of one of these parties, but he fled the country and escaped. As to who the other participants in this crime were, or whether there was another participant, the evidence as shown in the transcript leaves it to our minds very uncertain. There was evidence connecting defendant with the crime, and, so far as we can see, evidence equally as potent which showed to the contrary. This evidence connecting defendant with the crime consisted of the testimony of negroes, some of whom had been arrested and charged with the same crime. None of this evidence is of much importance except

the testimony of one negro who testified to a confession made by the defendant. Quite a number of witnesses testified that this negro was unworthy of belief, while one witness testified that his character was as good or better than that of the average negro. No one can read this evidence and not regret that the courts should be compelled to act in a grave matter involving the life of a human being on evidence of such an unsatisfactory character. But, though the nature of this testimony is such that we cannot feel great confidence in its truthfulness, still the weight to be attached to it was a question for the jury, and it is sufficient to sustain their verdict.

A number of questions have been presented by counsel of the defendant to the different rulings of the court in giving and refusing instructions. But most of the instructions given were clearly correct, and the law of the case was, we think, well stated in the original charge of the court to the jury.

The record recites that, after the jury had been out from eight o'clock Tuesday morning until about ten o'clock Wednesday morning, they came into court and asked for further instructions on certain points, among them the question of reasonable doubt. Now, the term "reasonable doubt" defines itself as a doubt that has some reason to rest on, and as opposed to an unreasonable doubt, or one having no valid reason to support it. As all this is plainly shown by the term itself, many learned judges have expressed the opinion that nothing is gained by attempts to explain a term the meaning of which is so apparent. In commenting on this matter, Judge Thompson says that the term "reasonable doubt" was an expression adopted by the common-law judges "for the very reason that it was capable of being understood and applied by plain men in the jury box," and that in attempting to explain this expression, which needs no explanation, judges generally lose themselves in mazes of subtlety and casuistry where the mind of the ordinary juror is incapable of following them. Thompson on Trials, § 2463.

Mr. Bishop says of this expression that "there are no words plainer than 'reasonable doubt', and none so exact to the idea meant. Hence some judges, it would seem wisely, decline attempting to interpret them to the jury." Then, after remarking that negative definitions of this phrase may sometimes be

helpful, such as that it is not a whimsical, imaginary or vague doubt, but one arising out of the evidence, he proceeds to say that "of affirmative definitions we have not one which can safely be pronounced both helpful and accurate." 1 Bishop's New Crim. Proc. § 1094.

The author of a recent article on this subject has this to say: "There have been many attempts to define and interpret the term 'reasonable doubt,' as used in this connection, but it is apprehended that such attempts are futile; that the words are of plain and unmistakable meaning, and that any definition on the part of the court tends only to confuse the jury and to render uncertain an expression which, standing alone, is certain and intelligible." 23 Am. & Eng. Enc. Law (2 Ed.), 955. See also *Burt* v. *State,* 72 Miss. 408, s. c. 48 Am. St. Rep. and note; *State* v. *Reed,* 62 Me. 129; *State* v. *Rounds,* 76 Me. 124; *Hamilton* v. *People,* 29 Mich. 193; *State* v. *Sauer,* 38 Minn. 438; *Miles* v. *U. S.*, 103 U. S. 312; *People* v. *Cox,* 70 Mich. 247.

On the other hand, many courts hold it to be proper to give an instruction defining the term "reasonable doubt." And short negative definitions of the kind referred to by Bishop are no doubt harmless, and probably at times helpful. And numerous decisions have approved instructions telling the jury in substance that a reasonable doubt is not a mere imaginary or vague doubt, but a doubt arising out of the evidence or lack of evidence, so that the jury, after a careful consideration of all the evidence, do not feel morally certain that the defendant is guilty. *Benton* v. *State,* 30 Ark. 328; *Commonwealth* v. *Webster,* 5 Cush. (Mass.) 295; *People* v. *Finley,* 38 Mich. 482; *Little* v. *State,* 89 Ala. 99; 1 Blashfield on Instructions, § 295, and cases cited.

But in most cases it would probably do as well for the trial judge to simply follow the statute, and tell the jury that, before convicting the defendant, his guilt must be established beyond a reasonable doubt; that if, after a careful consideration of all the evidence, they have a reasonable doubt of his guilt, they should acquit. On the other hand, if, after such consideration, they are convinced of his guilt beyond a reasonable doubt, they should convict. But, as before stated, according to the decisions of this and most other courts, there is no error in giving instructions defining such term if correctly drawn; whether it is necessary or

advisable to give them being a matter generally left to the discretion of the trial judge.

In this case the presiding judge in his original charge said to the jury that "a reasonable doubt is not a mere captious or imaginary doubt, but a doubt voluntarily arising in your minds after a fair and impartial consideration of all the evidence in the case, and which leaves your minds in that condition that you do not feel an abiding conviction to a moral certainty of the truth of the charge." This was a very satisfactory explanation of the term, and was all that was needed, and has ample precedent to support it. *Com.* v. *Webster,* 5 Cush. 295; *Benton* v. *State,* 30 Ark. 328; *People* v. *Finley,* 38 Mich. 482; Blashfield on Instructions to Juries, § 293.

And we are of the opinion that, when the jury came in and asked for further instructions on that point, it would have been as well for the judge to have repeated this instruction, and told the jury that this was a sufficient definition of reasonable doubt, and that he could not assist them further, for the question as to whether they entertained a reasonable doubt of the defendant's guilt was one addressed to the judgment of each individual juror, which he must solve for himself in the light of the evidence and the law as given by the court, after a full discussion of the matter with his fellow jurors. But, in his desire to aid the jury in the solution of the question before them, the presiding judge gave them another instruction still further defining the term "reasonable doubt," and which is set out in the statement of facts. Now, this second attempt to do what the Supreme Court of Mississippi in a case cited above says is equivalent to painting a lily or gilding refined gold does not seem to us quite so successful as the first. It is longer than the first instruction, and by the repetition of the same idea over in different words, and by the way in which it is expressed, makes the impression of an effort to convince the jury that there was no obstacle in the way to prevent them from returning a verdict either for or against the defendant. In this instruction, after an extended definition of reasonable doubt, which, it seems to us, rather clouded than cleared the subject, he says: "If you are so satisfied of defendant's guilt, it is not necessary for you to be able to put your finger on or point out the particular evidence that convinces you; and it is also

true that if you are not so satisfied it is not necessary that you should be able to point out the particular matter giving rise to your mental condition in that respect."

Now, waiving the question as to whether the last clause in this sentence states the law correctly, it seems to us that the statement of the law contained in the first clause is not correct. The substance of it is that a jury would, if convinced of defendant's guilt beyond a reasonable doubt, be justified in finding him guilty of a capital crime, although they were not able to point out any particular evidence that convinced them of his guilt. This instruction assumes that the jury might be justified in believing that defendant was guilty beyond a reasonable doubt, although at the same time they were not able to put their finger on or point out any evidence that convinced them of that fact. Now, in this case it was conclusively shown that Jones was murdered. But the only evidence to connect the defendant with the crime was the evidence of a negro that defendant confessed to the crime and evidence that shortly before the killing he was engaged with several other negroes in "shooting craps" for money, and the testimony of a negro that he heard him whispering to one Calvin Coggs when Coggs was trying to borrow a gun on the night of the killing. If the jurors believed this evidence, there was no trouble to point out the evidence that convinced them. If they rejected it as unworthy of unbelief, they should have acquitted the defendant; for, though other witnesses testified to circumstances surrounding the killing, their evidence did not connect the defendant with the crime. But, under this instruction, the jury may have rejected this evidence, which could be readily pointed out, and founded their verdict on a belief which rested on no tangible evidence. A rule of law that permitted either a court or jury to impose the death sentence on one without being able to point out the evidence upon which the conviction rested would be as dangerous as it would be novel. Such a rule would be antagonistic to the fundamental principles of law that there must be some substantial evidence of guilt before conviction and punishment. If it was within the prerogative of a jury to find the defendant guilty without being able to put their finger on or point out the evidence that convinced them, then the same rule would apply to the court, and it might follow that one could be convicted and executed for

crime where neither the judge nor the jury were able to name the evidence that showed his guilt. The mere statement of such a rule seems sufficient to condemn it as unsound.

It may be, and probably is, true that the learned trial judge did not intend by the language quoted to convey the idea that the jury could convict without being able to say what it was that convinced them of guilt. But the trouble with this part of the instruction is that it was calculated to create this impression. Under the facts of this case where there was a mass of circumstances in proof bearing on the crime but having little or no tendency to connect defendant with it, and where his connection with it was shown mainly by a purported confession proved by a negro witness of doubtful character, we think that this instruction was both improper and prejudicial.

If this rather diffuse explanation of reasonable doubt had been given as a part of the original charge, there would be less room to complain.

But this jury, called upon to decide a case involving the life or death of the defendant on the testimony of certain witnesses, some of whom had been suspected and arrested for this very crime, and whose reputations for truth and morality were shown to be more or less bad, had remained undecided, though kept together for over twenty-four hours. This hesitation in a matter of such importance was fully justified by the contradictory and unsatisfactory nature of the evidence. Coming before the court for additional instructions under these circumstances, this further charge was given to the jury explanatory of reasonable doubt. Now, whether a juror entertains a reasonable doubt is a matter for him alone to determine. He is, to quote the language of the Supreme Court of Minnesota, "the best judge of his own feelings, and knows for himself whether he doubts better than any one else can tell him." *State* v. *Sauer,* 38 Minn. 439.

When accurate and full instructions on the whole case have been given, including a concise explanation of reasonable doubt, and when, after considering all the evidence and the instructions, the only question in the minds of the jury is whether the guilt of the defendant is established beyond a reasonable doubt, they have reached a point where little assistance can be afforded by the presiding judge, for the matter is one which they must decide

according to the dictates of their own judgment. For the judge to undertake to assist them by still further elaborating on the nature and character of reasonable doubt is more likely to mystify and confuse than to aid them. And this is another reason why we think that this instruction should not have been given.

In concluding this second charge to the jury, the judge told them that he was very anxious for them to reason together to see if they could not come to a conclusion. "It is not intended," he said, "to force you to abandon honest convictions, but to give you ample opportunity to exercise the high qualities of manhood becoming jurors in an important case like this." Counsel for the defendant contends that this language, spoken to the jury after they had remained undecided for over twenty-four hours, was too earnest an appeal to them to decide the case, and was prejudicial to defendant. It was calculated, he says, to impress too strongly upon the jury the idea that it was their duty to exercise the "high qualities of manhood" to which reference is made in the instruction, and to decide the case in some way, even at the expense of honest convictions. But we can not concur in this view. While the part of the instruction referred to, being probably hastily drawn, is somewhat vague and seems to have more eloquence than lucidity in it, yet, taken as a whole, the meaning of the instruction is clear. It was an attempt on the part of the trial judge to impress upon the jury that it was their duty to consider the case carefully and to decide it if they could do so without violating their judgments and consciences. The idea that the court intended to convey was entirely proper. While we think that, instead of telling the jury that his intention was to give them ample opportunity "to exercise the high qualities of manhood becoming jurors in case like this," it would have been simpler and perhaps better to have said that the intention was to give them ample opportunity "to consider the evidence and decide the case," still, when the instruction is taken as a whole, it is clear that this is in substance what the court meant, and no error can be based on this instruction.

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

STORMS *v.* STATE.

Opinion delivered December 3, 1906.

1. EMBEZZLEMENT—INDICTMENT.—An allegation in an indictment for embezzlement that defendant received certain money as "bailee" is sufficient to advise him that he came into possession of the money of another to be held for the other for some special purpose, upon the accomplishment of which the money was to be returned or delivered over. (Page 30.)
2. SAME—DUPLICITY.—An indictment for embezzlement which alleges that defendant, having received as bailee certain property belonging to another, unlawfully and feloniously did embezzle, and unlawfully and feloniously did steal, take and carry away, the same does not charge two separate offenses. (Page 31.)
3. TRIAL—ARGUMENT NOT BASED ON EVIDENCE.—It was prejudicial error to permit the prosecuting attorney, in his argument, to charge defendant, accused of embezzlement, with having entered into a conspiracy to rob his employer, and to make reference to acts and declarations of the alleged fellow conspirator where there was no proof of such conspiracy, and where the alleged acts and declarations were done and made in defendant's absence and after the object of the conspiracy, if there was one, had been accomplished. (Page 31.)
4. EVIDENCE—ACTS OF CONSPIRATORS.—The acts and declarations of a conspirator are not admissible against a fellow conspirator where they were done and made in the latter's absence and after the object of the conspiracy had been accomplished. (Page 31.)
5. EVIDENCE—OTHER CRIMES.—In a prosecution for embezzlement it was not error to admit evidence of other similar transactions both before and after the alleged transaction in controversy, where the jury were instructed that the evidence could only be considered on the question of intent. Page 32.)

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

STATEMENT BY THE COURT.

The appellant was indicted as follows: "The said defendant, in the county and district aforesaid, on the 1st day of September, 1905, and being then and there the bailee of Ft. Smith Commission Company, a corporation, and as such bailee having received from Dave Mayo, Tom O'Leary and Frank Mason $10.50, gold, silver and paper money of the value of $10.50, the property of said Ft. Smith Commission Company, a corporation as aforesaid, and being then and there the bailee of said Ft. Smith Commission Company, unlawfully and feloniously did convert and embezzle

to his own use the said above described $10.50, gold, silver and paper money of the value of $10.50, the property of said Ft. Smith Commission Company, and so the said Gus Storms the above described money of the value of $10.50, the property of said Ft. Smith Commission Company, unlawfully and feloniously did steal, take and carry away."

A demurrer in short to this indictment was overruled. The State adduced the following testimony:

C. B. Riley testified: "In the year 1905 I was employed as manager of the Ft. Smith Commission Company. Louis Weiman was acting as salesman and collector. Defendant was employed as wagon driver and collector of bills that he delivered C. O. D. It was his duty to collect these bills, mark the bills paid and deliver the money to the office."

Q. "I will ask you to state how you received and filled orders of these C. O. D. packages in the city of Ft. Smith?"

A. "The customer would call over the 'phone or give the order to some of our city salesmen, who would 'phone it in, and this order would be written upon one of the order sheets, and the shipping clerk would fill the order. Such orders would be turned over to the shipping clerk, who would get the goods out, mark the weight and fill out the amount in dollars and cents, make out the number of ticket, invoice to the customer going to, and turn it over to weighman or driver. The only record we have in the office was the memoranda taken down on the order blank and turned over to the shipping clerk. The order blanks were placed in the drawer of the shipping clerk's desk. In the evening these sheets were taken to the bookkeeper, and the next day he would charge them up on the ledger. The bill for the 14th of January, 1905, for potatoes and celery sold Dave Mayo, amount $10.50, was made out by Mr. Tom Williams, shipping clerk, and was marked "Paid" by the defendant Storms. There is no record in our office of this transaction. I found the bill in the possession of Mayo." The State then offered in evidence the other bills sold Mr. Mayo, five bills sold Hotel Main, and eight bills sold Stevens & Rainey, all of which were objected to. "The bills are found on page 33 of the record. There is no charge of these bills on the books of the Ft. Smith Commission Company. Frank Wyman was in the employ of the company when these bills

were purchased. I did not see the goods delivered; only know the bill was marked 'Paid.'" Cross-examination: "Don't know who delivered them or to whom the money was paid or how paid; do not say the money was not turned over to Wyman. There were about twenty other employees besides Wyman. Don't know if the money was turned over to them; the records do not show. It seems there was money turned over know what Wyman told me." Re-direct examination: "If he delivered goods, it was his duty to turn the money over to the cashier. Wyman had no right to collect. Wyman was a salesman and collector; he collected from the customers; had no authority to collect from drivers. It was Storms's custom to turn money over to the cashier. Don't know what particular bills were collected, or what moneys were turned over to the cashier; don't know whether he did or did not turn over this $10.50."

Frank Mason testified: "I was manager of Mayo's restaurant. It was the custom in the year 1905 for me to O. K. bills and for Mr. O'Leary to pay them. Some of the bills shown me were O. K.'d by Mr. Eckwood. The bill of January 14 was not paid by me; it was paid by Mr. O'Leary or Mr. Mayo." Cross-examination: "Don't know of my own knowledge whether it was ever paid, nor how it was paid. The bill shows I O. K.'d it, and it was supposed to be collected after I did this."

Dave Mayo testified: "The bill shown me of January 14, 1905, was O. K.'d by Frank Mason, and paid by somebody in our employ. I don't know who paid it. It was paid at my place of business by some one. Don't know of my own knowledge who paid it. Was not present when it was paid. Know nothing of my own knowledge except what the bill shows." Cross-examination: "Do not know of my own knowledge who made payment of the bill. Do not know whether defendant got any money on it. Do not know whether it was all paid at one time or at different times."

Emma Yonkee testified: "Was cashier and bookkeeper for the Ft. Smith Commission Company in the year 1905. C. O. D. bills in the city would be turned in by the driver, a copy of the invoice brought to the cashier, the money turned in and the bills stamped 'Paid.' When money was thus turned in, I put the amount in a book I had for record and returned the bill to the

driver after it was stamped 'Paid.' The batch of Dave Mayo's bills shown me, including the one January 14, 1905, do not appear upon my cash book to have been paid."

C. B. Riley, recalled, testified: "There is no record upon any of their books of any of the sixteen bills sold Mayo, or of the eight sold Stevens & Rainey, nor of the five sold Hotel Main."

Dave Mayo, recalled, testified that either Mr. O'Leary or himself paid the other bills shown him.

The bills introduced in evidence, other than the one upon which the embezzlement was based, consist of five bills to Dave Mayo, the first being dated February 14, 1905, and the last September 7, 1905. The five bills sold Hotel Main are of date September 8, 1905, to September 23, 1905. The first bill of Stevens & Rainey bears date May 9, 1905, and the seven others at sundry dates from that time to September 13, 1905. The introduction of each of these bills was objected to, and objection overruled.

This was all the testimony introduced on behalf of the State. Defendant introduced testimony as to his good character.

The prosecuting attorney in his opening statement to the jury, among other things, said: "That the Ft. Smith Commission Company had been systematically robbed by its employees; that the scheme by which it was accomplished was, when an order for goods to be delivered by wagon in Ft. Smith was received it would be filled, but no entry be made on any books; that the slip showing the order would be given the shipping clerk, who would put it in a drawer in the office, and afterwards a confederate in the house would steal out this slip, so it would not go to the bookkeeper; that when the goods were delivered and collection made by the defendant, he, defendant, and his confederates would divide the money; that ——— Wyman was in the deal, and had been arrested for it, but gave bond,, forfeited his bond and ran away." Defendant objected to each and every statement made by the prosecuting attorney as above set out, but the court overruled the objection, saying that he would "govern that when the evidence was offered; it might or might not be admissible."

The prosecuting attorney in his concluding argument said: "That not only did the defendant embezzle $10.50, but the bills he collected at Hotel Main, Stevens & Rainey and the other bills

collected from Dave Mayo; that this was accomplished through the scheme he outlined in his opening statement to the jury, for which Wyman had been arrested and gave bond and skipped the country." Defendant objected to each and every statement above set out, and thereupon the court said that the jury "might consider the other bills sold to Mayo, Hotel Main and Stevens & Rainey only for the purpose of determining defendant's intent, but the jury could not convict him of any offense except the one charged in the indictment, and that this evidence was admitted for the sole purpose of shedding light on the question of intent, if it did so." The court, with this statement, overruled defendant's objection, to which defendant excepted.

The court, after having instructed the jury that, in order to convict the defendant, the testimony must establish that $10.50 in gold, silver or paper money were paid to him by Dave Mayo, Frank Mason or Tom O'Leary, then gave as a further instruction the following section of Kirby's Digest:

"In all prosecutions for the unlawful taking of money by larceny, embezzlement or otherwise, it shall not be necessary to particularly describe in the indictment the kind of money taken or obtained further than to allege gold, silver or paper money, and a general allegation in the indictment and proof of the amount of money taken shall be sufficient."

The court refused to give the following instruction:

"6. The allegation in the indictment that the defendant embezzled $10.50 in gold, silver or paper money paid him by Dave Mayo, Frank Mason or Tom O'Leary is a material allegation, and must be proved as charged beyond a reasonable doubt. If the evidence does not establish the kind of money received by the defendant and the value of that money, the jury cannot presume that he received from them $10.50 in gold, silver or paper money, and that its value was ten dollars and fifty cents."

To the action of the court in refusing to give this instruction, and in giving in charge the section of Digest above set out, the defendant excepted.

The jury returned a verdict of guilty.

Appellant filed his motion for new trial, containing all the exceptions reserved. It was overruled. Motion in arrest was overruled. Appellant prosecutes this appeal.

Ira D. Oglesby, for appellant.

1. The indictment is bad. It should have stated the facts constituting the alleged bailment, how and in what way defendant was bailee, instead of merely stating conclusions. It is also bad because it charged two offenses, larceny and embezzlement.

2. The cause should be reversed on account of language used by the prosecuting attorney in his opening statements and concluding argument to the jury, which was necessarily prejudicial to the defendant, and which were not supported by testimony. 71 Ark. 416.

3. The court erred in allowing other bills of merchandise alleged to have been sold long after the offense by defendant was alleged to have been committed. The testimony in this case does not fall within the rule laid down in 72 Ark. 586.

4. It was error to refuse the sixth instruction asked for by defendant, and also, under the testimony in this case, it was error to give the section of the Digest to the effect that it was not necessary to prove the value of the money alleged to have been received. It was in conflict with other instructions given, and authorized a conviction although the evidence did not show the kind of money embezzled nor the value thereof.

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

1. Evidence of other crimes of exactly the same nature, occurring about the same time, and in each case the order blank, the evidence of the sale retained at the store, was missing, negatives the theory of mistake, and on this ground the evidence was admissible. Wigmore on Evidence, § 329.

2. The prosecuting attorney's statements, although partly out of the record, were not prejudicial.

3. Instruction numbered six asked by appellant was substantially included in another instruction already given, and it was properly refused; and in lieu of that instruction it was proper to give in charge to the jury the section of the Digest.

WOOD, J., (after stating the facts.) The indictment is good. The term "bailee" is used in the statute, section 1839, Kirby's Digest. Alleging that a person received as a "bailee" certain money is sufficient to advise such person that he came into pos-

session of the money of another to be held for the other for some special purpose, upon the accomplishment of which special purpose the money is to be returned or delivered over. Schouler on Bailments, § 2.

The indictment does not charge two separate and distinct offenses. The crime alleged in the indictment is embezzlement which, committed under the circumstances and in the manner detailed, the statute denominates also larceny. Sec. 1839, Kirby's Digest. Only one offense is alleged.

The court erred in permitting the prosecuting attorney to argue that Wyman and the defendant "entered into a conspiracy to rob and were conspirators in robbing the Ft. Smith Commission Company, that Wyman would take the tickets out of the drawer after they had been made by the shipping clerk, so that they would not go to the bookkeeper, and that the defendant would collect the bills and divide the spoils with Wyman; that Wyman had been arrested for it, had forfeited his bond and run away, left the country." There was no evidence upon which to ground this argument. It was not shown that Wyman and appellant were in a conspiracy to rob the Ft. Smith Commission Company. Even had such conspiracy been shown, the acts and declarations of one of the conspirators in the absence of the other, after the object of the conspiracy had been accomplished, could not be used in evidence against the one on trial. *Benton* v. *State,* 78 Ark. 284, and authorities cited. It was therefore highly prejudicial to appellant for counsel to assert as a fact that appellant was in a conspiracy with another to rob the Ft. Smith Commission Company, and that the other conspirator had been arrested, had given bond, and had fled the country. Thus counsel attempted by assertion, without proof, to make the impression upon the jury that one was associated in crime with appellant and had shown by flight his consciousness of guilt. If the jury accepted as true the assertion of counsel, the inevitable conclusion would be that appellant was also guilty. For in a conspiracy of two one is necessarily as guilty as the other. The argument was most unfair to appellant, and well calculated to prejudice his cause before the jury. While we would not have disturbed the verdict upon the evidence aside from this improper argument, we are not so clearly convinced of appellant's guilt

upon the undisputed facts as to be able to say that the verdict was not caused by the *extraneous evidence* and improper argument which the prosecuting attorney brought into the record. See *Marshall* v. *State,* 71 Ark. p. 415.

The court did not err in refusing appellant's request for instruction numbered six, and in giving instead section 1844 of Kirby's Digest. This statute makes it unnecessary, where it is alleged, as in this indictment, that gold, silver, and paper money was embezzled, to do more than prove the amount of money, in all taken. That proof was made in this case by showing that the bill of Mayo marked paid by appellant amounted to $10.50. From this and other proof the jury were warranted in concluding that appellant had received the sum of $10.50.

The court did not err in admitting evidence of other similar transactions by appellant before and after the alleged transaction in controversy, since it was admitted with the limitation that it could only be considered on the question of intent. I Wigmore on Ev. § 329; *Howard* v. *State,* 72 Ark. 586. If appellant was guilty at all, the particular criminal act under consideration according to the proof was one of a series of similar acts, and these were admitted to prove system and show design. *Howard* v. *State,* 72 Ark. 586, *supra; Johnson* v. *State,* 75 Ark. 427.

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

HILL, C. J., (dissenting.) It is true that the prosecuting attorney referred to an unproved matter, the alleged flight of Wyman, but it was not a matter going to the real issue of the case—the guilt or innocence of this defendant—and I regard it as trivial, not prejudicing any substantial right of defendant; and the court's instruction removed any possible prejudice by confining the jury's attention to the real issue, which, according to previous decisions, is sufficient in such cases.

Mr Justice BATTLE concurs in this dissent.

HERRN v. SHARP COUNTY.

Opinion delivered December 3, 1906.

PROSECUTING ATTORNEY—FEES.—A prosecuting attorney is not entitled to a commission on money collected during his term of office upon a judgment rendered on a forfeited bail bond during the term of his predecessor.

Appeal from Sharp Circuit Court; *John W. Meek,* Judge; affirmed.

Claim of Thos. I. Herrn, prosecuting attorney, against the county of Sharp for commissions on amount collected on a judgment rendered upon a forfeited bail bond. The circuit court on appeal from the county court refused to allow the claim, and the claimant appealed.

John B. McCaleb and *Wright & Reeder,* for appellant.

Prosecuting attorneys "shall be allowed ten per cent. of the amount on forfeited bail bonds and recognizances." Kirby's Digest, § 3488. But this does not authorize payment of the per cent. to the prosecuting attorney upon his procuring judgment It can properly be allowed only upon collection, and should be paid to the officer effecting the collection.

It is proper, in construing the above subdivision of the statute, to seek for the legislative intent in the whole section. 2 Lewis' Suth. Stat. Const. § 368. It appears, by construing the above provision with the first sub-division of the section, that it was their intention that the presecuting attorney obtaining the judgment should be allowed a fee of five dollars therefor, and that he, or his successor, should be entitled to ten per cent. of whatever amount of the judgment he might collect or cause to be collected. 32 Ky. 326; 74 Ind. 415. See also 72 N. Y. St. 219; 38 La. Ann. 741; 15 How. (U. S.) 421.

McCULLOCH, J. The question presented here is whether or not a prosecuting attorney is entitled to a commission on money collected during his term of office on a judgment rendered during the term of his predecessor upon a forfeited bail bond. It is provided by law that prosecuting attorneys shall receive a salary of two hundred dollars per annum (Kirby's Digest, § 7374)

and in addition thereto the fees enumerated in the following section of the statutes, viz.:

"Sec. 3488. Prosecuting attorneys, when present and prosecuting cases, either in person or by his deputy in justice court.

For each judgment obtained on complaint, information or otherwise, in the name of the State or any county.....$ 5.00
For each conviction or indictment, presentment or information for misdemeanor or breach of the peace.. 10.00
For each conviction in cases of gambling..... 25.00
For each conviction on indictment for any felony, not capital 25.00
For each conviction of homicide, other than capital..... 35.00
For each conviction in capital cases..... 75.00

"They shall be allowed ten per cent. of the amount on forfeited bail bonds and recognizances.

"Prosecuting attorneys shall be entitled to the same fees for prosecuting in cases of misdemeanors before justices of the peace as in the circuit court." Act February 25, 1875, sec. 4, as amended by act of December 13, 1875, and act March 13, 1893.

Now it is obvious that it was the intention of the lawmakers that a prosecuting attorney should receive a stated salary to be paid by the State, and fees which should be earned according to the schedule prescribed in the section just quoted. His compensation, aside from the salary, is based entirely upon what he should earn. He is not a collecting officer, and therefore not entitled to commissions on collections. The commission on forfeited bail bonds and recognizances is allowed as compensation for services performed in obtaining the judgment on the forfeiture. For this service he is to receive $5.00 upon rendition of the judgment and a commission of ten per cent. upon the amount collected. The commission is earned when the judgment is rendered on condition that the amount shall be finally collected, and is payable only as the judgment is collected.

It follows that he is not entitled to commission on a judgment obtained for the State by his predecessor. Any other construction of the statute would give him fees which he does not earn—a mere gratuity—which is evidently not contemplated by the statute according to any reasonable interpretation.

Judgment affirmed.

HILL, C. J., (dissenting.) The fee should follow the office. The statute contemplates and provides for a fee to the prosecuting attorney when he secures a judgment and another when that judgment is collected. The fee is a perquisite of the office and a method of recompensing the officer for his public services, and inheres to the office and not to the officer.

Mr. Justice WOOD, concurs in this dissent.

PARAGOULD SOUTHEASTERN RAILWAY COMPANY *v.* CRUNK.

Opinion delivered December 3, 1906.

RAILROAD—STOCKKILLING—NEGLIGENCE.—While ordinary care does not generally require a train to be stopped in order to avoid injury to stock on the track, there may be facts which make it its duty to stop to avoid an injury which would otherwise occur.

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

Appellee's horse was on appellant's track, and, being frightened by an appraoching train, ran into a trestle, and was injured. There was evidence tending to prove that the train could have been stopped in time to have avoided frightening the horse. The jury found that appellant was guilty of negligence, and judgment was rendered accordingly, from which appellant had appealed.

S. H. West and *J. D. Block,* for appellant.

1. A railway company is only required to use ordinary care to avoid injuring stock after it is discovered on its track. And the proof is clear and convincing that appellant's servants did all that could have been done to avoid the injury, except to bring the train to a full stop. No such duty is imposed upon the company. 36 Ark. 607; 37 Ark. 593; 57 Ark. 18.

2. It appearing by the evidence that the legal title to the horse was in Breckenridge, he could not be substituted or made a party plaintiff, so as to give him a cause of action which did not exist at the bringing of the suit.

Johnson & Huddleston, for appellee.

1. There was evidence before the jury which, if believed by them, warranted the conclusion that after the first effort to frighten the horse from the track no further effort was made.

2. If appellant objected to the court's instruction, it should have pointed out to the court in what respect it was objectionable. It can not object here for the first time on a mere exception in gross below. 65 Ark. 255; 70 Ark. 141.

3. Breckenridge, having a mortgage on the horse, was properly made a party plaintiff. Kirby's Digest, § 6776; 12 S. W. 720. Whatever objection appellant might have had to the bringing of the suit in the name of Crunk was waived by its attorney telling Breckenridge before the suit was brought that it made no difference.

HILL, C. J. The principal question in this case is the correctness of this instruction:

You are instructed that if you find from the evidence, that plaintiff's horse was run into a trestle or culvert by a train on defendant's road and injured, and if you further find, from all the facts and circumstances in proof in the case, that the trainmen in charge of the train could have foreseen, as a natural or probable consequence of not stopping the train, that the horse would attempt to go on the trestle or culvert and be injured, then it was the duty of the trainmen to stop the train in order to avert the injury to the horse; and if they failed to do so, they would be guilty of negligence, and plaintiff would be entitled to recover."

This court said in *Railway Company* v. *Ferguson*, 57 Ark. 18: "But appellant did owe the appellee the duty, when it discovered his colt upon its track, to use ordinary or reasonable care to avoid injury to it by running its train against it, or by frightening and driving it by unnecessary alarms against the wire fence." (Citing authorities.) That principle controls here. Generally speaking, ordinary or reasonable care does not require a train to be stopped in order to avoid injury to stock on the track; but there may be facts which make the stoppage only ordinary care to avoid the injury which would otherwise occur, and there were sufficient facts in this case to send that question to the jury.

The other matters presented have been considered, but no error is found.

Affirmed.

CARTER v. STATE.

Opinion delivered December 3, 1906.

LIQUORS—SOLICITING ORDERS IN PROHIBITION TERRITORY.—An advertisement in a newspaper published in a prohibition district that liquor may be obtained from a licensed liquor dealer doing business elsewhere is not a solicitation within the meaning of Kirby's Digest, § 5133, making it unlawful for any person, firm, partnership, or corporation engaged in the sale of liquors to solicit orders for the sale of liquors in any place where the same is prohibited by law.

Appeal from Howard Circuit Court; *J. C. Pinnix,* Special Judge; reversed.

W. E. Carter was indicted for soliciting orders for the sale of whisky in a prohibition district.

The evidence established that Carter was a traveling salesman for Bonny Brothers, wholesale whisky dealers, and that J. M. Strange and J. A. Wilson were retail whisky dealers at Texarkana, Ark.; that Carter went to Nashville, Ark., a prohibition district, and inserted in a newspaper published there the following advertisements, viz.: "J. M. Strange, in Texarkana, will be glad to have your orders for Joel B. Frazier Whisky," "Please send your order to J. A. Wilson, of Texarkana, for Bonnie Rye."

The court instructed the jury that if Carter was a traveling salesman for Bonny Bros., sellers of the brands of whisky mentioned in the advertisements offered in evidence, and the witnesses, Strange and Wilson, purchased said brands of whisky from him, and kept same for sale in their business at Texarkana, and he caused the advertisements to be published in the Nashville News, a newspaper published in Nashville, he should be convicted. The court further instructed the jury to return a verdict of guilty, to which appellant excepted.

Carter was convicted and adjudged to pay a fine, and has appealed.

Sain & Sain and *Murphy, Coleman & Lewis,* for appellant.

1. The act, Kirby's Digest, § 5133, is unconstitutional, being in violation of art. 2, sec. 2, State Const., and of the 14th amendment U. S. Const. 6 L. R. A. 847; 123 U. S. 661; 50 L. R. A. 493; 82 Fed. 623; 63 Am. Dec. 391. See also 97 U. S. 659; 58 L. R. A. 266; 67 N. Y. App. 403.

2. If the act is upheld as a proper exercise of police power, still appellant is not within its terms. Since the statute, in defining the offense, designates persons who are engaged in the liquor traffic elsewhere, where the traffic is lawful, as the class of persons subject to the penalty, all others are thereby excluded from punishment. Suth. Stat. Const. § § 325, 327; 54 Mo. 400; 38 Ark. 521. The notices were prepared and published without authority from the dealers who were named therein, and appellant was not their agent. This is not solicitation within the meaning of the statute.

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

HILL, C. J. The facts of this case which will be found stated by the Reporter, call for a decision as to whether an advertisement is within the meaning of the solicitation denounced by § 5133, Kirby's Digest, which reads as follows: "It shall be unlawful for any person, firm, partnership or corporation engaged in the sale of alcohol or any spirituous, ardent, vinous, malt or fermented liquors where the same may be lawful, to solicit orders, either by agent or otherwise, for the sale of alcohol or any spirituous, ardent, vinous, malt or fermented liquors in any place or places in this State where the same is prohibited by law."

The many uses of the term "advertise," in its various forms, may be found in the Century Dictionary, from which this definition—the one most nearly reaching to the facts here—is taken: "The act or practice of bringing anything, as one's wants or one's business, into public notice, as by paid announcement in periodicals, or by handbills, placards, etc., as to secure customers by advertising." "To solicit" is thus defined: "To importune, entreat, implore, ask, attempt, try to obtain." Anderson's Law Dictionary. See also Century Dic. "Solicit." None of the uses of this term embrace advertising, although advertising is a method, in a broad sense, of soliciting the public to purchase the wares advertised. But soliciting is a well known and defined action, and advertising is an equally well known and defined action, and they are not identical. It is true that they are intended to reach the same result, the sale of the wares, but different routes are traveled in reaching that end; one is legislated against, and the other is not.

If the Legislature intended to make criminal the advertisement in prohibited district of liquor, it would have said so, and not left such an important matter to be implied from the use of a general term. It would be a strained and unnatural use of the term "solicit" to include in it advertisements in newspapers.

Judgment reversed.

STATE v. SAMS.

Opinion delivered December 3, 1906.

1. SUPREME COURT—JURISDICTION IN QUO WARRANTO.—The Supreme Court has no original jurisdiction to issue a writ of quo warranto to prevent usurpation of the office of road overseer. (Page 40.)
2. CIRCUIT COURT—RESIDUARY JURISDICTION.—The remedy for usurpation of the office of road overseer, not having been vested elsewhere, is by an action in the circuit court, brought either by the State or the person entitled to the office. (Page 40.)

Petition for quo warranto; writ denied.

Robert L. Rogers, Attorney General, and *Johnson & Huddleston,* for plaintiff.

1. Did the county court have the power to declare a vacancy in the office when none in fact existed, and proceed to fill the vacancy by appointment? Compare Acts 1895, 463; Kirby's Digest, § 7230; Mansf. Dig., § 5893; Acts 1889, 156; Kirby's Digest, § 7342; Acts 1899, 353 § 13; Kirby's Digest, § 7228.

The statute prescribes no time within which a road overseer shall qualify after he is elected. Where a statute concerning a public office does not fix its beginning for any day certain, a reasonable time will be given. 17 Cal. 11; 39 N. J. L. 14. Mere failure of an officer to file his bond within the time prescribed by law does not, *ipso facto,* vacate his office. 43 Ala. 568; 44 Ala. 696; 44 Mo. 230. See also 44 Ga. 501. Under the provisions of Kirby's Digest, § 7228, no vacancy would occur until the January term, 1907, of the county court.

2. Exclusive original jurisdiction is not conferred upon the county court in suits of this kind. 50 Ark. 266.

J. D. Block and *Murphy, Coleman & Lewis*, for defendant.

1. This case can not be maintained. It is not within the original jurisdiction of this court. Art. 7, § § 4 and 5, Const.; 37 Ark. 318; Id. 81; 39 Ark. 82; 39 Ark. 126; 44 Ark. 221; 48 Ark. 82. The writ and information as original proceedings are abolished by the Code. 75 Ark. 443.

2. If the case were properly here on appeal, then it would be insisted that the Const., art. 7, § 28, in conferring upon the county court exclusive original jurisdiction of all matters relating to the county roads, precludes the Legislature from making each political township in the county a road district, and from making overseers elective.

RIDDICK, J. One Charles D. Fossett was in September, 1906, elected road overseer of a road district in Greene County of this State. He failed to qualify as such on or before the 1st day of October following, and the county court which convened in regular session on that day declared the office vacant, and appointed P. H. Sams to fill the same. Sams thereupon qualified, and assumed to discharge the duties of the office. Afterwards the State, on relation to the Attorney General, filed a petition in this court, alleging that Sams was usurping the office of road overseer without right, and to which De Fossett is entitled, and asked that a writ of quo warranto issue against Sams, and that he be compelled to show under what authority he holds such office.

In response to such petition Sams, among other defenses, denied that this court has authority to issue such writ in a case of this kind. We are of the opinion that the objection is well taken. Under the Constitution this court has no original jurisdiction to issue writs of quo warranto to prevent usurpation of the office of road overseer. Const. 1874, art. 7, § § 4 and 5; *Louisiana & N. W. Rd. Co.* v. *State*, 75 Ark. 443; Ex parte *Snoddy*, 44 Ark. 221.

As the law does not expressly vest jurisdiction to hear and determine such an action in any other court, it falls within the general jurisdiction of the circuit court. The remedy for usurpation of office of road overseer is by an action in that court brought either by the State or the person entitled to the office.

Whittaker v. *Watson,* 68 Ark. 555; *Payne* v. *Rittman,* 66 Ark. 201; Const. 1874, art. 7, § 11; Kirby's Digest, § § 7981-7989.

Writ denied and petition dismissed.

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s86 505

WOOD v. STEWART.

Opinion delivered December 10, 1906.

1. ILLEGAL CONTRACT—ENFORCEMENT—PUBLIC POLICY.—Upon the principle that a court of equity will not lend its aid to enforce an illegal contract or one based upon an illegal or immoral consideration, equity will not enjoin a judgment at law upon allegations of the judgment defendant that he had a good defense thereto, but that he consented to judgment against himself in order wrongfully to give the court jurisdiction of a co-defendant, upon the promise of the plaintiff in the judgment that the judgment would not be enforced against him. (Page 46.)
2. JUDGMENT—FRAUD OR MISTAKE IN PROCUREMENT.—A judgment at law procured by fraud or mistake may be vacated or modified by proceeding instituted for that purpose in the court in which it was rendered. (Page 51.)
3. ACTION—TRANSFER OF CAUSE.—Failure of a plaintiff to proceed in the proper court is not ground for dismissal of his complaint, but the cause should, on motion, be transferred to the proper court. (Page 51.)

Appeal from Crawford Chancery Court; *J. Virgil Bourland,* Chancellor; reversed.

Sam R. Chew, for appellant.

1. The question whether appellee signed as a witness or as a guarantor was one of fact upon which appellant was entitled to have a jury to pass; and appellant should have been placed in position to have this question properly submitted, in a court of law. 35 Ark. 125.

2. If the allegations of the complaint are true, it does not state facts sufficient to authorize a court of chancery to interfere with the collection of a judgment at law. 50 Ark. 458; 57 Ark. 599. The burden was upon the appellee to aver and prove a meritorious defense. *Supra;* 61 Ark. 339; 48 Ark. 535; 40 Ark. 338.

3. The alleged agreement between appellee and the attorney was a fraud upon the rights of Bell, and upon the court. He is in no position to seek equitable relief. 6 Ark. 79; 43 Ark. 107; Bisph. Princ. Equity (4 Ed.), § 42; 1 High on Inj. § 205.

4. If it be conceded that Matlock was not authorized to represent appellee in the law court, still by his own conduct in that court appellee ratified his action and is bound by it. 50 Ark. 458.

Winchester & Martin, for appellee.

1. Viewed in the light of the facts as disclosed by the record, there is no fraud in the agreement. Appellee was lulled into a belief of security by the promise of appellant's attorney, and was kept under that belief until too late to apply for relief to the court trying the case. His only remedy was an appeal to a court of equity. 1 Black on Judgments, § § 369 *et seq.*; 20 Conn. 543; 28 *Id.* 552; 12 N. Y. 156; 15 Hun, 170; 9 N. J. Eq. 246; 22 Gratt. 136; 3 Dana, 536; 30 Md. 437; 28 Conn. 58; 44 Ia. 179; 98 U. S. 61; 40 Ark. 338; 50 Ark. 458; 48 Ark. 535.

2. The findings of the chancellor on the facts will not be reversed unless clearly against the preponderance of the evidence. 44 Ark. 216; 68 Ark. 134; *Id.* 314; 73 Ark. 489.

McCULLOCH, J. Appellant, John F. Wood, purchased a jack from one H. N. Bell for the price of $500, which was paid. At the time of the sale a written instrument in the following form was executed to appellant, the signature thereto of appellee, S. W. Stewart, appearing as shown below, viz.:

"Van Buren, Arkansas, 12-8-02.

"I hereby guaranty the jack, 'Cas Miles,' now at Van Buren, Arkansas, to be good server of mares and a good foal-getter. I further guaranty that he will sire as good crop of mules as any jack now in Arkansas. If he fails to do so, or fails on any of the above guaranty, I agree to refund the purchase money paid for said jack, and take him back and pay purchaser, John F. Wood, a reasonable compensation for care and keep of said jack, said amount to be $100. It is understood that said jack is to be properly handled and kept. I guaranty said jack at this time sound and healthy. I guaranty said jack to be free from climate fever. Jack to be delivered at Dyer, Ark., in good condition.

"HARRY N. BELL.

"Reference: Taylor National Bank of Taylor, Texas; State Bank of Texarkana, Ark.

"In case said jack fails to come up to written guaranty I agree to pay said J. F. Wood $100 as a forfeit over and above care and keeping.

"HARRY N. BELL.

Witness: "S. W. STEWART,
"W. N. BOATRIGHT,
"O. N. GRAY."

Appellant and appellee both resided in Crawford County, Arkansas, and Bell in Miller County.

Appellant instituted an action in the circuit court of Crawford County against Bell and Stewart, in which he alleged that they had executed to him a written agreement whereby they guarantied said jack and agreed to refund the purchase price and pay appellant a forfeit of $100 and the expense of keeping the jack in the event of a breach of the guaranty. He also alleged that the jack had not come up to the guaranty, and prayed judgment against them for $500, the price paid for the jack with interest, $100 for expenses of keeping it and $100 forfeit. Before the commencement of the action appellant and one of his attorneys had several times mentioned the transaction to Stewart, and claimed that he was liable on the instrument of writing in question, but the latter always asserted that he had only signed it as a witness to Bell's signature, and that he was not liable thereon for any sum.

A short while before commencement of the action appellant's attorney informed appellee, who still insisted that he had signed the writing in question only as witness, that appellant wanted to sue on the writing and join appellee and Bell both in the suit as defendants, so as to give the circuit court of Crawford County jurisdiction of the person of Bell upon service of summons in Miller County where he resided; and said attorney proposed to appellee that if he (appellee) would offer no defense to said action, and judgment should go against him, appellant would not enforce the judgment against him. Appellee accepted this offer, the action was commenced and summons was served on Bell in Miller County, and on appellee in Crawford County. Bell employed an attorney, who filed an answer for appellee denying any

liability upon the writing in question, and alleging that he signed same only as a witness to Bell's signature. He also filed for Bell a plea questioning the jurisdiction of the court on the ground that he had been summoned in another county. On a trial of the same before the circuit judge, sitting as a jury, he found that Bell and Stewart were both liable on the written guaranty, and rendered judgment against both for said sum of $500, the price of the jack, with interest, and the further sum of $100 for the expense of keeping the jack. The judgment expressly provided that execution should not be issued against Stewart until the plaintiff's remedy against Bell should be exhausted. This judgment was not appealed from.

Appellant caused execution to be issued against Bell to the sheriff of Miller County, which was returned unsatisfied, and he then sought to enforce the judgment against Stewart by issuance of execution against him.

Appellee, Stewart, then instituted this suit in equity against appellant to restrain the latter from attempting to enforce said judgment. His complaint, after setting forth the transaction concerning the sale of the jack and the rendition of the judgment and issuance of execution, proceeds as follows:

"Plaintiff now alleges that he did not sign said written guaranty as guarantor, but as witness, and that he was not, at the time said judgment was rendered, and is not now, legally or morally bound by said written guaranty. That he has never seen said writing since he signed the same as witness, but is informed and believes, and charges upon information and belief, that said writing is now in the hands of the said defendant, John F. Wood, or of his attorney of record in said suit. That the said Harry N. Bell, at the time suit was brought upon said written guaranty as aforesaid, was a resident of Miller County, Arkansas, and this plaintiff then and now a resident of Crawford County, Arkansas. That before said suit was instituted the said attorney of record in said suit for the said John F. Wood came to this plaintiff and told him he was going to sue on said written guaranty; that he was going to sue said Bell and this plaintiff; that, if this plaintiff would not defend said suit, he should never be called upon to pay any judgment that might be rendered against him in the suit; that he wanted to try the suit in Crawford County, and if

he would make this agreement with him he would give him a written guaranty signed by himself and his client, the said John F. Wood, that he should never be called to pay anything upon any judgment that might be rendered against him in the case; that this plaintiff told him that his word was good to him, and that he would not defend the suit upon that agreement.

"That afterwards he was sued jointly with the said Bell to the June, 1904, term of the Crawford Circuit Court; that he employed no attorney, and did not defend said suit; that he was summoned as a witness for the said Bell, and testified in the case; that judgment was rendered against him as hereinbefore set out; that he took no steps to have said judgment set aside; did not ask for a new trial; that no bill of exceptions was filed; that he did not know what character of judgment was rendered against him, nor the amount of it; that he was absolutely quiescent in the whole matter, resting implicitly upon the agreement made by him with and at the solicitation of the attorney of record of the said John F. Wood in said case."

The prayer of the complaint is that appellant be perpetually enjoined from attempting to enforce said judgment against appellee.

Appellant filed his answer, alleging that appellee signed the writing as guarantor and was equally bound with Bell; admitted that agreement had been made, as alleged in the complaint, between appellant's attorney and appellee to the effect that appellee should make no defense, and that the judgment should not be enforced against him, but alleged that appellee had violated the agreement by employing counsel, filing an answer and defending the action brought by appellant against him and Bell, and that the agreement was rescinded by mutual consent before the judgment was rendered. Appellant also alleged in his answer that the question of appellee's liability as guarantor was expressly put in issue and adjudicated in the action in the circuit court, and the judgment of that court in said action was pleaded in bar of appellee's right to have it again adjudicated.

The depositions of all the parties to the controversy were taken and read at the hearing of this cause—the depositions of appellant and appellee, appellant's attorney who entered into the agreement with appellee concerning the judgment to be obtained

in the circuit court, Bell and the attorney who appeared for him in the circuit court and the circuit judge before whom the action was tried.

Under our view of the law applicable to this case, it would serve no useful purpose to discuss the evidence in detail, or to determine where the weight of it lies. It is sufficient to say that there is no material conflict between the testimony of appellant's attorney and appellee concerning the agreement they entered into, but they disagree as to what occurred between them after an answer had been filed for appellee in the action. The attorney testified that when the answer was filed, and after appellee failed to have it withdrawn and appeared in court by attorney contesting the suit, he expressly repudiated the agreement, and so notified appellee. On the other hand, appellee testified that he neither employed an attorney nor authorized the filing of the answer, that he did not appear in the action except as witness summoned by Bell, and that appellant's attorney did not notify him of any repudiation of the agreement. He testified that he had no information that he was expected to pay the judgment until long after its rendition and the adjournment of the circuit court. Upon this point the testimony is conflicting, and it is unnecessary for us to reconcile or settle the conflict. The difference lies either in the recollections of the two witnesses as to the substance of a conversation which occurred between them during the progress of the trial in the circuit court, or in a misinterpretation on the part of one of them of the statements made by the other.

As already stated, it is unnecessary for us to attempt to reconcile this conflict, for, according to appellee's own version, he is not entitled to the relief he seeks and which the chancellor granted.

This suit is no more nor less than an effort to require specific performance of appellant's agreement not to enforce the judgment obtained in the circuit court. He sets forth an agreement entered into with appellant for the rendition of a judgment against himself in order that Bell might also be brought into the jurisdiction of the Crawford Circuit Court, and asks a court of equity to enforce appellant's agreement with him not to attempt to collect the judgment. Should a court of equity grant such relief?

The agreement between these parties was one plainly in

violation of the rights of Bell, and operated as a fraud upon the jurisdiction of the circuit court. The statute provides that in an action upon a transitory cause of action instituted against several defendants "the plaintiff shall not be entitled to judgment against any of them on the service of summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided, or were summoned in that county, the action is discontinued or dismissed as to them or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before judgment to its proceeding against him." Kirby's Digest, § 6074.

In the action against Bell and Stewart in the circuit court Bell did appear and object to the proceeding against him, but the judgment against his co-defendant who resided in the county barred him absolutely from objecting to the exercise of the court's jurisdiction. He was bound to submit to that jurisdiction unless the action had been discontinued or dismissed as to Stewart or judgment rendered in his (Stewart's) favor. It is true, an answer was filed, and the case was defended in the name of appellee; but he contends now that he neither employed the attorney who filed it nor authorized him to file it, and that he appeared at the trial only as witness for Bell. This contention is the basis of appellee's claim for equitable relief against the judgment, and in order to get such relief he shows that he entered into an agreement to deprive Bell of his right to object to the jurisdiction of the court and to impose upon the court the exercise of a jurisdiction which did not rightfully belong to it. In other words, appellee, in order to get relief preventing the enforcement of this judgment against him, must plead and establish an agreement of his own which was a legal fraud upon his co-defendant and upon the court. He asks for the enforcement of an agreement which he shows was entered into for the sole purpose of wrongfully compelling Bell to submit himself to the jurisdiction of the Crawford Circuit Court, and of compelling the court to exercise that jurisdiction wrongfully. He now says he was not liable at all in the action, but that he agreed not to appear, and consented to judgment for the purpose of wrongfully holding

Bell within the jurisdiction of the court. The judgment was rendered by a court having jurisdiction of the subject-matter and of the person of appellee, and, in order to set it aside or prevent its enforcement, he sets up his own wrongful agreement.

It is a familiar principle that a court of equity will not lend its aid to enforce an illegal contract or one based upon an illegal or immoral consideration. 2 Pom. Eq. Jur. § 929 *et seq.*

The doctrine is most frequently applied in cases where a grantor seeks to regain property which he has conveyed to another for the fraudulent purpose of cheating his creditor. In such cases courts of equity refuse relief and leave the parties where they found them, but the application of the principle is not limited to that particular class of cases.

Whenever a plaintiff comes into a court of equity and must rely, as the foundation of his relief, upon a contract which is illegal, he proves himself out of court, for the court will not lend its aid to enforce such a contract. The bare statement of his grounds for relief bears on its face the death-wound to his cause of action.

It is not essential that the contract should concern an act criminal in its nature before the court will refuse to enforce it. If it is a contract for the doing of an illegal or immoral thing, or one contrary to statute or public policy, whether it be criminal or not, a court of equity will not enforce the contract. Story's Eq. Jur. § § 296, 296*a*; Pom. Eq. Jur. § § 929-939; *Mendel* v. *Davies,* 46 Ark. 420; *Woodruff* v. *Berry,* 40 Ark. 251; *McMullen* v. *Hoffman,* 174 U. S. 639; *Atcheson* v. *Mallon,* 43 N. Y. 147.

Mr. Justice Peckham, in delivering the opinion of the Supreme Court of the United States in *McMullen* v. *Hoffman, supra,* said: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights springing from such contract. In cases of this kind the maxim is, *Potior est conditio defendentis.*"

Within this rule fall contracts interfering with judicial pro-

ceedings or wrongfully imposing upon the jurisdiction of the courts.

"All agreements directly or indirectly preventing or controlling the due administration of justice are opposed to the universal and most elementary principles of public policy, whatever be their form and immediate purpose; and, however innocent may be the motives of the parties, they are invalid." 2 Pom. Eq. Jur. § 935; 1 Story's Eq. Jur. § 295; *Goble* v. *O'Connor,* 43 Neb. 49; *Camp* v. *Bruce,* 96 Va. 521.

The effect of this agreement, however free the minds of the parties may have been from any actual intention to perpetrate a culpable wrong, was a fraud not only upon Bell but upon the court. If appellee was not in fact liable on the contract, and Bell only was liable, then Bell was deprived of his right to be sued in the county of his residence, or in the county where summons should be served on him. And it was as well a fraud on the jurisdiction of the court for these parties, in order to apparently give the court jurisdiction, to make an agreement permitting the court to render a judgment against appellee which was fictitious and unenforcible, and was to be considered no judgment at all.

But it is only where both parties to such a contract are *in pari delicto* that courts will refuse to enforce it. Where the party suing is guilty but not equally in wrong, a court should not refuse relief. "Such an inequality of condition," says Mr. Pomeroy, "exists so that relief may be given to the more innocent party, in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, if considered by themselves alone, would show the parties equally in fault, but are collateral and incidental circumstances attending the transaction, and affecting the relation of the two parties, which makes one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness and the like, as a means of inducing the party to enter into the agreement or of procuring him to execute and perform it after it had been voluntarily entered into. 2. The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is *intrinsically* unequal; is of such a nature that one party is necessarily

innocent as compared with the other; the stipulations, undertakings and position of one are essentially less illegal and blameworthy than those of the others." Pom. Eq. Jur. § 942; Story's Eq. Jur. § 291.

The first of the foregoing classifications of those who are participants in the wrong contemplated by a contract, but who do not stand equal in the wrong, is recognized by this court in the case of *Hutchinson* v. *Park,* 72 Ark. 509, where it was shown that one party of superior intelligence, who stood in a relation of confidence with another, took advantage of his position to induce the other to execute to him a conveyance in fraud of the rights of creditors. The court held that the parties were not *in pari delicto.* In the case at bar there is not, however, any of the elements falling within the classifications laid down by Pomeroy or within the distinction made by this court in *Hutchinson* v. *Park, supra.* There was no confidential relation existing between appellant or his attorney and appellee, nor was there any sort of advantage taken in making the agreement. It is true, appellant's attorney had a superior knowledge of the law, but his proposition to appellee carried with it full information that the thing sought to be accomplished by the agreement was contrary to law. He said, in effect, to appellee: "The only way I can legally get Bell into the court of this county is to sue you jointly with him and recover judgment against you. If you will agree to make no defense and permit me to take judgment against you, I will not enforce the judgment." Doubtless, both parties were innocent of any actual intention to commit a legal or moral wrong, but they both knew precisely what was to be accomplished, and knew the effect of their agreement upon the rights of Bell; and if either party was caught in the trap, the door of relief is closed equally against them both. Appellee, having agreed to a judgment against himself, can not be heard, either in a court of law or equity, to ask that it be set aside.

It does not appear from the pleadings and evidence, however, that appellee agreed to a judgment against himself for the full amount for which the judgment was rendered. If appellant, while the alleged agreement was in force, procured judgment against appellee for more than the latter had agreed to, or for more than it was agreed that appellant should ask for, then the

judgment should be, to that extent, set aside. It is plain to us that, on the face of the contract set forth in the pleadings, if the appellee signed it as a party and not as a witness, he was not liable for more than $100 forfeit and the expenses of keeping the jack. He was not liable for the return of the price of the jack, as his name is not subscribed to that part of the contract.

When appellee entered into the agreement to make no defense to the action, the only point of difference between him and appellant, so far as the evidence in the record discloses, was as to whether appellee signed the written guaranty as a party or as a witness. No dispute is shown to have existed as to the amount of his liability—the amount was confined to the terms of the written instrument, which it was claimed he had signed as a party, and which shows on its face that he is liable, if at all, only for $100 and the expenses of keeping the jack. In the absence of any evidence that appellee agreed to a judgment for the full amount named in Bell's contract, as well as the part thereof to which his signature is appended, it should be presumed that he agreed to a judgment only for the amount for which, according to the terms of the writing, he would be liable if he signed it as a party and not as a witness. Inasmuch as the question will perhaps be passed upon in a court of law, we will not undertake to decide what the agreement was between the parties as to the amount of the judgment, deeming it sufficient to state the law to be that if the court shall find on another hearing that the agreement as to the judgment remained in force between the parties up to the time of its rendition, and was not rescinded, appellant should only have taken judgment for such amount as they had agreed upon, and that appellee would be entitled to have any part of the judgment in excess of the agreed amount set aside.

Appellee's remedy to vacate or modify the judgment for fraud or mistake in its procurement is complete at law by proceeding instituted for that purpose in the court in which it was rendered. Kirby's Digest, § § 3224, 4431; *Shaul* v. *Duprey,* 48 Ark. 331; *Gorman* v. *Bonner,* 80 Ark. 339.

The failure of appellee to proceed in the proper court is no ground for dismissal of his complaint, but the same should be transferred to the proper court. Kirby's Digest, § 5991; *Daniel* v. *Garner,* 71 Ark. 484.

The decree is reversed, and the cause remanded with leave to the plaintiff to amend his complaint, if so advised, and with directions to transfer the cause to the circuit court of Crawford County for further proceedings consistent with this opinion.

WALWORTH v. BIRCH.

Opinion delivered December 10, 1906.

1. MASTER—RESTATING ACCOUNT—HEARING ADDITIONAL EVIDENCE.—Where a master was directed to restate his account so as to make it conform to the court's ruling, without directions to take further evidence, he had no authority to hear additional evidence. (Page 55.)
2. SAME—EXCEPTIONS UPON RECOMMITTAL.—Where a master's original report was excepted to by plaintiffs, and some of their exceptions were sustained, and a second report was filed by him in which material changes were made sustaining some of the exceptions to the original report, an exception to the second report to the effect that plaintiffs excepted, "as in the original exceptions filed herein to original report" was not specific enough to point out any objection to the second report. (Page 55.)

Appeal from Desha Chancery Court; *Marcus L. Hawkins*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Clara Walworth and others brought an action in equity against Thomas Birch and others to recover possession of the west half and southeast quarter of section 4, township 12 south, range 3 west, in Desha County, and to cancel a tax deed under which defendants held the land, alleging as a reason for going into equity that they held an equitable title to the land, and for that reason their remedy at law was inadequate. The tax deed under which the defendants held the land was based on a tax sale in 1894 for nonpayment of taxes of 1893. The defendants, in addition to setting up this tax title, alleged that they had taken possession thereunder, paid taxes and made permanent and valuable improvements on the land, and asked that they be allowed

pay for the same in the event that the title of plaintiff should be sustained.

On the hearing the court held that the tax title under which defendants held was void on account of the failure of the clerk to make a certificate upon the records showing publication of notice as required by statute. The court also held that plaintiffs were entitled to recover the possession of the land, rents from the time suit was commenced and offer to redeem made, the value of timber cut, and costs. That the defendants were entitled to recover the original sum paid at the tax sale and for a deed, and for all taxes paid on the land since the purchase and the value of improvements made on the land before the suit was commenced, with ten per cent. interest on all such sums. The court thereupon appointed the clerk of the court master to take evidence and state an account between plaintiffs and defendants. The master took depositions of witnesses, stated the account and made a report to the court.

The plaintiffs by attorney filed various exceptions to the report, and also asked the court to set the same aside and order a new reference on the ground that the plaintiffs had had no notice of the taking of depositions and hearing by the master. The court entered an order sustaining the exceptions generally, and ordered the master to restate the account and report at the next term of the court. The master restated the account and made another report. The defendants excepted to this report also, but these exceptions were not reduced to writing except as shown by the following order of the court, and the exceptions filed to the previous report of the master: "On this day came the plaintiffs by their attorney, June P. Wooten, a member of the firm of Vinson & Wooten, and except to the restatement of the master filed herein on this date, and for cause of exception state as in original exceptions filed herein to original report, and further that no evidence has been adduced before the master since said original report on which to base a restatement, which exceptions are by the court overruled, and said restated report is by the court approved. The court thereupon on the 31st day of October, 1904, entered a final decree in accordance with this amended report, and the plaintiffs appealed."

Baldy Vinson, for appellants.

1. A party has the right to be heard before a master and to introduce evidence in his own behalf in mitigation of damages; and when he is precluded from doing so, the report should be set aside. 16 Ark. 616.

2. It is imperative on the master to notify parties of the time and place of taking testimony. Kirby's Digest, § § 6329, 6335; 54 Ark. 437. It must be reasonable, so as to enable the party to prepare himself, and be present. *Supra.* See, also, 32 Fla. 481; 25 Ill. 257; 53 Me. 214; 9 How. Pr. 71; 2 N. C. 348; 21 S. C. 359; Henderson, Ch. Pr. § 186; 41 Ill. App. 399; 33 Ill. App. 238.

J. W. Dickinson, for appellees.

RIDDICK, J., (after stating the facts.) This is an appeal by plaintiffs from an order of the chancery court confirming a report of a master appointed to state an account between the plaintiffs and defendants in this case. The report of the master thus confirmed was the second report made by him, exceptions made by plaintiffs to the first report having been sustained and the master ordered to restate the account.

The original decree adjudging the rights of the parties and ordering a reference to a master was made in September, 1903. The master took evidence and filed his report, and on the 11th day of June, 1904, the plaintiffs filed their exceptions thereto, and moved to strike the report out on the ground that the master had taken depositions and heard the case without notice. After further setting out various specific objections to the report, plaintiffs ended their exceptions with the following words: "Plaintiffs move the court that, for the many errors and insufficiencies mentioned in their exceptions, the master's report be stricken from the files, and the matter referred with directions to forthwith state a true and accurate account in accordance with the law and instructions of this court." The court thereupon entered an order sustaining the exceptions generally, and ordered the master to restate the account.

Now, it will be noticed that, although the plaintiffs excepted to the report and moved to strike it out on the ground that it was based on depositions taken without notice, they do not ask that

the master be ordered to retake the depositions or to take further evidence, but only ask that the master be required to forthwith state a true and accurate account. For this reason, or because the court thought that the objection that the depositions were taken without notice was not well taken, or that the account could be restated on the depositions taken before the original decree, the court did not direct the master to hear further evidence, but referred the account to the master for restatement. No objections were made to this order of the court, and no appeal taken by plaintiffs, either from it or the original decree. But, on the filing of the restated account, plaintiffs appeared by their attorney and excepted thereto, and, to quote the language of their exception, "for cause of exception state as in the original exceptions filed herein to original report, and further that no evidence has been adduced before the master since said original report on which to base a restatement."

The court overruled these exceptions, and confirmed the report.

The appeal taken in this case was over a year after the original decree, and over a year after the judgment of the court ordering a restatement of the account, and those two judgments are not questioned. As the court did not, in ordering the master to restate the account, direct him to take further evidence, it was not his duty to do so, and the objection to his second report on that ground can not be sustained. If plaintiffs had desired to produce further evidence before the master, they should have asked a direction to that effect. But, instead of that, they asked the court to order the master to forthwith restate the account, which indicates that they did not consider that further evidence was necessary. 17 Enc. Plead. & Prac. 1073.

The other objection made by plaintiffs to this account can not be sustained, for the reason that it is not specific enough. The language of it is that they except as stated in their exceptions to the original report. But the two reports were not the same, for the master in the second report made material changes in his findings, sustaining some of the exceptions filed by plaintiffs to his first report. If any of the findings of the master in his second report were incorrect or not in compliance with the directions of the court, they should have been pointed out by a specific objec-

tion in writing, for the statute so requires. Kirby's Digest, § § 6336-6340. It would be obviously unfair to the chancellor to compel him to entertain an exception made in this form and to look through the long list of exceptions filed to the first report and compare them with the last report in order to ascertain the objections of plaintiffs to the last report. We must therefore hold that this exception was too indefinite to justify us in reviewing the order of the chancellor in overruling it and confirming this second report of the master. 17 Enc. Plead. & Prac. 1049; *King* v. *Burdett,* 44 W. Va. 561; *Findley* v. *Findley,* 42 W. Va. 372.

For the reasons stated the judgment of the chancellor is affirmed.

SALMON v. STATE.

Opinion delivered December 10, 1906.

LIQUORS—SALE BY MANUFACTURER WITHIN THREE-MILE DISTRICT.—The act of March 8, 1879, as amended March 26, 1883, providing that manufacturers of liquors are authorized to sell in original packages not less than five gallons, has no application to the three-mile districts created under the act of March 21, 1881, as amended by act of February 20, 1883, prohibiting the sale of liquors except wine manufactured by the seller.

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

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

1. Manufacturers were exempted from the provisions of the act of 1879, and were permitted to sell in original packages of not less than five gallons without license. Acts 1879, p. 33. They were also exempted from the provisions of the amendatory Act of 1883, and by that act permitted to sell without license, upon the same terms. Acts 1883, p. 192.

The "three mile" law was enacted March 21, 1881. If it applied to distilleries, it was repealed by the general repealing clause of the act of 1883. Acts 1883, p. 192, § 4.

The acts amendatory of the three-mile law of 1881 contain no general repeal words. Acts 1883, p. 54; Acts 1889, p. 139; Acts 1895, p. 86. Hence there is nothing in these acts amending, expressly or by implication, the proviso allowing distilleries to sell in original packages anywhere.

2. The authority to make implies the authority to sell, and, unless there is some act specifically prohibiting the sale of liquor by a distillery, it would have the right to sell. 33 Wis. 666; 3 Minn. 296; 60 Ark. 247.

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

1. The act of 1879 was a revenue act, as also the acts amendatory thereof, and has no application in this case.

The "three-mile" law of March 21, 1881, was an independent act, and not amendatory of any previous act. It is simply a prohibition act, and contains no provision exempting a manufacturer who sells in original packages. Neither does any subsequent amending act contain any such exemption.

2. Under our statute a manufacturer has no right to sell intoxicating liquors in a prohibited district, even in original packages. 62 Ark. 585.

BATTLE, J: "Ed Salmon, the appellee, hereinafter called the defendant, was indicted in the Woodruff Circuit Court for unlawfully selling five gallons of whisky within three miles of Ebenezer Church, situated in the Southern District of Woodruff County. He was convicted on September 7, 1906, by the court, sitting as a jury, upon the following statement of facts, towit:

"It is agreed that the Cache River Valley Distilling Company is a corporation which has complied with all the laws of the United States authorizing it to distill ardent spirits and whisky at Mayberry, Arkansas, in the Southern District of Woodruff County, Arkansas.

"It is further agreed that Ed Salmon is the manager and agent of the Cache River Valley Distilling Company, for the purpose of operating said distillery and of disposing of the output thereof. It is agreed that on the first day of June, 1906, the said Ed Salmon, after having complied with the laws of the United States with reference to the stamping and selling of whisky

produced at said distillery by putting same into an original package containing not less than five gallons, sold one of said original packages, containing not less than five gallons, to one W. C. Hogan for the price of $12.50.

"It is also agreed that the place at which said sale of said five-gallon package of whisky was made is within three miles of a church, known as Ebenezer Church, in the said Southern District of Woodruff County, and that at the January term, 1906, of the county court of Woodruff County, an order was made and entered by said county court prohibiting the sale or giving away of any ardent, vinous, malt or intoxicating liquors within three miles of the said Ebenezer Church, as is provided by law, within a period of two years thereafter, and until the further order of the court, and which said order is in words and figures as follows, towit:

"In the Woodruff County Court, January Term, 1906.

"In the matter of the petition to prohibit the sale of liquors within three miles of Ebenezer Church.

"On this day is presented to the court the petition of Dave Mayo, and other adult inhabitants residing within three miles of Ebenezer Church, situated upon the northwest quarter of section three (3), in township four (4) north, range three (3) west, praying an order of this court prohibiting the sale or giving away of intoxicating liquors of any kind or native wine within three miles of said Ebenezer Church. And upon examination thereof the court finds that said petition contains the names of a majority of the adult inhabitants residing within three miles of said Ebenezer Church; and it is hereby ordered by the court that the prayer of said petition be granted and the sale or giving away of any intoxicating liquors of any kind or alcohol or native wine, by any name whatever known, is hereby prohibited within three miles of said Ebenezer Church, for the period provided by law.

"He was sentenced to pay a fine of $50, and from this judgment he appealed."

Did appellant have the right to sell the whisky manufactured by himself in original packages, containing not less than five gallons, within three miles of Ebenezer Church?

Manufacturers of ardent, vinous, malt or fermented liquors were authorized to sell liquors of their manufacture in original

packages containing not less than five gallons, without license, by an act entitled "An act to regulate the sale of vinous, ardent, malt or fermented liquors," approved March 8, 1879. The act entitled "An act providing for the prohibition of the sale or giving away of vinous, spirituous or intoxicating liquors of any kind within three miles of any academy, college, university or other institution of learning, or of any church house in this State" was approved March 21, 1881. The latter act prohibited the sale of all liquors in districts created under it, except wine sold for sacramental purposes, and alcoholic stimulants prescribed and furnished by regular practicing physicians to the sick under their charge. Both of these acts were amended in 1883. The act approved March 8, 1879, was amended by an act approved March 26, 1883, but the provision as to manufacturers of ardent, vinous, malt or fermented liquors was left unchanged. The other act was amended by an act approved February 20, 1883, and that was so amended as to read: "and provided further, that nothing herein contained shall prohibit the sale or giving away by manufacturers of wine made from grapes or berries in quantities of one quart or more, or in sealed bottles."

Both of these acts were passed at the same session of the General Assembly, and must be construed together, and made to stand, if reconcilable. Construed in this manner, all manufacturers of ardent, vinous, malt or fermented liquors were prohibited from selling liquors in three-mile districts created under the act of March 21, 1881, except manufacturers of wine made from grapes or berries, and they could sell only in quantities of one quart or more, or in sealed bottles. The privileges of manufacturers of whisky as to the three-mile districts have not been extended further since then. Appellant was lawfully convicted. *Cotton* v. *State,* 62 Ark. 585.

Judgment affirmed.

SUMPTER v. STATE.

Opinion delivered December 10, 1906.

CONSTITUTIONAL LAW—SUSPENSION FROM OFFICE PENDING INDICTMENT.—Kirby's Digest, § 7992, providing that any county or township officer against whom any presentment or indictment shall be filed shall be suspended from office until such presentment or indictment shall be tried, is not unconstitutional as depriving the officer of property without due process of law or without the judgment of his peers or the law of the land within the prohibitions of the Constitution, art. 2, § § 8, 21.

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

STATEMENT BY THE COURT.

The grand jury of Garland County returned an indictment against O. H. Sumpter, county judge of Garland County, for nonfeasance in office for failing to hold the common pleas court on the 13th day of September, 1906, that being a day of an adjourned term of that court which the county judge was required to hold. Afterwards, on motion of the prosecuting attorney, the circuit court entered an order suspending Sumpter from the office of county judge until the indictment was tried, but specified that the suspension should not extend beyond the next term of the court unless the cause was continued on the application of Sumpter. Sumpter appealed.

C. V. Teague, R. G. Davies and *J. P. Clarke,* for appellant.

The act, Kirby's Digest, § 7992, when applied to the facts in this case, is unconstitutional. Appellant recognizes the fact that its constitutionality was upheld in *State* v. *Allen,* 32 Ark. 241, but insists that that decision was erroneous and should be overruled. Art. 2, § 21, Const.; art 2, § 8 *Id.*; 10 Ark. 516; 37 Ark. 391; 27 Ark. 401.

While the office is not deemed property or a contract in the sense that will deprive the State of the reserved power to deal with it at pleasure, yet, where the controversy is as to the right of the incumbent to hold the office as against a claim of a right to supplant him asserted on behalf of another person, the office is property. 32 Ind. 125; 92 U. S. 480; 112 U. S. 201; 143 U. S.

135; 169 U. S. 586; 178 U. S. 583, dissenting opinion; 31 Ark. 31; 42 Ark. 117.

The statute is void also because it imposes upon the court an explicit and imperative duty, not only in so far as it gives direction what the court shall do without a hearing and consideration, but it requires that it be done immediately, and as a mere matter of form. 24 Ark. 91; 58 Ark. 121.

A ministerial act performed by a judge is of no more comprehensive and obligatory force than when the same character of act is performed by a non-judicial officer. If an act is not by reason of its attributes judicial, it does not become so by being performed by a judicial officer. 93 Md. 156; 48 Ala. 399; 92 Md. 150. See, also, 39 Ark. 85; 17 Ind. 169; 100 Ala. 42.

RIDDICK, J., (after stating the facts.) The only question presented by this appeal is whether the statute by virtue of which the appellant was suspended from the office of county judge pending the trial of an indictment against him for nonfeasance in office is a valid law or not. The language of the act is as follows:

"Whenever any presentment or indictment shall be filed in any circuit court of this State against any county or township officer for incompetency, corruption, gross immorality, criminal conduct amounting to a felony, malfeasance, misfeasance or nonfeasance in office, such circuit court shall immediately order that such officer be suspended from his office until such presentment or indictment shall be tried. Provided, such suspension shall not extend beyond the next term after the same shall be filed in such circuit court, unless the cause be continued on the application of the defendant." Kirby's Digest, § 7992.

The act further provides that, upon conviction for any such offenses, a part of the sentence of the court shall be removal from office. It also provides for a temporary appointment of an officer to discharge the duties of the office during the suspension and for an appointment to fill the vacancy if upon conviction the officer so suspended is removed from office. It will be noticed that the statute does not authorize a removal from office upon the filing of the indictment, but only a suspension until the indictment can be tried, and to guard against unwarranted delay it provides that the suspension shall not extend beyond the next term of the court unless the case be continued on the application of the defendant.

There is a distinction between a suspension and a removal from office. In the case of suspension the defendant still remains an officer, and there is no vacancy, but as a matter of public policy he is prevented from exercising the duties of the office while an indictment is pending against him.

The statute makes no reference to the salary of the officer pending his suspension. It may follow that, by virtue of the suspension, he loses the salary during the period of suspension. But that matter is not before us. The question here is, has the Legislature the power as a matter of public policy to provide that a county officer indicted for misfeasance, malfeasance, or nonfeasance in office shall be suspended and not allowed to discharge the duties of the office during the pendency of the indictment.

In a recent work it is said that: "It is well settled in the United States that an office is not the property of the office holder, but is a public trust or agency; that it is not held by contract or grant; that the officer has no vested right therein; and that, subject to constitutional restrictions, the office may be vacated or abolished, the duties thereof changed, and the term and compensation increased or diminished." 23 Am. & Eng. Enc. Law, 328.

This statement of the law is supported by numerous decisions, and is undoubtedly correct. It follows that, unless restricted by the Constitution, the Legislature has the right to declare that no county judge shall serve as such while an indictment is pending against him for malfeasance or nonfeasance in office.

To sustain the contention that this law is invalid, we are pointed to only two provisions of the Constitution.

It is said that the Constitution provides that "no person shall be deprived of life, liberty or property without due process of law." Art. 2, § 8. And again that it provides that "no person shall be taken or imprisoned or disseized of his estate, freehold, liberties or privileges or * * * deprived of his life, liberty or property except by the judgment of his peers or the law of the land." Art. 2, § 21.

In reference to the provision in section 21 of art. 2, last quoted, it is only necessary to say that it does not limit the power of the Legislature to pass laws, but forbids that any one shall be

deprived of his rights, liberty, privileges or property, etc., except in accordance with the law. As the suspension in this case was based on a statute regularly passed, that section does not apply until it be shown that this law is invalid. As to the other quotation from section 8 of art. 2, which provides that no person shall be deprived of life, liberty or property without due process of law, it is evident that this defendant has been deprived neither of his life nor liberty, and this provision does not apply unless we can say that an office comes within the meaning of the word "property," of which the Constitution says no person shall be deprived without due process of law.

But we have just said that an office is not the property of the office holder. This question has often been considered by the courts, and is too well settled to require much discussion. In the recent case of *Taylor* v. *Beckham,* 178 U. S. 548, Chief Justice Fuller, referring to this question, said that "the decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments secured by a contract but compensation for services actments secured by a contract, but compensation for services actually rendered." "In short, generally speaking," he says, "the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." In his dissenting opinion in that case Mr Justice Brewer said: "Aside from these adjudications, I am clear, as a matter of principle, that an office to which a salary is attached is, as between two contestants for the office, to be considered a matter of property. I agree fully with those decisions which are referred to, and which hold that, as between the State and the office holder, there is no contract right either as to the term of office or the amount of salary, and that the Legislature may, if not restrained by constitutional provisions, abolish the office and reduce the salary. But when the office is not disturbed, when the salary is not changed, and when, under the Constitution of the State, neither can be, and when the question is simply whether one shall be deprived of that office and its salary, and both given to another, a very different question is presented, and in such a case to hold that the incumbent has no property in the office, with its accompanying salary, does not commend itself to my judgment."

Counsel for appellant quotes this language as supporting his contention that in this case the office must be treated as property. But we do not think so. The learned judge in this extract says that as between two contestants therefor an office to which a salary is attached is to be considered a matter of property, when the question "is simply whether one shall be deprived of that office and its salary and both given to another." But that is not the case here, for this is not a contest between two claimants to the same office. It is a contest between the State and the office holder. In such a case, to repeat the words of Judge Brewer quoted above, "there is no contract right either as to the term of office or the amount of salary, and * * * the Legislature may, if not restrained by constitutional provisions, abolish the office and reduce the salary." If it may do that, it certainly may provide for a temporary suspension of the officer and his salary during the time an indictment is pending against him. This is done, not as a punishment, but because, as a matter of public policy, it was deemed safer for the public interests that an officer charged by a grand jury of his county with having been guilty of such crimes should not be permitted to continue to exercise the functions of his office until tried and acquitted.

This same conclusion was reached by this court in the case of *Allen* v. *State,* 32 Ark. 242, where Chief Justice ENGLISH, delivering the opinion of the court, said that the same objection that is made to this act "might be urged to all statutes which provide for arresting men accused of crimes and depriving them of liberty before trial and conviction. Persons charged with crimes are often denied bail or unable to give it when allowed, and are imprisoned before trial and conviction. Public policy requires this to be done for the due enforcement of penal laws."

Counsel for appellant says that the requirement that an indicted person give bail and the requirement that an indicted officer shall be suspended from office are not analogous. It is true that there is a difference, but both laws rest on public policy. The law permits the court to refuse bail and to keep confined persons charged with a capital case where the proof is plain. It requires the court to suspend a county officer indicted for malfeasance in office. It may result that an innocent man may be confined in jail or an official without fault be suspended

from office. In neither case is a punishment intended, but imprisonment in one case and suspension in the other is inflicted because the wisdom of the Legislature deemed that the interests of the public required it.

The offense charged in this case was a mild one, and it may be that the defendant had a valid excuse for his conduct. But, as we see it, the law required the court to order the suspension. Being of the opinion that the law is valid, the judgment is affirmed.

SIMS v. YOUNG.

Opinion delivered November 19, 1906.

BILL OF EXCEPTIONS—SUFFICIENCY OF CERTIFICATE OF JUDGE.—Where a bill of exceptions was signed by the circuit judge with a statement that the same was signed with the understanding that all valid objections and corrections which may or can be urged by opposing counsel may be made, but without certifying to its accuracy, the authentication was insufficient to bring the exceptions on the record.

Appeal from Sebastian Circuit Court; *Styles T. Rowe,* Judge; affirmed.

G. S. Evans, for appellant.

Ira D. Oglesby, for appellee.

PER CURIAM. Appellee moves to strike out the bill of exceptions and to affirm the case. This is the authentication of the bill of exceptions: "Wherefore the defendant tenders this his bill of exceptions, together with the stenographer's official report of the case at the time, which is signed and sealed by the court, and ordered to be made a part of the record. This bill of exceptions presented on the 18th day of November, 1905, and the time for filing expires on tomorrow, the same is signed with the distinct understanding that any and all valid objections which may or can be urged by counsel for plaintiff may be done, and any and all corrections which should be made shall be made."

(Signed) "STYLES T. ROWE, Judge."

"The object of the statute in requiring the circuit judge to sign a bill of exceptions is to furnish a certain test of its accuracy." *Kansas City, S. & M. Rd. Co.* v. *Oyler,* 51 Ark. 280. This bill of exceptions is not signed in token of the accuracy of the proceedings therein contained, but in order that it may be filed before the expiration of the time limit, and the judicial power is not exercised, but reserved to be exercised thereafter. It expressly negatives that it contains a true memorial of the proceedings, and shows that the judge did not intend it to be accepted as importing absolute verity, but treated the signing and filing as purely formal. In *Kansas City, S. & M. Rd. Co.* v. *Oyler, supra,* the judge's statement showed more confidence in the bill of exceptions than this statement does, but like this one it lacked the essential element—a certification to its verity as the judicial act of the presiding judge—and the court, through Chief Justice COCKRILL, said: "But, as he was unwilling to accept the bill as a true narrative of the proceedings and sign it for the purpose of evidencing that fact, it did not serve the office of bringing the exceptions upon the record." The same is true of this bill, and there are no questions raised which are presented by the record proper, wherefore the judgment is affirmed.

STEWART v. BOBO.

Opinion delivered December 10, 1906.

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APPEAL—INSUFFICIENCY OF ABSTRACT.—A judgment will be affirmed on appeal where appellant asked a reversal on the ground that the verdict was contrary to the evidence, but failed to set out the evidence as required by Rule 9.

Appeal from Carroll Circuit Court; *J. S. Maples,* judge; affirmed.

Festus O. Butt, for appellant.

1. This court will reverse where there is a total absence of evidence on a material point. 44 Ark. 259; 46 Ark. 142; 47 Ark. 197; 51 Ark. 467; 52 Ark. 314; 57 Ark. 577.

2. Appellant was entitled to interest on acceptances after maturity. 19 Ark. 16; 36 Ark. 355; 43 Ark. 275; 46 Ark. 87.

3. The verdict is contrary both to the evidence and the law. The evidence is uncontradicted that the acceptances were sold by the Elgin Jewelry Company, in due course of business, to appellant, and before maturity, without notice or knowledge on his part of any claims or defenses against them. 31 Ark. 20; 31 Ark. 125; 40 Ark. 545; 36 Ark. 228; 41 Ark. 242; 49 Ark. 465; 48 Ark. 454; 61 Ark. 81.

McCULLOCH, J. This is an action brought by appellant, W. H. Stewart, against appellee, C. E. Bobo, to recover the amount of certain bills of exchange drawn by the Elgin Jewelry Company on appellee and accepted by him, the same having been assigned to appellant.

On a trial by jury a verdict was rendered in favor of appellant for a portion only of the amount sued for—the jury finding in favor of the defendant (appellee) as to certain credits claimed by way of setoff. No objection is made here to the instructions of the court, but it is contended that the verdict is contrary to the evidence.

Counsel for appellant does not, however, attempt to set out the evidence. He contents himself with an assertion in the brief, by way of argument, that the evidence is undisputed, and that it fails to establish any defense. In order for the judges to determine whether or not his contention is borne out by the record, it is essential for each of them to explore the transcript. The object of Rule 9 of this court is to obviate that. *Ruble* v. *Helm*, 57 Ark. 304. There being a palpable failure to comply with the rule, and nothing being shown in the abstract to justify a reversal of the case, we must affirm the judgment. *Shorter University* v. Kirby's Digest, § § 3274, 3275, 3281.

It is so ordered.

JENKINS v. JENKINS.

Opinion delivered December 10, 1906.

1. APPEAL—CHANCELLOR'S FINDING—CONCLUSIVENESS.—The finding of a chancellor will not be disturbed on appeal if it does not appear to be against the weight of evidence. (Page 70.)
2. PARTNERSHIP—PURCHASE WITH PARTNERSHIP FUNDS.—Whether property purchased with partnership funds was intended to become partnership property depends upon the intention of the parties as manifested by all the surrounding circumstances and the use to be made of it, whether for partnership or individual purpose. (Page 70.)

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

White & Altheimer, for appellant.

1. Property purchased in the firm name, and paid for with partnership funds, becomes *eo instanti* partnership property; and in the case of real estate, charging the purchase price, subsequently, on the books of the concern against the account of one of the partners can not have the effect of divesting the title to the real estate out of the partnership. That could only be effected by proper deed of conveyance from both partners to the purchaser. Kirby's Digest, § 731.

2. If real estate is ever to be treated as personal property, it is only for the purpose of paying partnership debts. 48 Ark. 558.

3. If appellee purchased in his own name with partnership funds without the consent of his co-partner, he became trustee for his co-partner to one half of the property. 9 Ark. 518.

Taylor & Jones, for appellee.

1. The parties to this suit were partners in the mercantile business only—not for the purchase and sale of real estate; hence appellant's reference to 9 Ark. 518 is without application. 2. Whether a purchase is partnership or individual property depends upon the intention of the parties, to be inferred from their actions and the circumstances. 17 Am. & Eng. Enc. Law, 945.

To constitute real estate partnership property, it must be purchased for that purpose, be appropriated thereto, and be paid for with partnership funds. 101 Mass. 482; 1 Bates on

Law of Part. § § 266, 280; 24 Ill. 316; 59 N. H. 375; 72 Ala. 423; 42 Ala. 212; 23 Ala. 837.

3. Real estate purchased by partners with partnership funds for partnership purposes and appropriated to such purposes, is considered in equity as personal estate for the payment of debts and liabilities of the partnership, and the settlement of claims of the partners as between themselves. 27 L. R. A. 450; 48 Ark. 558.

McCULLOCH, J. The parties to this action, J. L. Jenkins, appellant, and P. G. Jenkins, appellee, were partners in the mercantile business at Sherrill, Arkansas, under the firm name of "P. G. Jenkins," and during the pendency of said partnership the real estate in controversy, a house and lot in Sherrill, was purchased, and the conveyance made to appellee. The purchase price was paid out of funds of the co-partnership, but the same was charged on the books of the firm to appellee. Appellant immediately moved into the house and occupied it as his home until the commencement of this action. Subsequent to the purchase of the property the co-partnership was dissolved, appellee purchasing the interest of appellant in the partnership property for the sum of $4,583.16, the payment of which was evidenced by a written receipt signed by appellant reciting that it was for his "entire interest in stock of merchandise, store fixtures and book accounts."

Appellant contends that the property was purchased to be used as a home for him, that it was paid for out of partnership funds, and was partnership property, the title being taken in the name of P. G. Jenkins, which was the style of the firm name, and that on dissolution of the firm it was allotted to him as a part of his share in the partnership property, and that appellee agreed to convey it to him.

Appellee, on the other hand, contends that the property was not purchased as partnership but as his individual property; that, though it was paid for with funds belonging to the firm, the same was at the time charged to him on the books of the firm; that he permitted appellant to enter upon and occupy the premises as his tenant under an agreement that appellant should pay rent. He also denied that said property was allotted to appellant as a part of his share of the partnership property, or that he had ever agreed to convey it to appellant.

Each of the parties introduced considerable testimony in support of their respective contentions, and the conflict in the testimony is irreconcilable. The chancellor found the facts to be in favor of appellee, and, while the question is by no means free from doubt, we can not say that the finding is against the preponderance of the testimony. That being true, it is our duty, under the rule well established by the decisions of this court, not to disturb the finding of the chancellor.

Learned counsel for appellant argue that, because the real estate was paid for out of partnership funds, it became, from that fact alone, partnership property. Not so. Whether the purchase is as partnership or individual property is a question of fact not controlled entirely by the use of partnership funds, that being only a circumstance indicating the intention of the parties. It may or may not become partnership property, according to the intention of the parties as manifested by all the surrounding circumstances and the use to be made of it, whether for partnership or individual purpose. 17 Am. & Eng. Enc. Law, 945; 1 Bates on Partnership, § § 266, 284; *Richards* v. *Manson,* 101 Mass. 482; *Hatchett* v. *Blanton,* 72 Ala. 423.

While it is undisputed that the property was paid for out of partnership funds, appellee testifies that he immediately caused the amount to be charged to himself on the books of the firm, and that appellant recognized it as a purchase for individual use by his agreement to pay rent. Under the circumstances, the amount of the purchase price being charged to appellee on the books of the firm at the time of the purchase, a presumption even does not arise that the purchase was for partnership uses.

Decree affirmed.

EVINS v. SANDEFUR-JULIAN COMPANY.

Opinion delivered December 10, 1906.

1. SPECIFIC PERFORMANCE—PART PERFORMANCE.—One who takes possession of land under a verbal contract to exchange other land for it

and makes improvements under such contract is entitled to specific performance of the contract of exchange. (Page 73.)

2. EXECUTION—INTEREST SUBJECT TO.—One who is entitled to specific performance of a verbal agreement to exchange land has an interest therein that is subject to seizure and sale under execution. (Page 73.)

Appeal from Yell Chancery Court; *Jeremiah G. Wallace,* Chancellor; affirmed.

John M. Parker, for appellant.

1. The conditional agreement relied on to vest title in George Julian was verbal, and not enforcible under the statute of frauds. Kirby's Digest, § 3654; 37 Ark. 145; 3 Am. & Eng. Enc. of L. 424, note 1.

2. Appellee having failed to produce a deed to Geo. Julian for the lot, or a certified copy thereof, and no reason being given for its non-production, his testimony was incompetent to prove its existence. 4 Ark. 574; 28 Ark. 8; 7 Am. & Eng. Enc. 1 Ed., 87.

3. It was error to permit the sheriff's return on the execution to be introduced in evidence for the purpose of proving that Sandefur-Julian Company claimed title to the lot. If the return was admissible, it nevertheless fails to establish a legal sale, in that it does not show that notice of such sale was published in the manner and for the time prescribed by law, or that the land was sold at the place and on the terms required by law. Kirby's Digest, § § 3274, 3275, 3281.

4. Appellant having the legal title to the lot, and paying the taxes thereon since 1894, when it was abandoned by Julian, has also held, through his tenants, peaceable, open, adverse and continuous possession for more than seven years. He is entitled to the possession of the lot and the house thereon. Kirby's Digest, § 5056; 34 Ark. 534.

5. Appellees, if they are entitled to claim by adverse possession, not having specially pleaded the statute, can not avail themselves thereof to defeat the title of appellant. 78 Ark. 209.

Bullock & Davis, for appellees.

1. Taking possession of the lot and erecting a building thereon with the knowledge and consent of appellant, pursuant to the parol agreement to exchange lots, took the case out of the

statute of frauds, and vested Geo. Julian with the equitable title. 8 Ark. 272; 19 Ark. 23; 30 Ark. 249; 42 Ark. 246. One who stands by and acquiesces while valuable improvements are being made and money being expended on his property can not afterwards interfere with the possession of one thus improving the property. 33 Ark. 490; 46 Ark. 109; 51 Ark. 235; 74 Ark. 136.

2. On the objection as to the competency of testimony, the presumption is that the chancellor has considered only that part of the testimony which is competent. 76 Ark. 153.

3. It being proved that the deed of the sheriff, made pursuant to the sale under execution, was lost without having been recorded, it was proper to permit the sheriff's return on the execution to be introduced, as tending to show a claim of title upon which to base proof of title by adverse possession.

4. The allegation that Sandefur-Julian Company have been in undisputed possession from the date of the execution sale in June, 1897, until in August, 1904, was a sufficient plea of the statute of limitation. 80 Ark. 181.

5. The findings of the chancellor will not be disturbed unless contrary to the weight of evidence. 71 Ark. 605; 73 Ark. 489.

BATTLE, J. After hearing all the evidence in this cause, the court found the facts to be as follows: "That on the 12th day of December, 1902, the defendant, Joseph Evins, in consideration of the sum of one hundred dollars, sold to one George Julian lot No. 11, in block 56, Mt. Nebo, Yell County, Arkansas; that in the year 1893, by mutual consent of parties (Julian and the defendant), the said lot 11 in block 56 was exchanged for lot 13 in block 55, Mt. Nebo, and that the said George Julian and his father took possession of and made valuable improvements on the said last-mentioned lot; that at the time no deeds were exchanged, but that the defendant had full knowledge of, and allowed the said George Julian and father to proceed with, the improvements under the said verbal agreement to exchange lots, without objection by the said defendant, Joseph Evins; that on the 17th day of June, 1897, the said lot 13 in block 55 was levied upon as the property of Julian by the sheriff of Yell County under an execution issued by the clerk of the circuit court, and the property was purchased by the said plaintiff, Sandefur-Julian

Company; that in August, 1894, the plaintiff, L. C. Hall, having purchased the building upon said lot from Sandefur-Julian Company, proceeded to remove the same, and, the defendant, Joseph Evins, resisting the removal, the present suit was brought, praying for a decree that will remove the cloud from the plaintiff's title, and for a temporary restraining order, which was made, restraining the said defendant, Joseph Evins, from interfering with or preventing the removal of the said building until further orders of the court, and the court doth further find that the plaintiff and those under whom they claim have held the open, notorious, peaceable and adverse possession of lot 13, block 55, under claim of ownership for more than 7 (seven) years before the commencement of this action."

The temporary restraining order was made perpetual.

The findings of the court were sustained by the preponderance of the evidence. The two lots, at the time of the exchange, it seems, were vacant. The possession of George Julian and his father of lot 13 in block 55, and improvements made by them on the same, under their contract with Evins, entitled Julian to a specific performance of the contract of exchange. Waterman on Specific Performance of Contracts, § 279, and cases cited. The interest of Julian in the lot acquired by exchange was subject to seizure and sale under execution. Kirby's Digest, § 3228; *Hardy* v. *Heard,* 15 Ark. 184; *Young* v. *Mitchell,* 33 Ark. 222. Sandefur-Julian Company acquired such interest at the sale, and plaintiffs were entitled to the relief asked for by them in their complaint.

Decree affirmed.

WARD v. STURDIVANT.

Opinion delivered December 10, 1906.

1. FRAUDULENT CONVEYANCE—CREDITOR'S REMEDY AT LAW.—A judgment creditor who has levied upon and purchased at execution sale land fraudulently conveyed by the debtor previously to the rendering of his judgment can recover possession of the land without first going into equity to set aside the fraudulent conveyance. (Page 77.)

2. SAME—JURISDICTION OF CIRCUIT COURT.—Where a judgment creditor seeks to recover possession of land of his debtor which he had purchased at execution sale, and which the debtor had previously conveyed to another in fraud of his creditors, the circuit court had jurisdiction, and it was not error to refuse to transfer to equity. (Page 78.)

3. EJECTMENT—EXCEPTION—DEFECT NOT APPARENT.—While an exception to a deed exhibited by defendant with his cross-bill does not reach a defect not apparent on the face of the deed, as that the deed was executed in fraud of the grantor's creditors, such exception may be treated as a reply where it notifies defendant of the ground on which his deed would be attacked. (Page 79.)

Appeal from Howard Circuit Court; *James S. Steel,* Judge; reversed.

STATEMENT BY THE COURT.

Eugenia Ward brought an action of ejectment against W. A. J. Sturdivant and certain of his tenants in the Howard Circuit Court to recover an undivided one-half of 160 acres of land in that county.

She alleged that she had in 1895 recovered judgment against one John B. Sturdivant before a justice of the peace, that, the same not being paid, a transcript of this judgment was in 1899 duly filed in the office of the clerk of the circuit court, and docketed as required by law; that an execution on the judgment was issued by the clerk of the circuit court, and was levied on the undivided interest of John B. Sturdivant in the land in controversy, the land sold and purchased by plaintiff, and a deed executed to her.

In a separate paragraph, numbered 3, she alleged: "That on or about the eighth day of December, 1894, and after plaintiff's debt was contracted for the purpose of cheating, hindering and delaying his creditors, which said fraudulent purpose was well known and participated in by the defendant W. A. J. Sturdivant, the said John B. Sturdivant conveyed the land in controversy to the defendant W. A. J. Sturdivant, and for the same fraudulent purpose and with the consent of the said W. A. J. Sturdivant fraudulently dated said deed as of the 1st day of January, 1894, when in truth and in fact said deed was executed on or about the 8th day of December, 1894, and said defendant is claiming an undivided one-half interest in said land under and by

virtue of said fraudulent deed." She set out the deed from the sheriff to her, and asked judgment for possession.

The defendants filed an answer containing among others the following paragraph:

"They deny that John B. Sturdivant was insolvent on the 8th day of December, 1894, or at any other time, and deny that he did, while insolvent, on the 8th day of December, 1894, or at any other time while insolvent, convey all his interest in said land to the defendant, his brother, W. A. J. Sturdivant, to defraud his creditors in the collection of their debts." They further pleaded the statute of limitations.

Thereupon the plaintiff filed exceptions to the deed from John B. Sturdivant to W. A. J. Sturdivant set out and exhibited with the answer of defendants, and for ground of exceptions set up substantially the same matters contained in paragraph third of the complaint copied above.

Afterwards the defendant filed a motion to strike out paragraph third of the complaint, and this motion was sustained.

The cause was then on motion of the plaintiff transferred to the chancery court. When the cause was docketed in the chancery court, the defendant filed a motion to send it back to the circuit court. This motion was sustained, and the case remanded to the law court. When it was docketed there, the plaintiff again moved that it be returned to the chancery court, but this motion was overruled.

On the trial the plaintiff introduced evidence showing that the land in controversy had been sold under an execution issued on a judgment in her favor against John B. Sturdivant, and purchased by her, and a deed executed to her.

The defendant W. A. J. Sturdivant introduced a deed from John B. Sturdivant to himself, executed before the issuance of the execution under which the land was sold to plaintiff.

The defendant thereupon offered to prove that this deed was fraudulent, that it was executed by John B. Sturdivant to defendant W. A. J. Sturdivant for the purpose of defrauding the creditors of John B., and that this purpose was known to W. A. J. Sturdivant; that plaintiff was a creditor of John B. Sturdivant at the time the deed was executed, and that this deed was executed in pursuance of a fraudulent scheme devised by the defendant

and his brother, John B. Sturdivant, to put this property beyond the reach of the plaintiff and other creditors of John B. Sturdivant. But the court held that, being a court of law, "he had no power to inquire into the validity of the deed except as to such matters as appeared on its face; that he had no right to inquire into the matters of its fraudulent execution or set it aside on that ground." He therefore refused to allow the plaintiff to introduce evidence of such fraud, to which ruling the plaintiff duly saved her exceptions.

There was a judgment in favor of the defendants, and, plaintiff's motion for a new trial being overruled, she appealed.

D. B. Sain and *McRae & Tompkins,* for appellant.

1. The cause should have been transferred to the chancery court. True, an equitable answer was not tendered, but a deed was tendered therewith which the plaintiff by apt allegations stated was fraudulent, and that raised an equitable issue; and the question is, is there an equitable issue to be tried? 70 Ark. 157; 34 Ark. 534; 49 Ark. 20; 36 Ark. 456; 62 Ark. 51.

2. Since appellant was required to submit to a trial at law, she was entitled to introduce evidence tending to show that the deed was fraudulent. Fraud is a mixed question of law and fact to be submitted to the jury, and to be established by competent proof. 8 Ark. 83; 24 Ark. 222; 49 Ark. 22.

W. C. Rodgers, for appellee.

Appellant elected to bring suit in ejectment, which is purely a legal remedy, and is bound by her election. 30 Ark. 453; 61 Ark. 266; 64 Ark. 213; 65 Ark. 380; 69 Ark. 271; 75 Ark. 40. Moreover, appellant, having purchased at her own execution sale, and paying nothing for the land, only crediting her judgment with the purchase price, was not an innocent purchaser. 31 Ark. 252; 32 Ark. 346; 33 Ark. 621; 34 Ark. 85. Possession of W. A. J. Sturdivant was itself notice of his claim to the land and the nature thereof. 66 Ark. 167; 26 N. J. Eq. 70; 3 Paige, Ch. 421; 13 Ves. 114; 4 N. H. 397; 3 Md. Ch. 488; 40 Ala. 486. A purchaser at an execution sale acquires only such title as the debtor may have. 22 Ark. 572; 30 Ark. 249. And the lien of a judgment can only operate upon the interest which the debtor had at the time of its rendition. 15 Ark. 73. If the convey-

ance from J. B. to W. A. J. Sturdivant was fraudulent, it was nevertheless effective to divest out of him his title and interest in the land. 11 Ark. 411; 30 Ark. 453; 47 Ark. 301; 67 Ark. 325.

If the deed was executed at the time alleged, and if it were fraudulent, appellant was not injured. The burden was on her to show that J. B. Sturdivant was indebted to her at that time, and this she did not show. 43 Ark. 454; 53 Ark. 275; 71 Ark. 305; 74 Ark. 68; 92 S. W. 783; 90 Va. 719; 68 N. C. 494; 50 Miss. 34; 65 Ala. 343; 17 R. I. 519.

Authorities cited by appellant show that exhibits are not a part of the pleadings, and jurisdiction must arise from the pleadings: 7 Ark. 258; 113 U. S. 249; 152 U. S. 654; 13 Ark. 40; 66 Ark. 346; 7 S. D. 451.

The sale to W. A. J. Sturdivant was at least valid until set aside by a court of chancery. "Some process, after a judgment at law is rendered, is necessary, in order to fix and secure a lien upon property that has been fraudulently conveyed, and uncover it for the judgment creditor." 67 Ark. 325.

A conveyance of property made with fraudulent intent to cheat, hinder or delay creditors is ground for attachment, though it is a valid conveyance between the parties, and confers a perfect title. 75 Ark. 391.

RIDDICK, J. (after stating the facts.) There are only one or two points that need to be considered on this appeal.

The first question is whether a creditor who has recovered judgment against his debtor and has levied upon and sold land fraudulently conveyed by the debtor previous to the judgment can recover possession of the land in an action of ejectment based on the deed acquired at the execution sale, without first going into a court of equity to set aside the fraudulent conveyance? We are of the opinion that this question must be answered in the affirmative. It is the language of our statute, and it has been often said by this and other courts that a conveyance made for the purpose of defrauding a creditor is void as to the creditor. Chancellor Kent said that "a fradulent conveyance is no conveyance against the interest intended to be defrauded." *Sands* v. *Codwise*, 4 Johns. Ch. (N. Y.), 536, 4 Am. Dec. 305. Such expressions are found in numerous cases. *Ringgold* v. *Waggoner*,

14 Ark. 69; *Rudy* v. *Austin,* 56 Ark. 73-80; *May* v. *State National Bank,* 59 Ark. 614; *Johnston* v. *Harvey,* 21 Am. Dec. 426.

But in the recent case of *Doster* v. *Manistee National Bank,* 67 Ark. 325, is was pointed out that, although such conveyances were often spoken of as void as to creditors, they were in fact only voidable, and will stand unless some legal steps are taken to avoid them. In other words, "where it is said that a fraudulent conveyance is void as to the creditors of the grantor; what is meant is that it is ineffectual against legal process instituted by the creditor against the property of the debtor and exercised through regular and valid proceedings." 14 Am. & Eng. Enc. Law (2 Ed.), 310. In the Doster case the court held that a judgment was not a lien upon land which the judgment debtor has previously conveyed to defraud his creditors. I did not concur in that decision for the reason that it seemed to me to be in conflict with former decisions of this court. *Ringgold* v. *Waggoner,* 14 Ark. 69; *Hershy* v. *Latham,* 46 Ark. 542; *Stix* v. *Chaytor,* 55 Ark. 116.

But the case was carefully considered, and we have no inclination to overrule it. One reason for holding that a judgment was not a lien in such cases is that where a creditor has obtained judgment, but taken no steps to attack the fraudulent conveyance or to subject the property conveyed to his judgment, innocent parties might be misled into dealing with such property as the property of the fraudulent grantee, and might be exposed to injury if a judgment was held to be an absolute lien in such cases. But that reason does not apply where the creditor not only recovers a judgment but levies an execution upon the property and sells it as the property of the fraudulent grantor. For that conclusively shows that the creditor has elected to treat the conveyance as void, and to subject the property to his debt. For this reason we see nothing in the decision in the Doster case that conflicts with our conclusion in this case.

While the usual practice for the creditor seeking to reach property fraudulently conveyed by the debtor is to go into court of equity, and while this court in the Doster as well as other cases has said that the better practice was to do so, still the creditor has the right to choose his remedy, for fraud may be shown at law as well as in equity. Although, as said in the

Doster case, a fraudulent deed is not strictly speaking void until attacked by one having the right to do so, yet it is of no effect against the process of a creditor seeking to subject the property to his debt. While such a deed is good between the parties, a creditor may elect to treat it as a nullity; and when he recovers judgment against the fraudulent grantor, he may levy his execution on the property, and subject it to sale for the satisfaction of his debt. The purchaser at such sale can recover possession from the fraudulent grantee by an action of ejectment, upon showing the nature of the conveyance, and we are of the opinion that the circuit court erred in holding to the contrary. *Ringgold* v. *Waggoner,* 14 Ark. 69; *Apperson* v. *Ford,* 23 Ark. 746; *Hershy* v. *Latham,* 46 Ark. 542; *Scott* v. *Scott,* 85 Ky. 385; *Pratt* v. *Wheeler,* 6 Gray (Mass.), 520; *Sherman* v. *Davis,* 137 Mass. 132; *Smith* v. *Reid,* 134 N. Y. 568; 14 Am. & Eng. Enc. Law, (2 Ed.) 310, 312, 20 Cyc. 655, 656, and cases cited.

In this case the plaintiff did not ask for any equitable relief. She asked judgment for the possession of land held by defendant; and as the circuit court had jurisdiction to try and determine the case, the court did not err in overruling the motion of plaintiff to transfer to the chancery court. The paragraph of the complaint alleging the fraudulent nature of the convevance under which defendant holds was stricken out on motion of defendant. Plaintiff did not except to this ruling of the court, and that is not before us for review. But the answer of the defendant set out the deed from his brother, the debtor, to him, and expressly denied that it was made to hinder and delay creditors. The plaintiff thereupon filed exceptions to this deed on the ground that it was made to defraud the plaintiff of her debt. Strictly speaking, this was not a proper exception to the deed, for the deed was good on its face, and an exception goes only to defects apparent on the face of the deed; but if a reply was necessary to raise the issue as to whether this deed was fraudulent or not, this exception may be treated as a reply, for it set out the facts fully, and gave notice to the defendant of the grounds on which his deed would be attacked. But the court refused to permit plaintiff to introduce evidence to sustain the allegation of fraud. This ruling, as we have said, was in our opinion erroneous.

Judgment reversed, and cause remanded for a new trial.

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DRIVER v. MOORE.

Opinion delivered December 10, 1906.

1. PUBLIC DITCH—LOSS OF PETITION—PRESUMPTION.—While the filing of a petition for the establishment of a public ditch, signed by one or more persons whose property is to be affected by the proposed ditch and setting forth all the jurisdictional facts, is essential to the validity of the order establishing the ditch, yet where the order of the county court establishing the ditch recites that a petition was filed which complied with the law, it will be presumed, on subsequent loss of the petition, that it contained the necessary allegations. (Page 84.)

2. SAME—PRESUMPTION AS TO NOTICE.—Where the order of the county court establishing a public ditch recites that proper notice of the filing of the report of the viewers was given in apt time, this recital is taken as *prima facie* true, and casts upon one attacking the validity of the proceeding the burden of proving that the notice was not given. (Page 84.)

3. SAME—TIME FOR FILING VIEWERS' REPORT.—Sand. & H. Digest, § 1207, providing that viewers appointed to report upon the utility of the proposed public ditch shall "file their report with the clerk at least two weeks before the next regular meeting of the county court" after their appointment, is directory, and the time for filing such report may be extended by the county court. (Page 84.)

4. SAME—ALTERATION OF TERMINI.—An order establishing a public ditch is not invalid because it adopted the termini recommended by the viewers which altered the termini of the proposed ditch by shortening it at one end and lengthening it at the other, although neither the viewers' report nor the order of the court recites the reason for such alterations. (Page 85.)

5. SAME—CONCLUSIVENESS OF ASSESSMENT.—Under the statute providing that the viewers appointed to fix assessments on lands affected by a proposed ditch shall report the same to the county court, that the court shall confirm their report, that notice of the filing of the viewers' report shall be given, and that any landowner may appear and object to the assessment, an assessment when confirmed becomes conclusive, and can not be questioned collaterally. (Page 86.)

6. SAME—IRREGULARITIES.—A contract let for the construction of a public ditch is not invalid because the viewers made their final report one day in advance of the time fixed by the court, nor because no notice was given of the letting of the contract, nor because the contract was let *en masse,* instead of separate allotments. (Page 86.)

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

S. S. Semmes, for appellant.

1. Strict conformity with the statute, in the three essential mandatory particulars required therein to be shown in the petition, is jurisdictional. 64 Ark. 118; *Ib.* 566. This being a special statutory proceeding contrary to the course of the common law, there can be no presumption of jurisdiction, but all necessary jurisdictional facts must appear from the record. 51 Ark. 42; 54 Ark. 642; 59 Ark. 487; 10 Ark. 316; 18 Wall. 371; 28 Gratt. 872; Black on Judgments, § 280; Freeman on Judgments, § 123; 15 Am. & Eng. Enc. Law (2 Ed.), 388; 17 *Ib.* 1079.

2. The statute with reference to giving notice of the pendency of the petition, etc., should be strictly complied with, and the burden of proving that such notice had been given was upon the appellee. 51 Ark. 41; 64 Ark. 569; 67 Ark. 43; 7 Am. & Eng. Enc. Law, 212; 15 *Id.* 365; 13 *Id.* 301. Proof of the nature of the notice, and of the time and mode of giving it, should affirmatively appear from the record. *Ubi supra;* 54 Ark. 627; 59 Ark. 483; 15 Am. & Eng. Enc. Law (2 Ed.), 371. It is competent in this nature of case, even on collateral attack, to introduce evidence to prove the time when the printed notices were actually posted up. 43 Ark. 232; 46 Ark. 155; 55 Ark. 284; 59 Ark. 487; Black on Judgments, § 282.

3. The statute requires the viewers to file their report at least two weeks before the next regular meeting of the county court after their appointment. There is no provision allowing the report to be filed at a later term.

4. The change in the ditch as established from the ditch as petitioned for rendered void the order establishing it. The provisions of the statute as to how the viewers shall locate the ditch are mandatory, and must be strictly complied with. S. & H. Digest, § 1207; *Ib.* § 1206; 59 Ark. 363; 64 Ark. 567; Kirby's Digest, § 1426; 75 Ill. 246; 49 Cal. 672; 12 Mich. 434; 31 O. 466; 44 N. H. 388; 25 Wend. 453; 71 Ark. 19; 15 Am. & Eng. Enc. Law (2 Ed.), 364.

5. The assessment was excessive, not being made in conformity with the statute. S. & H. Digest, § 1205; 54 O. St. 247.

6. The contract was void because no final report was made and filed by the viewers as required by statute, because no notice of the letting of the contract was given, and because the shares

or allotments of the construction of the ditch were let *en masse* to one bidder. S. & H. Digest, § § 1215, 1218. And, if not void in the first instance, it had expired before the construction of the shares of the work allotted to appellant's land. The clerk was without authority to extend the completion of the work for a longer period than sixty days. He can not make repeated extensions of sixty days each. S. & H. Digest, § 1219.

J. T. Coston and *Murphy, Coleman & Lewis,* for appellee.

1. The allegations of the complaint, together with the order itself, establishes a *prima facie* jurisdiction in the county court, and the burden was upon the defendant to overthrow this *prima facie* case by evidence of the jurisdictional defects alleged. Kirby's Digest, § 6132; 51 Ark. 371; Sand. & H. Digest, § 1232. Where the jurisdiction of a court of inferior jurisdiction is made to depend on the existence of a particular fact, its decision with reference to such fact, if it has jurisdiction of the parties, is as conclusive upon collateral attack as the decision of a court of general jurisdiction. Compare Indiana statute on same subject; 100 Ind. 487; 145 Ill. 120; 213 Ill. 421; 95 N. W. 405; 90 N. W. 510; 77 Ind. 371; Freeman on Judgments, § 523; 75 Ind. 20; 77 Ind. 371; 24 How. 287; 47 Ark. 131. See, also, 68 Ark. 376; 71 Ark. 20.

2. On the question of notice: the recitals in the order are *prima facie* evidence of the facts set forth, and it is settled that the recitals in a judgment even of an inferior court are *prima facie* true. 12 Enc. Pl. & Pr. 204; Freeman on Judgments, § 517; 3 Ia. 114; 34 Ill. App. 491; 3 Barb. (N. Y.), 623; 12 Wend. (N. Y.), 102; 43 Ark. 230. And the burden is on him who questions the court's jurisdiction to show that it did not have it. 71 Ark. 20; 68 Ark. 376; Kirby's Digest, § 6132; Sand. & H. Digest, § 1232. See also, 80 Ark. 462.

3. Reasonable cause being shown why the viewers could not report at the term immediately following their appointment, an order was entered of record at that term directing them to report at the next term, which was within the power of the court to do. The proceedings to this point were in a sense *ex parte*. 64 Ark. 569. And appellants were not injured by the delay.

4. The exact location of the starting point, route, or term-

inus of the ditch was work for the viewers, and was not intended to be definitely described in the petition. There is nothing in the change of the ditch as established from the ditch as petitioned for to render the proceedings invalid. 64 Ark. 555; 71 Ark. 20; 6 L. R. A. 161; 117 Mich. 463; 68 Mich. 625; 58 Wis. 461; 17 N. W. 389. If aggrieved, appellant should have appealed from the order of the county court within twenty days. Having failed therein, he is barred. 71 Ark. 28.

5. The report of the viewers fixing the assessment on the land, when confirmed by the county court, is *prima facie* evidence of benefit. 70 Ark. 451; 68 Ark. 380; 78 Ark. 580; 80 Ark. 462.

The judgment of the county court that certain lands will be benefited and fixing the amount of the assessment, if not corrected by the mode pointed out in the statute, is conclusive, and not subject to collateral attack. 92 N. W. 841; *Ib.* 852; 121 U. S. 535; 164 U. S. 113; 95 N. W. 405; 90 N. W. 510.

6. The act of the viewers in meeting one day earlier than the time specified by the court for the purpose of making their report was a mere irregularity, in no sense jurisdictional, and not available as an objection on collateral attack. 71 Ark. 17. If all the shares were let *en masse,* this would not necessarily defeat a recovery. 116 Ind. 343.

7. From the magnitude of the enterprise, the length of the ditch, appellant's near proximity to it, the public agitation of the proceedings, aside from the evidence of actual notice given as required by law, he ought to be estopped to deny knowledge of the proceedings and construction of the ditch, or to question the validity of the judgment or the regularity of subsequent proceedings thereunder. 124 Mich. 285; 31 Neb. 668; 94 N. W. 1076; 119 Ill. 504; 116 Ind. 343; 43 Ia. 477; 69 Mich. 484; 22 Neb. 437; 15 O. St. 64.

McCULLOCH, J. This is a suit instituted in the chancery court of Mississippi County by appellee, Claude H. Moore, as contractor, against appellant, James D. Driver, to recover the amount of an assessment levied on the lands of appellant for the expense of a ditch, the construction of which was authorized by an order made by the county court on petition of landowners.

Appellant resists the enforcement of said assessment on the

ground that the order of the county court authorizing the improvement was void on account of certain jurisdictional defects in the proceedings, and that appellee had no valid contract to construct the ditch.

It is contended by the appellant, in the first place, that the validity of the order of the county court is not shown because the petition to the court upon which the order was based is not exhibited in this suit, nor its contents proved, so that the court may determine whether or not it sets forth all the essential jurisdictional facts. In the complaint it is alleged that the petition has been lost, and that for that reason neither the original nor a copy thereof can be produced. No proof was made, either as to the loss of the petition or as to its contents, further than the recitals of the order of the county court. This court held in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Dudgeon,* 64 Ark. 109, that the filing of a petition, signed by one or more persons whose property is to be affected by the proposed ditch and setting forth all the jurisdictional facts, is essential to a valid order and judgment of the county court, but it has never been decided by this court that the subsequent loss of the petition would affect the validity of the proceedings. On the contrary, it has been several times decided that in proceedings of this character the judgment of the court containing recitals and findings of jurisdictional facts is presumed to be within the jurisdiction of the court and valid. *Stiewel* v. *Fencing District,* 71 Ark. 20; *Overstreet* v. *Levee District,* 80 Ark. 462; *Coleman* v. *Coleman, ante* p. 7; *Ritter* v. *Drainage District,* 78 Ark. 580.

It is also contended that notice of the filing of the report of the viewers was not given in apt time before the order of the county court was made authorizing the construction of the ditch and levying the assessment on lands. The order of the court recites that the notice was properly given in apt time, and this recital must be taken as *prima facie* true, and it casts upon one attacking the validity of the proceedings the burden of proving that the notice was not given. *Kansas City, P. & G. R. Co.* v. *Waterworks Imp. Dist.,* 68 Ark. 376; *Stiewel* v. *Fencing District, supra; Overstreet* v. *Levee District,* 80 Ark. 462; *Jonesboro, L. C. & E. Rd. Co.* v. *Board of Directors, etc.,* 80 Ark. 316.

Appellant introduced some proof tending to show that the

notice was not published the length of time prescribed by statute; but the testimony was conflicting, and we think it was insufficient, even if it was competent for that purpose, to overcome the presumption raised by the recitals of the record.

The statute authorizing the proceedings provides that the viewers shall "file their report with the clerk at least two weeks before the next regular meeting of the county court" after their appointment. Sand. & H. Digest, § 1207. In this instance the viewers were appointed at the April term, 1902, of the county court, and did not file their report at the July term, which was the next term, but an order was entered by the court at that term extending the time for filing the report until the October term to enable the viewers to have the necessary surveying done, and the report was filed in time for the October term. It is argued that this rendered the order of the court void. The provision for filing the report at the next term is not mandatory, but only directory. Notice of the proceedings is not required until the report of the viewers is filed, and up to that time the proceeding is *ex parte. Cribbs* v. *Benedict,* 64 Ark. 555. There is, therefore, no reason for holding that the provision in question is mandatory and affects in anywise the jurisdiction of the court to receive and act upon the report of viewers at a subsequent term.

The report of the viewers altered the termini of the proposed ditch by shortening it at one end and lengthening it at the other. This alteration did not, however, change the route so as to affect the lands of appellant, as it was situated between each of the terminal points. The extension reported by the viewers and adopted by the court was to ditch through Tyronza Lake so as to reach Tyronza River as an outlet, instead of stopping at Tyronza Lake as set forth in the original petition. According to the rule laid down by this court in *Cribbs* v. *Benedict, supra,* the alteration did not affect the validity of the final order of the court fixing the limits of the district. In that case the court said: "It was not intended that the petition should give any exact or definite description of the starting point, route or terminus of the ditch that should be constructed. That was the work of the viewers."

Moreover, the statute expressly provides that "when there is not sufficient fall in the length of the route described in the petition to drain the lands adjacent thereto, they (the viewers)

may extend the ditch below the outlet named in the petition far enough to obtain a sufficient fall and outlet." Sand. & H. Digest, § 1206. This clearly gives the viewers the power to extend the length of the ditch without affecting the validity of the original proceedings, and certainly it could not invalidate the proceedings to shorten the ditch at the starting point.

It is true that neither the report of the viewers nor the order of the court recites the reason for the extension of the ditch, but it is not essential to the validity of the proceeding that the reason should be stated. We must presume, in the absence of any showing to the contrary, that it was done for valid reasons.

Appellant next contends that the assessment levied on his land for expense of the improvement is excessive. He undertook to show by his own testimony, and that of other witnesses in support of this contention, that his lands received no benefit from the construction of the ditch. The report of the viewers fixing the assessments on the land affected by the proposed ditch, and the judgment of the county court confirming the same, established *prima facie* the benefit to the land and the regularity, fairness and equality of the assessments. *Matthews* v. *Kimball,* 70 Ark. 451; *Kansas City P. & G. R. Co.* v. *Waterworks Imp. Dist.,* 68 Ark. 380; *Ritter* v. *Drainage District,* 78 Ark. 580; *Overstreet* v. *Levee District,* 80 Ark. 462; *Jonesboro, L. C. & E. Rd. Co.* v. *Board of Directors,* 80 Ark. 316.

The statute requires notice to be given of the filing of the report of the viewers, which report contains the assessments against the lands found to be benefited, and provides that any landowner may appear and object to the assessment and appeal from an order of the court confirming it. Sand. & H. Digest, § § 1208, 1210. The assessment thus made by the viewers and confirmed by the court is conclusive, and can not be questioned collaterally. *Stanley* v. *Supervisors of Albany,* 121 U. S. 535; *Fallbrook Irrigation Dist.* v. *Bradley,* 164 U. S. 113; *Oliver* v. *Monona Co.,* 117 Iowa, 43; *Stone* v. *Drainage District,* 118 Wis. 388.

The validity of appellee's contract for the construction of the ditch is attacked on the ground that the viewers made their final report one day in advance of the time fixed by the court, that there was no notice given of the letting of the contract, and be-

cause the contract was let *en masse,* instead of in separate allotments. These are mere irregularities which do not affect the validity of the contract. *Stiewel* v. *Fencing District, supra.*

Lastly, it is contended that the time for completion of the contract had expired by limitation before the construction of the work allotted to appellant's land and the contract became void. The expiration of the time did not avoid the contract. It only afforded grounds for avoiding the contract, but no steps to do this were taken. On the contrary, the clerk of the court made an indorsement on the contract, by order of the county court, extending the time for completion of the work. The statute authorizes an extension of the time by the clerk for a period of sixty days, or that the clerk may relet the contract to some other persons. Sand. & H. Digest, § 1219. Instead of reletting the contract, the clerk extended the time, and appellee completed the work under such extension.

Upon the whole, we find nothing in the record to justify the court in holding that the construction of the improvement was not properly authorized, or that the assessment on appellant's land was not legally levied.

So the decree is affirmed.

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INDUSTRIAL MUTUAL INDEMNITY COMPANY *v.* PERKINS.

Opinion delivered November 26, 1906.

TRIAL—IMPROPER ARGUMENT.—It was error to permit plaintiff's counsel to argue that the failure of defendant to produce a former employee who knew the facts about a disputed proposition warranted the jury in drawing an unfavorable inference against defendant; it being shown that such person was no longer in defendant's employment and that defendant knew nothing as to his whereabouts.

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

STATEMENT BY THE COURT.

This is an action against appellant on a policy of life insurance. The complaint alleged the issuance of the policy and

the death of the assured, and recites: "That said company issued to her, the said plaintiff, its policy of insurance, to which it attached the receipt of said company for the said premium, signed and countersigned as the contract requires." The answer admitted the issuance of the policy upon which the action was brought, and admitted that the policy had attached to it a receipt for the first premium. But it denied that such premium had in fact been paid, and alleged that the policy was void for want of consideration.

The appellee introduced the policy and receipt for the premium. The policy contained the following stipulation: "This contract shall not take effect until it is delivered to the insured while in good health and the first premium paid." The death of the assured was admitted.

The appellant adduced the following evidence:

Henry Howell testified: That he knew Jack Perkins in his life time and Nicholson, who was agent of the defendant company; that Nicholson sent him the policy for Perkins as it is now produced here in court or one similar to this one, with the receipt for the first premium as it is now produced in court or similar one; that he sent said policy and receipt to Jack Perkins by his son, Macy Howell.

Macy Howell testified: That he received the policy in suit, or one like it, with the receipt for the first premium attached as now, or one like it, from his father, Henry Howell, and delivered the same to said Perkins; that Perkins did not pay him the first premium, and he said he did not have the money to do so; said that his family was away, and he had to send for them; that afterwards Perkins and he had an interest in some lumber, and Perkins asked witness to allow him to take the lumber to the amount of $5.00 to Van Buren, saying that he wanted to use that in paying this premium, to which witness agreed; that after that time Perkins showed witness a letter from Nicholson, demanding the payment of the premium on the policy, and asked witness to read it, which he did. Witness then asked Perkins if he had not used that lumber money in paying on the policy, and he said, "No."

Mrs. Nancy Howell testified: That she was present when her husband, Macy Howell, delivered the policy with the pre-

mium receipt to Jack Perkins; that Perkins did not pay the premium at the time, saying that he did not have the money; that his family was away from home, and that he had to send for them; that about a week before Perkins's death he told witness that he had not paid for the policy.

C. E. Strickland testified: That he was the secretary of the defendant company who prepared and signed the policy and premium receipt here offered in evidence; that the defendant never received the first premium; that Nicholson is not in the employ of the defendant, and witness does not know his whereabouts.

Thereupon the defendant rested.

The appellant asked a peremptory instruction which was refused. The court at the request of appellant gave the following:

"A. If you find from the evidence that Jack Perkins never paid the first premium on the policy sued upon, then the policy never was in force, and you will find for the defendant.

"B. If you find from the evidence that the first premium was not paid when the receipt and policy were delivered to Jack Perkins, the burden is then upon the plaintiff to prove the payment of that premium before the death of Jack Perkins."

The court on its own motion gave the following:

"(1) If you find from a preponderance of the evidence that Perkins paid the first premium at the time the policy was delivered or at any other time before his death, then you will find for the plaintiff the amount of the policy sued on; and unless this appears from a preponderance of the evidence, you will find for the defendant.

"(2) The issuance of a properly signed and countersigned premium receipt for the first premium is not conclusive of the fact that the premium was paid, but in the absence of countervailing evidence the jury would be warranted in finding that the premium was paid. But when other evidence tending to show that the policy and receipt were delivered without the actual payment of the first premium is introduced, then it is for the jury to say on all the evidence whether the evidence tending to show payment outweighs that which tends to show nonpayment. If it

does, you will find for the plaintiff; if it does not, you will find for the defendant."

Counsel for appellee in his argument to the jury stated that, as the defendant had failed to produce its agent, Nicholson, the presumption of law was that if he had been produced his evidence would have been against the defendant's claim. The court of its own motion interrupted the counsel, and told him in the presence and hearing of the jury that there was no such presumption, but that the counsel for the plaintiff might call attention to the matter as a fact, and the jury would be the judges of whether the absence of the agent Nicholson would warrant any unfavorable inference against defendant or not, under all the circumstances of the case. Counsel for the defendant then interposed, and objected to the court permitting counsel for the plaintiff to call the attention of the jury to the absence of Nicholson at all. The objection was overruled, and defendant excepted. The counsel for the plaintiff then in his argument to the jury called the attention of the jury to the fact that the defendant had not produced Nicholson, and insisted that its failure to produce him would warrant the jury under the circumstances to draw an unfavorable inference against defendant that the premium had been paid, as Nicholson was perhaps the only living person who knew certainly the facts about the payment of the premium. At the conclusion of the argument the defendant, in writing, requested the court to instruct the jury that: "(*c*) There is no presumption against the defendant by reason of the absence of Nicholson, it being shown that he is no longer in the employment of the defendant," which instruction the court refused to give, and the defendant at the time excepted.

There was a verdict for the plaintiff in the sum of $500 with 6 per cent. interest from April 3, 1905.

Mechem & Mechem, for appellant.

1. The case should have been taken from the jury by peremptory instruction, and the verdict is not sustained by the evidence. A receipt is only *prima facie* evidence of payment, and may be contradicted and explained by the party signing it. 5 Ark. 61; 46 Ark. 219. See, also, 65 Ark. 581; 69 Ark. 287; 13 Ill. App. 537; 103 N. W. 7; 213 Ill. 138.

2. It was error to permit counsel in argument to call the attention of the jury to the absence of Nicholson, and to refuse to instruct the jury that no presumption could be indulged from that fact. 9 So. 566; 85 S. W. 383; 37 Mo. App. 454; 47 Atl. 1081; 27 Conn. 316; 110 Ill. App. 588; 138 Ill. 539.

J. E. London, for appellee.

1. The delivery of the policy by Nicholson was an act within the scope of his authority, and when delivered the insurance was in force whether the premium was paid or not, and the company was liable unless it immediately repudiated the act of Nicholson. 11 S. W. 1024. But the question whether or not the premium was paid was passed upon by the jury, and their verdict will not be disturbed. 46 Ark. 142; 51 Ark. 467; 56 Ark. 314; 47 Ark. 196; *Ib.* 469.

2. Appellant had more than three months in which to find and have summoned the witness Nicholson. Its failure to produce him or his deposition was a circumstance proper for the jury to consider.

WOOD, J., (after stating the facts.) The court did not err in refusing a peremptory instruction for appellant. It was a question for the jury, under the evidence, as to whether or not the premium had been paid. The court correctly instructed the jury on that question. But the court erred in permitting counsel for the appellee in his argument "to call attention to the fact that the defendant (appellant) had not produced Nicholson and to insist that its failure to produce him would warrant the jury, under the circumstances, in drawing an unfavorable inference against the defendant (appellant) that the premium had been paid, as Nicholson was perhaps the only living person who knew certainly the facts about the payment of the premium," and erred in refusing to instruct that no presumption unfavorable to appellant could be indulged on account of the absence of Nicholson. The uncontradicted proof showed that Nicholson was not in the employ of appellant at the time of the trial, and that appellant knew nothing of his whereabouts. The witness under such circumstances is as accessible to one party as the other. Therefore no unfavorable presumption can be indulged against either for a failure to produce the witness. *Reynolds* v. *Ry. Co.,* 85

S. W. 323; See, also, *Daggett* v. *Champlain Mfg. Co.*, 47 Atl. Rep. 1081; *Scovill* v. *Baldwin*, 27 Conn. 316; *Diel* v. *Mo. Pac. Ry. Co.*, 37 Mo. App. 454.

Reversed and remanded for a new trial.

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ON REHEARING.

Opinion delivered December 24, 1906.

PER CURIAM. Appellant insists that the evidence of two witnesses completely overthrew the *prima facie* case made by the delivery of the policy and receipt. The oft-repeated declaration of this court that the testimony of witnesses, unimpeached and uncontradicted, reasonable and consistent in itself, and not in conflict with other testimony or established facts can not be arbitrarily disregarded, is relied upon, and appellant relies on, as applicable to this case, the last application of this principle in the recent case of *Kansas City So. Ry. Co.* v. *Lewis*, 80 Ark. 396. The court has gone carefully over the evidence again, and its discussion reveals this difference of opinion: some of the judges do not regard it as falling within this category, and do not think it squares with the business principles involved in the transaction, and that it presents an unusual if not unreasonable story; others are doubtful of the application of this principle to this evidence, and one thinks the evidence falls squarely within the rule. This diversity of opinion of the character of this evidence demonstrates that the minds of men may well differ about it, and therefore it should go to the jury.

Motion to modify denied.

SECURITY MUTUAL INSURANCE COMPANY *v.* BERRY.

Opinion delivered December 3, 1906.

1. FIRE INSURANCE—SUBSTANTIAL COMPLIANCE WITH POLICY.—Kirby's Digest, § 4375a, providing that in an action against a fire insurance company upon any policy on personal property proof of substantial

compliance with the terms, conditions and warranties of such policy shall be sufficient, establishes the rule that a substantial, as contradistinguished from a strict, compliance with the terms, conditions and warranties in such policies is sufficient. (Page 94.)

2. SAME—UNANSWERED QUESTION—WAIVER.—Where, upon the face of an application for fire insurance, a question appears not to be answered at all, or to be imperfectly answered, and the insurer issues a policy without further inquiry, it waives the want or imperfection in the answer, and renders the omission to answer more fully immaterial. (Page 95.)

3. SAME—WHEN QUESTION FOR COURT.—Where an application for fire insurance shows on its face that the applicant's answers to questions asked were incomplete, the question whether such answers were incomplete was for the court to decide, and should not be sent to the jury. (Page 96.)

Appeal from Ashley Circuit Court; *Zachariah T. Wood,* Judge; affirmed.

Mehaffy & Armistead, for appellant.

1. Appellee failed to comply with the terms of the iron-safe clause of the policies. The credit book was not kept in a fireproof safe, and was destroyed by the fire. This clause in the contract has been upheld as reasonable, and its provisions have been sustained as promissory warranties to be strictly performed to entitle the insured to recover for a loss. 19 Cyc. 761, note 1; 58 Ark. 565; 53 Ark. 353. A reasonable construction of the statute with reference to substantial compliance, Kirby's Digest, § 4375a, will not excuse or justify noncompliance with the provisions of the contract.

2. The application is made part of the policy, and the answers to the questions therein are made warranties as to their truth. If the applicant makes an untruthful answer, or answers so incompletely as not to disclose all circumstances material to the risk, he can not recover. 57 Ark. 279; 123 Mich. 277; 39 Am. Rep. 584; 51 Barb. 647; 66 N. C. 70; 58 Ark. 528; 19 Cyc. 706; 25 Conn. 51; 74 Pac. 312; 53 Atl. 1102; 125 Fed. 684.

Pugh & Wiley and *T. M. Hooker,* for appellee.

1. All the entries with reference to credit sales were transferred, or copied, from the day book to certain pages of the cash register set apart for that purpose, and the latter book was

kept in the safe. If not a literal compliance with the iron safe clause, which appellee contends is the case, this was at any rate such substantial compliance as authorizes a recovery. Kirby's Digest, § 4375*a*; 79 Ark. 160; *Id.* 266. The clause relied on by appellant to defeat this claim, contains no warranty that the assured shall keep or produce the book of original entry. The transcript, when identified as being the book upon which the daily credit sales are entered, was the best means by which the credit sales could have been proved.

2. If the answer to the fourfold question, to which appellant objects, was not as "full, true and complete" as contended for by it, it was due to the form and arrangement of the question. Authorities cited in support of appellant's contention are either not in point or are favorable to appellee.

HILL, C. J. This was an action on a fire insurance policy. Appellant presents two matters which it alleges should bar recovery.

1. It is claimed that the "iron safe clause" was not complied with in that the book containing the credit sales was lost in the fire. It was shown, however, by appellee that said credit sales were a small part of the business, and they were entered on a day book (the one lost) and transferred or copied into another book which was preserved and presented for inspection.

Appellant refers to the doctrine that there must be a strict compliance with this clause in order for the insured to recover, and cites its statement and the authorities to sustain it in 19 Cyc. p. 761, and its application in *Western Assurance Co.* v. *Altheimer*, 58 Ark. 565, and *Pelican Ins. Co.* v. *Wilkerson*, 53 Ark. 353.

Undoubtedly this was the law in this State until the passage of the act of 1899 (Kirby's Digest, § 4375*a*) which renders substantial compliance with the terms, conditions and warranties in fire insurance policies on personal property sufficient.

Counsel, of course, admit the statute changes the force of the former decisions, but contend that "it excuses technical and nonessential details of performance, but it interprets itself as preserving the substance." It can not be presumed that the former decisions of this court and the current of authority held a policy void for noncompliance with "technical and nonessential details of performance." Necessarily, the act was intended to reach

beyond such matters, and to establish the rule that a substantial, as contradistinguished from a strict, compliance answered the justice of the requirement. See *People's Fire Ins. Co.* v. *Gorham,* 79 Ark. 160; *Security Mut. Ins. Co.* v. *Woodson,* 79 Ark. 266.

The court submitted, under proper instructions, the question of substantial compliance to the jury, and the verdict has sufficient evidence to support it.

2. The application contained these questions thus answered:

"31. Loss. Have you ever suffered loss by fire—when and if then insured, in what company? Yes. Security Mutual Ins. Co. How did it originate?"

It was developed on the trial that a former stock of goods of appellee insured in appellant company had been destroyed by fire, and also that prior to coming to Arkansas appellee's residence in Delhi, La., had been destroyed by fire. Whether the residence was insured in appellant company, or insured at all, was not shown. The answers to the fourfold interrogatory 31 were incomplete, but so far as they went were not false. The Supreme Court of the United States said in regard to a similar answer: "But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial." (Citing many decisions). *Phoenix Life Ins. Co.* v. *Raddin,* 120 U. S. 183, 190. To the same effect is *Mut. Reserve Fund Life Assoc.* v. *Farmer,* 65 Ark. 581.

The application of this doctrine to these answers, or want of answers, prevent the recovery being barred on this account.

Judgment affirmed.

ON REHEARING.

Opinion delivered December 24, 1906.

HILL, C. J. 1. Appellant calls attention to an inaccuracy in this statement in the opinion:

"Whether the residence (referring to Mrs. Berry's residence in Delhi, La.) was insured in appellant company, or insured at

all, was not shown." Mrs. Berry testified that she had forgotten the name of the company in which the house was insured, and that most of the insurance was collected, and this evidence was properly abstracted, and the mistake was that of the writer of the opinion in summarizing the facts. It makes not the slightest difference whether Mrs. Berry collected the insurance in Delhi or not, and that fact had not the least weight in this case. Whether the company insuring her there was this company might have been of some moment as showing the answer was true or not true when it said former insurance was in this company; but the controlling feature in the whole matter is that the answer on its face shows it is incomplete.

2. The 31st interrogatory contains four questions: "(1) Have you ever suffered loss by fire? (2) When? (3) If then insured, in what company? (4) How did it originate?" After the third is written "Yes," and opposite the question is name of appellant company. All that is answered is that she had suffered loss by fire, and had been insured in appellant company. When the fire or fires occurred, and how it or they originated, are not answered. Counsel say that the question whether the answers were complete should have been submitted to the jury, and insist that the question should have gone to the jury under the 6th instruction requested by appellant. This instruction did not submit to the jury whether these answers in the light of the evidence were complete, but sought to have the jury find that if there had been a previous fire then such a fact was a concealment and vitiated the policy. But the question should not have been sent to the jury under any kind of instruction, for it was a matter of construction of a writing, a question for the court, not the jury.

Motion denied.

LEWIS v. BRIGGS.

Opinion delivered December 10, 1906.

REAL ESTATE BROKER—WHEN COMMISSION EARNED.—Where a landowner agreed to pay his broker the residue of the purchase money of the land after realizing a sum named, and the purchaser failed to pay the pur-

chase price except a small sum, less than the sum so named, the broker was not entitled to recover his commission unless the landowner was to blame for the nonpayment of the purchase price.

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

STATEMENT BY THE COURT.

H. L. Briggs and his wife, Blanche W. Briggs, were in January, 1905, the owners of 320 acres of land in Lonoke County. George C. Lewis, an attorney at law and real estate dealer, undertook to sell this land for them. In pursuance of this purpose, he induced A. J. Cashburn and W. H. Richardson to enter into the following contract with Briggs and wife:

"Memorandum of agreement made and entered into this 19th day of January, 1905, between Henry L. Briggs and Blanche Briggs, parties of the first part, and A. J. Cashburn and W. H. Richardson, parties of the second part.

"Witnesseth: That said first parties have this day sold and agreed to convey to said second parties the east half of section 24, Tp. 2 N., R. 7 W., Lonoke County, Arkansas, for the sum of $9600; same to be paid as follows: $400 cash in hand. Deed to second parties to be deposited in Dairyman Bank, Carlisle. Arkansas, at once, and abstract of title to said land showing good title in said first parties to be furnished at once. As soon as said title shall be found good in said first parties or their assigns, second parties shall at once forward $3,000 additional to said bank for said first parties. The balance of purchase price, $6,200, said second parties agree to pay on March 1, 1905. If said title is not found good, said $400 shall be at once returned to said second parties, and all rights under this contract shall become void.

"Witness our hands this 19th day of January, 1905. Executed in duplicate.

"A. J. CASHBURN,
"W. H. RICHARDSON,
"HENRY L. BRIGGS AND BLANCHE
"BRIGGS,
"BY H. W. GUTHRIE."

"We hereby agree to above contract. Out of this price we are to receive $8,000 net to us. The balance of purchase price, $1,600, is to be paid to Geo. C. Lewis as commission for sale of said land. This 20th day of January, 1905.

"H. L. BRIGGS,
"B. W. BRIGGS."

A deed was executed by Briggs and wife to Cashburn and Richardson, conveying the 320 acres land described but excepting the railroad right of way across it, which contained about 8 acres. They placed this deed in the hands of H. W. Guthrie, an officer of the Dairyman Bank of Carlisle, to be delivered upon the payment of the price. Afterwards Guthrie received the following letter in reference to the land which explains itself:

"Ferris, Ill., February 6, 1905.

"H. W. GUTHRIE, Carlisle, Arkansas.

"Dear Sir: A. J. Cashburn and W. H. Richardson request me to write you concerning their land deal they made some time ago in January. They state that they purchased the one-half section for what it actually measured at $30 per acre, and they say they have several witnesses to prove it. They also say if you do not want to sell as per written and verbal contract to please return money paid down, viz.: $400, and the deal is off. The lawyers here can tell nothing about those abstracts, so it is possible you can not give a good title to said land.

"Let me hear from you soon.

Yours,
"F. N. CASHBURN.

"After you have surveyed it, they will send a surveyor from here to see that it is surveyed right.

"Dictated by W. H. Richardson and A. J. Cashburn. Please hand to Briggs Bros."

In response to this letter Guthrie notified the parties that Briggs and his wife would not reduce the price on account of the right of way, that he wanted $8,000 net to him.

Still later Guthrie received the following letter:

"Ferris, Ill., February 21, 1905.

"H. W. GUTHRIE:

Dear Sir: Yours of 17th at hand, and we have decided not to purchase the farm at all. I would like to have had it, but Mr. Richardson's wife would not permit him to mortgage his property to get the money, so consequently the deal is off, and we are loser $200 each, unless you are honest enough to return it, or a part of it. Perhaps I will be down again soon, and next time I will purchase for myself, then I will know what I am doing. I am,

"Yours truly,

"A. J. CASHBURN."

Guthrie notified Briggs of the receipt of this letter, and Briggs withdrew the deed from the bank.

Afterwards Lewis, the agent through whom the sale was negotiated, brought this action against Briggs and wife to recover the $1,600 which he was to receive from the proceeds of the sale.

On the trial there was a verdict for the defendants, and Lewis appealed.

Trimble, Robinson & Trimble, for appellant.

1. The court erred in charging the jury, in effect, that appellant undertook that the purchasers would buy the land at $9,600, and that, unless they paid for the land, appellant could not recover.

2. In failing to show good title to the land, and in refusing to reduce the price proportionately for the right of way, appellees were in default. The deed tendered excepted the right of way, hence it did not comply with their undertaking, and the court erred in refusing to instruct that such a deed was not a compliance with the contract.

3. Appellant was entitled to his commission if he found purchasers ready, willing and able to take and pay for such part of the land as appellees had title to, and they refused to convey such as they had title to for a consideration proportionately reduced. 15 Col. 142.

4. A real estate broker is entitled to his commission, even though it is payable out of the purchase price, if the seller fails

or refuses to make good title. Appellant was not responsible for the state of appellees' title. 51 Ill. 206; 25 Cal. 81; 83 Cal. 628; 42 S. W. 647; 43 S. W. 929; 20 Ore. 454; 103 Cal. 160; 57 Cal. 225; 90 Tenn. 77. The purchasers being financially responsible, the contract was enforcible, and appellant, having produced them, did all that he assumed, or was required, to do. 43 L. R. A. 604; 44 L. R. A. 593; 5 Current Law, 452, note 44-47; 3 *Id.* 543, n. 18; 205 Pa. 254; 5 Colo. 174.

Fulk, Fulk & Fulk, for appellees.

1. It is not error to refuse instructions asked for, where the court has already given instructions covering the same questions. 28 Ark. 8; 51 Ark. 324; 34 Ark. 649; 58 Ark. 472; 52 Ark. 180; 59 Ark. 143.

2. The commission was dependent upon the sale of the land, and there was no sale—no transfer of possession by deed, nor actual livery of seizin. The payment of the $400 on purchase price was not a sale. 70 Ark. 351. Moreover, appellees were to receive *first,* $8,000, net to them, and appellants commission was to consist of the "balance of purchase price, $1,600." Until appellees received the money due them, there was nothing due to appellant under the contract.

3. A broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his, and the reward comes only with his success. 83 N. Y. 378.

The compensation of a real estate agent is dependent upon his procuring a purchaser ready, willing and *able* to make the purchase on the terms fixed by the principal, and he must show affirmatively that he has done so before he can recover. 80 Ark. 183; 41 Mo. App. 118; 13 Bush (Ky.), 358; 20 How. 221; 21 Barb. (N. Y.), 145; 43 *Id.* 529; 25 Cal. 76; 21 Pac. 98; 26 Mo. App. 289; 29 Mo. App. 421; 34 *Id.* 273; 36 *Id.* 15; 61 N. Y. 445; 63 N. Y. 445. See also, 84 Me. 148; 23 Atl. 1019.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment refusing compensation to plaintiff, Geo. C. Lewis, for negotiating an agreement to purchase land. The contract of sale is set out in the statement of facts. The addendum thereto represents the contract made between the plaintiff and defendants. The language of it is: "We agree to above contract.

Out of this price we are to receive $8,000 net to us. The balance of purchase price $1,600 is to be paid to Geo. C. Lewis as commission for sale of said land." This was signed by Briggs and his wife.

It will be noticed that under this agreement $8,000 net was to be paid to Briggs and wife, and that Lewis was to receive only the balance left after the payment of this $8,000 to Briggs and his wife. If the contract had been carried out in good faith by both parties, Lewis could have claimed nothing until Briggs and wife had received the $8,000 which was to be paid to them. But it is undisputed that only the $400 referred to in the contract as having been paid in cash was ever received by the defendants. They have never received the $8,000 which they were entitled to under the contract, for it was never paid, and there is no contention that any portion of the $1,600 which Lewis was to receive has ever been paid to or received by defendants. Under the terms of this contract, Lewis does not make out a case for recovery against the plaintiff by showing that he secured a contract with solvent parties to purchase the land. He must under this contract show either that defendants have received some part of the balance of the purchase money to which he was entitled or that the parties who agreed to purchase were ready, willing and able to perform their part of the contract, and that they were prevented from doing so by the default or failure of the defendants to perform their part of the contract.

Now, it is certain that the parties who had agreed to purchase afterwards declined to do so. Whether their failure was caused by the fact that defendants refused to make any reduction from the price on account of the right of way which the railway company owned or claimed across the land, or whether it was due to other causes, is not made very clear by the evidence, though the case turned entirely on that point. But it seems to us that the question on which the case turned was fairly and clearly presented to the jury by the instructions of the court, and that the court did not err in refusing those asked by plaintiff. To return a verdict in favor of the defendants under the instructions given, the jury must have found that the act of the purchasers in failing to pay the purchase price was not due to any fault of the defendants. These purchasers were nonresidents, and there was

nothing in the contract that required the defendants to bring suit against them on their failure to pay. Under this contract, so long as the purchase price was unpaid, and so long as defendants were not to blame for its nonpayment, they are not liable.

We are therefore of the opinion that the judgment should be affirmed, and it is so ordered.

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CULVER LUMBER & MANUFACTURING COMPANY v. CULVER.

Opinion delivered December 10, 1906.

1. CORPORATION—CONTROL.—One who owns a majority of the shares in the stock of a corporation is entitled to control its business. (Page 113.)
2. SAME—WHEN RECEIVER APPOINTED.—Where the officers of a business corporation are recklessly and extravagantly managing its affairs, involving it in debt and converting its property to their own use, equity will interpose and appoint a receiver for the protection of stockholders and creditors. (Page 113.)
3. FOREIGN CORPORATION—CONTROL OF BUSINESS BY COURT.—While courts of equity have no authority to dissolve a foreign corporation, or wind up its business, they may, in case of mismanagement, take charge of its affairs and enforce the rights of stockholders and of creditors who have proved their claims; and where the affairs of the corporation in the State of its domicil have been wound up and the receiver discharged, the assets will not be remitted to that State, but will be disposed of here according to the respective rights of creditors and stockholders. (Page 114.)
4. ACTION—WHEN DISMISSAL NOT PERMITTED.—Where the principal stockholder in a trading corporation applied for a receivership, alleging mismanagement of its affairs by its officers, and the receiver was appointed without objection, and thereafter the principal creditors intervened and asked that the property be sold to pay the corporate debts, which was done without objection, the court will not thereafter permit the plaintiff to take a nonsuit, nor discharge the receiver, since other parties had acquired rights which the plaintiff could not defeat by a dismissal. (Page 114.)
5. JUDICIAL SALE—DISCRETION.—The approval of a judicial sale by the chancellor will not be set aside if no abuse of discretion appears. (Page 114.)

Appeal from Lawrence Chancery Court; *George T. Humphries,* Chancellor; affirmed.

W. E. Beloate and *F. G. Taylor,* for appellants.

A chancery court's jurisdiction of any particular case is determined by the allegations of the complaint. Wells on Jur. § 4. Courts of equity have no power to appoint a receiver of a corporation ancillary to a stockholder's suit to wind up its affairs. 5 Tex. Cir. App. 18; 23 S. W. 819; High on Rec. 287-289; Smith on Rec. 220, note 1; Wait on Insol. Corp. 172; 2 Spelling on Corp. 842; 1 Mor. Priv. Corp. 283; 53 Cal. 550. On allegations of fraud, etc., courts of equity will do no more than enjoin or forbid the misconduct. 34 S. W. 832; High on Rec. 288; Mor. Priv. Corp. 281; 30 Ia. 167; 68 Fed. 675; 98 Ga. 176.

In the absence of statutory authority, courts of equity have no jurisdiction, upon the application of an insolvent corporation, to take charge of and administer its affairs through a receiver. 10 Colo. 495; 32 Pac. 322; Chase, Dec. 466; Fed. Case No. 6840; 32 Mich. 11; 16 Cal. 145; 76 Am. Dec. 508; 30 Ia. 160; 43 Miss. 523; 2 Johns. Chy. 371; 2 Atl. 315; Wait on Insolv. Corp. 183; Gluck & Becker, Rec. 27. The facts and circumstances from which insolvency appear must be set out in the bill. 9 N. J. Eq. 95. *Ex parte* appointment of a receiver is absolutely void. Jurisdiction can not be conferred by consent. 3 N. Y. 552. The sale must be between the hours fixed by the statute. 23 Ark. 39; 38 Tex. 157; 4 Green (Ia.), 510. Inadequacy of price and improper notice of sale are sufficient to set the sale aside. 20 Ark. 381; 32 *Id.* 391.

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

Appellants can not take the benefit of the court's jurisdiction and then question it. 53 Ark. 514; 49 *Id.* 318; 45 *Id.* 536; 25 *Id.* 99; 68 *Id.* 460; 56 Fed. 1006; 163 U. S. 160; 25 Ark. 108.

Stockholders are equally estopped with the company. Thomp. on Corp. § § 5246 and 5269 *et seq.* The assets of a corporation stranded and going to pieces are a trust fund. Thomp. on Corp. § 6860; Cook on Corp. § 629; Beale, Foreign Corp. § § 74, 791; 81 So. 694; 107 La. 145; 72 Pac. 733. Chan-

cery courts are given jurisdiction over foreign corporations in this class of cases. Kirby's Digest, § 949; Const. art. 12, sec. 11; 69 Ark. 521; 63 *Id.* 165. After a case has been submitted to a court or jury, plaintiff can not take a nonsuit without prejudice to a future action. 23 Kan. 262; 69 Ark. 431. A corporation is insolvent when its embarrassments are such that early suspension and failure must ensue. 11 So. 350; 15 Fed. 786. Or is unable to pay its debts in the usual course of business. 38 N. E. 1017; 31 Atl. 799.

And insolvency is not necessary to give the court jurisdiction when it appears from other causes that business can not be carried on successfully. 82 Fed. 780.

BATTLE, J. On the 25th of August, 1902, Mary C. Culver instituted this suit against the Culver Lumber & Manufacturing Company in the Lawrence Circuit Court, on the equity side, which was afterwards transferred to the Lawrence Chancery Court, it having been created after the institution of this suit.

Plaintiff alleged in her complaint, substantially, as follows: She is a married woman and a resident of the State of Missouri. The defendant is a corporation, organized under the laws of the State of Missouri. Its capital stock amounts to $300,000, divided into shares of $100 each, of which she owns and holds as her separate estate 1725 shares, which is much more than one-half of the stock. It has been engaged in the business of sawing and manufacturing lumber and the selling of the same, and at the commencement of this suit was so engaged, with its mills at or near Sedgwick, in Lawrence County, in this State. It established, in 1902, in the State of Arkansas a planing mill with expensive machinery and facilities for making and furnishing the trade with all kinds of dressed lumber, sash, doors, mill and finishing work; and in the course of its business acquired considerable property, both real and personal, exceeding in value $500,000, and contracted an indebtedness in about the sum of $250,000. At a meeting of the board of directors, held in January, 1902, H. A. Culver was selected and appointed general manager of the business of the defendant, Elias W. Culver was elected president, Edgar W. Culver, treasurer, and Joe E. Culver, secretary. In March, 1902, the president, secretary and treasurer, without authority from the board of direc-

tors, purchased real estate, and recklessly, extravagantly and unnecessarily expended about $5,000 in building offices, and Edgar W. and Joe E. Culver, respectively, secretary and treasurer, have so extravagantly and recklessly conducted the business of the company that it became largely involved, and by such recklessness and extravagance alarmed the large creditors of the company, and caused them to induce the president to make an agreement in writing in and by which J. H. Jarrett and Frank I. Buckingham, of moderate means, were to be placed without bond, in the absolute charge and control of the entire business of the defendant yielding about $40,000 to $60,000 a month. Such managers are inexperienced in the management of similar business, and, if allowed to control, will in a short time cause great loss to defendant, if it does not render it bankrupt, and will imperil and wreck it financially. They have already taken possession of all the property at Kansas City, Missouri, and Kansas City, Kansas, "and refuse to act or conduct the business of the defendant under the directions or proper orders of its officers and managers, but that, instead, they are arbitrarily refusing to permit its officers, directors and legal managers to have any voice or control in the management of its business, and when its manager has drawn checks to pay for material used in the conduct of its business, they have refused to pay or permit the payment thereof, and are threatening, under and in pursuance of the alleged contract, to take charge of the business and property in the State of Arkansas, and hold and operate the same to the exclusion of the defendant or its board of directors or managing officers." Plaintiff "has requested the board of directors and officers of the defendant to bring suit to set aside said contract and take management of such business again, but they have refused and neglected to do so."

Plaintiff further stated that at the mills of defendant in this State, and elsewhere, "are employed about four hundred persons, and that there is now due to them in small sums, respectively, about $5,000, and that there is due on pay days, twice each month, to said hands about $2,000 or $3,000 each pay day, and that, being a foreign corporation, said sundry individual employees can attach the property of defendant to satisfy their claims and costs incident thereto, and that said proceedings would entail a large

amount of costs and would wreck said property; that the employees and creditors are threatening to attach, and such attachment would cause a large amount of defendant's property to be sacrificed and lost, and that, for the protection of all creditors and the rights of the plaintiff and other stockholders, it is necessary that said property in this State be held intact as a manufacturing plant, at least until the product belonging to the defendant can be manufactured and disposed of;" and that if this is done its debts can be paid in a short time.

Plaintiff asked the court, first, to "issue an order restraining and enjoining all of the officers in this State of the defendant, or any one acting for them in the State of Arkansas, from removing, selling, mortgaging or otherwise disposing of the property, real or personal, in this State, and also restraining them and enjoining all persons from interfering in this State with the business, assets, property or affairs of the defendant; second, that the court appoint a suitable person as receiver to take charge and control of all the property of defendant within the State of Arkansas, with the power to manage, control and operate it, if necessary, under the orders of this court, as may from time to time be made in the premises; and that the cause be referred to a master in chancery, who shall by appropriate orders be authorized to hear, determine and report to the court all indebtedness due by defendant, and that out of the proceeds arising from the receivership the receiver be directed by appropriate orders from this court to pay the costs and expenses of this receivership, next all debts that may be adjudged and found due to the creditors of the defendant, and that the remainder, if any, to the several stockholders as their rights may appear."

On the 25th day of August, 1902, in the vacation of court, a receiver was appointed, and a temporary injunction was granted according to the prayer of the complaint. H. L. Ponder was the receiver, and as such he took charge and control of the assets of the defendant in this State.

No answer to the complaint was ever filed by the defendant

On the 5th day of March, 1904, the National Bank of Commerce of Kansas City, Mo., Traders' Bank of Kansas City and Holland Bank of Springfield, Missouri, filed a petition in this suit, and represented that the defendant was indebted to each of them

in a large sum of money; that the intention of the plaintiff, acting in collusion with other stockholders and officers of the defendant, was to prevent its creditors from taking judgment against it; that Ponder, the receiver, had no experience in the lumber business; that the business of the company, under his management, has been conducted at a loss; that the expenses incurred under his management have been enormous and exceed the profits of the business; and that nothing had been paid under his management on their claims; and they asked that the property be sold to pay the debts.

Within a few days after the filing of the petition of the creditors, fifty-four other creditors joined them in asking for the sale of the property.

On the 31st day of May, 1904, the plaintiff and defendant answered and denied the allegations in the petition of creditors, and asked that their motion be overruled, and the administration of the receiver be continued under the orders of the court.

On the 13th day of July, 1904, upon the final hearing of the cause, after hearing the evidence adduced, the court found the defendant insolvent, and its assets trust funds due to its creditors, and appointed Ponder master to audit their claims, and directed them to present the same to him for allowance, and gave directions to the master as to his mode of procedure; and ordered that the property of the defendant in this State be sold, and appointed Ponder commissioner for that purpose, and gave him directions as to the time, place and manner of the sale, and ordered how the proceeds of the sale should be disposed of.

On the 9th day of September, 1904, the commissioner reported that he caused the property of defendant to be advertised for sale, and also a notice that bids would be received for the property as a whole, prior to September 1, 1904, and that in pursuance of the last mentioned notice he had received those bids, the highest of which was the bid of the Lesser-Goldman Cotton Company, the sum of $85,000; and on the 23d of September, 1904, the master reported the claims, amounting to $185,253.90, which had been heard, examined, investigated, and allowed by him against the defendant, and the court approved the report, and allowed the claims, and ordered and decreed that, upon final distribution, the assets in the hands of the receiver shall be paid upon

such claims, and on the same day rejected the bid, and ordered that the commissioner sell all the property of the defendant as in the former decree provided, "except that, after having offered the property as provided in the decree, he then shall offer the whole of it for sale in bulk, and if the same shall bring the sum of $2,500 in excess of the total aggregate of bids made for the property as provided by the decree, then the property shall be sold to the highest bidder for the property in bulk;" the sale to take place on the 31st day of October, 1904, between the hours prescribed by law for judicial sales. On the first day of December, 1904, the commissioner reported that the property was offered for sale on that day, and purchased by Lesser-Goldman Cotton Company at the price of $100,000, it being the highest and best bidder, and its bid being more than $2,500 in excess of the aggregate amount of the bids made for the property in parcels, and it having complied with the terms of the sale.

On the 24th day of March, 1905, the defendant, and Ed. W. Culver and Newton Mills, stockholders of defendant, moved the court to discharge the receiver and require him to deliver to defendant all money, choses in action and other property now in his hands, or under his control, or which had been received by him at any time since his appointment, because the appointment of the receiver is void, it not being shown by the complaint or other pleading, or by any evidence, that the court had any jurisdiction of the subject-matter of this suit, or any right or power to appoint a receiver in this cause. And at the same time filed exceptions to the commissioner's report of sale, in part, as follows: (1) Because the sale was not made within the hours prescribed for judicial sales. (2) Because of the circulation of a report on the day and at the place of sale that the title to the property sold was defective. (3) Because the price for which the property sold was grossly inadequate.

On June 3, 1905, the plaintiff moved the court to permit her to take a nonsuit in this suit without prejudice.

Evidence was adduced and heard upon the motion to discharge the receiver and the exceptions to the report of sale by the commissioner, filed by the defendant, and by Ed. W. Culver and Newton Mills. Certified copies of the proceedings of the circuit court of Jackson County, in the State of Missouri, in Mary

C. Culver against Culver Lumber & Manufacturing Company, and of the proceeding of the district court of Wyandotte County, in the State of Kansas, in Mary C. Culver and H. A. Culver against the Culver Lumber & Manufacturing Company were a part of the evidence. From these transcripts the following appears: In the two suits complaints similar to the one in this case were filed on the 25th day of August, 1902. In the first suit, brought in the circuit court of Jackson County, in the State of Missouri, the plaintiff asked that the corporation, the Culver Lumber & Manufacturing Company, be dissolved, and in both suits the plaintiffs asked that a receiver be appointed to take possession of all the defendant's property in the State in which he was appointed; that its assets be converted into cash, and, after the payment of the expenses and costs, the debts of the corporation be paid, and the remainder be distributed among the stockholders. In both cases a receiver was appointed, and he qualified and entered upon the discharge of his duties. In the case brought in the circuit court of Jackson County, Missouri, the creditors of the corporation proved their claims, which were allowed by the court; the property of the corporation in the State of Missouri was converted into money and paid *pro rata* upon the claims of creditors; and the receiver was discharged. In the other case the creditors proved their claims, which the court allowed, and the receiver was ordered to convert the property into money for distribution among them, which does not appear from the transcript to have been done.

So far as appears from the record in this case, M. C. Culver, Elias W. Culver, her husband, Ed. W. Culver, H. A. Culver, and J. E. Culver, her sons, and Newton Mills were the stockholders of the defendant corporation. Elias W. Culver was its president, Ed. W. Culver, treasurer and H. A. Culver, manager. For twelve or sixteen months after the appointment of Ponder receiver, H. A. Culver was the receiver's manager of the property in his hands, and after that Elias W. Culver filled that place. H. A. Culver operated a mill under a lease from the receiver after he ceased to be a manager. M. C. Culver, Elias W. Culver, H. A. Culver and Newton Mills proved claims against the defendant in this suit; and Mills offered a bid for the property at the sale which was rejected by the court. The commissioner commenced

selling the property at ten o'clock a. m., and continued selling, with the exception of an hour at noon, until it was disposed of, which was after five o'clock in the evening.

The value of the property was variously estimated by witnesses. M. La Fore, who bid at the sale for the property $97,000, and bid no more because he heard that the title was defective, says it was worth $250,000; H. L. Ponder, the receiver, says it sold at a fair price; T. J. Shannon, $200,000, but did not believe it would sell for that; H. A. Culver says it was worth $300,000, but he consented to the sale at $85,000, and sought to have the chancellor approve it at chambers; E. J. Mason and S. C. Dowell thought it was worth $100,000.

On the 3d day of June, 1905, the court overruled the motion of the defendants, Ed. W. Culver, and Newton Mills to discharge the receiver and the exceptions to the commissioner's report of sale, and the motion of the plaintiff for permission to take a nonsuit.

The object of this suit and the two suits in the States of Missouri and Kansas was to wind up the business of the defendant company—to ascertain its indebtedness, convert its assets into money and pay its debts with the same so far as it will extend. This relief was asked in all three of the suits. It had property in three States, and for that reason brought the three suits.

Mrs. M. C. Culver was the plaintiff in the three suits. She owned the majority of the shares of the capital stock. No answer was filed in any of the cases. Forty-three of the principal creditors, intervening, asked that the assets of the company be sold, and the discharge of the receiver. Plaintiff and defendant answered their complaint or petition, and insisted on the continuance of the administration of the receiver. For about two years and seven months there was no opposition to the suit. Four of the six stockholders proved claims against the defendant in this suit, and they owned in the aggregate 2979 shares of the 3,000 shares of the capital stock. The president and general manager of the company aided the receiver and participated in his administration of its assets. In fact, the record in this court indicates that all the stockholders and creditors consented to and approved the complaint and the proceedings of the court until after the creditors had proved their claims and the final decrees had been made and

the property sold thereunder, and the commissioner had reported the sale. Under such circumstances, had the court the right to wind up the affairs of the defendant and close its business? Mr. Justice Bigelow, speaking for the court in *Treadwell* v. *Salisbury Manufacturing Co.*, 7 Gray, 393, said: "We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity. Angell & Ames on Corp. § 127 *et seq.*; 2 Kent's Com. 6th Ed. 280; *Mayor, etc., of Colchester* v. *Lowton*, 1 Ves. & B. 226, 240, 244; *Binney's Case*, 2 Bland, 142. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed upon them by their charters. Corporations established for objects *quasi* public, such as railway, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accomodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the Legislature have any direct interest in their business or management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as

soon as, in the exercise of a sound judgment, it is found that it can not be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority." See to the same effect *Price* v. *Holcomb,* 89 Iowa, 135, 136; *Merchants & Planters Line* v. *Waganer,* 71 Ala. 581, 587; *Berry* v. *Broach,* 65 Miss. 450; *Miner* v. *Belle Isle Ice Co.,* 93 Mich. 97; 2 Cook on Corporations, § 629; 1 Morawetz on Corporations, § § 413, 284, 285; 2 Beach on Private Corporations, § 781; Taylor on Private Corporations, § 431; Clark on Corporations, p. 445; 5 Thompson on Corporations. § 6685.

The allegations of the complaint are admitted by the failure of the defendant to answer the same. Among other things plaintiff alleges therein that the president, secretary, and treasurer of the company, without the authority of the board of directors, have purchased real estate, and recklessly and extravagently and unnecessarily expended about $5,000 in buildings thereon, and the secretary and treasurer have so carelessly, recklessly and extravagently operated the business of the defendant at Kansas City, Kansas, as to involve the defendant in the indebtedness of $30,000, and have applied a large amount of money and property belonging to the corporation to their own personal use and benefit; that such recklessness and extravagance alarmed the large creditors, and caused them to become so urgent in their demands as to induce the president to enter into an agreement in writing in and by which J. H. Jarrett and Frank I. Buckingham, both of whom are inexperienced in the lumber business, were to be placed in the absolute charge and control of the entire business of the defendant, including the collection of money, drawing checks, the sale of defendant's output or product, and everything else that could be done by the defendant through its duly authorized officers; that under this agreement they have taken possession of all the property of the defendant in Kansas and Missouri and are arbitrarily refusing to permit the officers, directors, and legal managers of the corporation to have any control in the management of its business, which

by their management, will be greatly imperilled and entirely wrecked; that she has requested its directors and officers to bring suit to set aside the contract and take the management of its business, and they refused so to do; that the defendant is a foreign corporation, and its employees and creditors are threatening to attach its property in this State, and thereby to sacrifice a large amount of its property; and that its indebtedness amounts to about $250,000. From all of which it appears that the corporation is seriously threatened with insolvency by the frauds and mismanagement of its officers; and the evidence in this case tends strongly to corroborate this conclusion, if it does not prove it. Under such circumstance, it seems, it would be the exercise of sound judgment to wind up the affairs and close the business of the corporation.

Plaintiff owns a majority of the shares of the stock, and is entitled to control the business of the corporation. *Pratt* v. *Jewett,* 9 Gray, 34; *Von Schmidt* v. *Huntington,* 1 Cal. 55, 73; *Miner* v. *Belle Isle Ice Co.,* 93 Mich. 97. There is no reason why she should not be entitled to protect her interest in the same manner as a majority in number of the stockholders could do if they owned it. The corporation consented to her doing so, and the stockholders acquiesced, until it was too late to withdraw consent. Forty-three creditors, representing at least $125,206.73 of the $185,253.90 proved against the corporation, join her in asking for the relief. In doing so they asked a court of equity to grant equitable relief over a subject-matter coming within its jurisdiction. Creditors do not, and stockholders have no right to, complain.

At the time of the institution of this suit the property of the corporation was in a precarious condition. It was threatened with attachment by creditors, which begun, it being a foreign corporation and considerably in debt, the probability is all the creditors, for their own protection would have been forced to attach. In that event the probable result would have been the sacrifice of its property and hopeless insolvency. Its officers were recklessly and extravagantly managing its business affairs, involving it in debt, and converting its property to their own use. Its board of directors, although requested to do so, refused to interfere. The interposition of a court of equity and the appointment of a re-

ceiver were necessary and demanded for the protection of stockholders and creditors. *Sage* v. *Memphis & Little Rock Railroad Company,* 125 U. S. pp. 361, 375; *Union Trust Co.* v. *Illinois Midland Ry. Co.,* 117 U. S. 434, 458; Receivers of Corporations (2 Ed.) by Gluck and Becker, § 9, and cases cited; Beale on Foreign Corporations, § 791; Alderson on Receivers, § 362; High on Receivers, § 306, and note.

Courts of equity have no right or authority to dissolve a foreign corporation, or wind up its business, but they may, in cases like this, take charge of its property within the jurisdiction of the court, and enforce the rights of creditors and stockholders in respect to the same, where it can be done by the exercise of equity jurisdiction. As the affairs and business of the corporation in the State of Missouri, its domicil, have been wound up, and the receiver appointed for that purpose discharged, and creditors have proved their claims here, it will not be necessary to remit any part of the assets in this State to that State, but the same may be fully disposed of here according to the respective rights of creditors and stockholders therein.

The trial court did not err in refusing to allow the plaintiff to take a nonsuit. At the time she asked for the privilege to do so, creditors had intervened, a final decree had been rendered, and under it the property involved had been sold; and creditors had proved their claims against the corporation. Other parties had acquired rights, and she no longer had power to control the suit. 1 Daniell's Chancery Pleading & Practice (6 Ed.), marginal pages, 793, 794, and cases cited. *Cromwell* v. *MacLean,* 123 N. Y. 474.

The motion to discharge the receiver was properly overruled; and the court committed no reversible error in overruling the exceptions to the commissioner's report of sale. The sale commenced within the hours prescribed by the decree of the court. Every one present had the opportunity to bid, and there is no evidence that any one lost a bid by continuing the sale beyond the time prescribed. There is no evidence that the reports that the title to some of the lands sold was defective were false and therefore affected the sale. There was a contrariety of opinion as to the value of the land. Three witnesses testified that it sold for its value; and three valued it from $200,000 to

$300,000, and facts proved weakened their evidence. The chancellor was the judge of the weight of the evidence and the credibility of witnesses, and the evidence does not show that he erred in his judgment. The court did not abuse its discretion in approving the sale. See *George* v. *Norwood,* 77 Ark. 216; *Johnson* v. *Campbell,* 52 Ark. 316; *Farnsworth* v. *Hoover,* 66 Ark. 375, 376; *Waldo* v. *Thweatt,* 64 Ark. 126; *Colonial & United States Mortgage Co.* v. *Sweet,* 65 Ark. 152.

Decree affirmed.

McCARTY v. WILSON.

Opinion delivered December 10, 1906.

1. INJUNCTION—TRESPASS—CUTTING TIMBER.—Injunction will not lie to prevent a trespasser from cutting timber where there was no proof of irreparable injury to the freehold nor of defendant's insolvency. (Page 117.)
2. ACTION—WRONG FORUM—DISMISSAL.—Where an action to enjoin the cutting of timber, was improperly brought in equity, the cause should be dismissed without prejudice to plaintiff's right to bring an action at law. (Page 117.)

Appeal from Mississippi Chancery Court; *Edward D. Robertson,* Chancellor; modified and affirmed.

Driver & Harrison, for appellant.

The two years time fixed in the reservation in the deed was the limit of title. It did not give the appellee an absolute interest in the trees, nor a perpetual right to enter and remove the standing timber on the land, but his estate in the trees was determined if they were not removed from the land within two years. 130 N. Y. 465; 34 Barb. 566; 60 Mich. 622; 63 Ark. 10; 69 Ark. 442; 57 Wis. 118; 37 Wis. 360; 26 Mich. 523; 19 Am. Dec. 330; 6 Atl. 48; 164 Pa. St. 234; 54 N. H. 109.

J. T. Coston and *Murphy, Coleman & Lewis,* for appellant.

1. The title to the timber did not pass to the vendee at the expiration of two years. The intention of the parties is the controlling principle, and the language of the deed, construed in

the light of the situation of the parties and of the circumstances, points to the conclusion that the stipulation to remove the timber within two years was intended by the parties to be a covenant, and not a limitation upon the title of the grantor or a condition of forfeiture. 111 Ga. 65; 106 Ga. 353.

2. Having been prevented by an unusual amount of water on the land from removing the timber within the two years, it would be inequitable to deny appellee the right to remove it after the expiration of that time. 122 Ga. 330; 150 Ind. 85. Where a complainant comes into a court of equity seeking its aid, such aid will not be granted except upon equitable terms. 52 Ark. 157; 53 Ark. 69; 76 Ark. 245; 16 Cyc. 140.

3. There is no equity alleged in the complaint, and none is disclosed by the proof. There was no allegation or proof of insolvency of defendants, nor of irreparable damage to plaintiff. 75 Ark. 288; 67 Ark. 414.

BATTLE, J. "On the last day of November, 1901, Wilson & Beall, a firm composed of R. E. Lee Wilson and S. A. Beall, sold and by warranty deed of that date conveyed to appellant the southwest quarter of section 13 and the southeast quarter of the northwest quarter of section 13, township 12 north, and range 9 east in Mississippi County, Arkansas, which deed contained the following clause: "Wilson & Beall reserve all merchantable timber on said land same to be removed within two years from date." On the 27th day of November, 1903, appellant instituted this suit in the chancery court of Mississippi County, alleging that appellee Wilson and his employees, John Merrill and J. H. Page, made codefendants, had entered upon the land and were cutting and removing timber therefrom, to the irreparable damage and injury of appellant, praying an injunction to restrain appellee and codefendants from cutting and removing the timber from the land."

The defendants, appellees, answered and admitted the execution of the deed to appellant, and Wilson claimed the merchantable timber on the land conveyed under the reservation therein.

The depositions of witnesses were taken, and the cause was submitted at the October, 1905, term of court. The court found that the title to the merchantable timber on the land was never

conveyed and did not pass to plaintiff, the appellant, and that the defendant-appellee, Wilson, is the owner of it, and rendered decree in favor of the defendants, dismissing the complaint for want of equity.

Neither the complaint nor the evidence in this case show that the plaintiff was entitled to relief by injunction. What is said in *Myers* v. *Hawkins,* 67 Ark. 413, is applicable and appropriate in this case; and nothing more, in addition, need be said in this suit. See also *Western Tie & Timber Co.* v. *Newport Land Co.,* 75 Ark. 286.

The decree of the chancery court is modified so as to dismiss the complaint for want of equity, without prejudice to plaintiff's right to bring an action at law for damages, or for the recovery of timber or both.

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STATE v. VAUGHAN.

Opinion delivered December 10, 1906.

1. GAMING—BETTING ON HORSE RACING is not gaming within Kirby's Digest, § 1740, providing that it shall be an offense to bet "any money or any valuable thing on any game of hazard or skill." (Page 120.)
2. NUISANCE—TURF EXCHANGE.—A turf exchange or pool room wherein money is received, won and lost on horse races, where tickets for pools on horse races to be held in this State and elsewhere are bought, sold and cashed, where fifteen to thirty persons daily congregate for the purpose of buying, selling or cashing pools on the races, is a nuisance at common law. (Page 121.)
3. SAME—INJUNCTION.—Injunction will not lie at the instance of the State to restrain an indictable public nuisance, unless the nuisance is one touching civil property rights or privileges of the public, or the public health is affected thereby, or some other ground of equity jurisdiction exists calling for the injunction. (Page 126.)
4. SAME—INJUNCTION AGAINST POOL ROOM.—An injunction will not lie at the instance of the State to restrain as a nuisance the maintenance of a pool room. (Page 126.)
5. JURY TRIAL—RIGHT TO.—Persons charged with crime are entitled to jury trial, which right can not be taken from them under guise of an injunction against a nuisance. (Page 127.)

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

Robert L. Rogers, Attorney General, *Lewis H. Rhoton,* Prosecuting Attorney, *Bert Brooks,* City Attorney of Little Rock, and *W. E. Atkinson,* for appellants.

1. Poolrooms and turf exchange are gaming houses, and are *per se* common public nuisances. 51 N. J. L. 387; 30 Ark. 428; 79 Ky. 361; 39 Fla. 441; 55 Pa. St. 294; 58 Ark. 82; 51 Mich. 203; 51 Cal. 78; 16 Minn. 209; 60 N. H. 73; 2 Ky. L. R. 339; 98 Ky. 635; 80 Pac. 877.

Book-making is a gaming device or gaming table within the meaning of the law. 6 App. Cas. (D. C.), 6; 98 Ky. 576.

2. Courts of equity have undoubted jurisdiction to enjoin public nuisances. 2 Story, Eq. Jur. § 921; 4 Pomeroy's Eq. Jur. § 1349; Wood on Nuisance, (3 Ed.), § 819; Bispham on Eq. § 439; 18 B. M. 800; 23 Ky. L. R. 1744; 25 *Id.* 411. That the criminal courts may punish those who maintain a public nuisance does not affect the right of equity to interfere by injunction. 21 Am. & Eng. Enc. Law, 703; 52 L. R. A. 279; 143 Ind. 98; 28 Kan. 726; 66 N. H. 39; 158 U. S. 564; 65 Ia. 488; 84 Ala. 115; 46 L. R. A. 533; 18 L. R. A. 646; 116 Cal. 397; 76 Pac. 513; 99 N. W. 249; 11 Md. 128; 128 N. Y. 341; 37 Mo. 214; 22 Ala. 190; 61 L. R. A. 150; 30 Ga. 506.

3. The authority of the Attorney General to bring the suit is not statutory, but derived from the common law, and is generally recognized. L. R. 21 Ch. Div. 752; 3 McN. & Gor. 453; 25 Ky. L. R. 411; 1 B. M. 215; 6 B. M. 397; 69 N. Y. Sup. 383; 59 Mass. 336; Eden on Inj. § 259; 19 Pet. 91; 118 Cal. 234; 26 N. Y. 293; 108 Mass. 436.

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

1. Betting on a horse race, where it is what is called a turf race, is not gambling, nor a violation of the law. 23 Ark. 726; 58 Ark. 79. Selling pools on horse races or betting on same is not an offense under our statute nor at common law. 15 Ark. 71; *Ib.* 259; 63 Md. 242; 46 Am. Dec. 97; 58 *Id.* 94; Kirby's Digest, § § 1807, 1809, 2036, 2040, 3687, 3688, 3689; 18 Ark. 570; 79 Ky. 359; 1 Morris (Ia.), 169; 46 Mo. 375; 31 Mo. 35; 8 Gratt. (Va.), 292; 33 Ala. 433; 63 Md. 242; 4 Har. (Del.), 308.

2. An injunction will not as a rule lie where there is a plain remedy at law, or by criminal prosecution. The mere fact that the law is against gambling, even if it be conceded that the keeping of a poolroom is keeping a gambling house, is no ground for the interposition of a court of equity. 2 Beach on Inj. 1087-9; High on Inj. 23; 37 S. W. 478: 36 S. W. 1106; 2 Wood on Nuisances, § § 788, 791; 34 L. R. A. 95. See, also, 34 L. R. A. 95; 2 John. Ch. 374; 37 S. W. 478; 46 L. R. A. 850; 42 Am. Rep. 182; 45 S. W. 506; 52 L. R. A. 299. When the remedy at law is complete, equity will not grant relief. 7 Ark. 20; 13 Ark. 630; 26 Ark. 649; 27 Ark. 97; 27 Ark. 157; 48 Ark. 331; 14 Ark. 339. See, also, 1 Bishop's Crim. Proc. § 1417; 141 N. Y. 237; 42 Wis. 609; 59 Ga. 790; 102 Ill. App. 449; 58 Pac. 605; 99 Wis. 213.

3. In this case the remedy at law was complete. The cities of Little Rock and Argenta each had the power, under its charter, to suppress a nuisance. Kirby's Digest, § 5438. If the running of a poolroom was keeping a gambling house or a common nuisance, the defendants were liable to indictment and punishment, and the whole police power of the State could have been called upon to suppress it. Kirby's Digest, § § 2464, 7769; 124 U. S. 200; 25 Ark. 301.

HILL, C. J. The Attorney General of Arkansas, the Prosecuting Attorney of the Sixth Judicial Circuit, and the Mayor and City Attorney of Little Rock brought a bill in chancery against Vaughan, Furth, Faucette and others, in the name of the State of Arkansas and the City of Little Rock, seeking to enjoin Furth from operating a pool room at a place in the city of Argenta near the Free Bridge which connects Argenta and Little Rock, and that the other defendants be enjoined from permitting or assisting, in the several ways alleged, said Furth in conducting said pool room. The defendants answered, denying many allegations of the bill, and to this answer the State and city demurred, and the case was determined on the demurrer, the court sustaining it, and the State and city rested upon it and appealed. The review here is limited to the admissions and allegations in the answer and the undenied allegations of the complaint, as all other allegations were eliminated by trying the case on the sufficiency of the an-

swer. The material parts of the answer, aside from its denial of the allegations of the complaint, are as follows:

"It is true that the defendant, Bob Furth, operated what is known as a turf exchange or pool room, where money is received, won and lost on horse races, and where tickets for pools on horse races run, or to be run, at various and divers racecourses in the State of Arkansas and throughout the United States, are bought, sold and cashed." "That in point of fact there are not more than fifteen or thirty people who visit said turf exchange daily, and that neither women nor children are permitted in said pool room or turf exchange. And they state that said pool room or turf exchange is conducted as a quiet, orderly business, and that no persons visit the same except those who desire to do so, and that disorderly or dissolute characters are not allowed or permitted to visit there, and are not in the habit of doing so. It is true that he has caused the said turf exchange to be advertised by a short notice in one of the Little Rock papers, and that he has at times operated a carriage from said city of Little Rock to said pool room. That the business only attracts such as desire to purchase tickets or pools on horse races, and that disorderly or lewd women or the lawbreaking class are not in the habit of attending said pool room or turf exchange. And that no one is disturbed by the gathering of the people in or about said premises. They further state that the city of Little Rock has no corporate property whatever that is in any way affected by the alleged public nuisance as described in said complaint. They further state that the State of Arkansas has no property interest in the matters complained of, and that, if the said defendants are violating any law, the criminal courts of the State have ample power and authority to prosecute the defendants for such offenses, and that the charter of the city of Argenta authorizes said city to punish or abate a nuisance carried on as alleged in the complaint."

The first question under inquiry is whether betting on horse-racing is gambling within the meaning of the statutes against gaming.

The general statute, the only one of them under which it could fall, defines the act therein made criminal to be "betting any money or any valuable thing on any game of hazard or

skill." Kirby's Digest, § 1740. It contemplates that the game be "played," for the next section provides that it shall not be necessary for the indictment to allege with whom the game was played. Sec. 1741. In construing these statutes in 1861 Chief Justice ENGLISH for this court said: "But we do not think the Legislature intended to embrace horse-racing by the words 'any game of hazard or skill' 'played,' etc., however vicious such sports may be." *State* v. *Rorie,* 23 Ark. 726. In 1893 this court had before it betting on a game of baseball, and it was held to be criminal because on a game of skill, and the distinction that horse-racing was not a game but a sport was approved. *Mace* v. *State,* 58 Ark. 79. Some States sustain this distinction, and hold horse-racing to be a sport and not a game, within the gaming statutes, but the weight of authority is to the contrary. 20 Cyc. 884; 14 Am. & Eng. Enc. Law, p. 682. It will not do to overule *State* v. *Rorie* merely because against the weight of authority; there is good reason to sustain the distinction therein made, and it has been acquiesced in by the State for 45 years, when at any time it could have been changed by legislation. Therefore it must be taken in this case that betting on horse-racing is not a crime of itself.

The quoted parts of the answer admit the maintenance by Furth of a turf exchange or pool room, wherein money is received, won and lost on horse races, where tickets for pools on horse races run or to be run in Arkansas and elsewhere are bought, sold and cashed; that fifteen to thirty persons daily visit the pool room for the purpose of betting on the races or buying, selling or cashing pools on the races; that said business is advertised, and at times a vehicle to bring patrons to it has been furnished.

What is the status of such a house, notwithstanding it is conducted in a quiet and orderly manner without unusual noise or disorderly conduct? At common law there were no statutes against gaming, yet the maintenance of a gaming house was a criminal nuisance, indictable and punishable as such. Mr. Justice SCOTT for this court said: "Independent of any statute, the keeping of a common gaming house is indictable at common law on account of its tendency to bring together disorderly persons, promote immorality and lead to breaches of the peace.

Such an establishment is thus a common nuisance." *Vandeworker* v. *State,* 13 Ark. 700. Chief Justice WATKINS for this court said:

"At common law, gaming houses were indictable as a public nuisance (*Vandeworker* v. *State,* 13 Ark. 700), but unless restrained by express statute ordinary wagers or betting were tolerated as being for amusement or recreation." *Norton* v. *State,* 15 Ark. 71.

In *Thatcher* v. *State,* 48 Ark. 60, the court went into the subject of gaming, bawdy and disorderly houses being common-law nuisances, and held that they were such, not from the noise or disorder, but on account of the evil tendency of the business there conducted. Mr. Wharton says: "It is at common law not indictable for persons to engage in gaming in private, or to conduct a single game of chance in public. But when gaming is there publicly known to be carried on, however secluded the place may be, and when unwary and inexperienced persons are there enticed and fleeced, then the parties concerned are indictable for nuisance, irrespective of any particular statutes." 2 Wharton, Crim. Law, § 1465.

Mr. Bishop says a common gaming house is a nuisance because those attracted to it, especially youths, are there lured to vice, and youths may be as effectually lured by a noiseless process as by any other. 1 Bishop, Crim. Law § § 1135, 1136. Therefore it follows that the fact that betting on horse-racing is not within the gaming statutes does not prevent a house maintained for such betting being a criminal nuisance. As seen, the evil character of the business, and not the violation of express statutes, is what stamps it as a nuisance.

Turning more directly to the case in hand, do pool rooms fall within the definition of common-law nuisances, whether the games or sports bet upon are contrary to statute or not?

Judge Cooley, speaking for the Michigan court, drew a vivid picture of the evils of betting, and showed that, even where individual wagers were tolerated by law, a house maintained to carry on a betting business was unlawful. *People* v. *Weithoff,* 51 Mich. 203. The case of *State* v. *Nease,* 80 Pac. (Ore.), 897, is much in point, as these excerpts will show: "The evidence shows that he (the defendant) was the keeper and proprieter of

what is called a 'turf exchange' or poolroom on one of the principal thoroughfares of the city, at which persons daily congregate for the purpose of betting upon horse races run in other States and repeated to him by telegraph. * * * That such a house is a gaming or gambling house, and punishable as a nuisance at common law, whether betting on a horse race is a crime or not, has so often and uniformly been held by the courts that it is no longer open to discussion. There is no dissent in the adjudged cases, and it is unnecessary to do more than cite the authorities." (Citing many cases.) See, also, 20 Cyc. p. 893, 894, notes. The foregoing question must be answered affirmatively.

The common law is put in force in this State, and the punishment for common-law offenses not covered by statute is fixed as a fine not exceeding $100 and imprisonment not to exceed three months. Kirby's Digest, § § 623 and 624.

These statutes have been held applicable to a gaming house as a common-law misdemeanor. *Vandewoker* v. *State,* 13 Ark. 700; *Norton* v. *State,* 15 Ark. 71; *Thatcher* v. *State,* 48 Ark. 60; 1 Bishop, Crim. Law, § 1137. Each period in which a nuisance continues is a separate offense. Wharton, Crim. Law. § 1419.

In addition to proceeding by fine and imprisonment, the State may have a judgment abating the nuisance and execution therefor. Wharton, Crim. Law, § 1426; Bishop, Crim. Law, § 1179; Kirby's Digest, § 2464.

The court has gone fully into the question of the criminality of maintaining a poolroom and the remedies therefor, in order to ascertain whether a chancery court by injunction can restrain a person or persons from carrying on such business.

There are some courts of learning and ability holding that common-law nuisances, such as illegal tippling houses, disorderly houses, bawdy houses and gaming houses, may be restrained by injunction. These cases go back to *State* v. *Crawford,* 28 Kan. 726, s. c. 42 Am. Rep. 182, in which it was held that an illegal drinking saloon (one run counter to a prohibition law of the State) could be closed by injunction, although in that particular case it was not done, on account of the sufficiency of a statutory remedy reaching the evil. Mr. Justice Valentine thus stated and commented upon the case: "This action was originally in-

stituted in the district court of Shawnee County by the county attorney of such county, in the name of the State, for the purpose of perpetually enjoining the further continuance of an illegal liquor saloon, in which intoxicating liquors were illegally, continuously and persistently sold to be drunk on the premises as a beverage. * * * It must be admitted that this is a rare proceeding—so much so as to startle old and experienced practitioners, and yet, if it were ascertained, after a careful examination of all its elements, to be founded in reason and justice, and to come within the principles of long established equity jurisprudence, it should not be dismissed unceremoniously, or denied a respectful hearing, simply because of its unquestioned and admitted novelty." Then the learned Justice plausibly contends that such an use of the injunction accords with the principle of equity jurisprudence. See *State* ex rel. *Rhodes* v. *Saunders* (N. H.), 18 L. R. A. 646, and *Weakley* v. *Page* (Tenn.), 46 L. R. A. 552, where cases supporting this view are reviewed, and other cases along the same line may be found in appellant's brief. The same question came before the St. Louis Court of Appeals when Seymour D. Thompson was a member of that court, and that able jurist delivered an opinion completely answering the contention of the Kansas court in the Crawford case. He showed by authority and reason that the jurisdiction in courts of equity to restrain public nuisances was limited to these three classes:

1. To restrain purpresture of public highways or navigation.

2. To restrain threatened nuisances dangerous to the health of a community.

3. To restrain *ultra vires* acts of corporations injurious to public right.

The court proceeds: "Unquestionably, the exercise of equity jurisprudence in these three classes of cases is an exception to a very general, well-understood, and important rule. That rule is, that a court of equity has no jurisdiction in matters of crime. In these three classes of cases jurisdiction is, however, exercised for special reasons, although unquestionably the nuisance complained of is a misdemeanor and subject to prosecution by indictment." *State* v. *Uhrig*, 14 Mo. App. 413. Chancellor Kent said: "If the charge be of a criminal nature, or an

offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court (a chancery court), which was intended to deal only in matters of civil right resting in equity, or where the remedy at law was not sufficiently adequate. * * * I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private rights; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less preliminarily by injunction, to put down a nuisance which did not violate the rights of property, but only contravened the general policy." *Atty. Genl.* v. *Utica Ins. Co.*, 2 Johns. Ch. 371.

The Illinois court said: "It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. * * * The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property." *Sheridan* v. *Colvin,* 78 Ill. 237. Again it is well said: "It is no part of the mission of equity to administer the criminal law of the State or to enforce the principles of religion or morality, except so far as the same may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance." *Cope* v. *Fair Assn.*, 99 Ill. 489. In *People* v. *Condon,* 102 Ill. App. 449, the subject of equity jurisdiction to enjoin a pooling and betting business was gone into fully and the authorities reviewed, and the result thus summed up: "1. That a court of equity has no jurisdiction over matters merely criminal or merely immoral. 2. That a court of equity will sometimes enjoin a public nuisance. 3. That this will be done in no case where the State is the complainant, unless it be clearly shown that such nuisance affects public property or public civil rights." A learned text writer, whose works are standard authorities, says: "Nuisances that arise from the acts of men that, for the time being, make the property devoted to their purposes a nuisance, but which cease to be so when the use is stopped: such as disorderly houses, gaming houses and cockpits, that are *malum in se* and common nuisances purely, and only punishable by indictment." 1 Wood on Nuisances, § 14.

The Supreme Court of the United States considered the use

of the injunction to restrain public nuisances and preserving rights of the public in highways when the Government secured an injunction against strikers interfering with interstate mail and traffic at Chicago in the railroad strike of 1894, and Mr. Justice Brewer, speaking for an undivided court, said: "The difference between a public nuisance and a private nuisance is that one affects the public at large and the other only the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. * * * Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the law of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they were accompanied by, or are themselves, violations of the criminal law." In re *Debs*, 158 U. S. 564, 592, 593.

It is demonstrably true that it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the State to restrain a public nuisance where the nuisance is one arising from the illegal, immoral or pernicious acts of men which for the time being make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law. On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery. Applying these principles here, it is seen that the admissions of the answer prove Furth to have been daily violating the criminal laws, but there is an absence of any showing that the acts constituting the crime reached to any of the grounds of equity jurisdiction. In some cases where the jurisdiction of equity is sought to restrain a criminal nuisance,

there are allegations that the criminal processes are inadequate to afford relief from connivance of the officers or other reasons. Happily, that unfortunate situation is not presented here; the prosecuting attorney joins in this complaint, and allegations involving the officers of Argenta in the maintenance of this poolroom were denied in the answer, and the State elected to treat the answer as true. It is not only the right, but the sworn duty, of every prosecuting attorney to proceed by information in justice's or circuit court to close these illegal places when they have information of them; it is not only the right but the duty of every grand jury to find the existence of such places if they exist and to indict the keepers thereof. It is also the privilege of any citizen to proceed against them at any time by affidavit before a justice of the peace.

There is no possible excuse under the law for a poolroom—a place maintained for carrying on or facilitating betting on horse races or any other sport or game or contest or other event upon which wagers are laid—to exist in Arkansas for one minute. Its maintenance is a crime, nothing more, nothing less.

Persons charged with crime are entitled to a jury trial, and this right must not be taken from them under guise of an injunction against a nuisance.

The chancellor was right in refusing to entertain jurisdiction, and the judgment is affirmed.

BURNS v. YOCUM.

Opinion delivered December 10, 1906.

1. CHECK—PRESENTATION—WAIVER.—A verbal agreement by the drawer of a check whereby he undertook to pay the check if the bank failed on presentation to make payment was not a waiver of presentation to the bank in due time. (Page 132.)
2. SAME—TIME FOR PRESENTATION.—Where the payee of a check and the bank on which it is drawn are in the same place, reasonable diligence requires the check to be presented for payment not later than the day after it is received, and delay beyond that time without excuse will discharge the drawer from liability if he is injured by the delay. (Page 133.)

3. SAME—PAYMENT.—Where the drawer of a check had money at the bank on which it was drawn, and the payee's agent accepted a deposit receipt of the bank in lieu of the money, and the bank failed, without paying the money, the drawer was discharged, although the cashier of the bank failed to place the deposit to the credit of such payee. (Page 133.)

4. SAME—AGREEMENT TO PAY—STATUTE OF FRAUDS.—Where the drawer of a check was discharged by the payee's acceptance of a deposit receipt in lieu of the money, a subsequent oral agreement on the former's part to pay the check, not supported by new consideration, is an agreement to pay another's debt within the statute of frauds. (Page 134.)

Appeal from Union Circuit Court; *Charles W. Smith,* Judge; reversed.

STATEMENT BY THE COURT.

The defendant, J. R. Burns, was indebted to the plaintiff, B. E. Yocum, in the sum of $974.61 evidenced by his promissory note secured by mortgage on land, and on August 18, 1903, delivered to her his check on the Bank of El Dorado, Ark., for that sum, which she accepted, and she surrendered to him the note and mortgage.

The plaintiff's brother, George Yocum, acting as her agent, presented the check to the Bank of El Dorado for payment on August 24, 1903, about 9 o'clock A. M., and the cashier of the bank accepted the check, and executed and delivered to plaintiff's agent at the time a deposit slip, showing that plaintiff had deposited to her credit said sum in the bank. A few hours later the Bank of El Dorado closed its doors, and a receiver was on the same day appointed to take charge of its affairs as an insolvent corporation. At the time said check was drawn the defendant had sufficient funds to his credit in the bank to cover said check, and continued to have sufficient funds therein until the failure of the bank. Later in the day George Yocum went back to the bank, and delivered the deposit slip to the receiver (E. H. Smith, who was the cashier of the bank) and the latter returned the check to him. Still later during the same day Yocum re-delivered the check for collection to the receiver. Subsequently a distribution of twenty per cent. was ordered and paid on the liabilities of the bank, and that *pro rata* on the amount of said check was paid to plaintiff as a creditor of the bank. The bank proved to be insolvent, and this distribution exhausted its assets.

The plaintiff then instituted this action in the circuit court of Union County against the defendant to recover the amount of said check, with interest thereon, after deducting the amount of said *pro rata* distribution paid thereon. She alleged in her complaint that the defendant had, in order to induce her to surrender his note and mortgage and accept the check, fraudulently misrepresented to her that he had funds in the bank more than sufficient to cover the amount of said check, which was untrue, and that said check was dishonored and payment refused because he had not sufficient funds in the bank to pay the check. She also alleged that, after the appointment of the receiver for the bank, the defendant agreed with her that if she would deliver said check to the receiver for collection (which she did) he would pay the balance of the check after deducting the amount of the *pro rata* thereon when distributed and paid.

The defendant answered, setting forth the fact that he had given the check to her in payment of said note, and that he had more than sufficient funds in the bank to pay the check. He denied that he had misrepresented to plaintiff the amount of funds to his credit in the bank, or that he had made any agreement with plaintiff or her agent after the appointment of receiver and surrender of the deposit slip with reference to his payment to plaintiff of the balance of the check after deducting the amount of the distributive payment, and he also pleaded the statute of frauds against said alleged agreement, and that it was entered into, if at all, without any consideration.

The plaintiff and her brother, George Yocum, testified that when defendant gave her the check she expressed to defendant some doubt about the solvency of the bank, and that the latter said to her: "Miss Bobbie, I have plenty more money, and if it fails before you get it (meaning the amount of the check) I will give you every cent of it." George Yocum also testified that, after he had received the deposit slip and returned later and exchanged it with the receiver for the check, the defendant made the following promise or statement to him: "George, every cent that bank don't pay, your sister sha'n't lose a cent."

The testimony of this witness with reference to the deposit of the check is as follows:

Q. "Why did you take a deposit slip?"

A. "I was going to transfer it to Camden; she told me to deposit it and transfer it to the National Bank at Camden."

Q. "That is why you deposited the money in the Bank of El Dorado and took a deposit slip for it?"

A. "Yes, sir. I was going to Camden the next Tuesday morning to draw it. She said she wanted to put it there where I did business, and it would be safe."

Q. "You did not raise any question about this matter, or about this deposit, or about this check until after the bank had failed?"

A. "No, I did not have any intention to; I just walked over here to the clerk's office before I knew it."

Q. "You never raised any question?"

A. "No, I did not; I did not have time. I thought everything looked kind o'spotted that morning."

Q. "Then why did you deposit your money in the bank and take a deposit slip for it?"

A. "I was going to transfer it to Camden."

E. H. Smith testified that he received the check as cashier of the bank, and gave a deposit slip for the amount, in the usual course of business, but that the amount was not transferred to plaintiff's credit on the books of the bank for the reason that it was the custom to post up the books after banking hours, and that the receiver was appointed and the bank suspended business on that day before the close of banking hours.

The court, at the request of the plaintiff and over the objection of defendant, gave the following instructions, viz.:

"No. 1. The jury are instructed that if they believe from all the evidence in this case that the check of the defendant on the Bank of El Dorado was accepted by the plaintiff on condition at the time that the money on said check would be paid by said bank of El Dorado, and you further find that said check was not paid by said bank, then in such event your verdict will be for the plaintiff, although you may find that a deposit slip was issued by E. H. Smith, the cashier of said bank, to the plaintiff, provided you further find that said deposit slip was returned by E. H. Smith and the amount of the check never credited on the books of the bank to the plaintiff, nor charged by said bank to the account of the defendant.

"2. The jury are instructed that if they believe from all the evidence in this case that it was agreed at the time of the delivery of the check by the defendant and plaintiff, and was a condition of the check by the plaintiff, that if same should not be paid by the Bank of El Dorado the defendant would pay said indebtedness, and you further find that said check was not paid by the bank and credited on its books to the account of the plaintiff, then your verdict will be for the plaintiff."

The court also instructed the jury, at the request of defendant, as follows:

"No 3. You are instructed that, even though you believe from the evidence that after the deposit of the check drawn by J. R. Burns to Yocum was made in the Bank of El Dorado, and a deposit certificate issued therefor by the Bank of El Dorado to the plaintiff, and after the failure of said bank, the defendant, J. R. Burns, agreed to pay all of said amount sued on which the Bank of El Dorado should not pay, still, if you believe that such agreement was without any valuable consideration passing from the plaintiff to the defendant, then you must find for the defendant.

"No. 4. You are instructed that a bare threat to sue a person or agreement not to sue will not of itself be sufficient consideration upon which to base an oral or written contract, unless there was at the time some obligation due from the party agreeing to the party accepting the agreement which would be accepted in law.

"No. 5. That a party receiving a check in payment of a debt is bound to present the check for payment within a reasonable time, and the party receiving the check is not warranted in holding the check without presentation merely to suit her convenience, but that she must have used reasonable exertions to present the check, or the maker of the check will be absolved from liability upon the original debt."

The court refused to instruct the jury, as requested by defendant, that the alleged agreement of defendant after the surrender of the check to pay the balance after crediting the distributive share received from the defunct bank, must, to bind him, have been in writing.

The jury returned a verdict in favor of plaintiff for the

amount claimed. Judgment was rendered accordingly, and the defendant appealed.

Marsh & Flenniken, for appellant.

1. Appellant's act in depositing money in the bank after he drew the check proves his faith in its solvency, and fraud will not be presumed. 68 Ark. 261; 34 Ark. 419; 63 Ark. 16; 11 Ark. 378. See, also, 27 L. R. A. 248.

2. If a debtor gives his creditor his check on a bank in which he has deposited sufficient money to pay the same, and the creditor, on presenting the check to the bank, accepts, in lieu of cash, a deposit slip, the debt is discharged, and the bank becomes debtor to the payee for the amount of the check so deposited. 53 Ark. 116; 46 Ark. 537.

3. If appellant agreed to pay such part of the check as the bank should fail to pay, this agreement, being oral, was within the statute of frauds, and not enforcible. Kirby's Digest, § 3654; 12 Ark. 174; 45 Ark. 67; 31 Ark. 613; 52 Ark. 174.

4. Appellee ought not to recover because of her own negligence in presenting the check for payment. 5 Cyc. 532; 44 L. R. A. 397.

5. The court erred in admitting testimony to show that Smith returned to Yocum the check and took up the deposit certificate after the former had been appointed receiver for the bank. 170 Ill. 82; 5 Cyc. 602; 27 Kan. 707.

McCULLOCH, J., (after stating the facts.) In the trial of this case below the parties ignored some of the issues presented by the pleadings, and introduced proof directed to other issues. There being no objection to this, the court treated the pleadings as amended to conform to the proof.

The plaintiff introduced no testimony tending to establish the allegations of the complaint that the defendant had no funds in bank to pay the check and misrepresented that fact to induce plaintiff to accept the check in payment of the note.

The court, in the instructions given at the request of plaintiff, based the defendant's liability upon his alleged promise, when he delivered the check to plaintiff, to pay it in the event of the failure of the bank to pay on presentation, and on the fact that when the check was received by the cashier of the bank and

the deposit slip issued to plaintiff the amount was not passed to her credit on the books of the bank. These instructions assumed that defendant's alleged promise to pay the amount in the event of the failure of the bank to pay on presentation of the check was a waiver of presentation for payment within a reasonable time, and made him liable for the failure of the bank to pay at any time. They also assumed that the check was not paid by the bank by issuance of the deposit slip, because the amount was not credited to plaintiff on the books of the bank. The instructions were erroneous for these reasons. The promise of the defendant to pay the amount in the event of the failure of the bank to pay on presentation of the check added nothing to his obligation, and was not a waiver of his right to have the check promptly presented by the plaintiff. "A check, like a bill of exchange, must be presented for payment within a reasonable time, and what is a reasonable time will depend upon the circumstances of the particular case. In the absence of special circumstances excusing delay, the reasonable time for presenting a check, where the person receiving the same and the bank on which it is drawn are in the same place, is not later than the next business day after it is received; and where they are in different places, reasonable diligence requires the check to be forwarded to the place of payment not later than the next business day after it is received by the payee, and presented not later than the day after it is there received. Inexcusable delay will discharge * * * the drawer from liability if he is injured by the delay." 7 Cyc. pp. 977-979; Same, pp. 531, 532; Tiedeman on Com. Paper, § 443; *Minehart* v. *Handlin,* 37 Ark. 276; *Morris* v. *Eufaula Nat. Bank,* 122 Ala. 580; *Kilpatrick* v. *Home B. & L. Assoc.,* 119 Pa. St. 30; *Hamlin* v. *Simpson,* 105 Iowa, 125, 44 L. R. A. 397; *Anderson* v. *Rodgers,* 53 Kansas, 542, 27 L. R. A. 248.

In this case there was a delay of five days (excluding Sunday) in presenting the check for payment, and no excuse for the delay is shown to have existed. This was sufficient to discharge the drawer when presentation within a reasonable time was not waived. An unreasonable delay taken by the drawer for his own convenience in presentation of the check is at his own risk.

The plaintiff's acceptance of the deposit slip or receipt, which turned out to be worthless, instead of demanding the cash

in payment of the check, placed the loss upon the plaintiff as a result of the negligence of her agent in so doing. *Loth* v. *Mothner,* 53 Ark. 116; *O'Leary* v. *Abeles,* 68 Ark. 259, and cases cited.

It is immaterial that the cashier or other employees of the bank did not place the deposit to the credit of plaintiff on the books of the bank. The surrender of the check and acceptance of the deposit receipt, instead of demanding the cash, was an election to accept payment in that way.

The oral agreement alleged to have been entered into by appellant after the deposit of the check is void under the statute of frauds because not supported by a new consideration. *Kurtz* v. *Adams,* 12 Ark. 174; *Hughes* v. *Lawson,* 31 Ark. 613; *Chapline* v. *Atkinson,* 45 Ark. 67; *Killough* v. *Payne,* 52 Ark. 174.

The instructions of the court were erroneous, and the verdict is not sustained by the evidence. So the judgment is reversed, and the cause remanded for a new trial.

AMERICAN STANDARD JEWELRY COMPANY *v.* WITHERINGTON.

Opinion delivered December 17, 1906.

1. FRAUD—EFFECT.—Where plaintiff's agent fraudulently took advantage of defendant's illiteracy by concealing a clause in a written contract about to be signed by defendant, such clause was not binding on defendant. (Page 135.)
2. EXPRESS COMPANY—DELIVERY.—It is the duty of an express company to make personal delivery of packages, except where the place is so small as not to justify the employment of messengers, or where the consignee does not reside within a reasonable distance of the office for personal delivery, in which case prompt notice must be sent. (Page 136.)
3. CARRIER—DUTY TO NOTIFY CONSIGNEE.—Before a carrier can be put in default for failure to give notice of the arrival of a package, it must be properly addressed to the usual shipping place of the consignee, unless some other place is contracted for. (Page 136.)
4. SALE OF CHATTEL—NONDELIVERY BY CARRIER AS DEFENSE.—Where by the seller's negligence goods were shipped to a place not the buyer's usual shipping point, and the buyer failed to receive them, the seller could not recover their value. (Page 137.)

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

Thornton & Thornton, for appellants.

Campbell & Stevenson, for appellee.

If one party induces another to sign a contract without reading it, this may give the signer, if he be deceived thereby, the right to avoid the contract as fraudulent. 9 Cyc. 390; 17 Ark. 498. A contract is an entire thing, and when altered in any of its integral parts is not the same contract. 5 Ark. 655. A general objection to an instruction has been condemned. 65 Ark. 259; 73 *Id.* 534. Objections to a number of instructions in gross will not be entertained. 38 Ark. 528; 39 *Id.* 337; 59 *Id.* 314.

HILL, C. J. Witherington entered into contract with appellant company to purchase a lot of jewelry; he could not read or write, and called his daughter-in-law, who was assisting him in the store, to sign his name for him. The jewelry was shipped by express to Bearden, Arkansas, a railroad and express station not far from Woodberry, an interior hamlet, where Witherington resided. It was directed to Witherington at Woodberry, care of express agent at Bearden. After staying at Bearden for several weeks, the jewelry was returned to the shipper. The contract contains this provision:

"When we deliver goods to transportation company in good order, they become the property of the purchaser, subject to all the conditions and safeguards contained herein. Purchaser pay all transportation charges. All goods are shipped at our earliest convenience."

There was evidence tending to prove that the agent of appellant committed a fraud on Witherington in the procurement of the contract in taking advantage of his illiteracy by purporting to read the contract to him when in fact he omitted important and material terms thereof, including the above. That the goods were purchased at the price sued for is admitted, and the fraud only went to certain clauses in the written contract. Concealment or misrepresentation to an illiterate person of matters in writing will avoid such matter. 1 Page on Contracts, § 64; 9 Cyc. p. 390; *Jones* v. *Austin,* 17 Ark. 498.

The question of fraud was submitted to the jury under an instruction fairly accurate, which was not excepted to, and the finding, in effect, is that the above clause, and others not important to this discussion, were fraudulently inserted. If the above-quoted clause was in the contract, the goods became Witherington's on delivery to the carrier. If that clause was not binding, and the verdict takes it out of the contract, then Witherington's liability rests on whether the delivery to the carrier was delivery to him. At the bottom of the contract, after Witherington's signature, was a statement that the jewelry was to be sent by express to Bearden; but this was no part of the signed contract, and there was no evidence of a direction that the goods were to be sent there.

Witherington testified that Camden was his freight station. but that he sometimes received a little at Bearden, and that he did not receive any notice from the express company or any one else that the jewelry was sent to Bearden. The appellant does not show notice was given of the shipment and its destination, and Witherington swears that he received no notice of it.

It is the duty of an express company to make personal delivery of packages, except where the place is so small as not to justify employment of messengers, or where the consignee does not reside within a reasonable distance of the office for personal delivery, when prompt notice must be sent. Hutchinson on Carriers, § § 379, 380; 6 Cyc. p. 466.

Generally, it is the duty of the carrier to give notice of the arrival of goods. *Turner* v. *Huff*, 46 Ark. 225; *Ry. Company* v. *Nevill*, 60 Ark. 375.

It might be important to determine whether the carrier in this instance was the agent of the consignor or consignee, eliminating the contract as to delivery as the verdict has done, and that subject has received recent consideration. *Gottlieb* v. *Rinaldo*, 78 Ark. 123; *Templeton* v. *Eq. Mfg. Co.* 79 Ark. 456.

But, before the carrier can be put in default for failure to give the notice, the package must be properly addressed to the usual shipping place unless some other place is contracted for. Hutchinson on Carriers, § § 216, 349*b*; 6 Cyc. 467; *Gottlieb* v. *Rinaldo*, 78 Ark. 123.

Here the undisputed evidence is that it was sent to a place

not the usual shipping point of Witherington, and this placed the shipper in default before the default of the carrier occurred, and disabled appellant from recovering. Hutchinson on Carriers, § 216.

Affirmed.

SHIREY v. HILL.

Opinion delivered December 17, 1906.

1. HUSBAND AND WIFE—SEPARATION—MAINTENANCE.—If a husband and wife are living apart, he may validly bind himself to render her a separate maintenance. (Page 139.)
2. AGREEMENT TO PAY ALIMONY IN FUTURE—ENFORCEMENT.—In a suit to enforce an agreement of a husband to pay alimony to his wife, it was not error to render decree, not only for the amount accrued at the time the decree was rendered, but also for the amounts that should accrue in the future, and to order that execution should issue for the separate monthly payments as they become due. (Page 140.)

Appeal from Lawrence Chancery Court; *George T. Humphries*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellee, by her next friend, F. A. Hill, brought this action, and alleged that she was a minor under eighteen years of age, that she and appellant were married on the 29th day of February, 1904, and lived together until the 24th day of May, 1904. That appellee, by her next friend, brought suit for a divorce from this appellant, and that, in consideration of a certain written contract, she dismissed her cause of action for divorce on the 12th day of January. The contract that is the foundation of this suit is as follows:

"This agreement made and entered into by and between A. W. Shirey, of Lawrence County, Arkansas, and Mrs. F. A. Hill, as the next friend of her daughter, Fairbelle Shirey, wife of the said A. W. Shirey, and Fairbelle Shirey, his said wife:

"Witnesseth, that whereas there is now pending in the Lawrence Chancery Court a suit in which the said Fairbelle Shirey, by her next friend, the said F. A. Hill, is plaintiff, and the said A. W. Shirey is defendant, for divorce and alimony. It is understood and agreed that the said suit shall be dismissed by the said plaintiff on the 12th day of January, 1905, with the understanding that it shall be without prejudice to the said plaintiff of any right or cause of action she might now have under the laws of this State. It is further understood that the said defendant agrees to pay the sum of twenty-five dollars per month to the said plaintiff on the first day of each month during the year 1905 for her maintenance as his wife."

(Here follow stipulations as to future employment of counsel, not material here.)

Appellee alleges compliance with the contract on her part, and says that appellant refused to carry out his part of the contract, and prayed for a decree compelling appellant to carry out his contract for the year 1905, and for such equitable relief as she might be entitled to.

Appellant demurred to the complaint on the ground that it did not state a cause of action, and for the further reason that the court was without jurisdiction. The court overruled the demurrer, and appellant excepted. Appellant then answered, and denied, among other things, that plaintiff had been ready and willing at all times to carry out her part of the contract sued on; alleged that Fairbelle Shirey had abundant separate estate out of which to pay for her maintenance; and further set forth facts sufficient to constitute a cause of action for a divorce against her.

Appellee demurred generally to the answer, and the court sustained the demurrer as to the cause of action set up subsequent to the contract.

Appellant excepted. Thereupon the court rendered judgment in favor of appellee as follows:

"The court upon complaint and contract as set out therein finds that the defendant, A. W. Shirey, is due said plaintiff, F. A. Hill, as next friend for Belle Shirey, the sum of $200 for the months of February, March, April, May, June, July, August and September, 1905, and there will be due under said contract for the months of October, November and December, 1905, $25 for

each of said months, payable the first of each month. It is therefore ordered, decreed and adjudged that the plaintiff have and recover of and from defendant the sum of $275, as follows: $200 at the rendition of this decree; and $75 payable, October 1, 1905, $25; due November 1, 1905, $25; and $25 due December 1, 1905, and the cost of this action; and that an execution may issue at the expiration of ten days for the amount due now, and an execution may issue for the separate monthly payments as may become due. A period of ten days to be allowed on each installment after its maturity before execution may issue."

To which action of the court in rendering said decree appellant excepted, and prayed an appeal, which was granted.

Campbell & Suits, for appellant.

1. The complaint alleged a cause of action on contract wherein the remedy at law was adequate and complete.

The chancery court had no jurisdiction. 7 Ark. 520; 13 Ark. 625; 26 Ark. 649; 27 Ark. 97; *Id.* 158; 48 Ark. 331.

2. If this is an action on contract, chancery has no jurisdiction. *Supra.* If it is an action for maintenance, the court erred in sustaining the plaintiff's demurrer to defendant's answer, since the answer averred all necessary facts to entitle him to a divorce under the statute. Kirby's Digest, § 2672.

3. It was error to render judgment for sums of money not due when the suit was filed. 14 Ark. 427; 21 Ark. 495; 22 Ark. 572.

W. E. Beloate, for appellee.

Equity only has jurisdiction between husband and wife. 67 Ark. 25; 54 Ark. 172.

WOOD, J., (after stating the facts.) Alimony, in general terms, "is the allowance which a husband pays by order of court to his wife while living separate from him." 2 Bishop, Marriage, Divorce and Separation, § § 1385-6.

A separate suit for alimony, under our statute, may be maintained, and is cognizable only in a court of equity. Kirby's Digest, § 2675; *Wood* v. *Wood,* 54 Ark. 172.

Mr. Bishop says: "Since parties may validly bargain to do whatever accords with their legal rights and duties, * * * if a husband and wife are living apart, he may * * * validly

bind himself to render her a specific maintenance." 2 Bishop, Marriage, Divorce and Separation, § 1261. In *Harshberger* v. *Alger,* 31 Gratt. 52 at page 60, the doctrine is announced that courts will generally uphold and enforce against the husband such conveyances and covenants as he may have made for the maintenance of his wife, provided the separation has actually taken place, or is contemplated as immediate, and the provision for the wife is made through the intervention of a trustee, and the parties have not subsequently come together again. Citing authorities.

The complaint, though not as fully and technically accurate as it should have been, nevertheless stated a cause of action for alimony.

Second. The court did not err in rendering a decree for the amount that had accrued under the contract at the time the decree was rendered, and the amount that should accrue, and in ordering that execution should issue for the separate monthly payments as they became due.

The complaint asked for "such equitable relief as the complainant was entitled to." The chancery court evidently took jurisdiction of the cause as a suit for alimony, and treated the contract as the basis of the amount which should be allowed. This was correct. Appellant specified that sum in his contract. The statute provides that "the court may enforce the performance of any decree or order for alimony and maintenance by sequestration of the defendant's property, or that of his securities, or by such other lawful ways and means as are according to the rules and practice of the court." Kirby's Digest, § 2682.

Mr. Bishop says: "In some courts an execution, or series of executions, may be issued for the alimony ordered." 2 Bishop, Marriage, Divorce and Separation, § 1094.

The court, having taken jurisdiction to enforce the contract between appellant and appellee as for alimony, was expressly authorized by our statute to proceed in the manner indicated by its decree to enforce its decree. This was in accord with well-recognized methods of chancery procedure in other jurisdictions. See cases cited by Mr. Bishop under § 1094, *supra.* Another well-recognized method is by contempt proceeding. See *Casteel* v. *Casteel,* 38 Ark. 477.

Appellee's demurrer to appellant's answer was overruled except as to that part which alleged that appellee did not have a cause of action in equity. But appellant did not pretend to adduce proof to support the allegations of his answer. The allegations of the complaint, sufficient to entitle appellee to the relief sought and granted, were not denied, and they were moreover supported by the terms of the contract.

Finding no error, the decree is affirmed.

BATTLE and MCCULLOCH, JJ., concur in so much of the opinion as affirms the decree for the matured amounts under the contract, but dissent from that part of the opinion which holds that the court below properly decreed payment of amounts falling due in the future and awarding execution therefor.

This is a suit on contract, not a suit for alimony. The status of the parties, and not the nature of the cause of action, gives jurisdiction to the chancery court. The fact that the contract is one for alimony does not render the suit any the less a suit on contract. They are of the opinion that the decree should be reversed as to future payments.

HARDIE v. INVESTMENT GUARANTY & TRUST COMPANY, LIMITED.

Opinion delivered December 17, 1906.

REAL PROPERTY—CONSTRUCTIVE POSSESSION.—Constructive possession of land follows the title until there has been an invasion of the possession of the rightful owner by actual occupancy of at least a part of the tract; and actual occupancy of part of a contiguous tract owned by another does not oust the constructive possession of the true owner, even though both tracts be described in the same instrument.

Appeal from Chicot Chancery Court; *Marcus L. Hawkins,* Chancellor; reversed.

Baldy Vinson, for appellants.

W. G. Streett, for appellee.

MCCULLOCH, J. Appellee instituted this suit in equity against appellants, William T. Hardie and Cincinnati Cooperage

Company, to quiet its title to a tract of land in Chicot County, to cancel the deeds under which appellants claim title, and to restrain the last-named appellant from cutting and removing timber. Appellants filed their answer and cross-complaint, in which they deny that appellee had any title to the land, and in which they deraigned title from the United States. They prayed that their title be sustained, and that possession be awarded.

It is expressly admitted that appellants have a complete chain of title from the United States, and appellee asserts title only by adverse possession for the statutory period of limitation under color of title.

The land in controversy was wild and unimproved until about a year before the commencement of this suit, when appellee took actual possession and placed tenants upon it. More than seven years before the commencement of this suit appellee received a deed from one W. D. Hill for several contiguous tracts, containing in the aggregate 3,394 acres, including the tract in controversy, and took actual possession of a portion of said land, claiming title to the whole. As already stated, actual possession of the tract in controversy was not taken until a short time before the commencement of this suit, nor was actual possession taken of any of the lands of appellants.

Appellee claims constructive possession by virtue of actual occupancy of an adjoining tract embraced in the same deed of conveyance. The facts of the case bring it squarely within the doctrine laid down in *Haggart* v. *Ranney*, 73 Ark. 344, that "constructive possession follows the title until there has been an invasion of this possession of the rightful owner by an actual occupancy of at least a part of the tract, and an actual occupancy of a part of a contiguous tract owned by another does not oust the constructive possession of the true owner, even though both tracts be described in the same instrument."

Other questions are argued by appellants as grounds for reversal, but as this is decisive of the case we need not discuss the others.

Reversed and remanded with directions to dismiss the complaint for want of equity, and to enter a decree in favor of appellants, in accordance with the prayer of the cross-complaint, quieting their title to the land in controversy and awarding possession thereof.

SCHOOL DISTRICT NO. 47 *v.* GOODWIN.

Opinion delivered December 17, 1906.

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SCHOOL—ILLEGAL EMPLOYMENT OF TEACHER—RATIFICATION.—A contract for employment of a school teacher, made at a meeting of two directors of which the third director had no notice, will be binding on the district if acquiesced in and ratified by the entire school board.

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

Smead & Powell, for appellant.

The action of the separate members of a school board is not the action of the board. There must be a meeting, after due notice to each director, which should be in writing, stating the time, place and purpose of the meeting. Until this is done, the action of a majority of the directors is not binding unless it be in a matter involving no exercise of discretion. 52 Ark. 515-16; 64 Ark. 491.

Gaughan & Sifford, for appellee.

1. There is no statutory requirement that a notice to directors of a meeting for the purpose of employing a teacher should be in writing, and it is respectfully submitted that the opinion cited by appellant so holding should be overruled.

2. Whether, in this case, the notice was given in writing, or verbally, is immaterial. It is undisputed that two of the directors met in the field of one of them, and that the third, who was in an adjoining field, was invited but refused to attend.

3. It is also undisputed that appellee was permitted to teach without objection for two months, and that the warrants for her salary were drawn by the director who did not attend the meeting at which she was employed. This amounted to a ratification.

HILL, C. J. Appellee was engaged to teach school by two school directors at a meeting of which, at best, only verbal notice was given to the other director. A written contract for six months at rate of $40 per month was signed by the teacher, and on part of the district was signed by the two directors, and under it she entered into performance and taught the school for two months, two weeks and two days, and then was barred entrance to the school house by the directors, and she sued upon the contract and recovered, and the district appealed.

Appellant points out error in the instructions given and the refusal to give requested instructions, the latter being in conformity to *Burns* v. *Thompson,* 64 Ark. 489.

The errors of the court however were not prejudicial, for the appellant's own testimony shows the contract was ratified, and this renders unavailing here matters as to its original invalidity.

The evidence most favorable to the district was in substance: That the agreement to employ appellee was made at a meeting attended by only two directors, of which meeting, if the absent director had any notice at all—a disputed matter—it was verbal and informal; the written contract was signed by only two directors, the other declining to sign it. After it was signed by the teacher and the two directors purporting to act for the district, the teacher at once opened school with the knowledge and acquiescence of the other director. This absent director, Browning, was secretary of the board, and drew warrants in favor of the teacher for each of the two completed months she taught, which he would not sign himself but delivered to the other directors to be signed by them and to be cashed by the teacher.

The district patronized the school, and people and directors recognized appellee's authority as teacher for the district, and the only objection at all was this director, Browning, refusing to sign the contract or warrants, but at the same time he acquiesced in the matter, as he expressed it to her: "If the other two directors hire you, I can't contrary them, and I did not."

Judge Dillon says: "A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within the scope of the corporate powers, but not otherwise." 1 Dillon, Mun. Corp. § 463. The making of the contract was within the powers of these directors, and the invalidity of the contract only due to failure to comply with the legal requirements of giving written notice of the meeting, and did not go to any want of power of the corporation or its directors to make such a contract. The employment of a teacher was within the scope of their authority, and therefore subject to ratification. This question was before the Supreme Court of Kansas, and Justice Valentine, speaking for the court, said: "It is admitted that the original contract with Eley was, at the time

it was made, void for the reason that it was not made by the entire school board, but only by a portion thereof. * * * But it is claimed by the plaintiffs that the evidence introduced in the court below tended to show a ratification of the contract by the entire school board, and also by the entire school district. We think such a contract might be ratified, and might be made binding upon the school district." [Citing many cases]. *Sullivan* v. *School District,* 39 Kan. 347. See, also, *Keyser* v. *School District,* 35 N. H. 477; *Jordan* v. *School District,* 38 Me. 164; *Fisher* v. *School District,* 4 Cush. (Mass.), 494; 1 Beach, Pub. Corp. § § 248, 250.

This contract was indubitably acquiesced in by the district, and by the dissenting director as well, who would not "contrary" his colleagues and the teacher. All parties permitted her to act under the contract for nearly half its life, and all in authority had knowledge of its original infirmity. It was then too late for the board or the district to seek to disaffirm it.

Judgment affirmed.

WELLS v. UNION CENTRAL LIFE INSURANCE COMPANY.

Opinion delivered December 17, 1906.

1. LIFE INSURANCE—NONPAYMENT OF PREMIUM.—A stipulation in a policy of life insurance that a failure to pay any of the first three annual premiums shall avoid the policy is valid. (Page 147.)
2. SAME—LIMITATION.—An action on policy of life insurance executed prior to the passage of the act of March 12, 1901, brought more than a year after the death of the insured, is barred where it stipulated on its face that no suit under it should be brought after one year from the insured's death. (Page 147.)

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

F. G. Taylor, for appellant.

1. The stipulation that no suit to recover under the policy should be brought after one year from the death of the insured is a limitation in conflict with the law, and will not be enforced.

70 Ark. 1; Kirby's Digest, § 4380. See 6 Am. & Eng. Enc. Law, 937 *et seq.* Remedial statutes are construed liberally to accomplish the object sought. *Id.*, 939. Statutes of limitation are purely remedial, and *a fortiori* are limitations in contracts. 18 Ark. 384; 21 Ark. 287; 56 Ark. 187.

2. By its letter denying liability under the policy, defendant waived proof of death. 53 Ark. 494.

3. An insurance company is bound by the acts and declarations of its agents. 52 Ark. 11; 96 S. W. 365.

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

1. Under the "notice to policy holders," appearing in the policy, the local agent, Gillard, could do no act to waive any right of the company. 54 Ark. 75; 60 Ark. 532; 187 U. S. 236; 76 Ark. 328; 75 Ark. 25. The annual premium due October 30, 1899, was payable only at the office of the company in Cincinnati, or to an authorized agent of the company producing a premium receipt, signed by the president or secretary. 15 S. W. 863; 71 N. W. 668; 56 N. W. 773; 101 Fed. 673.

2. The stipulation in the policy requiring the suit to be brought within one year after the death of the insured was a valid contract, and binding upon the parties. 25 S. E. 189; *Id.* 31; 7 Wall. 386; 24 S. E. 869; 34 N. W. 183; 102 Ia. 112; 103 Ia. 532; 53 N. W. 1104; 110 Ala. 508; 55 Ga. 266; 71 Ill. 620; 66 Mo. 32; 52 Ark. 21; 39 Am. St. 877.

The statute, Kirby's Digest, § 4380, is not retroactive. A statute is never retroactive unless expressly so declared in terms. 10 Ark. 148; *Id.* 512; *Id.* 516; 20 Ark. 293; 24 Ark. 372; 26 Ark. 127; 14 Am. St. Rep. 94; 82 Am. Dec. 696; 87 *Ib.* 240; 90 *Ib.* 438; 67 Am. St. Rep. 735.

BATTLE, J. On the 22d day of October, 1898, the Union Central Life Insurance Company, in consideration of the sum of $73.56 paid, and of that sum to be paid at the home office of the company on the 30th day of October of each year after that date, executed a policy of insurance upon the life of John A. Harbison for the sum of $2,000, to be paid to Millie Wells within sixty days after the receipt of notice and satisfactory proof of the death of Harbison. It was stipulated in the policy that the sum of $73.56 should be paid annually as a premium on the policy,

that is to say, a premuim of $73.56 should be paid at the home office of the company on the 30th day of October of each year after the execution of the policy, and that "the failure to pay any of the first three annual premiums, or any notes, or interest upon notes, given to the company for any premium or part of premium, on or before the days upon which such premiums, notes, or interest become due, shall avoid and nullify the policy without any action on the part of the company or notice to the insured or beneficiary, and all payments made upon the policy shall be deemed earned as premiums during its currency." The policy also contained this stipulation: "No suit to recover under this policy shall be brought after one year from the death of the insured."

The second premium on the policy was due on the 30th day of October, 1899, and no part of the same was paid, and has not since been paid. John A. Harbison, the insured, died on the 23d day of November, 1899, and the action on the policy was commenced on the 19th of September, 1904, more than four years after the death of the insured.

The policy was avoided by the failure to pay the second premium at the time it was due.

This action was barred, it having been brought more than one year after the death of the insured. It was barred before the enactment of the act, entitled "An act to fix the time within which an action may be maintained in the courts of this State on policies of insurance," approved March 12, 1901. The act was prospective, and did not apply to policies executed before its enactment.

Judgment affirmed.

KENADY v. GILKEY.

Opinion delivered December 17, 1906.

1. ATTACHMENT SALE.—CONFIRMATION.—Title does not pass under an attachment sale until confirmation by the court. (Page 152.)
2. HOMESTEAD—REDEMPTION BY WIFE.—A married woman, who redeems her husband's homestead from an attachment sale by means of the

rents and profits derived therefrom, acquired no title or lien, as against her husband, to which her assignee would be subrogated. (Page 152.)

3. LIMITATION OF ACTION—HUSBAND AND WIFE.—The statute of limitations does not run in favor of a married woman redeeming her husband's homestead from an attachment sale, at least until she obtains a divorce. (Page 152.)

4. HUSBAND AND WIFE—SUBROGATION.—A wife paying off an attachment lien on her husband's homestead out of the rents thereof is not entitled to be subrogated to the lien so discharged. (Page 152.)

5. EVIDENCE—LOST DEED.—Where a husband alleges that a deed was executed and delivered to him by his deceased wife and has been lost, he must prove such fact by clear and satisfactory evidence. (Page 152.)

Appeal from Perry Chancery Court; *Jeremiah G. Wallace,* Chancellor; affirmed.

Campbell & Stevenson, for appellant.

1. Mrs. Kenady made and delivered to W. H. Kenady her warranty deed to the land in controversy. Acknowledgment of an instrument raises a presumption of its due execution, and is a fact entitled to be considered in determining whether there has been a delivery. 1 Cyc. 540. Her subsequent statement that he had taken the deed to his attorneys to examine shows delivery to him by her, and delivery passes title. 7 Ark. 505; 15 Ark. 538; 14 Ark. 286; 24 Ark. 244. Destruction of a deed by the grantor after it had been delivered will not revest title in the grantor. 33 Ark. 63; 34 Ark. 503; 37 Ark. 195; 42 Ark. 170; 43 Ark. 203; 52 Ark. 389. This court will sustain the findings of the chancellor unless they are clearly against the weight of the evidence. 42 Ark. 246; 49 Ark. 465; 44 Ark. 219; 31 Ark. 85.

2. Appellee Gilkey's cause of action is barred by the statute of limitations. Kirby's Digest, § 5056. The mere filing of a complaint in the office of the clerk is not sufficient to institute a suit. A summons must, in addition, be issued, and it must be delivered to the sheriff for service. 62 Ark. 406. The burden is on the plaintiff to show the suing out of the writ within the statutory period. 27 Ark. 343; 43 Ark. 136.

3. Appellant has acquired title to the land by adverse possession. Pierce's testimony is uncontradicted that he took possession of the land after the sheriff's sale, in May, 1891. Adverse possession, once proved, is presumed to continue until the

contrary appears. 34 Ark. 598; 38 Ark. 182. The intention of Mrs. Kenady to acquire title in her own right is manifest from her arrangement with Pierce, the purchaser at execution sale. Her contract with Pierce has the force and effect of a bond for title, and possession under a bond for title for the full period of limitations would bar a judgment, and is a good defense in equity. 31 Ark. 378, and cases cited.

4. The deed of Mrs. Kenady sufficiently describes the land intended to be conveyed. 40 Ark. 240; 65 Ark. 506; 68 Ark. 328; *Id.* 544; 70 Ark. 357; 73 Ark. 226.

5. Gilkey could only take the land subject to a lien of the appellant for $225, the amount paid by Mrs. Kenady to free the land from sale under execution. Her grantee would be subrogated to her lien.

Sellers & Sellers and *John M. Parker,* for appellees.

1. Gilkey's title was never divested out of him. Personal judgment can not be rendered on constructive service, nor is an execution authorized thereon. If there was an attachment suit against him, and a judgment *in rem* against the land, it should have been sold under order of the court, and the sale reported and confirmed. Kirby's Digest, § 385. The law authorizing judgments or the sale of property upon constructive service must be strictly complied with, and this fact must affirmatively appear of record. Kirby's Digest, § § 383, 3274, 3275, 3281, 6254; 71 Ark. 322; 55 Ark. 30.

2. If the sale was legally made, the land was merely redeemed by Mrs. Kenady for Gilkey's benefit. Pierce having never obtained a deed, the legal title remained in Gilkey; and since the payments made by Mrs. Kenady were derived from the rents of the land, no equitable title passed to her.

3. The statute of limitations could not run in favor of Mrs. Kenady before she was divorced from Gilkey. 30 Ark. 17. The burden of proving adverse possession is on him who alleges it. 40 Ark. 366.

4. The proof fails to establish a purchase by appellant; but on the contrary it shows that no deed was ever delivered. The burden of showing the transfer and its *bona fides* is upon the appellant.

5. The deed to the Gilkey tract is void for uncertainty. 35 Ark. 470; 48 Ark. 419; 34 Ark. 534; 41 Ark. 495; 60 Ark. 487; 68 Ark. 150.

6. If appellant ever had a deed, it was a voluntary gift from his wife, and a court of equity will not reform a voluntary conveyance, even if clearly shown to have been fairly obtained. 15 Ark. 533; 48 Ark. 421; 104 Wis. 81; 24 Am. & Eng. Enc. Law (2 Ed.), 653; 2 Am. Rep. 341.

7. One spouse can not convey the legal title in land directly to the other. 60 Ark. 70; 62 Ark. 26.

8. Husbands are not favored in the acquisition of their wives' property. Where the sale or gift is in issue, the husband must show that it was not imprudent on the wife's part, and that it was not unfairly procured by him. 20 Cyc. 1219; 10 Am. St. 339 note; 1 Am. St. 719; 51 Am. Rep. 281; 34 So. 320; 1 Block's Eq. § 125; 73 Ga. 275; 75 Ill. 446; 39 N. J. Eq. 215.

9. Testimony as to oral statements of, and transactions with, a deceased person is received with the closest scrutiny, and the courts lend an unwilling ear to such testimony. 17 Cyc. 808; 21 How. (U. S.), 493; 45 Am. St. 94; 46 Mo. 423; 53 Mo. 395.

McCULLOCH, J. This suit involves a tripartite controversy over the title to certain lands in Perry County, Arkansas.

Appellee, M. W. Gilkey, was formerly a resident of Perry County, and acquired title to the N. E. ¼ of S. W. ¼ and N. W. ¼ of S. E. ¼ sec. 36-4-21—80 acres—which we may hereafter refer to as the Gilkey tract. About the year 1890, while in possession of the land as a homestead, he left the country and left his wife in possession of the land; and she procured a divorce from him about 1899, intermarried with appellant, W. H. Kenady, on September 2, 1902, and died childless in June, 1903.

On May 9, 1891, the Gilkey land was sold under special execution in an attachment suit against Gilkey to one Z. J. Pierce, who, on October 22, 1891, entered into the following contract with Mrs. Gilkey concerning the same:

"This agreement, entered into this 22d day of October, 1891, by and between Z. J. Pierce and Mrs. A. M. Gilkey, witnesseth: That, whereas the said Z. J. Pierce holds a certificate of purchase at sheriff's sale to what is known as the M. W. Gilkey

farm in Perry County, Arkansas, now in possession of the said A. M. Gilkey. Now, in consideration of the receipt of one half of the rent of said farm until the sum of $225 has been collected by him without interest, the said Z. J. Pierce agrees, when said sum has been received by him, to execute to the said Annie M. Gilkey a quitclaim deed to said farm. It is further agreed that the division of the rent, as above stated, is to commence with the year 1891, and to continue until the said sum of $225 has been paid to Z. J. Pierce as above stated, and no further proceeding taken under said certificate of purchase unless this agreement is broken by said A. M. Gilkey."

On January 19, 1897, Pierce executed to Mrs. Gilkey a deed purporting to convey the land to her.

Mrs. Gilkey owned another tract, containing 80 acres, which is known as the Bates tract.

After the intermarriage of Mrs. Gilkey with appellant, and her death, Gilkey commenced an action at law against appellant to recover possession of the Gilkey tract; and J. C. Harkness and other collateral heirs of appellant's wife commenced a similar action against him to recover the Bates tract.

Appellant filed his answer in each case, claiming title to all of said lands under a deed of conveyance alleged to have been executed to him by his wife, Annie M. (Gilkey) on September 4, 1902, which said deed, he alleged, had been lost or destroyed, and had not been recorded. In his answer in the Gilkey case he also pleaded that he and his grantor had been in actual, adverse possession of the land more than seven years next before the commencement of the action.

By consent of all parties the two actions were consolidated and transferred to the chancery court. Appellant then filed an amendment to his answer, making it a cross-complaint, asking that the alleged deed executed to him by his wife be reformed so as to correct the imperfect description therein of the land conveyed.

The court rendered a final decree in favor of Gilkey for the Gilkey tract, and in favor of appellant for the Bates tract. Kenady and the plaintiffs in the Harkness suit appealed to this court.

We are of the opinion that the decree was correct in award-

ing the Gilkey tract to appellee Gilkey. In the first place, no title passed to Pierce under the attachment sale, for the reason that the sale was never confirmed by the court which ordered it in the action against Gilkey. The judgment was rendered upon constructive service, an order of attachment was levied on the land, and the court ordered it sold to satisfy the debt, as provided by statute. The sale was made subject to confirmation, and title did not pass until the sale was confirmed by the court. Kirby's Digest, § 385; *Freeman* v. *Watkins,* 52 Ark. 446.

In the next place, the right of redemption existed for a period of one year after the sale. *Beard* v. *Wilson,* 52 Ark. 290. No deed was ever executed pursuant to the sale. The contract between Pierce and Mrs. Gilkey was entered into within that period, and was in effect only an agreement for redemption. The redemption money was paid out of the rents and profits of the land, and Mrs. Gilkey could not, by that means, acquire title to the land against her husband. It was her husband's homestead, and she remained in possession, which she had the legal right to do, and used the rents and profits in removing the incumbrance. Nor did the statute of limitation run in her favor, at least until she obtained a divorce. Until then her husband had no cause of action for recovery of the land.

Counsel for appellant contend that he should at least be subrogated to the lien of the judgment creditor on the land. They assert this right under the doctrine laid down in *Spurlock* v. *Spurlock,* 80 Ark. 37. In that case the right of subrogation was given because the earnings of the wife were used in discharge of a mortgage lien created by the husband on the homestead. That doctrine has no application here, because the money used in removing the incumbrance arose, not from the earnings of the wife or from her separate estate, but from the rents and profits of the homestead.

As to the Bates tract, we think that the chancellor reached the wrong conclusion from the evidence. The testimony is, in our opinion, insufficient to justify a finding that a deed was executed and delivered to appellant Kenady by his wife. He alleged that his wife did execute and deliver such a deed to him, and that it had been destroyed. It devolved upon him to prove

all these facts by clear and satisfactory evidence. *Nunn* v. *Lynch,* 73 Ark. 20; *Elyton* v. *Denny,* 108 Ala. 323.

The relationship between the parties to the deed, that of husband and wife, and the death of the grantor call with special force for the application of that rule, for such conveyances are viewed with some suspicion.

The only testimony in the case of a delivery of the deed is that of Kenady himself; and if his testimony was competent for that purpose (which we need not decide), it is far from satisfactory. He testified that when he obtained his license to marry Mrs. Gilkey he also procured a blank form of deed for her to convey the land to him, and that she executed and delivered the deed two days later. Yet it is shown by the testimony of another witness, who is entirely disinterested, that a month later both of them went to an attorney and procured the preparation of another deed for the same land which she never executed, and the same was found unexecuted after her death. The attorney testified that Mrs. Kenady stated to him in the presence of Kenady that the deed claimed to have been previously executed (and which he says then lacked the signature either of the grantor or the officer before whom it was to be acknowledged) was not satisfactory, and that she wanted to reserve the timber on the land. He testified also that Mrs. Kenady said to her husband after the deed had been prepared and handed to them, "I am going to keep these papers" (referring to the previously prepared deed and the one just handed to them), and that he replied, "Yes, that is our agreement." Now, this occurred after Kenady claims that the deed had been delivered to him, and is inconsistent with a previous consummated conveyance of the land. This testimony shows clearly that at that time neither of the parties understood that the title to the land had been vested in Kenady. He does not claim that a delivery of the deed was made to him after that time. He claims that the deed, after delivery, was kept in a wardrobe to which he and his wife both had access, and remained there until the death of his wife. No one ever saw it after the death of Mrs. Kenady, and its disappearance is not accounted for except by a surmise of Kenady, unsupported by evidence, that it was abstracted from the wardrobe by one of the collateral heirs and destroyed. Mrs. Kenady died in possession of the land, and the

testimony is far too unsatisfactory to justify us in declaring that the title had been divested under a lost unrecorded deed.

That part of the decree in favor of appellee M. W. Gilkey for the land known as the Gilkey tract is, therefore, affirmed; and that part of it in favor of W. H. Kenady for the Bates tract is reversed and remanded with directions to enter a decree for that tract in favor of the collateral heirs of Mrs. Kenady.

MONTGOMERY v. DANE.

Opinion delivered December 17, 1906.

HOMESTEAD—ABANDONMENT BY HUSBAND—RIGHTS OF FAMILY.—After impressing the homestead character upon his dwelling place, a husband can not, by deserting his family and abandoning the homestead, deprive them of its protection, without furnishing them another home, so long as they seek to continue to reside in such home.

Appeal from Randolph Chancery Court; *George T. Humphries,* Chancellor; affirmed.

J. T. Lomax, for appellant.

1. It was error to transfer the case to equity. The only issue raised by the pleadings was whether the land was the homestead of Elijah Dane, and that defense could have been interposed at law.

2. If the land was the homestead of appellee and her husband, it was abandoned when they separated, and each moved away from the land.

Witt & Schoonover, for appellant.

1. The appeal should be dismissed for failure of appellant to file a proper transcript.

2. The appellant having failed to make an abstract setting out the material parts of the pleadings and evidence, as required by rule 9, the judgment should be affirmed. 57 Ark. 304; 75 Ark. 571; 76 Ark. 217; 80 Ark. 19. In any event the costs of the appeal should be taxed against the appellant. 74 Ark. 320.

3. The judgment should be affirmed because it affirmatively appears from the transcript that not all of the evidence and record is included therein. 63 Ark. 513; 64 Ark. 609; 70 Ark. 409; 72 Ark. 21.

4. The homestead of a defendant in a criminal prosecution is not subject to sale under execution for fine and costs adjudged against him. Const. 1874, art. 9, § 3; 59 Ark. 211. If land be a homestead, the debtor may dispose of it as he sees fit, and no creditor can interfere. 43 Ark. 431; 52 Ark. 549; 73 Ark. 489. If Dane and appellee abandoned the homestead, it became subject to execution for ordinary debts; but his abandonment could not defeat the rights of his wife in the homestead. Unless she abandoned it also, it remained a homestead. 21 Cyc. 598; 66 Ark. 386. If the owner of a homestead and his wife convey it to a third party, to be immediately conveyed to the wife, and this is done, there is no abandonment of the homestead of the grantors therein, the wife being as much entitled to a homestead as the husband. 15 Neb. 653; 17 Neb. 626; 65 Ia. 523; Thompson on Homesteads, Par. 473.

Enforced absence from the homestead, or absence therefrom by reason of necessity, does not constitute an abandonment. If there exists the intention of returning to the homestead, it does not lose its character as such. Thompson, Homesteads, Pars. 277, 285, 280; 21 Cyc. 600; 74 Ark. 88. It is not necessary to claim homestead exemptions before sale. Kirby's Digest, § 3902. Where the husband fails to claim the exemption, the wife may do so. 59 Ark. 211.

5. The case was properly transferred to equity. If an answer tenders an equitable issue and asks affirmative relief, the case should be transferred on motion. An execution sale may be a cloud on a homestead title in some cases. 66 Ark. 382.

HILL, C. J. Montgomery sued Mrs. Dane for a tract of land. She answered, claiming ownership by a purchase from one Hamil, to whom she and her husband had conveyed, and asserting and claiming a homestead right in the property, and alleging that it was her husband's homestead at time of its sale under execution under which Montgomery purchased; that the sale was for a debt, not a lien on a homestead, and that Montgomery had acquired no title from his sale, and the same was

a cloud on her title, and alleged a redemption from the sale to Hamil, and she asked a cancellation of Montgomery's title and the quieting of her title. The cause was, after this answer and cross-complaint, transferred to equity, and prayer of cross-complaint granted, and Montgomery appealed.

The transaction with Hamil proved to be no more than a redemption of the property from a mortgage executed by herself and husband.

The case turns on whether or not the land was a homestead at the time of sale. If it was not, Montgomery's title would prevail, possibly subject to subrogation of Mrs. Dane to the Hamil mortgage; and if the property was a homestead, the deed of Montgomery, based on an execution sale under a judgment obtained on a note given for a fine and costs, should be canceled. The facts were that Dane and wife lived upon the land for many years as a home, and he had no other property, and in 1896 they separated. Both left the place, but not the county at that time. There were no children in the family, and Mrs. Dane went to a married daughter's house when they separated. One Douglass lived on the land in 1897. Whether he paid rent to Dane is not clear, but Dane went back to the land in 1898, and lived there till he mortgaged it to Hamil, and he then left the State. Mrs. Dane then took charge of the land, and rented it, and collected rents from different tenants, who occupied it until 1900, when she returned to it with her grandchildren and great grandchildren, and has since occupied it with them.

The judgment was obtained against Dane on 24th April, 1899, and execution sale took place June 15, 1901. A deed to Hamil, which was in fact a mortgage, was executed on the day before the execution sale, and subsequently, on Mrs. Dane paying the debt, Hamil conveyed to her. This was the second mortgage given Hamil. The first was when Dane left and Mrs. Dane refused to sign it, but this deed she signed on promise of Hamil that on repaying the debt he would convey to her. Dane was in Missouri when he signed this instrument, and when the sale occurred. Mrs. Dane was looking after the sale. Whether she forbade it and then asserted her homestead rights is a matter in conflict, but certainly she was on the ground, asserting her right to its occupancy as a homestead. Mr. and Mrs. Dane were not

divorced; they simply separated. In 1900 Mrs. Dane purchased a 40-acre tract, but she never made it her home.

She testified that her only reason for leaving the home place when she and her husband separated was that she could not live there alone, and had no one to stay there with her. She went to live with her married children, and lived with them temporarily till she could return to the home place. She retained control of it through tenants from the time her husband left it until she personally returned to it. She did not want to leave the place, and only left from necessity, and never intended to abandon it, is her testimony, and it is found true by the chancellor.

Under many decisions of this court, recently reviewed in *Newton* v. *Russian,* 74 Ark. 88, the temporary absence from the home with intention to return was not an abandonment by Mrs. Dane. The abandonment by Dane is a different matter, and the question is whether his abandonment of the homestead and his family will let in claims of his creditors when the wife is not joining him in the abandonment and desires to continue to reside upon it and to preserve it as the family homestead. The constitutional provisions are: "The homestead * * * owned and occupied as a residence." * * * to be selected by the owner." Const., art. 14, § § 3-5; Kirby's Digest, 3898-3900. The act of 1887 renders void any conveyance affecting the homestead with a few exceptions, unless the wife joins in the execution of it and acknowledges it, and further provides that the debtor's right to it shall not be lost by omission to select and claim it before sale, but he may select and claim it after as well as before sale and set up the homestead right as a defense when suit is brought for possession; and if he neglects or refuses to make such claim, his wife may intervene and set it up. Kirby's Digest, § § 3902, 3903. It has often been said that the protection of the family from dependence and want is the object of the homestead law; that apart from the family the debtor is entitled to no consideration. *Harbison* v. *Vaughan,* 42 Ark. 541; *Hollis* v. *State,* 59 Ark. 211. This being the controlling thought in the homestead provisions, it naturally followed that the courts have held that the abandonment or desertion of the family and homestead by the husband did not forfeit the homestead right of the family, so long as he

was acting independently and the family were seeking the shelter of the homestead.

Thompson says: "But it has been frequently decided that what amounts to an act of desertion by the husband can not have the effect of changing the home of either the husband or his deserted family. * * * The homestead character was held to remain as long as the wife manifested an intention to remain and not abandon the home. And even where the husband's removal of the furniture compelled her to live at another place, and her intention to remain was only evinced by giving her personal attention to the house, still there was no abandonment." Thompson on Homestead and Exemptions, § 277.

If written of this case, the statement above quoted could not have been more in point, and this text does not come as a new doctrine, for it was expressly approved in *Hall* v. *Roulston,* 70 Ark. 343, and *Newton* v. *Russian,* 74 Ark. 88, and approved in principle in *Hollis* v. *State,* 59 Ark. 211. See, also, *Moore* v. *Dunning,* 29 Ill. 130, s. c. 81 Am. Dec. 301, and note, which case was approved in the Hollis, Roulston and Russian cases.

The principles of these decisions control here. Whether the act of the husband be a separation mutually agreed to or an abandonment, the controlling factor remains—he is not acting for the family but for himself in derogation of the family rights, and the whole object of the homestead law would be defeated if the homestead impressment was swept away by the act of the husband. Indirectly the husband could convey his homestead by simply quitting his family and letting in the sheriff when the policy of the law and the express statute of 1887 is to prevent that very situation. Where the wife or family refuse to obey the husband and father in leaving the homestead when he, in pursuance of his privilege as head of the family, seeks to take his family elsewhere, another question is presented, and one not before this court in this case.

It has been argued that *Pipkins* v. *Williams,* 57 Ark. 243, *Sidway* v. *Lawson,* 58 Ark. 117, and *Farmers' B. & L. Assn.* v. *Jones,* 68 Ark. 76, conflict with this conclusion; but far from it. In *Pipkins* v. *Williams,* Mr. Justice HEMINGWAY, for the court, said: "When the homesteader, with his family, abandoned the land as a homestead, it became liable to attachment for his debts."

The parenthetical qualification of the homesteader's right to abandon "with his family" showed that the learned justice, in applying the law to the facts of that case, had in mind that where there was an abandonment by the homesteader without his family joining in the abandonment a different question would be presented. In *Sidway* v. *Lawson* the rule above quoted was stated, but not stated fully and without the qualification of "with his family." It was not intended to change the rule in the Williams-Pipkins case, but it was merely stated in shorter form, and only so much as was pertinent to the case in hand. *Farmers' B. & L. Assn.* v. *Jones, supra,* held that the act of 1887 is a limitation upon the right of the husband to convey his homestead, but not a limitation upon his marital and parental authority to select or abandon the homestead. This is manifestly true, but it is dealing with the rights of the husband and father as head of the family to select the home, abandon and select another or select none but to live in rented houses if he sees fit. These are considerations touching the right of a head of a family to control it, and relate to him when acting for the family, not when in derogation of the rights of the family and not when he deserts or abandons his family or voluntarily separates from them. When he deserts, abandons or separates from his family, he is then no longer its head, and is no longer acting for the family, but for himself, and against the family, and then it is that the law presumes he is a wanderer without home until he returns to his duty and his family. *Moore* v. *Dunning, supra; Hall* v. *Roulston, supra; Newton* v. *Russian, supra.* In *Sidway* v. *Lawson, supra,* there is the further holding that the Legislature intended to create no new estate by the act of 1887, but prescribed the manner of executing instruments affecting the homestead, and recognized the homestead as the husband's, not the wife's, nor their joint property. This is manifestly the correct construction, and does not trench on the principle which the court is following in its conclusions herein.

The homestead being created for the benefit of the family, when the husband selects it and impresses it with the homestead character as the dwelling place of his family, then the law frees it from his debts, and he can not let in his debts against it when he separates from his family or deserts them and does not attempt

to provide them another home or dwelling place or shelter, and does not seek to take his family with him, so long as they seek to continue to reside in the only home he has provided for them. It is within the letter, and most positively within the spirit, of the homestead law to extend its beneficence to the family under these circumstances.

Judgment affirmed.

Mr. Justice McCULLOCH dissents.

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QUEEN OF ARKANSAS INSURANCE COMPANY v. COOPER-CRYER COMPANY.

Opinion delivered December 17, 1906.

INSURANCE—FORFEITURE—WAIVER.—A stipulation in a policy of fire insurance that the policy shall cease on default in payment of the premium note may be shown to have been subsequently waived by extension of the time of payment and acceptance of payments thereon.

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

A. W. Files and *Carmichael, Brooks & Powers*, for appellant.

1. Placing the most favorable construction upon the testimony introduced by plaintiff, the Shaws were in arrears when the fire occurred. The conditions in the note were a part of the policy, and a breach of its conditions was a breach of the conditions of the policy. 93 S. W. (Ark.), 752; Vance on Ins. 237. There was no substantial compliance with the clause with reference to keeping a set of books. Such a set of books should be kept as will show from the inventory and cash sales the specific goods sold, in order to arrive at the goods on hand at the time of the fire. 95 S. W. 481. Where it is not shown that the agent has other authority than soliciting insurance and collecting the premiums therefor, it can not be presumed that he had authority to waive a forfeiture in the matter of transfer of property and assignment of policies.

2. It is provided in the note that the contract of insurance is to be considered null and void so long as the note or any part of it remains unpaid. Hence the first instruction was erroneous. *Supra.*

3. The second instruction was erroneous in that there was no evidence that the company waived the transfer of the policy, and because it does not inform the jury what would amount to a waiver.

4. The court erred in instructing the jury that it was for them to say whether Young was authorized by the company to waive the provision requiring indorsement of the transfer on the policy. 75 Ark. 25.

J. H. Harrod, for appellee.

1. The note introduced by the company shows credits of $1.00 per week for three weeks next preceding the fire, and Shaw testified that the agent agreed to extend the payment to July 12. It is immaterial that the agent was without authority to extend the note, since the company ratified his act by accepting payments and crediting them on the note.

2. The jury, after being properly instructed, found that Young had authority to bind the company by waiving the provision requiring indorsement of the transfer of the policy.

3. Appellant's abstract fails to show that proper books were not kept.

HILL, C. J. This was an action on a fire insurance policy issued to B. G. Shaw, by him alleged to have been transferred to George Shaw, and after fire destroyed the property insured, a stock of goods, assigned by George Shaw to appellee. After judgment against the insurance company, it appealed.

1. The insurance company took a premium note, which was past due when the fire occurred, and it contained the usual stipulation that the insurance should cease if note became overdue. Appellee relied upon waivers of various clauses of the policy and claimed an extension of the note, and these questions went to the jury under proper instructions. It is insisted that the verdict is without evidence to support it and that question turns on the capacity of the agent, Young, to bind the company by his waivers, knowledge or conduct in the several matters in issue.

There was evidence tending to prove that Young extended time of payment of the note until a date beyond the fire, that he permitted payment of $1.00 per week to be made upon the note before the new due date; and suggested this method of paying it out; that he had knowledge of and consented to B. G. Shaw selling out to George Shaw, and accepted payments from George Shaw with the knowledge of the transfer of ownership. Thirteen receipts were issued by Young for $1.00 each, and three of these were indorsed on the note, and all credited on the books of the company, and all of these payments were after original due date of the note. Young's name appears on the policy as solicitor. He testifies that he was city collector for appellant, and its agent for the purpose of writing insurance. It was shown that he solicited the insurance, wrote the application, delivered the policy, took the note, extended the time thereof, collected thirteen payments on it after its due date, credited part on note and all on the books of the company, and issued receipts therefor. The court submitted the question to the jury under this instruction:

"It is for the jury to say from all the facts and circumstances in the case whether Young was authorized by the company to waive the provision requiring indorsement of the transfer of the policy. In determining this question, the jury may consider Young's entire connection with the transaction."

The court will not disturb a verdict on this evidence, and under it the company is bound by the acts of its agent in consenting to the transfer and by the waivers alleged. *German-Am. Ins. Co.* v. *Harper*, 75 Ark. 98; *Fidelity Mut. Life Ins. Co.* v. *Bussell*, 75 Ark. 25; *People's Fire Ins. Co.* v. *Goyne*, 79 Ark. 315.

2. The court submitted to the jury, under a correct instruction given at instance of appellant, that the policy required a substantial compliance with its terms by both parties, and a failure to keep a set of books as contemplated by the policy would not be a substantial compliance and would avoid the policy. The books were submitted to the jury, and Shaw examined fully as to his method of keeping them and what they showed. It was for the jury to say whether they answered substantially the requirements of the iron safe clause, and there is evidence to sustain the finding that they did. The change in the rule on that subject by

Kirby's Digest, § 4375a, has just been recently considered in case of *Security Mutual Ins. Co.* v. *Berry, ante,* p. 92.

3. Other questions are presented and have been considered, but no matter of moment is raised which is not included in the discussion of the foregoing questions.

Finding no error, judgment affirmed.

BURNS *v.* BEASLEY.

Opinion delivered December 17, 1906.

EQUITY—JURISDICTION.—Where a complaint in equity fails to state a cause of action, the defect in the court's jurisdiction may be supplied by an answer and cross-complaint asking equitable relief.

Appeal from Cleburne Chancery Court; *George T. Humphries,* Chancellor; affirmed.

The substituted complaint of Beasley and another against B. F. Burns and wife was as follows: That on and prior to the 7th day of June, 1898, one Robert F. Payne was seized in fee of the lands in controversy, holding under patent from the United States; that on said date said Payne departed this life, leaving as his sole heirs at law the plaintiffs, defendant Fannie Burns and Forest Payne, and that said Fannie Burns was and is the wife of B. F. Burns; that since the 5th day of May, 1903, the said B. F. Burns has been the owner of an undivided one-fourth interest in said lands by virtue of a purchase and deed of conveyance from said Forest Payne, one of said heirs of R. F. Payne, thereby becoming the co-tenant of the plaintiffs and Fannie Burns, his wife. That said B. F. Burns had been a tenant under lease of said R. F. Payne for about two years prior to his said death, and still so holds as tenant of the said co-tenants or tenants in common, and that said Burns as such tenant had never paid any rents since the death of said Payne as aforesaid, and prayed that, by the proper order and decree of the court, defendant B. F. Burns be required to account to the court for the rents and profits of said lands since the 7th day of June, 1898, and for waste committed, that a sale of said lands be made and the proceeds thereof be divided as the rights of the parties shall appear, or that the plaintiffs be placed in posses-

sion of their share of said lands upon a division thereof being duly made, which division was alternately prayed.

A motion to strike this complaint from the files because it was alleged that it was substantially the same as the original was overruled. Defendants excepted.

Defendant B. F. Burns answered the substituted complaint, and denied every allegation therein, and alleged that said land was sold on the 12th day of April, 1886, for the taxes due thereon for the year 1885; that he was the purchaser; that on the 14th day of April, 1888, the clerk of said county executed to him a tax deed for said three tracts of land; that later, on the 10th day of December, 1903, he delivered said tax deed to the county clerk, who issued in their stead three several deeds in lieu of said deed so surrendered, and files copies of said three deeds as exhibits; that he owned the interest of said Forest Payne in said land; and filed as exhibit the deed from said Forest Payne, dated May 5, 1903. He also pleaded the statute of limitation, and prays: "Wherefore, the premises seen, this defendant prays that defendant's title to said lands be forever quieted as against the plaintiffs in this cause."

The court found that plaintiffs were entitled to one-half of the land, and ordered that same be partitioned between the parties. Defendant B. F. Burns has appealed.

W. L. Thompson, for appellant.

1. Appellees having a complete remedy at law, the chancery court was without jurisdiction, and the cause should have been transferred to the law court, where the question of title could have been submitted to a jury. 48 Ark. 333. The answer of appellant B. F. Burns, though declared in equity, stated only a legal defense. 31 Ark. 345; 22 Ark. 591; Story's Eq. Pl. § 389. The question of possession can not be tried in an action for partition. 44 Ark. 334; 47 Ark. 235; 71 Ark. 545; 70 Ark. 432.

2. In an action for partition, the petitioner must show such an estate in possession as entitles him to receive rents and profits, and he will be denied such relief until his possession is shown. 40 Ark. 136. If the petitioner has been ousted, or his rights denied by an alleged co-tenant, his remedy is plain,

adequate and complete at law. *Id.* Possession by one claiming title by virtue of a recorded deed is presumed to be under such deed; and where the statute of limitations is relied on by one having possession under such claim of title, the burden is on the plaintiff to show that the possession was permissive and not adverse. 56 N. H. 357; 63 Tex. 184; 47 Ark. 469. See also 27 Ark. 92.

George W. Reed, for appellees.

1. The statutory regulations for the partition of land do not take away the original jurisdiction of chancery. 19 Ark. 233. In most matters for the purpose of taking an account equity courts exercise concurrent jurisdiction with the courts of law. 31 Ark. 345. The jurisdiction of chancery to quiet titles to real estate and to remove clouds from titles is exclusive. 19 Ark. 139; 22 Ark. 103; 24 Ark. 431. Where an action at law has been brought in equity, the error should be corrected by motion to transfer to the proper court. It is no ground for demurrer. 37 Ark. 286.

Where it appears on the face of a tax deed that several tracts of land were sold together for the taxes due on the whole, it is void, and casts no cloud on the owner's title. 30 Ark. 579. If the tax sale were valid, and Payne disseized by virtue of the sale, yet, subsequent to the execution of the tax deed, Payne acquired title by seven years adverse possession. 34 Ark. 534.

2. The statute of limitations does not apply in favor of appellant because he has never held adverse possession. Payment of taxes does not constitute adverse possession. 45 Ark. 81. Having intentionally or negligently misled the appellees, appellant is estopped to plead the statute, even if he had had adverse possession. 55 N. J. Eq. 583; 74 Ill. 405; 80 Ky. 309; 67 Ind. 503; 117 Ia. 268; 97 N. C. 148. When Burns purchased Payne's one-fourth interest, he became a co-tenant with his wife and appellees. Freeman on Cotenancy, § 160. And there can be no adverse possession by husband or wife where both occupy the same premises. 18 Am. St. Rep. 113; 106 Ia. 715; 156 Ill. 586; 125 Mo. 118; Rodgers, Dom. Rel. § 199. Nor could he claim adversely to his wife's co-tenants. 2 Wood on Lim. § 266; 61 Ark. 527.

WOOD, J. The answer of appellant Burns to the substituted complaint of appellees set up tax title and possession thereunder, and asked to have same quieted. These allegations gave the chancery court exclusive jurisdiction, even if the substituted complaint failed to state a cause of action cognizable in equity. The court, having jurisdiction, properly retained the cause and determined the whole controversy. *Cockrell* v. *Warner,* 14 Ark. 345; *Shell* v. *Martin,* 19 Ark. 139; *Walker* v. *Peay,* 22 Ark. 103; *Branch* v. *Hickman,* 24 Ark. 431; *Sale* v. *McLean,* 29 Ark. 612; *Radcliffe* v. *Scruggs,* 46 Ark. 96; *Crease* v. *Lawrence,* 48 Ark. 312; *Goodrum* v. *Ayers,* 56 Ark. 93.

The finding of the court in favor of appellees on the issue of fact as to the statute of limitations was sustained by the evidence.

Judgment affirmed.

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DAVENPORT v. HUDSPETH.

Opinion delivered December 17, 1906.

REFORMATION OF INSTRUMENT—SUFFICIENCY OF PROOF.—To authorize reformation of a deed on account of mistake, the proof of the mistake must be clear, unequivocal and decisive.

Appeal from Marion Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This suit was begun by appellee in the Marion Circuit Court as an action of ejectment. Appellee set up that he had title and the right to possession of the land in controversy by virtue of a deed from J. F. Hudspeth and his wife, who deraigned title from one Rhea, who obtained patent from the United States Government in 1852.

Appellants answer, admitting possession and setting up title and the right to possession as follows:

That said J. F. Hudspeth was the father of the defendant Sallie Davenport, and that these defendants were living in the

Indian Territory, and said J. F. Hudspeth, being desirous of having the defendants return to this country and live near him in his declining years, and being the owner of the land in controversy, together with other lands adjoining it, for his love and affection for the defendant Sallie Davenport, and to induce her to return to this county, gave her in fee simple absolute the land in controversy, together with the S. E. ¼ of N. E. ¼ and N. ½ of N. E. ¼ of section 1, township 18 N., range 17 W., and the S. ½ of S. E. ¼ of S. E. ¼ of section 36 and S. ½ of S. W. ¼ of S. W. ¼ of section 31, township 19 N., range 16 W., on the 27th day of February, 1894, and that she accepted said lands from her father at the time by her agent, W. T. Davenport, and immediately entered into the possession of the same, on said date, and has held, used, and occupied said lands at all times since they were given to her as above stated, and has so held said lands at all times as her property, and claimed the same as her land openly and notoriously, and held it adversely to J. F. Hudspeth and to everybody else at all times since the 27th day of February, 1894, to the present time.

They further state that said J. F. Hudspeth at all times during his life recognized the defendant, Sallie Davenport, as the owner of the land in controversy.

Appellant filed a separate cross-complaint, which, in addition to the facts alleged and set up in their answer, contained the following:

That on the 9th day of March, 1904, said J. F. Hudspeth made a gift of the tract of land adjoining the land in controversy to the defendant, Jas. Hudspeth, and attempted to convey it in escrow to him, but by mistake of the draftsman the land in controversy was embraced in said escrow deed, and the said J. F. Hudspeth, being unable to read, did not discover said mistake, and did not know that said land was so included in said escrow deed. That sometime before the death of said J. F. Hudspeth he was informed of said mistake, and that said J. F. Hudspeth wanted to correct said mistake and took steps to do so, but was prevented from making said correction by the fraud and misrepresentations of the defendant; said defendant telling said J. F. Hudspeth that he had not made said mistake, and that he had not included the land in controversy in said escrow deed.

That the pretended deed on which said Jas. Hudspeth founds his action in this case was never delivered to him by said J. F. Hudspeth in person or by anyone else by the authority of said J. F. Hudspeth, and that the same is not a deed. That said Jas. Hudspeth procured said escrow to be placed on the records of Marion County without the authority or consent of said J. F. Hudspeth, and that said pretended deed is a cloud on the title of the plaintiff, Sallie Davenport, to the land in controversy, and should be canceled.

They prayed to have the cause transferred to the chancery court, and that the alleged pretended deed of James Hudspeth from J. F. Hudspeth be canceled, and that the title of Sallie Davenport to the land in controversy be quieted, etc.

The cause was transferred to the chancery court, whereupon the appellee filed an answer to the cross complaint, denying all of its allegations.

The court, after hearing the testimony, dismissed the cross-complaint of appellants for want of equity, and granted the relief prayed in appellee's complaint.

Woods Brothers and *Frank Pace,* for appellant.

Where a party is put into possession of real estate under a parol gift, and remains in possession of the same for the statutory period, such possession is adverse, and ripens into title, notwithstanding any claim of title that may be set up by the donor after having made the gift; and nothing will arrest the running of the statute except actual possession taken by the donor before the statutory period has elapsed. 30 Ark. 340; 39 Conn. 98; 85 Ky. 666; 93 Ky. 435; 55 Miss. 681; 6 Met. 337; 35 L. R. A. 835.

G. H. Perry, for appellee.

To justify a decree in favor of appellants, the proof should be sufficient to warrant a decree for specific performance against J. F. Hudspeth, had he lived and retained title and suit had been brought against him. 63 Ark. 100. If the rights of appellee had not intervened, and if Hudspeth had lived and retained title to the land, still, to overcome the deed from J. F. Hudspeth to Sallie Davenport, the proof must be clear, unequivocal and decisive. 95 U. S. 494; 71 Ark. 614; 75 Ark. 72. A

verbal promise of a parent of a gift to a child, without possession being given, is void and within the statute of frauds. Kirby's Digest, § 3654; 63 Ark. 100. The finding of the chancellor that there was no gift accompanied by possession prior to the conveyance to James Hudspeth will not be disturbed unless clearly against the weight of evidence. 73 Ark. 479; 71 Ark. 105; 68 Ark. 287.

WOOD, J. (after stating the facts.) The questions in the case, as stated by the learned counsel for appellants, are:

"First: Did J. F. Hudspeth give the appellant, Sallie Davenport, the land in controversy? Second, did he place her in possession of said land under a valid gift? Third, if she went into possession of said land under a valid gift, did she hold the same continuously and under claim of ownership under said gift for a period of seven years?"

It would doubtless be interesting to the parties litigant for the court to discuss in detail the evidence bearing upon these questions. But the record is voluminous, and the determination of these issues depends mainly upon questions of fact upon which the evidence in the record is conflicting. It will serve no useful purpose as a precedent to discuss pure questions of fact as they are presented in this case, and therefore we refrain from doing so. This is one of those unfortunate controversies between brother and sister which the courts are sometimes called upon to settle. Witnesses are adduced on each side whose testimony tends to support the respective contentions, but, the chancellor having found in favor of appellee, we think it is a case in which his finding should be very persuasive. It may be said in this case as was said by us in *Meigs* v. *Morris,* 63 Ark. 100: "To justify a decree in favor of appellants, the proof should be sufficient to have warranted a decree for specific performance against J. F. Hudspeth, had he lived and retained the title." The proof should be sufficient to warrant the reformation of the deed of J. F. Hudspeth to Sallie Davenport, so as to make it include the land in controversy.

Appellee relies upon a deed from his ancestor which embraces the land in controversy. Appellants claim that this occurred through a mistake of the draftsman who was instructed to draw a deed containing other lands, and by mistake included

the tract in controversy as well. In *McGuigan* v. *Gaines*, 71 Ark. 614, this court approved the following language by Bishop on Contracts, § 708. The author says: "In no case will the court decree an alteration in the terms of a duly executed written contract, unless the proofs are full, clear and decisive. Mere preponderance of evidence is not enough. The mistake must appear beyond reasonable controversy." Again the court said in *Goerke* v. *Rodgers*, 75 Ark. 72: "It is to avoid such honest misunderstanding, as well as to prevent advantage by unscrupulous parties, that the law requires that the evidence to overcome the written memorial must be clear, unequivocal and decisive." See also *Tillar* v. *Wilson*, 79 Ark. 256, and *Foster* v. *Beidler*, 79 Ark. 418.

We are convinced from a careful consideration of the evidence in this record that the chancellor had in mind the above principles, and correctly applied them by finding and decreeing in favor of appellee.

Affirmed.

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

Opinion delivered December 17, 1906.

1. JUDICIAL SALE—IRREGULARITY—CONFIRMATION.—Failure of the commissioner appointed by the court to make sale of lands in an overdue tax proceeding to state in his report that he had given the notice as required by the statute in such cases and to attach such notice to his report was an irregularity which did not affect the jurisdiction of the chancery court to affirm and approve same. (Page 172.)
2. SAME.—Failure of the commissioner in an overdue tax proceeding to show in his report that the lands in controversy were struck off to the State for any specified amount, or that he had certified to the county clerk the lands that were struck off to the State as required by law, did not affect the validity of a subsequent sale of such lands by the State. (Page 173.)

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

STATEMENT BY THE COURT.

This suit was begun by the appellant to quiet title to the N. W. ¼, S. W. ¼, sec. 30, T. 9 S., R. 22 W., in Nevada County.

Appellant claimed title from the Government through patent to the Cairo & Fulton Railroad Company, with which company it was consolidated.

To sustain its case, it introduced in evidence the patent of the United States to the State of Arkansas for the use and benefit of the Cairo & Fulton Railroad Company, and the certified copy of the articles of consolidation of the St. Louis & Iron Mountain Railway Company with the Cairo & Fulton Railroad Company, forming appellant as a corporation and thereby conveying the tract in controversy to it. Appellee Greeson filed an answer, setting up conveyance from Giles to him of the premises, setting up title in Giles from the State by mesne conveyances, and setting up title in the State by reason of the sale of the land under an order and decree of the chancery court of Nevada County under the overdue tax act of 1881.

Giles, the original defendant, answered, adopting the answer of Greeson. Defendants introduced in evidence the records of the chancery court of Nevada County in an overdue tax proceeding instituted under the act of 1881, showing the complaint was filed as authorized by the statute against the tract of land in controversy, among others, for overdue delinquent taxes. that warning order was issued and entered on record as required by statute, and that on August 10, 1882, decree was entered by the court at its regular term, which recites the entry of the warning order and recites:

"That it appears that the clerk of this court caused the said order to be published as required by law and did give the notice as required by law, and that the proof of the publication of which notice, verified as required by law, was filed as required by law."

And the court decreed that the above described land was subject to a tax penalty and costs of $11.05, and that it, with several hundred other tracts against which taxes were decreed as a lien, be advertised and sold by George Christopher, commissioner, on the 18th day of September, 1882.

On February 23, 1883, the commissioner filed his report,

showing as follows: On the 18th day of September, 1882, the day fixed for said sale, I sold all the said lands mentioned in the said decree as follows, towit: (here follows a description by legal subdivisions of lands mentioned in the decree and the amounts for which they were sold, but the tract in controversy is not included in the list) and the report continues as follows: "and that all the balance of said lands as described in said decree was sold to the State of Arkansas, all of which is respectfully submitted. [Signed] George Christopher, Commissioner."

Which said report, the record showed, was "submitted to the court, and upon examination the court approved and confirmed same in all things."

No advertisement or notice of sale by the commissioner was introduced in evidence in this case or in any way shown.

B. S. Johnson and *S. R. Allen,* for appellant.

The jurisdiction of the commissioner to sell the lands depended upon the notice of the sale as well as the decree under the law by which the proceeding was had. Act March 12, 1881, § § 9. 14. In overdue tax cases the report of sale and the confirmation constitute the conveyance to the State, and it must contain a particular description of the property sold and the price bid for each separate lot or parcel. Herman on Ex., 435, § 262; 61 Ind. 584; 48 Ind. 397.

W. V. Tompkins, for appellee.

WOOD, J., (after stating the facts.) The failure of the commissioner appointed by the court to make sale of the lands in the overdue tax proceedings to state in his report that he had given the notice as required by the statute in such cases and his failure to attach such notice to his report were, at most, irregularities which did not affect the jurisdiction of the chancery court to confirm and approve same. The fourteenth section of the overdue tax act (March 12, 1881), while requiring the commissioner making the sale to report "his proceedings to the court," and to "file it in the office of the court thereof," does not set forth what the proceedings are that he is required to report, nor does the statute anywhere make the report he files the only evidence of what he did. The statute requiring the filing of the report of his proceeding provided that the report should stand open for ex-

ceptions, that if exceptions were filed they should be disposed of summarily, that if any irregularity should be apparent the court should set aside sale, and order new sale, etc. Section 15 of that act provides that "whenever a report of such commissioner shall be confirmed, all objections to the sale and the proceedings thereunder shall be adjudicated in favor of the validity thereof," etc. These were not jurisdictional defects, but were irregularities which the confirmation and approval of the report by the court rendered impregnable to collateral attack.

Likewise the failure of the commissioner to show in his report that the land in controversy was struck off to the State for any specified amount. Likewise the failure of the commissioner to show in his report that he had certified to the clerk of the county the lands that were struck off to the State, as required by section, 12 of the overdue tax act.

This court in the recent case of *Kelly* v. *Laconia Levee District,* 74 Ark. 202, held that the failure of the commissioner to certify to the proper county clerk the sale of certain lands to the State will not affect the validity of a subsequent sale of such land by the State. We also said in that case that "the effect of confirmation was to complete the sale, the court having jurisdiction." That decision is controlling here. See also other decisions of this court to the effect that, the court having jurisdiction, its decree will not be set aside for irregularities on collateral attack. *Johnson* v. *Lesser,* 76 Ark. 465; *Arbuckle* v. *Matthews,* 73 Ark. 27; *Clay* v. *Bilby,* 72 Ark. 101, and the cases there cited.

Finding no error, the decree is affirmed.

BUTT v. STATE.

Opinion delivered December 17, 1906.

1. EVIDENCE—STATEMENT IN DEFENDANT'S PRESENCE.—In a prosecution of a senator for bribery, evidence that another senator, in defendant's presence, suggested an organization to control legislation and make money corruptly, to which defendant assented, was competent. (Page 177.)

2. CONSPIRACY—HOW SHOWN.—If the acts of two or more persons were aimed toward the accomplishment of some unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected, indicating a closeness of personal association and a concurrence of sentiment, a conspiracy may be inferred, though no actual meeting among them to concert means is proved. (Page 179.)

3. TRIAL—ORDER OF PROOF.—It is immaterial whether the evidence showing a conspiracy was introduced before or after the acts of the conspirators were proved, it being sufficient if on the whole case a conspiracy is shown. (Page 180.)

4. EVIDENCE—OTHER CONNECTED CRIMES.—If several crimes are so intermixed or blended with one another or so connected that they form an indivisible criminal transaction, and a complete account of any of them can not be given without proving the other, any or all of them are admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme. (Page 181.)

5. WITNESS—CHARACTER OF ACCUSED.—A reversal will not be allowed because testimony as to appellant's character was not confined to a time anterior to the commencement of the prosecution if the testimony of the witness shows clearly that he referred to a time previous to the prosecution, and no special objection to the testimony on that ground was made. (Page 183.)

6. ACCOMPLICE—HOW TESTIMONY WEIGHED.—In order to determine the truth or falsity of the testimony of an accomplice, it should be weighed by the same rule as the testimony of other witnesses is weighed; that is, by considering their connection with the crime and the defendant, their interest in the case, their appearance on the stand, and the reasonableness of their testimony and its consistency with other facts proved. (Page 184.)

7. CRIMINAL PROCEDURE—BURDEN OF PROOF.—While the guilt of an accused must appear upon the whole case beyond a reasonable doubt, it is not necessary that the different items of evidence which go to establish guilt should be shown beyond a reasonable doubt. (Page 184.)

8. ACCOMPLICE—WHO IS NOT.—Neither silence in the presence of crime, nor failure to inform the officers of the law when one has learned of the commission of a crime, makes one an accomplice. (Page 184.)

9. TRIAL—ARGUMENT OF PROSECUTING ATTORNEY.—A remark of a prosecuting attorney in his closing argument to the jury that in his opinion the State had made the strongest case against appellant that had been made in any of the "boodle" cases, was not prejudicial where the court held the remark improper and instructed the jury to disregard it. (Page 185.)

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

J. V. Walker and *Sellers & Sellers,* for appellant.

1. The testimony of M. D. L. Cook that he gave money to Covington was incompetent and inadmissible. Before the acts and declarations of a third person may be shown against the party on trial, it must be proved with reasonable certainty that the defendant and the person whose acts or declarations are offered in evidence have formed a conspiracy to commit the crime for which the defendant is on trial; also that the unlawful conspiracy still exists, and that the acts or conduct of the conspirators offered in proof were in execution of the unlawful purpose. 9 S. W. 50; 57 Pac. 1016; 69 S. W. 153; 65 S. W. 308; 11 Am. St. 581; 40 N. Y. 228.

2. Before Covington's acts could be shown by Cook's testimony, the testimony itself should be sufficient to show *prima facie* that Butt and Covington had formed a conspiracy to bribe. 22 Am. & Eng. Enc. Law (2 Ed.), 1294; 6 Words & Phrases, 5549; Wharton, Crim. Ev. § § 440, 698.

3. The admission of McNemer's testimony as to defendant's reputation in Little Rock was erroneous. At the time of trial, rebutting testimony upon character and reputation, like the testimony in chief, must be confined to a time anterior to the charge under investigation. 12 Cyc. 415; 20 Pac. 396; 38 Pac. 743; Wharton, Crim. Ev. § 63; 20 O. St. 460; 3 Enc. Ev. 27; Winst. (N. C.) 151; Underhill, Crim. Ev. 104; 80 Ky. 480; 46 Ala. 175; 90 Ala. 589; 2 Wig. Ev. 1966; 1 Bishop, Crim. Pros. § 1118.

4. The court erred in its fourth and fifth instructions as to testimony of accomplices. The fourth is argumentative, and the two together tell the jury to convict if there is any testimony, aside from that of the accomplices, tending to connect the defendant with the commission of the crime charged, whether they believe the accomplices or the corroborating witnesses or not. It has always been the rule to instruct the jury that they should view testimony of accomplices with caution. 33 Pac. 98; 12 Cyc. 453; 17 Pac. 519; 11 Enc. Pl. & Pr. 325. To sustain a conviction upon the testimony of an accomplice, he must be corroborated both as to the commission of the crime and the connection of the party charged. 1 Enc. of Ev. 105; 6 S. W. 318.

5. The question of whether witness Hinkle was an accom-

plice or not should have been submitted to the jury. By his own testimony he stood in the attitude of an accomplice, or at least it justified submitting the question to the jury. 26 S W. 830; 48 S. W. 581; 62 S. W. 749; 1 Thompson on Trials, § 1042; 28 Minn. 223; 1 Enc. of Ev. 111; 11 Pac. 797; 42 Pac. 215; 25 S. W. 629; 42 S. W. 301.

6. The testimony corroborative of an accomplice should be of a substantial kind, and the court erred in refusing so to instruct the jury. 75 Ark. 540.

7. The cause should be reversed because of statements of the prosecuting attorney in his closing argument to the effect that he had made the strongest case against the defendant of any of the boodle cases. The prejudicial effect of this statement could not be overcome by a reprimand from the court. 70 Ark. 305.

R. L. Rogers, Attorney General, and *Lewis Rhoton*, Prosecuting Attorney, for appellee; *James A. Gray* and *De E. Bradshaw*, of counsel.

1. In proof of a conspiracy great latitude must be allowed. The jury should have before them every fact which will enable them to come to a satisfactory conclusion. 130 Ind. 467; 110 Ia. 81; 137 Pa. St. 255; 107 Fed. 753. Hence the testimony of Cook that he gave money to Covington, and of Hinkle as to the meeting in Covington's room, was competent.

Much discretion is left to the trial court in a case depending on circumstantial evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact. 55 Conn. 46; 163 Mass. 411; 107 N. C. 822; 159 U. S. 590; 8 Cyc. 678; 77 Ark. 444.

Where the whole evidence shows that a conspiracy actually existed, it will be considered immaterial whether the conspiracy was established before or after the acts and declarations of the members. 122 Ill. 337; 12 Tex. App. 65; 17 Kan. 298; 3 Star Route Trials, 3188; 181 Mo. 173; 99 N. W. 47; 90 Minn. 183; 132 Mich. 537; 4 Am. Crim. Rep. 78; 134 Mich. 537; 157 Ind. 57.

2. Although, in the examination of the witness McNemer as to defendant's reputation, the questions and answers were couched in the present tense, yet it is clear, both from the

direct and cross-examination, that the witness was basing his answers upon information received prior to the commission of the offense for which the defendant was being tried.

3. The court properly charged the jury in its fourth instruction that in weighing the testimony of an accomplice they should determine its truth or falsity by the same rules as they would the testimony of other witnesses. 59 Ark. 422; 98 Cal. 278; 26 Ill. 344; 58 Me. 267; 57 Mich. 505; 39 Miss. 570; 22 Neb. 481; 109 N. Y. 251; 2 Leigh, 769.

There was no error in the fifth instruction given by the court, especially since the court further charged the jury that there could be no conviction upon the testimony of Adams and Cook, unless there was other evidence, independent of theirs, which, of itself, without reference to their testimony, proved, or tended to prove, that the crime charged in the indictment was committed, and that the defendant was a party to its commission.

4. Appellant's objection to the prosecuting attorney's statement in his closing argument is untenable. It was a mere matter of opinion, and so stated at the time. It can not be held to have prejudiced the appellant. 58 Ark. 368; 74 Ark. 256.

5. There was no error in the court's refusal to submit to the jury the question as to whether or not Hinkle was an accomplice, because there is not only no conflict in the testimony, but there is no testimony that could justify a finding that he was an accomplice. 43 Ark. 367; 1 Am. & Eng. Enc. Law, (2 Ed.), 390; 42 Pac. 215; 13 Pac. 896.

RIDDICK, J. This is an appeal from a judgment convicting the defendant of the crime of bribery and sentencing him to pay a fine of two hundred dollars and to be imprisoned in the State penitentiary for the term of two years. The defendant was a member of the State Senate in 1905 when a bill appropriating eight hundred thousand dollars for the completion of the State Capitol was pending before the Senate. The conviction was based on a charge that defendant paid Senator Adams one hundred dollars to induce him to vote for this bill. The evidence, so far as necessary to show the questions of law involved, was as follows:

It was shown by the testimony of witness Hinkle that, soon after the organization of the Senate in 1905, he, with a few

other senators, including defendant, Butt, was present in the room of Senator Covington at the hotel, and that in the course of their conversation Covington said that by standing together they could control legislation, and in substance suggested that they organize and make money by demanding and receiving pay for the passage or defeat of bills. The witness said that he himself did not agree to this suggestion, though he made no response to it, but sat silent for a few minutes while it was discussed by the others, and then left the room and did not return. He further stated that he did not remember what the defendant Butt said in reply to this proposition of Covington, "more than that he seemed to agree," and that Butt thereupon made out a memorandum of the names of those senators that it was believed could be induced to enter the combination.

It was shown by another witness, Cook, that two or three months afterwards, towards the latter part of the session, when bill No. 370, to appropriate eight hundred thousand dollars for the completion of the State Capitol building and for other purposes, had been introduced in the Senate, Caldwell & Drake, a firm of contractors who had a contract for erecting the new Capitol, and who were especially interested in the passage of this bill, paid to witness Cook a large sum of money, over twelve thousand dollars, to be used to influence members of the Legislature. A large part of this, some four or five thousand dollars, was paid by Cook, acting for Caldwell & Drake, to Senator Covington, to be used for that purpose.

It was further shown by the testimony of Senator Adams that the defendant Butt paid him one hundred dollars to vote for the bill, with the promise of four hundred more when the bill became a law. After the Senate adjourned and the grand jury began to investigate these matters, this witness saw the matter in a new light, and says that he returned the money to Butt. Senator Hardy, another witness, testified that while the bill was pending Butt stated to him that there was a rumor that a large amount of money was being used to pass the bill, and that he could get five hundred dollars for voting for the bill. The language of this witness is not quite clear as to whether Butt stated that the wtiness or Butt could get the money. But, let it be taken either way, and it will seen by reference to the testi-

mony of Adams set out in the transcript that Butt approached Hardy in much the same way that he did Adams. Another witness, Hinkle, testified that after the bill was passed it was rumored that money had been used, and that, being informed that Butt had paid Adams one hundred dollars to vote for the bill, he questioned Butt about it; that at first Butt denied it, but finally admitted that he had paid Adams money. Still another senator, Holland, testified that after the Senate had adjourned, and when Covington was being tried, he was told that Adams had returned the money, and he asked Butt about it, and Butt admitted that Adams had returned it, but later made a different statement.

Butt and Covington, who testified for him, both denied about all of this incriminating testimony. This testimony need not be set out here, for the question now is whether the evidence introduced by the State was competent and sufficient to sustain the judgment.

Counsel for appellant contends that there was not sufficient evidence of a conspiracy between Covington and the defendant, Butt, to justify the admission of the declarations and acts of Covington as evidence against the defendant. Before discussing that question, we will say that no declaration by Covington made in the absence of Butt was admitted in evidence. The statement of Covington, made in the presence of Butt, suggesting an organization to control legislation and to make money corruptly, to which Butt assented, is competent, whether there was a conspiracy or not. For that is, in effect, only showing the act of Butt himself. The statement of Covington was admitted as explanatory of this act, and to show to what Butt assented. But, if this evidence be true, it is difficult to believe that no conspiracy existed. When a conspiracy has been shown, then the acts and declarations of one conspirator in furtherance of the common design may be shown as evidence against his associates, and we think the evidence in this case sufficient to show that there was a conspiracy between Covington and Butt and others to pass Bill 370 through the Senate by bribery.

In a recent case decided by this court the following extract from Underhill on Criminal Evidence was quoted with approval: "Direct evidence is not essential to prove the conspiracy. It

need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely part of some complete whole. If it is proved that two or more persons aimed by their acts toward the accomplishment of the same unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected and co-operative, indicating a closeness of personal association and a concurrence of sentiment, a conspiracy may be inferred, though no actual meeting among them to concert means is proved." This is a clear and correct statement of the law. Underhill on Criminal Evidence, § 491; *Chapline* v. *State,* 77 Ark. 444.

Nor is it material now whether the evidence showing the conspiracy was introduced before or after the acts of the confederate were received in evidence, it being sufficient if on the whole case a conspiracy is shown. Now, a conspiracy is a combination between two or more persons to do something unlawful or to accomplish something lawful by unlawful means. *Commonwealth* v. *Waterman,* 122 Mass. 57; 6 Am. & Eng. Enc. Law, p. 832.

The evidence tends to show that early in the session at a meeting in his room, Covington made the suggestion to the defendant, Butt, and a few other senators present that they organize for the purpose of controlling legislation and making money out of it. The defendant, Butt, did not dissent from this bold proposition to combine for the purpose of extorting bribes, in other words, to go into it as a regular business, but, on the contrary, if the witness told the truth, he showed a ready response to it, and at once began in a practical way to carry out the suggestion by making a memorandum of the names of those senators who, it was believed, could be induced to join the combination. Later in the session we find these two men doing the very thing that was on that occasion proposed by one of them and assented to by the other. We find that one of them received several thousand dollars which he takes under a promise to use for the passage of this Capitol bill through the Senate, and shortly

after we find the other acting as a distributor of money for the passage of this bill. Now, it is certain that Butt did not pay out his own money in such liberal sums on this bill. If he paid out money, it was furnished by some one financially interested in the passage of the bill. The evidence shows that there were no others thus interested except the firm of Caldwell & Drake. They did pay out a large sum to bribe senators to vote for this bill. It is therefore morally certain that, if Butt paid out money to bribe Adams on this bill, the money he used came from Caldwell & Drake, either directly or through some agent of theirs. As the evidence shows that this money of Caldwell & Drake was paid to Covington, who was to secure the passage of the bill with the money paid him, it seems probable that Butt was acting under Covington. But, whether that be so or not, they were both engaged in the same undertaking to pass this bill by the corrupt use of money, and were acting for the same principal. Taking the whole evidence together, we think it was amply sufficient to show a conspiracy between them.

But, even if we concede that no conspiracy was shown, a majority of us think that this evidence was competent on another ground. For, while you cannot show separate and isolated crimes or facts having no bearing on the crime under investigation, you can always show all the circumstances connected with the particular crime, even if in doing so you have to bring to light other offenses. You can go back to the time when the intention to commit the crime under investigation was first formed and trace it through all the intervening circumstances to the consummation of the criminal act, and thus lay before the jury the whole transaction. This is necessary in order that they may correctly judge the motives and conduct of the defendant under investigation. "If," says the author of a recent work, "several crimes are so intermixed or blended with one another or connected so that they form an indivisible criminal transaction, and a complete account of any of them can not be given without showing the other, any or all of them are admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme." Underhill, Crim. Ev. § 88.

You might as well expect that one should be able to judge correctly the merits of a play, and of the motives and conduct of

the actors as displayed therein, by witnessing only the last scene of the last act, as to expect, where the crime under investigation is part of a connected scheme, that the jury should be able to determine the motives of the defendant and judge correctly of his guilt or innocence without any knowledge of the origin of the crime or the circumstances and motives that led up to it. The law does not blindfold courts and juries in that way, and it is always competent to show the beginning as well as the end of the criminal transaction.

Now, as before stated, the evidence tends to show that this crime had its beginning early in the legislative session. The rising curtain discloses defendant and certain other senators, guardians of the State, assembled in the room of Covington, President of the Senate, gravely discussing, not the good of the State, but how to take over the business of Cox and Cook, two noted lobbyists, control legislation, and make money out of the passage of bills. This was the beginning. Later, when the bill appropriating eight hundred thousand dollars of the State's money was introduced in the Senate, in which bill Caldwell & Drake, contractors of large means and rather lax ideas about the proper use of money, were greatly interested, an opportunity was presented to put into practice the plan agreed to by Covington and defendant at the beginning of the session.

They did not, however, put Cox and Cook out of business, but acted with them. Cook says that Caldwell put up over twelve thousand dollars to pass this bill. Of this Cook gave Covington $7,000, but $2,500 went for another purpose, leaving about $4,500 to be used in the passage of the bill through the Senate, with the promise of more if it became a law. Cook does not state what he did with the remainder, but he no doubt retained a liberal percentage. Cox appears only in the misty background, but he no doubt got his percentage also. So that the amount paid to Covington probably represents the bulk of that expended on the Legislature. With this sum Covington was to pass the bill through the Senate. The evidence does not directly show to whom Covington distributed this money, or how much of it he retained himself, but it shows that very soon after it was placed in his hands the defendant appeared as the distributor of money to secure the passage of this bill.

As the testimony of Hinkle shows that Covington knew that Butt was ready and willing to engage in a venture of that kind, it, as before stated, seems highly probable that, if Butt paid out any money to secure the passage of this bill, he secured it from Covington. These transactions, from the time the money was paid over by Caldwell to Cook until a portion of it was paid to Adams by the defendant, were all part of the same scheme to pass this bill by buying the votes of senators. The evidence that money was paid by Caldwell to Cook and by Cook to Covington for the passage of this bill is competent because it tends to show where Butt procured the money which he paid to Adams and explains the motives that lay behind this act of Butt. He had no personal interest in the passage of the bill, and there was no reason why he should squander money in that way. If it could not be shown where this money probably came from, the testimony of Adams that Butt paid him money to vote for the bill would seem unreasonable. But the whole thing is cleared when you trace the crime back to its source and view the whole transaction. You then see that Butt was not acting for himself alone, but that behind him was a party interested and willing to pay out large sums of money on this bill. Caldwell did not deal directly with these corrupt legislators, but his desire to make money out of the expenditure for which this bill provided was the moving force that led to this crime, and it was competent to show that he paid money and to trace this money through the different agents into whose hands it came in order to show the whole of the criminal transaction and to explain the motives of the different actors therein. A part of the route that the money took is shown by circumstances only. But, assuming that the witnesses spoke the truth, these circumstances are quite convincing, and to repeat again makes it seem very probable that the money used by Butt came through Covington, and that the whole of this evidence relates to the same criminal scheme. But whether he received it from Covington or not, the evidence tends strongly to show that the act of Butt was only a detail in a larger scheme being carried out by Cox, Cook, Covington and others, and the whole can be shown. We think there can be no doubt of its competency. *Melton* v. *State*, 43 Ark. 368.

The objection to the testimony of McNemer, a witness who

testified for the State in rebuttal as to the character of this defendant, on the ground that it was not confined to a time anterior to the commencement of the prosecution, is based entirely on the form of the question propounded to this witness and his answers thereto. In these the present tense is used, but his testimony shows clearly that he refers to a time previous to the prosecution. No special objection was made at the trial to this testimony on that ground, and the exception must be overruled.

Coming now to the charge of the court, objection is made to the fourth instruction given for the State on the ground that "it overrules the statute, and tells the jury that an accomplice for the purpose of the trial is to be considered the equal of any other witness." But this is not so. The instruction says that, in order to determine the truth or falsity of the testimony of an accomplice, it should be weighed by the same rule as the testimony of other witnesses is weighed. This is correct, for the testimony of other witnesses is weighed by considering their connection with the crime and the defendant and their interest in the case, their appearance on the stand, and the reasonableness or unreasonableness of their testimony and its consistency with other facts proved in the case. The testimony of an accomplice should be weighed in the same way.

Instruction number 8 requested by defendant was clearly erroneous, for it declared that the jury should not consider the fact that Cook delivered money to Covington to be used in the passage of bill No. 370, unless they found "beyond a reasonable doubt that such money or some part of it was delivered to defendant for the purpose of use in the passage of the bill." Leaving out all other objections, this court has several times held that the different items of evidence that go to establish guilt do not have to be shown beyond a reasonable doubt. That doctrine only applies to the guilt or innocence of the defendant on the whole case. As this instruction was properly rejected on that ground, we need not notice the other objections urged to it.

The contention is made that the question of whether or not the witness Hinkle was an accomplice should have been submitted to the jury. I felt some doubt myself on this point at first, but the definition of an accomplice quoted by appellant

from Wharton shows that the evidence in this case falls short of showing that Hinkle was an accomplice. Wharton, Criminal Ev. § 440. Mere silence in the presence of a crime, or the mere failure to inform the officers of the law when one has learned of the commission of a crime, does not make one an accomplice. Hinkle may have been an accomplice, but the evidence in this case does not show it, and the court did not err in refusing to submit the question to the jury. *Melton* v. *State,* 43 Ark. 368; *Carroll* v. *State,* 45 Ark. 539.

We have carefully considered the other objections urged to the rulings of the court in giving and refusing instructions, and in our opinion none of these are tenable.

The prosecuting attorney in his closing argument to the jury said that "in his opinion the State had made the strongest case against Butt that it had made in any of the boodle cases." On objection being made, the court held the remark to be improper, and instructed the jury to disregard it. This ruling of the court was correct, for there was no need to make such a comparison. But, apart from that, the remark was in effect nothing more than the expression of an opinion by the attorney for the State that the case against the defendant was a strong one, and as such we doubt if it could under any circumstances be treated as prejudicial.

This brings us to the question as to whether the evidence was sufficient to sustain the verdict. We have already noticed this evidence, and it need not be repeated here. Whether the witnesses whose testimony implicates defendant and others in this crime spoke the truth was a question for the jury, and not for us. In discussing the case we have assumed that those facts were established which the jury had the right to find from the testimony before them, and the same rule must be applied on this point. Now, one senator testified positively and explicitly that the defendant paid him a bribe of one hundred dollars as alleged in the indictment. Three other senators testified to facts which tended to connect defendant with the crime and to show that he was guilty. Opposed to this testimony of the State is the testimony of the defendant and another senator who was accused of a similar crime, and who the evidence in this case tends to show was implicated in the crime charged against defendant.

It was also shown that defendant had a good character previous to this prosecution. This evidence of his character is probably the most potent evidence in his behalf. In view of the fact that the defendant had previously borne an excellent character, and that it seems unnatural that a man of such character would so soon yield to temptation and be guilty of such a shocking disregard of his duty, there may be those who will disbelieve the evidence against him.

But, although a number of witnesses testified to the good character of the defendant, and only one testified to the contrary, yet the testimony of this witness received some confirmation from the lips of the defendant himself. For defendant, while on the witness stand, after saying that he knew that Tom Cox, whom the evidence tends to implicate in this crime, had the reputation of being a "lobbyist and boodler," admitted that he had written to Cox and solicited his support in defendant's race for the presidency of the Senate, and had visited the home of Cox to see him when he was confined to his room on account of illness. Defendant gave explanations of these acts consistent with honest intentions on his part. But these admissions and the explanations which the production of this letter to Cox forced him to make may have aroused in the minds of the jury some suspicion that his character was not as good as his reputation. But while character and reputation may in doubtful cases be weighed with the other evidence in deciding whether one is guilty or not, it is no excuse or justification for crime. The jury have considered the evidence of defendant's character in connection with the other facts, and have found that he is guilty. After a full consideration of the evidence as found in the transcript, it makes the same impression on us, and we are of the opinion that the verdict was right.

Finding no error, the judgment is affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. SPARKS. 81 187 / 82 391

Opinion delivered December 31, 1906.

1. PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE OF INFANT.—Only that degree of care and prudence may be expected of an infant which a child of his age should exercise. (Page 190.)
2. CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—Whether an infant under ten years was negligent in attempting to cross a railroad track in front of a freight caboose was properly left to the jury. (Page 190.)
3. SAME—BURDEN OF PROOF.—An instruction to the effect that contributory negligence was an affirmative defense, and that the burden was on defendants to establish it, was not objectionable as conveying the idea that the defendant must introduce evidence to show contributory negligence, even though it was shown by the plaintiff's evidence. (Page 190.)
4. SAME—BURDEN OF PROOF—SATISFACTION OF JURY.—An instruction that contributory negligence must be shown "by a preponderance of the testimony to the satisfaction of the jury" does not require more than a preponderance of the testimony. (Page 190.)
5. APPEAL—INSTRUCTION—GENERAL OBJECTION.—A general objection to an instruction is insufficient to point out merely formal objections on appeal. (Page 191.)
6. EVIDENCE—CUSTOM.—Where there was no evidence that plaintiff was endeavoring to jump upon or ride the car which injured him, evidence that he had previously been in the habit of riding cars was inadmissible. (Page 191.)
7. NEGLIGENCE—EVIDENCE.—Evidence that a railway track was in a populous town, and that pedestrians frequently used it as a passway, was admissible to show the necessity of increased vigilance in keeping a lookout when cars were pushed or backed along the track at that place. (Page 191.)
8. DAMAGES—EXCESSIVENESS.—Where plaintiff, a bright boy of ten, lost his foot through defendant's negligence, and suffered greatly, a verdict in his favor of $10,000 was not excessive. (Page 191.)

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

B. S. Johnson, for appellant.

1. This was an unusually bright boy, ten years of age, who had often walked along the railroad tracks to and from school. By his own testimony it appears that he frequently had

to get out of the way of cars, knew the risks incident to his walking along the tracks, and that it was necessary to his own safety to look out for approaching cars. Under this state of facts it was negligence on his part to walk along the track toward the cars by which he was injured, and while thus walking to continue looking back in the direction from which he was walking until struck. 49 Ark. 257; 67 Ark. 240. No amount of youthful recklessness can supply the place of proof of negligence on the part of the defendant. 57 Ark. 461.

2. The seventh instruction given for plaintiff was erroneous, because (1) if contributory negligence is disclosed in plaintiff's testimony, there is no burden on the defendant to prove it by a preponderance of evidence (Beach on Contributory Neg. 448); (2) because it tells the jury that contributory negligence must be established by a preponderance of the evidence, to the *satisfaction* of the jury, which is equivalent to saying that it must be proved beyond a reasonable doubt, and places a greater burden on defendant than it should bear. 89 S. W. 762; 15 S. W. 575; 40 S. W. 398; 15 S. W. 556; 69 Ark. 537; 52 Ark. 517; 37 Ark. 588; 59 Ark. 426; 130 Ala. 504; 100 Ala. 146; 93 Ala. 425; 169 Ill. 301; 83 Ill. 85; 11 Wyo. 482.

3. When the defendant alleged in its answer, and put in issue as a defense, that the plaintiff received his injuries solely on account of his own contributory negligence in attempting to catch and ride upon the car in passing, and the plaintiff on examination denied having attempted to do so at the time of the injury or at any time previously, it was competent for the defendant to introduce testimony to contradict the plaintiff on this point and to establish the allegation, and the court erred in excluding it.

4. Evidence of the custom of the public in using the track of the railway company was inadmissible, and should have been excluded. 46 Ark. 522; 1 Dill. 579.

O. A. Graves, O. D. Scott and *W. H. Arnold,* for appellee.

1. There is no proof whatever that plaintiff, who at the time of injury was barely past nine years of age, was a boy of more than ordinary intelligence.

A child can only be held to such degree of care and caution as may reasonably be expected of one of his age and expe-

rience—never to that degree which is required of one of mature age. Shearman & Redfield on Neg., § 73. And the jury under proper instructions have passed upon the question of the boy's negligence in this case. 68 Mich. 94. But, even if plaintiff had been chargeable with the degree of care required of a mature person, and granting that he saw the cars as he walked along the ends of the cross ties, he must necessarily have seen that they were disconnected from a locomotive, and for a short time, at least, harmless; then if he started to cross the track during this interval, as appears from undisputed evidence, he is not chargeable with negligence. 61 S. W. 58; 104 Fed. 741; 76 Ark. 227; 79 Ark. 137.

2. The only objection raised by defendant to the seventh instruction below was that it failed to tell the jury that the burden did not attach to defendant to show plaintiff's contributory negligence if it was shown by his own testimony, and that objection has been adjudicated against plaintiff's contention. 78 Ark. 251. Appellant can not object here for the first time to the use of the words "to the satisfaction of the jury," in the instruction. It was appellant's duty to point out wherein it was objectionable, and should have asked the court for a proper instruction. 88 Wis. 521; 35 Mo. App. 321; 14 S. E. 593; 53 N. E. 282; 47 Mo. App. 519; 17 So. 445; 8 So. 500; *Ib.* 571; 3 S. E. 418; 140 U. S. 76; 27 Pac. 34; 132 N. Y. 459; 13 S. E. 679; 71 Ark. 317; 73 Ark. 531; *Ib.* 591; 74 Ark. 436; 75 Ark. 325.

3. There was no testimony that the plaintiff attempted to catch and ride on the car at the time of his injury, and evidence of his doing so on other occasions was inadmissible. 76 Ark. 302.

4. From the facts in the case the jury could fairly find that plaintiff was not capable of being guilty of contributory negligence, hence the judgment will be sustained. 72 Ark. 1.

RIDDICK, J. This is an action brought by Willie Sparks, a minor, by his next friend to recover damages for an injury caused by one of the cars of the defendant railway company. At the time of the accident Willie Sparks, a boy between nine and ten years of age, was returning from the place where he attended school to his home. He and a number of other school

children walked along the side of the railway track, and then attempted to cross the track. The employees of the company had left a caboose with three freight cars attached standing on the track near where the boy attempted to cross. Just before the boy attempted to cross the track another car was pushed or kicked against these cars and caboose which were standing on the track, and caused them to back down the track. While thus moving, the caboose struck the plaintiff, Willie Sparks, and the result was that his foot was crushed to such an extent that it was necessary to amputate it.

The jury returned a verdict in favor of plaintiff, and assessed his damages at $10,000. Judgment was rendered against the company for that amount, and it appealed.

It is said that the plaintiff, Willie Sparks, was guilty of contributory negligence, but that question was submitted to the jury under proper instructions, and, considering that plaintiff was at the time of the accident under ten years of age, we think that the circumstances are sufficient to support the finding of the jury. It has been frequently held that a child is not required to exercise the same capacity for self-preservation and the same prudence that an adult should exercise under like circumstances. You can reasonably expect of a boy between nine and ten years of age only that degree of care and prudence that a boy of that age or of his degree of intelligence should exercise. What would be ordinary care for such a boy might be culpable negligence in an adult. *Dowling* v. *Allen,* 88 Mo. 293; *Ridenhour* v. *Kansas City Ry. Co.,* 102 Mo. 283; *Railroad Company* v. *Gladmon,* 15 Wall. (U. S.) 401; *Lynch* v. *Smith,* 104 Mass. 52; 7 Am. & Eng. Enc. Law (2 Ed.), 405.

The evidence tends to show that the defendant company was guilty of negligence in allowing these cars to be pushed or kicked along its track through a populous town without any lookout on them to guard against accidents to persons and property, and we think the question as to whether the plaintiff was guilty of contributory negligence in failing to look up and down the track as he walked upon it was a question for the jury.

An instruction of the court told the jury that contributory negligence was an affirmative defense, and that the burden of

proof was on defendants to establish it "by a preponderance of the testimony to the satisfaction of the jury." Counsel for defendant contends that this instruction was erroneous, for the reason that, while usually the burden is on the defendant to show contributory negligence, yet it is sufficient if shown by the evidence introduced by plaintiff; and further that the use of the word "satisfactory" was improper, and rendered the instruction erroneous and prejudicial. But it is evident, when the whole charge is considered, that the court did not intend by this instruction to convey the idea that the defendant must introduce evidence to show contributory negligence, even though it was shown by the evidence of plaintiff. It is equally plain, we think, that the court did not, by saying that contributory negligence must be "established by a preponderance of the testimony to the satisfaction of the jury," intend to require more than preponderance of the evidence. In fact, the instruction says that such defense must be shown "by a preponderance of testimony." The use of the word *satisfy* or *satisfaction* in such connection has been criticised as inaccurate, and there was no need to use it to express the idea intended. But no special objection was made to this instruction on the grounds mentioned, and it is too late to raise such formal objections on appeal. *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325; *Thomas* v. *State,* 74 Ark. 436; *St. Louis, I. M. & Sou. Ry. Co.* v. *Norton,* 71 Ark. 317; *Aetna Ins. Co.* v. *Ward,* 140 U. S. 76; *Wells* v. *Higgins,* 132 N. J. 459.

There was no evidence in this case that the plaintiff attempted to jump upon or ride this car, and the evidence offered by defendant that he had previously been in the habit of riding cars was properly rejected.

It was proper to show that this railway track was in a populous town, and that pedestrians, both young and old, frequently used it as a passway, to show the necessity for increased vigilance in keeping a lookout when cars were to be pushed or backed along the track at that place.

The damages allowed were liberal, but, considering the fact that plaintiff, a young and bright boy, lost his foot, that he suffered greatly, we are not able to say that the damages assessed were excessive.

Finding no error, judgment affirmed.

MINTON v. MINTON.

Opinion delivered December 24, 1906.

JUSTICE OF THE PEACE—JURISDICTION—RECOVERY OF RENT.—An action to recover rent does not lie in a justice's court except where the relation of landlord and tenant exists.

Appeal from Sebastian Circuit Court; *Styles T. Rowe*, Judge; affirmed.

Spradling & Evans, for appellant.

1. If the relation of landlord and tenant existed between the parties, the court had jurisdiction, and plaintiff was entitled to recover.

2. The question whether or not this relation existed was one for the jury to decide from the whole testimony under proper instructions.

T. B. Pryor, for appellee.

The title to the land was necesarily involved in this suit, and the justice of the peace was without jurisdiction to try it. Const. 1874; 7 Ark. 305.

McCULLOCH, J. Appellant sued appellee before a justice of the peace to recover an amount alleged to be due for rent of land, and to enforce, by attachment of the crop on the land, the landlord's lien. An appeal was taken from a judgment rendered by the justice of the peace to the circuit court, where the case was tried *de novo*, and the trial resulted in a verdict and judgment for the defendant. The court gave to the jury a peremptory instruction to return a verdict in favor of the defendant.

The instruction was correct. Appellant failed to prove a contract concerning the occupancy of the land or for payment of rent. There was no proof of facts tending to establish the relation of landlord and tenant between appellant and appellee. On the contrary, appellant's own testimony shows affirmatively that there was no such contract.

Appellee had occupied the farm in question for several years as tenant of Mrs. Bennight, the former owner. Appellant bought it at a sale under execution in 1902 against Mrs. Bennight. The title was in dispute between appellant and Mrs. Bennight, and appellee merely announced his intention of remaining on the land

until the end of the anticipated lawsuit concerning the ownership thereof.

The action involved the title to the land and plaintiff's right to recover for the use and occupation thereof. He does not claim to have had a contract with appellee for the payment of rent, but bases his right to recover solely upon his ownership of the land by purchase under the execution sale and appellee's declaration of his intention to remain on the land until the end of the suit about the title. Appellant offered to introduce the sheriff's deed as evidence of his title, and excepted to the ruling of the court excluding it.

Justices of the peace have no jurisdiction of cases involving the title or right of possession to land. Const. 1874, art. 7, sec. 40. They have no jurisdiction of an action brought under the statute for use and occupation of land, except where the relation of landlord and tenant exists. *Fitzgerald* v. *Beebe,* 7 Ark. 305.

The jurisdiction of a justice of the peace in an action brought by a landlord to recover rent due upon contract can not be defeated by the defendant controverting the plaintiff's title to the land (*Matthews* v. *Morris,* 31 Ark. 222; *Nolen* v. *Royston,* 36 Ark. 561; *Bramble* v. *Beidler,* 38 Ark. 200; *Jansen* v. *Strayhorn,* 59 Ark. 330); but when there is no contract for the payment of rent, where the relation of landlord and tenant does not exist, and the plaintiff's right to recover depends entirely upon his title to the premises occupied by the defendant, then a justice of the peace has no jurisdiction. In the absence of contractual relation between the parties, the title to the land is necessarily involved, and the Constitution of the State expressly forbids that justices of the peace shall take jurisdiction of such a controversy.

Counsel argue that there is some evidence that appellee agreed to occupy the premises as appellant's tenant, though the amount of rent was not agreed upon. We do not think there is a particle of evidence to that effect. Appellant stated in so many words that appellee never agreed to rent the land from him. Appellee remained in possession as tenant of Mrs. Bennight, and merely said to appellant that he would remain thereon until the end of the suit about the title. This is all that can be made out of the evidence, and it was insufficient to sustain a ver-

dict in favor of the plaintiff. Having failed to prove a contract, he had no case within the jurisdiction of the court, and the trial judge correctly so declared.

Affirmed.

SCHOOL DISTRICT No. 23 *v.* OZMER.

Opinion delivered December 24, 1906.

1. SCHOOL DISTRICT—EMPLOYMENT OF TEACHER—LIABILITY.—Where a school district employed a teacher holding a second-grade license, which would expire before his term of employment would end, and subsequently he was examined before his school was to begin, and received license in the third grade, which authorized him to teach the school, the school district was liable for his salary, if he held himself ready to teach, though the directors refused to permit him to do so. (Page 194.)
2. SAME—EMPLOYMENT OF TEACHER—WARRANTY AS TO GRADE.—The recital in a contract of employment of a teacher that he holds a license of the second grade is not a warranty that he will continue to hold that grade. (Page 195.)

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

C. W. McKay, for appellant.

Smead & Powell and *A. S. Kilgore,* for appellee.

HILL, C. J. The school district in April employed Ozmer to teach a three-months' school beginning in June. The directors prevented him opening his school, and he sued for salary, and the court, after a trial, directed a verdict in his favor, and the district appealed.

The contract begins thus: "This agreement, between * * * (names of the directors of the district) and H. F. Ozmer, a teacher who holds a license of the second grade," etc. Ozmer's license would expire in July; he went before the county examiner after his contract was executed, and before his school was to begin, and stood his examination and received license, but of the third grade this time. This fact is urged as cause to

justify the district in attempting the rescission of the contract. This third grade license gave Ozmer lawful authority to teach this school, and there is no clause in the contract requiring him to continue to hold a second-grade license.

The district and Ozmer could have contracted that, should he fail to get a renewal of his second-grade license, the contract should terminate, but they made no such contract; and so long as Ozmer was licensed to teach, and he was ready to do so, he performed his part of the contract, and the district must perform its. The recital of his grade of license can not be construed into a warranty that it would continue such. He was required by law to stand another examination before the life of this contract expired, and he made no warranty what his next license would be; merely described, and truthfully described, his present one.

Judgment affirmed.

WHITE RIVER RAILWAY COMPANY v. BATESVILLE & WINERVA TELEPHONE COMPANY.

Opinion delivered December 17, 1906.

1. APPEAL—FAILURE TO EXCEPT TO INSTRUCTION.—Appellant can not complain of the giving of an instruction if he saved no exception thereto. (Page 200.)
2. MASTER AND SERVANT—ACTS OF INDEPENDENT CONTRACTOR.—The rule that a master is not liable for the negligent or wrongful acts of an independent contractor is subject to exception in case where the thing to be done must necessarily damage another. (Page 200.)
3. AMENDMENT OF ANSWER—REFUSAL TO PERMIT—PREJUDICE.—Appellant can not complain because the court refused to permit it to amend its answer if the court had already permitted it to adduce all the testimony bearing upon the issue sought to be raised by the amendment. (Page 201.)
4. RAILROAD—RIGHT OF WAY.—A railroad company, by filing a survey and proceeding to construct its roadbed, acquires no exclusive rights to its right of way until it files a map and profile of the route, as required by Kirby's Digest, § 6569. (Page 202.)

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

STATEMENT BY THE COURT.

The complaint charged that the Batesville & Winerva Telephone Company was a corporation organized under the laws of Arkansas, and owned prior to October, 1901, a telephone line through the counties of Independence, Izard and Baxter, and that in the early part of 1901 it constructed its telephone line on the north or east bank of White River from Syllamore to Penter's Bluff, Independence County. That in October, November and December, 1901, the defendant, the White River Railway Company, began the construction of its line of railway from Penter's Bluff to Syllamore. That the railway company constructed its roadbed largely upon the ground where plaintiff's line was located, and in the construction of its line defendant wilfully, intentionally and unlawfully cut down, tore down, and dug up a large number of plaintiff's poles, towit, 560, and tore down and destroyed plaintiff's telephone wires for the greater part of the distance between Penter's Bluff and Syllamore. That by reason thereof plaintiff lost the value of said telephone line, in addition to the expense of erecting and maintaining it. That, by reason of such willful, intentional and unlawful destruction of its plant, plaintiff has been damaged $3,000 actual damages, and the further sum of $3,000 double damages, and asks for damages in the sum of $6,000.

The appellant answered, denying each and every allegation of the complaint, and further charged that, if plaintiff's telephone line was injured, as alleged, it was the act of one J. R. Reynolds, or his sub-contractors, the said Reynolds having the contract, as an independent contractor, for the construction of said railroad, and for whose negligence and torts this defendant is in no wise responsible.

After the jury had been impaneled and after the evidence was all in, the defendant asked leave of the court to amend its answer, so as to conform to new evidence, which amendment was as follows:

"Defendant, for further answer, says: That the defendant surveyed its line of road over the line on which plaintiff built its telephone line, and had staked off its right of way, and was in good faith proceeding to build its line of railroad before the plaintiff built its telephone line; that after it had so appropriated said

line the defendant built its telephone lines on the line of the defendant's survey, with full knowledge and notice of the right and claim of defendant, and subject to same."

The court refused to allow the amendment to be made, to which all proper exceptions were saved.

The uncontradicted evidence establishes the fact that the damage of which appellee complains was done by a sub-contractor, one J. W. Williamson, who had a contract with appellant's principal contractor, J. H. Reynolds, for the cutting of the right of way and constructing appellant's roadbed along the line where it is alleged that appellee's injury occurred. It was conclusively established that the work which caused the injury and damage to appellee was the work of an independent contractor, over which appellant exercised no control.

The proof tended to show that the work of clearing appellant's right of way and building the roadbed necessarily caused the injury to appellee's telephone line of which it here complains. There was some proof of negligence on the part of the contractor in injuring the telephone line.

The clerk of the circuit court of Izard County, where the injury occurred, testified that the map adopted by the White River Railway Company was filed in his office February 8, 1902, and that the profile of the road was filed February 13, 1902. The undisputed evidence showed that appellant's right of way over which appellee's line ran was cut and cleared in 1901. There is no testimony abstracted by appellant or appellee that shows that any work was done on the road covered by appellee's telephone line, where the injury to it was done, after the filing of the map and profile.

So far as abstracted, the testimony shows that the work on appellant's right of way that injured appellee occurred before appellant had filed its map and profile.

There was some proof tending to show that appellee's telephone line was built after appellant's survey was made and the right of way cut. But the preponderance of the evidence was to the contrary.

The court on its own motion, among others, gave the following instruction:

3. "If you find from the evidence that the plaintiff sus-

tained damages to its telephone line substantially as alleged in the complaint, and that the damages so sustained were occasioned by the acts of contractors who had contracts with the defendant to clear the right of way and construct its road, the defendant is liable for all the damages sustained by plaintiff which were necessarily done by said contractors in the cutting of the said right of way or construction of said railroad. In other words, if the contractors, in cutting out the right of way and constructing the railroad, were necessarily compelled to destroy the plaintiff's telephone line, then you will find for the plaintiff."

4. "I instruct you that an independent contractor is one to whom the owner lets a certain work, to be done by such contractor and delivered to the owner in a finished condition, when the owner reserves no control over the employees of the contractor, or the manner of conducting the work; and if you find from the evidence that the clearing of the right of way and constructing the railroad in controversy had been let to such independent contractor by the defendant, and that the damages sustained by the plaintiff, if any, or any part thereof, was the result of the negligence of said contractor or his employees or sub-contractors, then I charge you that the defendant would not be responsible to the plaintiff for such damages, and you will find for the defendant as to all such damages as were the result of such negligence."

5. "If you find from the evidence that the plaintiff's telephone line was injured by the clearing of the right of way and construction of said railroad, and that the defendant is liable under these instructions for only a part thereof, then I charge you that it is incumbent on the plaintiff to prove, by a preponderance of the evidence, that part of said damages for which defendant is liable; and unless the plaintiff has so proved said damages, you will find for the defendant."

The court refused the following request of appellant for instructions, towit:

1. "If you find from the evidence that the defendant had surveyed its line, or any part thereof, before the plaintiff built its telephone line, and that the plaintiff built its telephone line, or any part thereof, on the survey defendant had made on which to build its railroad, and the defendant was at the time in good faith

prosecuting the work of building its line of road, and the plaintiff built its telephone line on the line of said survey, with knowledge of said survey, then I charge you that the plaintiff would not be entitled to recover for such damage to its line as was the necessary consequence of the clearing of the right of way and construction of said railroad."

The court refused to give defendant's instruction number one, as above, to which all proper exceptions were saved. A judgment for $550 was rendered in favor of plaintiff.

Appellant's motion for new trial contained the general assignments that the verdict was contrary to law and contrary to the evidence, and the following:

"Fourth. The court erred in refusing to permit defendant to amend its answer to conform to the evidence and the facts proved and admitted in the case.

"Fifth. The court erred in giving its instruction number three, over defendant's objection.

"Sixth. The court erred in refusing to give instruction number one as asked by defendant.

"Seventh. The verdict is excessive."

The motion was overruled, and this appeal duly prosecuted.

B. S. Johnson, for appellant.

1. The acts complained of being the acts of an independent contractor, and appellant having reserved no control over those employed in the work, it is not liable. 53 Ark. 503; 55 Ark. 510; 54 Ark. 424; 3 Elliott on Railroads, 1586, 1591; 77 Ark. 551.

2. The third instruction was erroneous. There was no evidence that it was necessary to break down the telephone line, or to destroy the poles.

3. The court erred in refusing to permit defendant to amend its answer after the testimony was all in so as to conform to the proof. Kirby's Digest, § 6145; 64 Ark. 257; 29 Ark. 323; 53 Ark. 263; 58 Ark. 504; 59 Ark. 317; 70 Ark. 233; 44 Ark. 524.

John B. McCaleb and *Bradshaw, Rhoton & Helm,* for appellee.

1. That the work was done by an independent contract or does not necessarily relieve the appellant of liability for injury. If

the injury done in prosecuting the work by the contractors in an ordinary maner is inherent in the nature and character of that work, then the company is liable. 53 Ark. 503; 55 Ark. 522; 77 Ark. 553. If the contractor was not negligent, and did not exceed his authority, the company is liable. 3 Elliott on Railroads, 1063. Appellant was without authority to construct any part of its road through the county until it had filed a profile and map with the county clerk; and where the work to be done is wrongful or unlawful in itself, doing it by another person under any form of contract will not relieve the employer. *Id.* 1064; 1

2. There was no error in refusing to allow defendant to amend its answer. It raised no issue which was not submitted to the jury.

3. There was no exception to the third instruction below.

WOOD, J., (after stating the facts.)

First. Appellant did not except to the giving of instruction number three which it makes the fifth ground of its assignment of error in the motion for new trial. Appellant therefore can not complain of the giving of this instruction.

But, passing that, instructions numbered three and four declared the law more in appellant's favor than it had the right to ask under the testimony adduced.

The proof showed that the work contracted for by appellant with its principal contractor, and which was by him sublet to another, would necessarily result in injury to appellee. Where such is the case, the company contracting for the work to be done is liable, although the work is to be done by an independent contractor. This court, while announcing the doctrine that a railway company is not responsible for the negligent or wrongful acts of an independent contractor in the construction of its work, has not failed to note also the qualifications to the rule. See *St. Louis, I. M & S. Ry. Co.* v. *Gillihan,* 77 Ark. 553, and cases cited.

In *Martin* v. *Railway,* 55 Ark. 510, this court, after announcing the rule, declared also the limitations as follows: "But this rule of immunity from liability is not without its qualifications. If the thing to be done is in itself unlawful, a nuisance *per se,* or probably can not be done without necessarily doing damage, the person causing it to be done by another is as much

liable for injuries suffered by third persons from the act done as he would be had he done the act in person." The qualifications are in fact but a part of the rule. See *Railway* v. *Yonley,* 53 Ark. 503, where this court announces the rule in a quotation from Judge Cooley in his work on Torts, at page 646; also 3 Elliott on Railroads, § § 1063, 1064; 1 Jaggard on Torts, 233 *et seq.*

The instructions given were really more favorable to appellant than the facts warranted; for it was undisputed that the work could not be done in the ordinary way without injury to appellee, yet the court submitted to the jury the question of whether or not the work was necessarily injurious to appellee, and as to whether or not the injury was caused by the negligence of the subcontractor or his employees. The appellant, of course, was not liable for any injury caused solely by the negligence of its independent subcontractor or his employees; or for any increased damages which their negligence might have occasioned. But it was liable for injuries which must have resulted from the prosecution of the work, although the negligence of the independent subcontractor may have increased the injury and enhanced the damages. The instructions were given in the form most favorable to appellant, ignoring undisputed facts in the record in favor of appellee.

Second. The court did not err in refusing to permit appellant to amend its answer as set forth in the statement of facts. Such an amendment was a work of supererogation on the part of appellant, for it had already adduced before the jury without objection all the testimony bearing upon the issue sought to be raised by the amendment. The amendment was unnecessary, and the court did not abuse its discretion in refusing it, for in so doing no possible prejudice to appellant's cause resulted.

Likewise, the court did not err in refusing appellant's request for instruction number one. The making of a survey gave appellant no right in the land on which appellee's telephone was located, even if the telephone was built after the survey. It was not shown when appellant acquired its right of way, and, unless this was acquired prior to the construction of appellee's telephone, appellant had no exclusive rights in the ground. Moreover, the clearing of appellant's right of way was done in 1901, prior to the filing of its map and profile in the office of the circuit

clerk of Izard County. The appellant was therefore without authority to do the clearing under the statute, Kirby's Digest, § 6569, and was liable in damages for the injury caused by its wrongful acts. See authorities *supra*.

Third. It is conceded by appellee here that the work of which complaint was made was that of an independent contractor. But appellee contends that the work was necessarily injurious to the property of appellee, and that appellant at the time its right of way was cleared was engaged in a wrongful act, and was therefore liable to appellee for the injury done its property. As we have shown, that was the theory upon which the cause was submitted to the jury. There was no prejudicial error in instructions, and the verdict was sustained by the evidence.

Affirmed.

MUTUAL LIFE INSURANCE COMPANY *v.* REYNOLDS.

Opinion delivered December 3, 1906.

1. AGENCY—AUTHORITY OF SPECIAL AGENT.—A special agent must act within the scope of his powers. (Page 204.)
2. INSURANCE—POWER OF SOLICITING AGENT.—A soliciting agent for an in-insurance company has no authority to appoint an agent for the purpose of soliciting insurance on behalf of his company, or of receiving premiums therefor. (Page 204.)
3. SPECIAL AGENT—POWERS.—One who deals with another claiming to be soliciting agent of a life insurance company should ascertain the scope of his authority before paying him the premium for insurance for which application had been made. (Page 204.)

Appeal from Marion Circuit Court; *Elbridge G. Mitchell*, Judge; reversed.

Reynolds sued the Mutual Life Insurance Company and E. V. M. Powell, alleging that he had paid $329.90 as the first premium on a policy of $5,000 which the insurance company declined to issue, and he sought to recover the premium.

The insurance company denied that it received the sum of money set out, or that any one authorized to do so received any money on account of the proposed insurance.

Plaintiff's testimony was to the effect that he paid the first premium as alleged to Powell, who executed a binding receipt therefor, countersigned by Powell as collecting agent. The application contained no receipt for the premium.

R. M. Carter testified:

"My only authority is to solicit applications and send them to Remmel, and afterwards to deliver the policies to the applicants and then to collect the premium. About the 1st of September, 1904, I received by mail from Powell the plaintiff's application. Powell asked me to place it for him, as he had just tried to get a $10,000 policy for plaintiff in the company for which Powell was agent, and that the Security Mutual had rejected his application. Powell informed me that plaintiff would pay the premium as soon as the policy should be delivered. As a courtesy to Powell, I signed the application as agent, and forwarded it to Remmel. Seeing that the application indicated that no money had been paid by plaintiff, and having such information from Powell, I executed my personal settlement note for the premium, and sent it along with the application. I have never at any time received any money or other consideration from any source on account of said application, and I never knew that plaintiff had paid any money to Powell, or that Powell had given Reynolds a binding receipt, until some time in November, 1904, when the Bank of Batesville presented to me the draft of plaintiff for that sum accompanied by the binding receipt here exhibited. I have never had possession of any binding receipts for any insurance company and never saw one until I saw this one attached to plaintiff's draft. I never, prior to the draft which plaintiff drew on Remmel, advised Remmel that the application had been sent in by Powell or that Powell had any connection with it."

H. L. Remmel testified:

"I am manager of the defendant company for Arkansas, and have exclusive authority to appoint agents to solicit applications for insurance for said company in that State on blanks furnished to me by the company and by me furnished to the agents. In September, 1904, R. M. Carter, one of my agents, sent me the application of Ben Reynolds for $5,000 policy, which application was signed by Carter as soliciting agent. It was recorded in my office and sent to the home office in New York. The application is in the form already presented. I was not informed that Powell had anything to do with it, or that Reynolds had

paid the premium, or that a binding receipt had been executed. Carter sent along with the application his personal settlement note for the premium, to be paid on delivery of the policy to Reynolds, in the event it should be issued by the company. The application signed by plaintiff showed that nothing had been paid on the premium. The custom is, when the appellant pays the premium at the time of his application and receives from the agent a binding receipt, for the agent to attach a copy of the receipt to the application. No such copy accompanied this application. * * * I did not know until some time in December, 1904, when the draft and binding receipt attached were presented to me, that Powell had anything to do with the application of plaintiff."

Verdict and judgment were for plaintiff.

Defendant insurance company appealed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. Carter could not have made Powell the company's agent. It is settled that an agent can not delegate his authority. 10 Ark. 18; 28 Ark. 98.

2. Insurance soliciting agents must act strictly within the limits of their powers. 54 Ark. 75; 60 Ark. 532; 62 Ark. 348; 88 S. W. 950.

3. Appellee's duty was to ascertain the scope of Powell's authority before paying the money to him. 28 Ark. 98; 62 Ark. 40; 46 Ark. 210; 52 Ark. 435.

WOOD, J. There was no evidence to support the verdict against appellant. Powell was not its agent, and had no authority to represent it. There is no evidence to warrant the conclusion that appellant "held him out" as its agent. Special agents must act strictly within the limits of their powers. *Amer. Ins. Co.* v. *Hampton,* 54 Ark. 75, 78; *Burlington Ins. Co.* v. *Kennerly,* 60 Ark. 532; *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348; *Mutual Life Ins. Co.* v. *Abbey,* 76 Ark. 328.

Carter had no authority to appoint Powell agent for appellant. That was exclusively the province of H. L. Remmel.

Appellee should have ascertained the scope of Powell's authority before paying him the premium. *Danley* v. *Crawl,* 28 Ark. 98; *City Electric Ry. Co.* v. *First National Bank,* 62 Ark. 33.

Powell alone, under the proof, was liable to appellee for the unauthorized premium which he had collected.

Reversed and remanded for new trial.

MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* COTTER.

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Opinion delivered December 31, 1906.

1. INSURANCE—MISREPRESENTATIONS IN APPLICATION—ESTOPPEL.—Where an applicant for life insurance correctly answered the questions propounded to him by the insurance company's medical examiner, but without his knowledge the examiner wrote down incorrect answers, the insurance company is estopped to take advantage of the wrong of its own agent. (Page 206.)

2. SAME—REPRESENTATION AS TO USE OF INTOXICANTS.—Where an applicant for life insurance was asked if he used ardent spirits, and if so to what extent, and to give average quantity each day, the questions did not refer to an occasional or exceptional use of such drinks, but to habitual or customary use. (Page 207.)

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

Geo. Burnham, Jr., Rose, Hemingway, Cantrell & Loughborough and *N. W. Norton,* for appellant.

1. Where, through either fraud or mistake, a written instrument, which is part of a contract, does not state the facts, before it can be corrected, the evidence of the fraud or mistake must be clear, full and convincing. 15 Ark. 275; 71 Ark. 614; 75 Ark. 72.

2. Among the questions propounded to the deceased, Riffey, were the following: "Do you use, or have you ever used, ardent spirits, wine or malt liquor? If so, to what extent—average quantity each day? State fully. Do not answer occasionally, moderately or temperately." To which the answer was, "Only in sickness." The fact is the deceased was a moderate drinker, who did not get drunk, but would take a drink or two when he came to town, usually on Saturday. His answer was untrue, was a breach of warranty, and fatal to recovery. 58 Ark. 528; 3 Dill. 217; 77 N. W. 690; 20 Fed. 482; 47 S. W. 614; 84 S. W. 789.

P. D. McCulloch, for appellee.

1. Knowledge on the part of the examining physician that the answers written down by him in an application for a policy are false estops the insurance company from forfeiting such

policy on account of such false answers. 71 Ark. 295 and cases cited.

2. The questions as to the use of intoxicating liquors had reference to the habitual use thereof, and not to an occasional and infrequent use. *Id.*; 28 S. W. 837; 60 S. W. 576; 70 N. Y. 605; Elliott on Ins. § 374; May on Ins. § 299; Beach on Ins. § 436; Cook on Ins. § 36; 19 Am. & Eng. Enc. of L. 67, 68; 51 Atl. (N. Y.) 689; 2 Parsons on Contracts, 472; 145 Ill. 308. See also 6 Can. Sup. Ct. 695; 97 Tenn. 291.

RIDDICK, J. This is an appeal from a judgment in favor of Arthur Cotter and others, administrators of the estate of John Riffey, against the Mutual Reserve Fund Life Association for the sum of $1,000 and interest on a policy of insurance issued by the company on the life of John Riffey.

This is the second appeal by the company. When the case was here before, the judgment against the insurance association was reversed for the reason that the evidence showed that in his application for the policy Riffey had made misstatements of material facts. In answer to the question, "How long since you consulted or were attended by a physician? Give date," he answered, "September, 1897," and in answer to the question, "State name and address of such physician," he answered, "W. B. Snipes, Spring Creek." To a further question, "Have you had any disease or medical attendance not stated above?" he answered, "Malarial fever, Dr. D. S. Drake, Marianna." But the evidence showed that the answers to the first two questions stated above were not true, that the date of his last sickness before the application was in October, 1897, at which time he was attended by Drs. Foreman and Drake, of Marianna. On the last trial evidence was introduced tending to show that at the time he made the application for insurance Riffey gave correct answers to all of the questions referred to above, but that in reducing them to writing the examining physician, Dr. Snipes, filled out the answers so as to show that he himself was the last physician who treated Riffey, and that the date of the sickness was in September, 1897, instead of October of that year, and that this was done without the knowledge of Riffey. The physician was employed and paid by the company. If he, after being correctly informed of the facts by the applicant, chose to write them down

incorrectly, the company would not be allowed to take advantage of this wrong of its own agent or permitted to avoid the policy on that ground. It would be estopped from doing so. *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295.

The question as to whether the answers were correctly given by the applicant was submitted to the jury under proper instructions, and their finding has evidence to support it, and is conclusive.

Again to the question, "Had you used, or do you now use, ardent spirits, wine or malt liquor? If so, to what extent, give average quantity each day? State fully," the applicant Riffey replied, "Only in sickness." The evidence showed that Riffey, while not addicted to the habitual use of liquors, did take a drink occasionally. It was held in the case of *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295, that such questions do not refer to an occasional or exceptional use of such drinks, but to the habitual or customary use. The question propounded in this case of itself indicated that it did not refer to an occasional use, such as a drink once or twice in a week or two, as is shown here. The question requests a statement as to the "average quantity each day." But the average quantity for each day that Riffey took of such drinks would have been infinitesimally small, for the evidence showed that he did not use intoxicating beverages daily or regularly, but that occasionally when he came to town he took a drink, sometimes two, but not to an extent sufficient to affect him. The answer that he made to this question that he used such liquors "only in sickness" showed that he was not a total abstainer from such drinks, but that he used them when in his opinion they were beneficial to his health. Considering that the question referred as before stated to the habitual, not the occasional, use of such drinks, we are of the opinion that the answer involved no material misrepresentation. *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295; *Van Valkenburgh* v. *Am. Ins. Co.,* 70 N. Y. 605; *Chambers* v. *Northwestern Ins. Co.,* 64 Minn. 495.

Judgment affirmed.

McCULLOCH, J., disqualified.

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LENON v. BRODIE.

Opinion delivered December 24, 1906.

1. APPEAL—WHEN EVIDENCE BROUGHT UP.—Where the parties to a chancery cause agreed that depositions of witnesses should be taken *ore tenus* at the bar of the court, and should thereafter be reduced to writing and filed, which was done, the clerk's certificate to the transcript reciting that it includes the evidence taken *ore tenus* is sufficient to show that such oral evidence is embodied in the transcript. (Page 215.)
2. IMPROVEMENT DISTRICT—EFFECT OF INCLUDING OR EXCLUDING PROPERTY.—As the action of a city council in including certain property within an improvement district is conclusive that it adjoins the locality to be affected, except when attacked for fraud or mistake, so its action in excluding certain property therefrom is conclusive unless it appears to have been left out through fraud or mistake. (Page 215.)
3. ASSESSMENT OF CHURCH AND SCHOOL PROPERTY.—In ascertaining the value of the property of churches and private schools for the purpose of forming an improvement district, the city council is required, by Kirby's Digest, § 5717, to be governed by the valuation which the assessor is required by Kirby's Digest, § 6987, to place upon such property. (Page 218.)
4. SAME—ASSESSMENT OF STREET RAILWAY.—A street railway being personal property, its value should not be included in the valuation of real property in ascertaining whether the petition for a local improvement was signed by a majority in value of the owners of real property in such district. (Page 218.)
5. SAME—IMPEACHMENT.—The validity of a tax assessment against a local improvement district can not be impeached on the ground that there was no competent evidence before the city council to show that the second petition was signed by a majority in value of the real property owners in the district. (Page 219.)
6. SAME—RIGHT TO WITHDRAW SIGNATURES FROM PETITION.—After a board of improvement has been appointed and the members have taken the oath of office, the city council has no authority to permit signers of the second petition to withdraw their signatures therefrom. (Page 219.)

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

W. B. Brooks and *DeE. Bradshaw*, for appellants.

1. After the city council has appointed commissioners, names of petitioners can not then be withdrawn from the peti-

tion. Such a procedure could have no other effect than to create endless uncertainty and confusion. There is no provision in the law for protests, and the question presented here was not before the court in the Rector case, 50 Ark. 116; and the Watkins case, 59 Ark. 358, was determined upon the issue that the district was formed for one purpose, and was converted into a district for an entirely different purpose.

For decisions in analogous cases, see 1 Sheld. 180; 57 Ala. 13; 18 Ohio, C. C. Rep. 605; 5 Ohio, N. P. 123. See also 28 N. Y. 605; 24 N. J. L. 385; 112 Ind. 122; 30 N. E. 1095.

The decision in 71 Ark. 4 covers every proposition involved in the case, and is controlling. As in the case of the three-mile law, the local improvement district law makes no provision for protests. A petition in such case is in the nature of an election; and when it is presented to the city council and acted upon, the ballot is cast, and a person so voting (petitioning) can not change his vote. 70 Ark. 175; 40 Ark. 290; 51 Ark. 164. When the city council, the agent of the property owners, appointed the board of commissioners upon petition of the majority, the board became the agent of the property owners, and the petitioners were bound by its acts. 70 Ark. 451; 55 Ark. 148.

2. The burden is on plaintiff to show that a majority in value did not sign the second petition. The last assessment on file in the county clerk's office is fixed by statute as the source of determining the majority in value. Kirby's Digest, § 5717.

3. The expression of an opinion or belief, if so intended and understood, is not a representation of fact, and, even if false, does not amount to fraud. 14 Am. & Eng. Enc. of L. 34; *ib.* 39; *ib.* 47; 20 Cyc. 17; *ib.* 18; 1 Ark. 31; 68 Ia. 386; 86 U. S. 146. In the absence of injury, fraud affords no ground for judicial action. 11 Ark. 378; 43 Ark. 454. An injury can not result to one on account of an improvement. 71 Ark. 305; 20 Cyc. 13.

4. The board of commissioners are not bound to wait until after the levy of an assessment before making a contract. The assessment may be made either before or after the completion of the improvement. 25 Am. & Eng. Enc. of L. 1219, note 4.

5. The property owners who signed the second petition are estopped to deny or change the act. Herman on Estoppel,

§ 6; *ib.* § § 3 and 8; 33 Ark. 465; 35 Ark. 376; 52 Ark. 212; 31 Ark. 356; 2 Reid, Corp. Finance, § 572; 69 Ark. 287; 57 Cal. 406; 59 Ark. 513; 14 L. R. A. 575; 42 Ark. 152.

6. The boundaries of the district are within the discretion of the petitioners. "A tax for local improvement should be distributed among, and imposed upon, all equally, standing in like relation." 44 Vt. 186; 48 Ark. 383. And the action of the city council in defining the boundaries of the district is conclusive unless attacked for fraud or demonstrable mistake. 52 Ark. 107. In this case there is no proof that any real estate was left out of the district through fraud. The decision of the question of what property should be included or excluded rests with the Legislature or the subordinate body to which it submits the question. Gray, Lim. Taxing Power, 1888; 1 Abbott, Corp. 347 a; 60 Ia. 29; 120 Ill. 269; 128 Ill. 367; 2 Smith, Mun. Corp. 1240. See also 40 Kan. 353; 71 Mo. 493; 66 Pa. 454; 32 Ia. 271.

7. The value fixed by the assessor upon the church and school property included in the district, and not the market value of such property, is the proper value to be considered in determining the amount of the majority petition. Kirby's Digest, § § 5717, 6976, 6987; 69 Ark. 68.

8. Street car property in the street is not subject to the assessment. Special assessments can be imposed on real property only. Kirby's Digest, § 5677; 25 Am. & Eng. Enc. of L. 1184, note 3; *ib.* 1188, note 6; 69 Ark. 68.

Robt. Martin, for appellees.

1. The only means by which the testimony in the case could make a part of the record (the same having been taken *ore tenus* at the bar of court) is by identifying it in the decree, or by a bill of exceptions, and neither has been done.

2. The constitutional provision for improvement districts, to be based upon the consent of the majority in value of the property holders owning property adjoining the locality to be affected, limits the power of the city council, and it is not authorized to leave out property that is in the district to be affected. Const. art. 19, § 27; 52 Ark. 107; 48 Ark. 270; Kirby's Digest, § 5676; 69 Ark. 68; 181 U. S. 351.

3. Though not subject to general taxation, church property is subject to assessment for local improvements, and extraneous proof of its value may be made. 69 Ark. 72. When the true value, as proved, of Winfield Church and the Arkansas Baptist College is considered, the majority in value is reduced to a minority.

4. In determining whether or not a majority in value had signed the petition, the city council were required to take and be governed by the valuation placed upon the property as shown by the last county assessment on file in the county clerk's office. Kirby's Digest, § 5717. The county clerk's certificate attached to the petition was not sufficient, but the council should have required the production of the assessment books, or an exemplification thereof, or at least an examination of the books by a committee.

5. Until the rights of third parties intervene, a petitioner has the right to withdraw his name from the petition asking for the improvement. The proceeding is in the nature of giving a letter of attorney. 31 Ark. 720; 59 Ark. 357. The district is the agent of the property owners (55 Ark. 157); and, being so, they have the right to revoke their agent's authority when they find that the agency will not be profitable, if the rights of third parties have not intervened. 88 Pa. 314; 57 Ala. 13; 42 Ind. 125; 58 N. J. 289; 63 N. Y. Supp. 878; 52 N. Y. 296.

BATTLE, J. This appeal involves the validity of the organization of "Street Improvement District No. 117," of the city of Little Rock. On October 23, 1905, the petition of more than ten owners, resident in the district, was presented to the city council of Little Rock, asking for the laying off of "Street Improvement District No. 117," including therein the real property for 150 feet on each side of Fifteenth Street from Main to Pulaski, Pulaski from Fifteenth to Sixteenth, and Sixteenth from Pulaski Street to Park Avenue.

Fifteenth and Sixteenth streets run about east and west, and Pulaski Street and Park Avenue about north and south. Through the district, from east to west, a street railway is constructed and operated. The owner of the street railway, in consideration of the franchise granted it by the city, contracted to pave the streets over which its tracks are laid, between the

tracks and for two feet on each side thereof, with the same character of material, and in like manner, as the remaining portion of the street is paved, and to change the material used from time to time as that on the other portion of the street may be changed, using the same kind of material.

On the 20th of November, 1905, in response to the petition, the council passed an ordinance establishing the district for paving, except the portion of the street the car company are bound to pave. On the 8th of January, 1906, and in less than three months after the ordinance establishing the district was passed, a majority in value of the owners of real property within the district presented their petition to the city council, which we shall call the second petition, asking that the improvement be made and the costs thereof assessed and charged upon the real property within the district, and asking for the appointment of three persons for a board of improvement. The county clerk of Pulaski County certified that the total assessed value of real estate within the district was $236,215, and that petitioners on second petition owned real property in the district of the assessed value of $148,900, showing a majority in value of $30,872 in favor of the petition. The council granted the petition, and elected Lewis Rhoton, George C. Naylor and Miles Scull members of the board of improvement; and they qualified as such board.

Three lots on the northwest corner of Fifteenth and Pulaski streets, three lots on the southeast corner of Sixteenth and Pulaski streets, and three lots on either side of Sixteenth Street and fronting on the west side of Park Avenue, were not included in the district. But the improvement nowhere runs by or alongside of any of these lots. The value of so much of the street railway as is in the district was not estimated and included in the valuation of the property in the district in determining the total value of such property and whether a majority in value of the owners of the real property in the district signed the second petition.

The board employed an engineer to form plans for the improvement of the district and to estimate the cost of the same, and on the 5th day of February, 1906, filed its report to the city council; and on the 16th day of April, 1906, filed an ad-

ditional report, stating that the cost of the improvement to be made by the district would be about $40,500, and that it had procured donations of $18,500 from the city of Little Rock and the county of Pulaski.

On the 16th day of April, 1906, nearly five months after the passage and publication of the ordinance laying off the district, a petition was presented to the city council by T. B. Martin and others, protesting against the maintenance of the improvement district, and asking that the ordinance creating same be repealed and the "commissioners be discharged." A sufficient number of the original signers of the second petition signed the petition of T. B. Martin to reduce the majority to a minority, if their names could be taken off the second petition in this manner after the council had acted upon it. The council refused to consider Martin's petition, but referred it to the board of improvement.

On the first day of May, 1906, John Brodie and others brought a suit, in the Pulaski Chancery Court, against W. E. Lenon, mayor, and the city council, of Little Rock, and the board of improvement, and others, and, among other things, alleged in their complaint "that Mayor W. E. Lenon and others circulated a petition for the formation of an improvement district, and that a number of citizens in said district who signed the petition for the assessment of benefits were induced to do so after one or two calls for that purpose, and by false and fraudulent statements that it would take an assessment not exceeding one per cent. per annum for eight years, and to some that it would probably not be more than one per cent. for five years; that the statements were made for the purpose of fraudulently inducing the citizens in the district to sign the petition. * * * That a large number of the persons who signed the petition for the levying of an assessment signed a protest or objection to any further effort on the part of any one looking to the carrying out of the improvement (giving list of names). * * * That a majority in value of the owners of real property within the district have not petitioned the city council of the city of Little Rock to levy any assessment for said pretended district. * * * That the property in the district prior to March 1, 1906, according to its assessed value, amounted to

$243,450, and the certificate of the county clerk shows that persons owning property in the district assessed in the sum of $148,990 had petitioned for the district; that persons owning property in the district who are now petitioning for it represent property valued at $77,420, thus showing that persons owning property valued at $166,030 are against the district. That, as a matter of fact, the owners of property valued at $123,640 have protested against the formation of the district, thus showing the majority in value of property against the district to be $88,-610. * * * That it is the duty of the street car company to pave between the car tracks and two feet on either side thereof. That it is the real contractor, and that the pretended contractor is acting in the interest of the street car company. * * * That the city engineer who laid off the district left out all the street car property in said district, although it will be benefited more than any other property in the district, and that the ordinance of the city of Little Rock granting the charter to the Little Rock Traction & Electric Company seven years before its old charter had expired, requiring the street car company to pave within its track and two feet on each side thereof, was nothing more than a part of the consideration for the charter rights and privileges granted, and does not exempt it from taxation or from the payment of its proportionate benefit in any improvement district. * * * That at first persons representing in value $148,980 petitioned for the assessment of their property. That persons owning property valued at $71,-560 on the first petition, together with persons owning property valued at $52,080, petitioned the city council against levying an assessment. That persons owning property in the district valued at $166,030 under the law are opposed to the levying of an assessment on their property, and that persons owning property valued at $77,420 are petitioning for the assessment."

And plaintiffs asked that the court declare the ordinance by which the district in question was created illegal; that the board of improvement be perpetually enjoined from acting as such; and that the city council be inhibited from completing the formation of the district, and for other relief.

The board of improvement answered, and the city council demurred, to the complaint.

The court, having heard all the evidence adduced, declared the law to be "that any person signing the second petition had a right to withdraw his name after the same had been filed and board of improvement and of assessors had been appointed, and before the final levy was made by the city council," and granted the complaint on that ground alone. The defendant appealed.

Appellees insist that "there is nothing in the transcript to show that all of the testimony taken in this case has been embodied" therein. It was agreed by all parties that the evidence in this cause, "though actually taken *ore tenus* at the bar of the court, should be treated as depositions," It appears at some time to have been reduced to writing and indorsed, "Depositions filed in my office July 23, 1906. [Signed] F. A. Garrett, Chancery Clerk." In the decree, after reciting, in part, upon what the cause was heard, the court, continuing, said: "The depositions of witnesses taken *ore tenus* at the bar of the court and agreed to be filed and used as depositions in the case." The clerk, in his certificate to the transcript, says: "Foregoing 403 pages of above-written matter (which includes the evidence taken *ore tenus*), contains a true, correct and compared transcript of all the pleadings, papers, files and entries of proceedings in the action named, as hath appeared by comparing the same with the original thereof now on file in my office." We think that this is sufficient to show the evidence upon which the cause was heard.

Appellees argue that "Street Improvement District No. 117," in the city of Little Rock, was not legally organized, and that it does not contain the "three lots on the northwest corner of Fifteenth and Pulaski streets, three lots on the southwest corner of Sixteenth and Pulaski streets, and three lots on either side of Sixteenth Street fronting on the west side of Park Avenue," they being in the locality to be affected and in the same condition as the property included in the district. But this contention is not correct. Section 27 of article 19 of the Constitution provides: "Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law,

to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform." Sections 5664 and 5665 of Kirby's Digest provide: "The council of any city of the first or second class, or any incorporated town, may assess all real property within such city, or within any district thereof, for the purpose of grading or otherwise improving streets and alleys, constructing sewers or making any local improvements of a public nature, in the manner hereinafter set forth." Section 5665. "When any ten resident owners of real property in any such city, or incorporated town, or any portion thereof, shall petition the city or town council to take steps toward the making of any such local improvement, it shall be the duty of the council to at once lay off the whole city or town, if the whole of the desired improvement be general and local in its nature to said city or town, or the portion thereof mentioned in the petition, if it be limited to a part of said city or town only, into one or more improvement districts, designating the boundaries of such district so that it may be easily distinguished; and each district, if more than one, shall be designated by number and by the object of the proposed improvement." It appears from these sections that the Legislature has imposed the duty of forming improvement districts, and defining their boundaries, upon the city councils. This done, the locality to be affected is fixed. The statute then provides that those owning real property in such locality may give their consent to assessments upon their property to pay for the improvements. Section 5667 says: "If, within three months after the publication of any such ordinance, a majority in value of owners of real property within such district adjoining the locality to be affected shall present to the council a petition praying that such improvements be made, which petition shall designate the nature of the improvements to be undertaken, and that the cost thereof be assessed and charged upon the real property situated within such district or districts, the city council shall at once appoint three persons, owners of real property therein, who shall compose a board of improvement for the district." Upon taking the oath of office within ten days after their appointment, and electing one of their number chairman,

they become organized and qualified for the transaction of business and the performance of all the duties imposed upon them by law; and the district is completely organized for the purpose for which it was created.

Judge Cooley says: "The whole subject of taxing districts belongs to the Legislature; so much is unquestionable. The authority may be exercised directly, or, in the case of local taxes, it may be left to local boards or bodies; but in the latter case the determination will be by a body possessing for the purpose legislative power, and whose action must be conclusive as if taken by the Legislature itself. It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits can not be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying the court that no special and peculiar benefits are received. If the legislation has fixed the district, and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed to be conclusive. No doubt there may be exceptions." 2 Cooley on Taxation, (3 Ed.), pp. 1207 and 1208. And he then proceeds to mention exceptions.

In *Little Rock* v. *Katzenstein,* 52 Ark. 107, it is said: "To the General Assembly, then, was delegated the task of providing agencies for the accomplishment of these improvements. The General Assembly, in the exercise of a well recognized constitutional power, imposed the duty of forming improvement districts, and defining their boundaries, upon the various city councils. The city council is invested with discretion in this behalf, necessary to a just performance of the duty; and when it has acted, the property included by it in any district is *prima facie* adjoining the locality to be affected. We conclude, therefore, in answer to the two queries originally propounded.

* * * * * * * * * * * * * * * *

"Second. That the action of the city council, in including property in an improvement district, is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake."

The city council is invested with the same discretion in excluding real property from a district as it is in including it,

and the same conclusiveness ought to and does attend its action, the reasons for the same being equally as strong or stronger. The property to be included ought to adjoin the locality to be affected. The statute says, "within such district adjoining the locality to be affected." The lots excluded in this case are not adjoining the district, but entirely disconnected, and they do not appear to have been left out through fraud or mistake.

It is said that the names of the majority of the owners in value of the real property in the district were not signed to the second petition. The reason given for this contention is that the value of the Winfield Church and the Arkansas Baptist College property, which are in the district, was not included in the valuation of the real property in the district, but the assessed value instead. That was in accordance with the law. The statute provides: "The assessor, at the time of making the assessment of real property subject to taxation, shall enter in a separate list pertinent descriptions of all * * * public schoolhouses, houses used exclusively for public worship, * * * and public buildings and property used exclusively for any public purposes, with the lot or tract of land on which said house or institution or public building is situated, and which are by law exempt from taxation, and the value thereof." Kirby's Digest, § 6987. Another statute provides: "In ascertaining whether the petition for improvement of any kind is signed by a majority of the owners in value of the real property in the district adjoining the property to be affected, the council shall take and be governed by the valuation placed upon the property as shown by the last county assessment on file in the county clerk's office." Kirby's Digest, § 5717. The Winfield Church was assessed at $8,150. The Baptist College and real property were assessed at $5,800. The majority of the assessed value of the real property in the district belonging to those who signed the second petition amounted to $33,472.50. The assessed value of the property of the church and college and of the real property of those persons who were induced to sign the second petition by misrepresentation, deducted from the $33,472.50, still leaves a majority of $9,092.50 in favor of the signers of the second petition.

The value of the street railway in the district ought not to

have been included in the valuation of real property in ascertaining whether the second petition was signed by a majority of the owners in value of the real property in the district. The company owning it has "no easement or freehold interest in the soil, or exclusive control of the highway in which a location is granted to lay tracks and operate the road. The right conferred is to use the way within its location in common with others, and not exclusively for its own benefit. The whole way is as fully open to the lawful use of travelers after the road is built and in operation as before." *Lorain Steel Co.* v. *Norfolk & Bristol Street Railway Co.,* 187 Mass. 500. The owners of real property on either side of the street own to the middle of the street subject to the public easement. All its property is required to be assessed for taxation as personalty. Kirby's Digest, § 6936. And therefore is not real property, within the meaning and signification attached to those words by the statutes governing improvement districts. Kirby's Digest, § 5673.

Appellees say that there was no competent evidence before the city council to show that the second petition was signed by a majority in value of the owners of the real property of the district. That question is not presented for consideration. If the validity of a tax assessment against the property of the district were attacked, it would be proper to show that the second petition was not signed by such majority; and that could not be shown by evidence that the city council received incompetent evidence, but by evidence that it was not so signed.

Could any of the signers of the second petition withdraw their names therefrom after the appointment of the board of improvement? It was then too late. The petition had answered its purpose, and was no longer subject to the action of the city council. When the members of the board accepted their appointment, and took the oath of office, they became vested with complete control over the construction of the improvement, with the power to make all contracts necessary to be made in respect thereto, with power to borrow money, to institute suits in its name, to enforce the payment of the assessments upon the real property in its district, to disburse the money collected to pay the cost of the improvement, and with the power, except when the cost of the improvement exceeds twenty per centum of the as-

sesed value of the real property, to compel the city council by mandamus to make further assessments upon the real property to complete the improvement. The city council has no power to abolish the improvement district and prohibit the construction of the improvement unless it be by refusing to make an assessment when the estimated cost of the improvement exceed twenty per cent. of the assessed value of the real property in the district. *Morrilton Waterworks Improvement District* v. *Earl,* 71 Ark. 11. It is obvious that the signers of the second petition could not withdraw their names after the appointment of the members of the board of improvement. The power then had passed from them, and can not be recalled by their own acts.

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

HILL, C. J., and MCCULLOCH, J., concur in the opinion and judgment. WOOD and RIDDICK, JJ., concur in the judgment, but dissent from the opinion.

WARE v. WHITE.

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Opinion delivered December 3, 1906.

1. MINING CLAIM—ADVERSE SUIT.—An "adverse suit," authorized by Rev. Stat. U. S., § 2326, to be brought in a court of competent jurisdiction "to determine the question of right of possession of a mining claim on Government land, in order that the Government officers may patent the claim to the party establishing right thereto," is a law action, and contains no element of equity jurisdiction. (Page 223.)
2. SAME—LOCATION NOTICE.—In order to secure a valid location of a mining claim, it is necessary that the claim should be "distinctly marked on the ground so that its boundaries can be readily traced," and that it contain a reference to some natural object by which it can be identified. (Page 223.)
3. SAME—AMENDMENT OF LOCATION NOTICE.—A mining claimant has a right to amend his location notice and mark the claim on the ground, if there are no intervening rights. (Page 225.)
4. SAME—EFFECT OF AMENDMENT OF LOCATION NOTICE.—An amendment of a mining location by a claimant not in possession can not be made

to relate back to the original location so as to cut out intervening work for three years under a defective location. (Page 225.)

5. SAME—RELOCATION.—A mining claim in the adverse possession of another is not subject to relocation. (Page 226.)

6. SAME—POSSESSION.—Possession of a mining claim may be founded on complete compliance with the mining laws and local regulations or by physical marks or distinct marking of the ground evidencing possession. (Page 226.)

7. SAME—PRESUMPTION AS TO POSSESSION.—While possession and improvement alone do not establish title to a mining claim, they raise a *prima facie* presumption that the possession is rightful, which prevails, in the absence of proof of a better right. (Page 226.)

8. EJECTMENT—MINING CLAIM.—Where a complaint alleged that plaintiffs were entitled to possession of a mining claim, and asked for possession, and that defendants be ejected therefrom, and the answer admitted possession and claimed title, the pleadings formed an issue as to the possession, and the action is in ejectment. (Page 227.)

9. MINING CLAIM—LOCATION.—A mere disconnected marking of a mining claim, not accompanied by possession or the required work, does not constitute a location within the acts of Congress. (Page 228.)

10. SAME—AMENDMENT OF LOCATION—RIGHT TO PATENT.—One who is in actual possession of a mining claim and has done the required work may amend his location notice, and thereby perfect his entry; and, even without a valid location notice, if he can peacefully hold possession against the world and do the requisite work for the required time, he will be entitled to a patent. (Page 228.)

Appeal from Marion Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

Woods Bros., for appellant.

1. Appellee's notice of their alleged location in September, 1899, was insufficient, in that it was not posted on the land claimed. It also failed to conform to the requirements of § 2324, U. S. Rev. Stat., in failing to describe the location with reference to natural objects or permanent monuments so as to identify the claim.

2. If appellees acquired any rights under such location, they have forfeited the same by failure to do the assessment work required by law. Section 2324 *supra;* 73 Ark. 610; 72 Ark. 225; 70 Ark. 525.

W. S. Chastain, for appellee.

1. Neither the Federal nor the State laws require that notice of location be posted. 111 U. S. 356; 1 Snyder on Mines, § 374; 1 Lindley on Mines, 350; Barringer & Adams on Mines, 234. If posting or recording is required, it must come from some local rule or custom of the district, and none is proved. 99 U. S. 261; 1 Snyder on Mines, § 128.

2. The question of forfeiture does not enter into this case. It is simply a question of who has the valid location. If appellant's attempted amended location of May 10 and September 26, 1904, were good, he can not rely on the deeds made by his co-locators to him, and received prior to that time, because they were only quitclaim deeds. Kirby's Digest, § 734; 76 Ark. 417. No rights were acquired under the notices made by appellant in 1898. They do not comply with the act of Congress, and are void on their face. U. S. Rev. Stat. § 2324. Appellee's notices of September, 1899, were similarly defective, and within themselves conferred no rights, but appellees did take actual possession of the lands at that time. When, in August, 1903, appellees procured the services of the county surveyor, went upon the lands, had same surveyed and the "location distinctly marked on the ground so that its boundaries could be readily traced," this gave appellees all rights of possession against the Government, and against all claimants who did not hold a valid location. 113 U. S. 527; White on Mines and Mining Rem. § 35.

HILL, C. J. White and associates in a zinc mining venture brought suit in the August, 1903, term of the Marion Circuit Court against Ware and associates to recover possession of the E½ SW¼ sec. 21, T. 18 S., R. 15 W., asserting possessory right thereto as a mining claim acquired as follows: That, by virtue of making discovery of mineral on the land, then wild and unoccupied Government land, and posting location notice thereon September 27, 1899, and doing the necessary assessment work for 1900, 1901 and 1902, and complying with the mining laws of the United States and the State and the local rules and regulations of the Marion County Mining District, they had acquired possessory right to it, and that Ware had made application for it to the United States Land Office, and they (White and associates) had in proper time filed therein their adverse claim to Ware's claim, and they prayed that Ware be ejected and posses-

sion given to them. Ware and associates admitted possession, and denied plaintiffs' title, and asserted title in themselves, which they set forth fully, and prayed that plaintiffs' complaint be dismissed, and that their possession and title be quieted and confirmed. On motion of plaintiffs, which was conceded by defendants, the cause was transferred to Marion Chancery Court, and there progressed to decree in favor of plaintiffs, and the defendants prosecuted this appeal.

This was an "adverse suit" authorized by sec. 2326, Rev. Stat. of the United States, to be brought in a court of competent jurisdiction "to determine the question of right of possession" of a mining claim on Government land, in order that the Government officers may patent the claim to the party establishing right thereto in such possessory action. *Giberson* v. *Wilson,* 79 Ark. 581. The action is essentially a law action, and contains no elements of equity jurisdiction, and the answer herein presented no equitable defense.

Under the decision in *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81 (to the correctness of which two members of the court do not subscribe), the decree is not reversible for lack of jurisdiction in the chancery court because appellants did not insist on a trial at law in the lower court. The appellant does not raise the question now, but the court mentions it so that it may be understood how this law suit is determined as a chancery suit.

Passing to the merits, or more properly, demerits, of the conflicting claims, it is found:

That the appellees (plaintiffs below) purchased rights to two mining locations, which were located in 1898, situated one on each forty of the eighty-acre tract in controversy. On September 27, 1899, they filed notice of location seeking an original location then, and did some assessment work thereafter, which will be referred to later. The claim or location was not "distinctly marked on the ground, so that its boundaries can be readily traced," and the location notice filed did not contain a description of the property, tying it to some natural object by which it could be indentified. These are mandatory provisions of sec. 2324, Rev. Stat. U. S., and must be complied with in order to secure a valid location. *Worthen* v. *Sidway,* 72 Ark. 215.

Appellees in August, 1893, after their adverse claim was filed in the land office and after this suit was instituted, had a surveyor run out the lines and blaze around the entire tract and mark its corners with stones. This was the first attempt of either party to mark the location on the ground, so that its boundaries could be readily traced.

On May 2, 1904, appellees filed an amended notice attempting to follow up the marking on the ground of August, 1903, by proper description tying the location to some natural object for identification. On the 3d of May by supplement to the answer they asserted title by virtue of such marking and amendment having made valid the original location. The court sustained this location.

Prior to attempting a location on this property, appellants examined the records of the mining district and found only the insufficient notice of appellees against this property and no affidavits of having done the assessment work; and proceeded to make a location upon it on January 1, 1900. Their notice is similarly defective, and they likewise failed to mark the claim on the ground, but they did proceed to do the assessment work for three years.

On the trial the appellants gave detailed statements of amount of assessment work done, and its value amounting to $106 for 1901, $124.50 for 1902 and $188 for 1903. This was not controverted, and must be taken as established.

On May 10 and September 26, 1904, appellants also attempted by amendments to their notice to cure its defects, and pleaded the same in supplement to their answer.

The appellee White in his testimony claims to have receipts for $400 worth of assessment work, but does not give a definite statement of what was done or its value. Stegall, a witness for appellees, says that in 1901 he and three others did five days' assessment work, and he was paid $1.25 per day for his work, and he knows one of the other workmen was paid that amount. He also testifies to doing some assessment work each year which appellees claim to have done work, but he does not prove that the requisite work each year, or any year, was done by appellees. Treat, likewise for appellees, lived near the land, and saw the assessment work, and said it was worth

as much, or more, than assessment work by others. This was all the evidence to sustain appellees' claim of having done the annual assessment work, and they did not file the affidavits authorized by section 5364, Kirby's Digest, which makes such affidavits *prima facie* evidence of the performance of the work.

The appellants showed by one Ott that he was one of the four men employed by appellees to do the assessment work in 1901, and that they were instructed to do five days' work each—20 days' work in all—and that was all the assessment work done by appellees for that year on this claim. There was other evidence showing appellees' total work for the four years was worth about $100. Very likely appellees were proceeding under a custom or mining regulation providing for twenty days' work to count as the requisite $100 worth of work required by the Federal statute, which custom and regulation was held to be in contravention of said statute by this court in *Woody* v. *Bernard,* 69 Ark. 579. Be that as it may, it must be taken as established that the appellees failed to do the requisite assessment work under their 1899 location. Up to the amended location neither party had a valid location; the appellees failed for defects in notice and in marking the ground and further failed to do the assessment work, and appellants failed in the same particulars except as to doing the assessment work.

Concede, without deciding, that plaintiffs could amend their pleadings so as to assert new rights at this time, the complaint alleged appellants to be in possession, the answer admitted it, and three years' assessment work under a defective notice had been performed by them, and they had a right to amend their location notice and mark the claim on the ground, there being no intervening rights. 1 Snyder on Mines, § § 395 425, 429 & 577.

The appellants had something to amend to, while appellees had nothing to tack their amendment to. An amendment can not relate back and cut out intervening rights. The doctrine of relation can not be invoked to exclude rights built up in the interval which is sought to be covered by the relation back. 1 Snyder on Mines, § 429. Therefore it is plain that the amendment of appellees of May 2, 1904, could not relate back to their

defective location of 1899 and cure it in order to defeat rights built up by appellants after the 1899 location.

The case then resolves itself into an inquiry whether appellees' location of May 2, 1904, can be regarded as an original location, or relocation, and valid as such. It did not purport to be such, but purported to be an amendment seeking to make valid the 1899 location, and it was pleaded and relied upon as an amendment, and not as an original location, but, aside from this, it could not be a valid location or relocation. If anything, this would amount to a relocation by the original locators (1 Snyder on Mines, § § 583, 584); and for the relocation, as well as location, the land must be subject to location, and this land was not then subject to location on account of the rights and possession of appellants. At this date they had a right, as against the Government and every one else, to perfect their location, and their improvements had given them possession of the land. Possession may be founded on complete compliance with the mining laws and local regulations or by physical marks or distinct marking of the ground evidencing possession. Possession and improvement alone give no value to a mining claim, but raise a *prima facie* presumption that the possession is rightful. This subject is fully discussed in 1 Snyder on Mines, § § 452, 457.

Whether appellants' possession was aided by section 5363, Kirby's Digest, is not important because the *prima facie* presumption of the rightfulness of appellants' possession alone prevents the land being subject to original location as wild and unimproved mineral land.

The appellants' compliance with the law requiring $100 worth of improvements per annum under a defective location notice gave them a possessory right which is presumed rightful, in the absence of a better right being shown.

The appellees failed in every particular to comply with the mining law, and all rights they had, if any, were forfeited by a failure to do the assessment work. When they attempted to amend their location, they were met with these propositions: (1) They can not cut out other rights by relation, hence the former location can not be patched up against appellants; and (2) they can not make a new location, for the appellants are

found in possession of the property improving it under the mining laws, and the validity of the latter location is not the inquiry. *Malecek* v. *Tinsley,* 73 Ark. 610.

Reverse and remand with directions to dismiss the complaint.

Mr. Justice BATTLE thinks the court should stop at the jurisdictional question, and remand for want of jurisdiction in the chancery court.

ON REHEARING.

Opinion delivered January 14, 1907.

HILL, C. J. 1. Appellees insist that the complaint is sufficient to be sustained as a complaint in equity to confirm title, under chapter 25, Kirby's Digest, and that it does not, taken as a whole, allege that the defendants were in possession. It asserts a possessory right in themselves; that the defendants (appellants here) assert some claim to it and have pending in the United States Land Office an application for it, and they, plaintiffs, have filed their adverse claim therein, and, after asserting right to possession as a mining claim, plaintiffs pray for possession, and that the defendants be ejected from the land therein described, and for costs and general relief. The defendant in answer "admits he is in possession of the land mentioned and described in the complaint," and then asserts title thereto. Certainly, these pleadings put the possession of the land in the defendants, and form an issue as to the rightful possessory title thereto; essentially an action of ejectment.

2. Appellees contend that they were peacefully in possession when appellants surreptitiously proceeded to attempt a location, which was defective in many respects. The evidence does not sustain appellees' contentions. The evidence shows that they never held possession of the land, and never had any possession of it except such scrambling possession as accompanied their wholly insufficient assessment work.

The failure to do the assessment work forfeited whatever original rights they may have had, but they had a right to resume work unless other rights intervened, and appellees contend that this principle applies to them; but they never did *bona fide* work,

and never had anything to tie back to. Whatever rights they have must be builded on the May 2, 1904, location. In August, 1903, they had the ground surveyed and the lines blazed, not in view of a new location, but to establish evidence in this suit. Later, when a new location, or amendment as it was called, was made, then this survey of the year before was relied upon as marking the claim on the ground. The Supreme Court of the United States said: "The right to possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by marking on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local terms and regulations." *Belk* v. *Meagher,* 104 U. S. 279.

The disconnected marking of the claim on the ground of August, 1903, the new location of May 2, 1904, unaccompanied by work and without actual possession, are insufficient to bring these parties within the above requirements.

On the other hand, Ware had the possession contemplated of mining claims by the actual physical work required, and the work was there as evidence of possession; and, as shown, in the absence of intervening rights, he could amend and thereby perfect his entry. In addition to this, even without a valid location notice, if he could peacefully hold possession against the world and do the requisite work for the required time, he could get a patent. *Belk* v. *Meagher, supra.*

This possession is merely *prima facie* rightful. It was at least sufficient to sustain an action of trespass against an intruder, but not enough to prevent recovery by one who had made peaceful entry and in good faith made a valid location of it; but, as seen, appellees' evidence fails to bring them into that class.

The court has not held, and does not hold, that Ware has title. It is merely holding that Ware's possession and requisite annual assessment work under a defective location is sufficient to defeat a recovery on a patched relocation where there is no peaceful entry and possession of the land nor work done under it. The question of appellants' title is not for adjudication,

but appellees'; and for the reasons given appellees must fail in this action.

The court might well have disposed of the case on the ground that this action could not be maintained on after-acquired title. That question was not presented, and these others were; and, as they both work out to the same end, the court preferred placing its decision on the ground discussed.

Motion overruled.

WOOD and RIDDICK, JJ., dissent.

SUTHERLAND MEDICINE COMPANY v. BALTIMORE.

Opinion delivered December 24, 1906.

SALE—RIGHT OF VENDOR TO RECOVER ON LOSS OF GOODS IN TRANSIT.—Where a contract for the sale of goods stipulated that the vendor should ship the goods together with certain advertising matter, and the vendor shipped the goods without the advertising matter, and the goods were lost by the carrier in transit, the vendor failed to comply with the contract, and can not recover for the goods.

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

Crawford & Gantt, for appellant.

Delivery of goods to a common carrier pursuant to the directions of the purchaser is delivery to the purchaser. Benj. on Sales, 6 Am. Ed. 181, 1040; 44 Ark. 556; 53 Ark. 196; 79 Ark. 456.

White & Altheimer, for appellee.

Where the agreement to include advertising matter with the bill of goods is a material inducement to giving the order, if the seller omits to ship with the goods such advertising matter, the contract is thereby broken, and the seller can not recover, notwithstanding the goods may have been shipped and consigned according to instruction. 79 Ark. 456.

HILL, C. J. Appellee, Baltimore, bought of appellant medicine company a bill of its goods, and signed written order there-

for. Following various items of medicine appears this: "Full line of advertising matter." On face of the order was this also: "Paste label on back of this order." On the back was a list and description of signs and posters and other articles, such as: "Bell Watch Fobs," "Bell Stick Pins," "B. M. Bells," "Sgns. P. F. H." "Some Tacks," various books, as "50 Good Eagle Books," etc. In explanation of these matters, and certainly the writings are not self-explanatory, Baltimore testified that the watch fobs and stick pins were premiums, and with the signs and advertising matter were an inducing cause for the order. Some calamity befell these articles, and Baltimore did not receive the medicines, nor the stick pins, nor watch fobs, nor anything ordered. The medicine company proved that it accepted the order and directed the advertising matter and the medicines to be shipped to Baltimore, and that it delivered to the railroad company for shipment to Baltimore a box properly directed containing the medicines ordered. But it failed to prove the shipment of the advertising matter. In fact, the only inference to be drawn from the testimony is that it was not sent. Evidently the box of medicines was lost in transit, and the question is upon whom the loss shall fall. If the medicine company complied with its contract and delivered the goods ordered to the carrier for Baltimore, then the loss is his; if it did not comply with the contract, it can not require him to pay for the goods. The contract can not be considered several, and binding to the extent it was fulfilled, as in *Duffie* v. *Pratt*, 76 Ark. 74. The advertising matter, if of any importance at all, from its very nature touched the whole order, and may have been an inducing cause to the contract. *Templeton* v. *Equitable Mfg. Co.*, 79 Ark. 456. Even if the evidence that it was an inducing clause be not competent, and be disregarded, the court can not treat the failure to send these premiums and advertising matter as a matter of no moment to the purchaser. It is very probable that a country merchant would more readily purchase goods when a full line of advertising matter of those goods was furnished him to go with the goods. In this case the signs and posters, presenting the virtues and cures of "Tar Honey" and "Anti-pain", and stick pins and watch fobs and "Household Help Books" as lagniappe

for "Eagle Eye Salve" and the "Tonic", may have been, and doubtless were, important factors.

The court was not without evidence in finding that the contract had not been complied with.

Affirmed.

FORT SMITH LIGHT & TRACTION COMPANY v. FLINT.

Opinion delivered January 7, 1907.

STREET RAILROAD—NEGLIGENCE—IMPROPER ARGUMENT.—Where, in an action for injuries received by plaintiff in a collision with a street car, the issue was whether the inexperience of the motorman caused the accident by reason of his failure to stop the car after the danger was discovered, it was error to permit plaintiff's attorney to argue that the street car company was liable if it permitted an inexperienced motorman to operate the car, regardless of whether such inexperience caused the accident or not.

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

Brizzolara & Fitzhugh, for appellant.

Where the plaintiff was guilty of contributory negligence, the defendant was only bound to exercise ordinary care to avoid injuring him, after discovering his perilous position. 62 Ark. 164; 64 Ark. 420; 91 S. W. 748; 101 N. W. 298; 78 S. W. 82.

2. It is error, for which this court will reverse, if the trial court refuses to reduce oral instructions to writing when requested. Kirby's Dig. § 6196; 51 Ark. 177.

3. After having instructed the jury that there was no evidence that the motorman was incompetent, it was error to permit plaintiff's counsel to argue that the defendant was liable because of the motorman's incompetency. The court's refusal to check counsel was an indorsement, in effect, of his statements. 69 Ark. 67.

4. Where a person permits his team to remain on the street car tracks until struck by a car, he cannot recover. 25

Atl. 601; 40 Atl. 67; 24 Atl. 688; 62 N. W. 1007; 74 N. Y. Supp. 844; 75 S. W. 672; 37 So. 452.

Dan Danielson, for appellee.

1. The verdict will not be disturbed where there is sufficient evidence to sustain it. 51 Ark. 467; 70 Ark. 136.

2. If either party is entitled to complain of the so-called oral instructions given, it is the plaintiff, since they were more favorable to the defendant than to him; but failure to reduce them to writing was a mere unsubstantial error, and the court will not reverse on that account. 51 Ark. 177.

3. Under the evidence and the instructions, counsel for plaintiff was justified in arguing to the jury that defendant was liable because the motorman was incompetent. 69 Ark. 648.

4. Motormen are required to keep a reasonable and careful lookout to discover pedestrians and vehicles on or approaching the track, so as to be able to take proper precaution to avoid injuries. 72 Ark. 572.

RIDDICK, J. This is an action brought by John Flint against the Fort Smith Light & Traction Company to recover damages for injuries occasioned from a collision with a street car. Flint was driving a wagon, which was struck by a street car, resulting in severe injuries. He testified on the trial that he was driving, and that, as the wagon got on the street car track, one of the horses hitched to the wagon balked and refused to move forward. That he did all he could to get them across, but was unable to do so, until the wagon was struck by the car, and he was injured. On the other hand, several witnesses testified that the plaintiff deliberately stopped the wagon on the street-car track and remained there until the wagon was struck and knocked over by the car. There seems from the transcript to have been a conflict in the evidence on this point, and, if so, the question whether the plaintiff was guilty of contributory negligence should have been left to the jury. But the trial judge was of the opinion that the evidence clearly showed negligence on the part of the plaintiff, and he told the jury that under the testimony and conceded facts the plaintiff was guilty of contributory negligence, and that he could not recover unless they believed "from the evidence that defendant's motorman in charge of its car actually

discovered plaintiff's perilous position in time to have prevented injuring him and negligently failed to do so." Assuming that the plaintiff was guilty of negligence contributing to his injury, and the evidence tends very strongly to show that he was, this was a correct statement of the law. But counsel for plaintiff in his closing argument made the following statement to the jury:

"The defendant in this action was liable to the plaintiff because the motorman, E. V. Sappington, was inexperienced and did not know how to manage and control the car that injured plaintiff; and that defendant was liable because it had permitted Sappington to operate the car, and that Sappington did not have sufficient experience to exercise proper care in controlling the car."

The defendant objected to this statement at the time, but the court overruled the objection, and defendant contends that this ruling of the court was erroneous and prejudicial.

There was evidence tending to show that W. T. McMinn was motorman in charge of the car at the time of the accident, and that Sappington was working under him, and was operating the car at that time. Both of these men were on the front of the car, and McMinn, who was an experienced motorman, testified that "Sappington cut the current and applied the brake while he reversed the car, that on account of there being two motormen the car was reversed and brake applied quicker than it would have been possible for one man to have done so." He further testified that it was getting dark and very dusty, and that, although they were keeping a lookout, they did not see the wagon until too close to avoid striking it. There was other testimony that the wagon could have been seen in time to have avoided the collision. The question submitted to the jury by the instructions was whether the employees in charge of the car exercised due care in trying to stop the car after the wagon was discovered on the track. That was the question on which, under the instructions of the court, the liability of the defendant depended. But the argument referred to was misleading, for it evaded the question presented by the instructions as to whether due care was exercised by the employees in charge of the car, and told the jury that the defendant was liable because one of the motormen, E. V. Sappington, was inexperienced and did not

know how to manage the car. Now, leaving out the fact that McMinn, an experienced motorman, was in charge of the car with Sappington, suppose that Sappington was inexperienced, still the company could not have been responsible to plaintiff on that account unless Sappington's inexperience caused the accident by reason of his failure to stop the car after the danger was discovered. The jury may have believed from the evidence that the car could not have been stopped after the employees discovered the wagon on the track. If this was so, the instructions of the court told the jury to find for defendant; while on the other hand the argument of counsel told them that the company was liable in any event because of the inexperience of Sappington. The argument of counsel was in conflict with the law and the instructions of the court, and the objection thereto should have been sustained. *Cockburn* v. *State,* 76 Ark. 110.

It does not, of course, necessarily follow that, because an improper argument has been made by the plaintiff's attorney, the judgment rendered in favor of plaintiff must be reversed. But the argument in this case affected the pivotal point in the case, and evaded the question submitted by the court, and was calculated to cause the jury to lose sight of that point and decide the case on another point. It is true that the jury, in determining the question as to whether proper efforts were made to stop the car, had the right to consider the testimony bearing on the question of the skillfulness of those in charge of the car. For it was alleged in the pleadings that the car was operated by an inexperienced and unskillful motorman, but this fact, if proved, did not of itself, as counsel asserted, justify a verdict for plaintiff. We are, therefore, of the opinion that this argument was improper and prejudicial, and that the court erred in overruling the objection made to it by counsel for the defendant.

For this reason the judgment is reversed, and the cause remanded for a new trial.

McDONALD v. SHAW.

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Opinion delivered December 17, 1906.

1. WILL—AMBIGUITY IN DESIGNATING BENEFICIARY.—A bequest or devise will not fail because of a mere inaccuracy in the designation of the beneficiary, if the meaning of the testator can be gathered with reasonable certainty from the instrument itself, or if the identity of the object of his bounty can be shown by extrinsic evidence, which is always admissible wherever there is ambiguity in designating the beneficiary. (Page 240.)
2. TRUST—APPOINTMENT OF TRUSTEE IN SUCCESSION.—A devise to the pastor of a certain church of property to be used for the purpose of educating boys and young men of the church constitutes the pastors of the church in succession as the trustees under the will. (Page 241.)
3. SAME—INDEFINITENESS.—A devise of property to a trustee for the purpose of "helping to educate poor Catholic children" is not too indefinite to be enforced. (Page 241.)
4. SAME.—A devise of property to a trustee "for the purpose of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood" is not too indefinite. (Page 243.)
5. PUBLIC CHARITY—DEFINITION.—A public charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burden of government. (Page 243.)
6. TRUST—TRUSTEE'S POWER TO SELL.—A devise of real property in fee to a trustee for educational purposes impliedly confers upon the trustee power to sell and convey such real property. (Page 243.)

Appeal from Sebastian Chancery Court; *J. Virgil Bourland,* Chancellor; affirmed.

Ira D. Oglesby, for appellant.

The powers exercised by the English chancery courts over what we call the *cy pres* doctrine are not exercised by the courts of this country. 9 Am. Dec. 577, and note; 44 Am. Dec. 98, and note; 64 Am. St. Rep. 755, and note. If the beneficiaries are to be determined by arbitrary and uncertain standards, the bequest is void. 9 Am. Dec. 586. The purpose of the trust must appear from instrument creating it. 9 How. U. S. 55.

A gift for charitable uses must be sufficiently definite that a court of chancery can determine from the will the beneficiaries and carry out the design of the testator. Courts of chancery do not permit trustees, of their motion, to break in upon the capital of a trust estate. 6 Hump. 219.

Youmans & Youmans, for appellees.

A charitable devise to the vestrymen of a church, an unincorporated religious body, is a good charitable devise (74 Ark. 545), but the devisee in the present case is a corporation. The devisee, being the only person that fills the description given in the will, is the proper person to receive the legacy. 48 Atl. 737; 53 L. R. A. 711; 87 Md. 664; 40 Atl. 894; 60 Conn. 472; 22 Atl. 848; 111 Mich. 168; 69 N. W. 251. The rule announced in 4 Wheat. 1 has since been shown to be erroneous. 2 How. 127; 24 *Id.* 465; 95 U. S. 303. A direction for a division of real estate is held to carry an implied power of sale. 28 Am. & Eng. Enc. Law, (2 Ed.), 1003. It is not a question as to whether a sale would be wise, but whether the terms of the will carry an implied power of sale. 50 S. E. 597. Even a non-user or a misuser does not avoid the trust. 74 Fed. 854.

U. M. Rose, for appellees.

Wills are favorably construed in order to carry out the will of the testator. 31 Ark. 581; 13 *Id.* 518. Courts look upon charities with favor, and will carry them into effect if possible consistent with the rules of law. Perry on Trusts, § 699, 709, 716, 717. It immaterial that the beneficiaries are indefinite or not ascertained. 6 Cyc. 904; 74 Ark. 546; 91 Mo. 45; 60 Am. R. 226. Parol evidence is admissible to identify the trustee. 62 Md. 275; 50 Am. Dec. 219; 6 Cyc. § 936. The devises in this case for charitable purposes are valid. 107 U. S. 163; *Ib.* 174; 41 Fed. 371; 91 Mo. 45; 6 Am. Dec. 226. In the case of a charity it is immaterial that the beneficiaries are indefinite, or that the trustee is uncertain. 6 Cyc. 904. In a case of this kind the trust will not fail for want of a trustee, as the court will appoint one. 2 Perry on Trusts, § 722, 731; 4 Ark. 302; 66 *Id.* 166. Uncertainty as to the individual beneficiaries is characteristic of a charitable use. 2 Perry, Trusts, § 732. Any other rule would subvert the foundation of all public charity. *Ib.*

McCULLOCH, J. This appeal involves the construction of the will of Mary Hare, deceased, the validity of certain bequests therein made and the right to sell, during the life of her daughter, Ella Hare, the real estate of the testator. The clauses of the will under consideration are the following:

"I give and bequeath to Rev. Lawrence Smyth and the Rev. Michael Smyth the sum of two hundred dollars each, and request that they offer the Holy Sacrifice of the Mass occasional for the eternal repose of the souls of myself and my husband.

"I give, devise and bequeath to the Convent of the Sisters of Mercy at Fort Smith, known as Saint Anne's Convent, one-half of all my real estate, real and personal, after deducting the legacies and bequests mentioned in this my last will and testament, for the support and maintenance of my daughter, Ella Hare, during her life, and after the death of my said daughter Ella I give, devise and bequeath to the said Sisters of Mercy the said one-half of my estate, real and personal, for the purpose of helping to educate poor Catholic children.

"I give, devise and bequeath to the pastor of the parish of the Immaculate Conception of Fort Smith in the State of Arkansas one-half of all my estate, real and personal, to be used by the said pastor for the purpose of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood."

The testatrix, Mary Hare, resided at Fort Smith, and was a member of the Roman Catholic Church called the Church of the Immaculate Conception. This church is sometimes called the "Irish Catholic Church" because of the fact that its membership is made up largely of Irish Catholics, and in contradistinction from another church organization in the same city named St. Bonifacius Catholic Church and sometimes called the "German Catholic Church."

There was a local body of Sisters of Mercy connected with the Church of the Immaculate Conception conducting a school on their property adjoining the church, and commonly known as "Sisters of Mercy of St. Anne's Academy." Also sometimes called "St. Anne's Convent," and sometimes "Sisters' Convent." In the laws of the church such an organization is denominated as "Chapter of the Sisters of Mercy," and is perpetuated by the

incoming of new sisters from year to year. The title of the executive officer of the chapter is "Mother Superior," and the office is filled by election of chapter sisters at intervals of three years. When the sisters first enter the convent, they serve for a time as postulants, and later become members of the chapter, and are called "Sisters of Mercy." These organizations are auxiliaries of the Catholic Church, and have fixed rules for their operation.

The General Assembly enacted a statute, which was approved December 20, 1860, as follows:

"An Act to Incorporate the Sisters of Mercy of the Female Academies of Helena, Little Rock and Fort Smith.

"Section 1. Be it enacted by the General Assembly of the State of Arkansas.

"That the Sisters of Mercy of the female academies of Helena, Little Rock, and Fort Smith, and their successors, respectively, are hereby constituted bodies corporate and politic, with succession, each, for ninety-nine years, under the respective corporate names and styles of 'The Sisters of Mercy of the Female Academy of Helena,' 'The Sisters of Mercy of the Female Academy of Little Rock' and 'The Sisters of Mercy of the Female Academy of Fort Smith,' and by those names applicable to each corporate body as if contained in separate acts; shall have power to make contracts, and to sue and be sued, and shall have a common seal; and each corporation, respectively, shall have full power to form such constitution and by-laws, or such rules and regulations, as may be necessary and needful for the government of each of said academies respectively; and to promote proper discipline and education and learning therein and to provide for the selection of superiors or directors, or other officers therein, at any time; also power to use and preserve their property, real, personal and mixed, and to have, hold and enjoy the same, which may be at any time given, donated, granted, sold or bequeathed to the said sisters, or said academies, respectively, for the use thereof; and to sell, mortgage or pledge the same, for the benefits of the said academies, or for the use thereof, respectively; and finally to do and perform all other things that may be proper to be done for the advancement of learning, and the interest and objects of the said corporations,

respectively; but nothing shall be allowed contrary to the Constitution and laws of this State.

"Sec. 2. No misnomer shall defeat or annul any grant, gift, devise or bequest thereto, or contract therewith, whenever the real intent sufficiently appears.

* * * * * * * * * * * * * * * * * * *

"Sec. 4. This act shall be construed as if it were three separate charters for said corporations, and shall be judicially noticed without pleading, and shall be in force from its passage."

The chancellor in his decree construed the will as follows: "The bequest to 'the Convent of the Sisters of Mercy at Fort Smith, known as 'St. Anne's Convent,' is construed to mean that the Sisters of Mercy of the Female Academy of Fort Smith, a corporation, was made trustee under this clause of the will; that said Sisters of Mercy took no beneficial interest, but did take as trustees one-half of said estate, after deducting special legacies, for the support and maintenance of Ella Hare, daughter of testator, during her life, and at the death of said Ella Hare take the said one-half in trust for the purpose of helping to educate poor Catholic children, and the latter bequest was for charitable uses, and was and is a valid bequest to said Sisters of Mercy of the Female Academy of Fort Smith for the purposes mentioned in said will.

"The bequest to the pastor of the Church of the Immaculate Conception is construed to mean that the pastor of the Church of the Immaculate Conception at the death of said testator and his successor or successors as pastor took the property therein bequeathed in trust for the purposes mentioned in that clause of said will; that the said trust was and is a valid one, and that James Brady, present pastor of the Church of the Immaculate Conception, holds said property under the provisions of said will as trustee for the uses and purposes therein mentioned.

"That the Sisters of Mercy of the Female Academy of Fort Smith and James Brady, pastor of the Church of the Immaculate Conception, had the right to sell the property devised as aforesaid and held in trust by them, respectively, as hereinabove decreed, and that the deed of conveyance made to defendant, Tillman Shaw, by said James Brady and the Sisters of Mercy of

the Female Academy of Fort Smith by Sister Aloysius O'Connell, Mother Superior, was and is valid."

Did the chancellor reach the correct conclusion?

1. It is contended, first, that the court erred in construing the language of the will "Convent of the Sisters of Mercy at Fort Smith, known as St. Anne's Convent" to mean and refer to "Sisters of Mercy of the Female Academy of Fort Smith," a corporation created by the statute quoted above; that said so-called "Convent of the Sisters of Mercy at Fort Smith, known as St. Anne's Convent," was not capable of acting as trustee, that the devise was void, and that on the death of the testatrix the title vested by inheritance in her daughter.

It is an elementary rule of construction that a bequest or devise will not fail because of a mere inaccuracy in the designation of the beneficiary, where the meaning of the testator can be gathered with reasonable certainty from the instrument itself, or where the identity of the object of his bounty can be shown by extrinsic evidence; and such evidence is always admissible for the purpose of identifying the beneficiary, where there is uncertainty or ambiguity in the designation. This rule applies to corporations as well as to individuals, and to trustees as well as to those taking for their own benefit. 1 Jarman on Wills, (6th Ed.) p. 347; Page on Wills, § 538, 539; 6 Cyc. p. 936.

"Misnomer," says Mr. Page, "is especially frequent in devises to charitable corporations. The real names of such corporations are often never used and never known by people generally; and many testators do not feel the need, in preparing a will, of getting the real name of the proposed beneficiary. They prefer to guess at the name. Hence the number of adjudicated cases on this point. It is an elementary principle that where a corporation is indicated in a will by an erroneous name, such a mistake will not avoid the gift if it is possible by means used, or by intrinsic evidence, to identify the corporation intended as beneficiary with sufficient certainty. * * * Where the name given to the corporation is not that of any existing corporation, but closely resembles the name of a corporation engaged in a similar work, the gift will be held a gift to such corporation if the evidence indicates that this corporation was intended by testator.

The following cases illustrate the various applications of this principle by the courts, and fully sustain the chancellor in his conclusion: *Reilly* v. *Union Protestant Infirmary,* 87 Md. 664; *Woman's Missionary Society* v. *Mead,* 131 Ill. 338; *Chambers* v. *Higgins,* (Ky.) 49 S. W. 436; *Newell's Appeal,* 24 Pa. St. 197; *Straw* v. *East Main Conference,* 67 Me. 493; *Russell* v. *Allen,* 107 U. S. 167; *Gilmer* v. *Stone,* 120 U. S. 586; *Cook* v. *Universalist General Convention,* (Mich.) 101 N. W. 217; *Oades* v. *Marsh,* 111 Mich. 168; *Bristol* v. *Ontario Orphan Asylum,* 60 Conn. 472.

It is also argued, in this connection, that the statute quoted did not *ipso facto* create the corporation named, but only authorized its organization, which was never done. We think that the statute did create the corporation, and that corporate functions have been exercised thereunder. Real estate to be used, and which has since been continuously used, for the purposes contemplated by the act of incorporation was conveyed to the corporation *eo nomine,* and an organization has been regularly kept up with an executive officer at the head.

2. It is contended that the decree of one-half of the property of the testatrix in the next clause of the will was to the pastor of the Church of the Immaculate Conception then in office, that the trust was conferred upon the individual, and not upon the office, and that the court erred in decreeing that James Brady, the succeeding pastor of the church, could take the property as successor in trust. We think it is quite clear that the testatrix meant to constitute the pastors of the church in succession as the trustees under the will.

3. The main ground for the assault upon the validity of the two devises is that they are both too indefinite to be enforceable in designating the beneficiaries. It is contended that the language "helping to educate poor Catholic children" in one clause, and "for the purpose of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men for the priesthood," in the other clause, is too indefinite to manifest the intention of the testatrix, and that the trust is void and cannot be carried out.

In *Biscoe* v. *Thweatt,* 74 Ark. 545, where the court had under consideration a devise to the "Vestrymen of St. John's

Episcopal Church of Helena, Arkansas, and their successors in office," * * * "for the benefit of said St. John's Church as they may deem best for its interest," it was held that the statute of charitable uses, 43 Elizabeth, c. 4, is in force in this State, that an unincorporated religious body is a public charity, so as to be capable of receiving the testator's bounty as such charity, and that the devise was not too indefinite on account of the discretion vested in the trustees. The court there quoted with approval the following language of the Supreme Court of the United States, speaking of trusts for public charitable purposes: "They may, and indeed, must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are designated, the trust lacks the essential elements of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery." *Russell* v. *Allen, supra.*

In the note to a case of *Fifield* v. *Van Wyck,* 64 Am. St. Rep. 745, the author states (at page 771) the following rule as being sustained by a majority of the adjudged cases: "The donor may, however, appoint trustees, and invest them with discretion to apply the fund toward a charitable purpose specified by him, leaving them, in its application, to select, from numerous persons or institutions, which shall receive the benefit of his bounty, or the testator may specify the charitable purpose in terms so general that the trustees must necessarily exercise a discretion in determining which of many purposes falling within the general description they shall seek to promote or accomplish." Counsel for appellant challenge the statement of the author that this doctrine is sustained by the weight of authority, but we conclude that it is, and that this court has approved it in *Biscoe* v. *Thweatt, supra.*

Mr. Perry announces substantially the same doctrine as follows: "It is immaterial how uncertain the beneficiaries or objects are if the court by a true construction of the instrument has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be. Uncertainty as to the individual beneficiaries is characteristic of a charitable use." 2 Perry on Trusts, § 732.

Now, after having ascertained that the will designates as trustee an incorporated educational institution with purposes and powers defined by the statute creating it, the difficulty of interpreting the meaning of the testatrix in providing that the devise shall be for the purpose of helping to educate poor Catholic children entirely vanishes. There is left no uncertainty in her specification of the charitable purpose, and her intention to vest in the trustee a discretion in its application to select out of the class designated the individual recipients of the bounty is clearly implied. It is plain that the object of the devise was to assist in the education, at the institution named, of such poor Catholic children as the trustee, acting through its proper officials, shall elect. That there are, and will ever continue to be, individuals falling within that class, goes without saying.

Nor is there any uncertainty in the design of the testatrix in providing that the other half of her property shall "be used by said pastor for the purpose of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood." A class to be the object of the bounty is plainly designated, and the selection of the individuals out of that class is left to the discretion of the trustee.

It will hardly be said that either of these devises does not fall within the definition of a public charity. The definition given by Mr. Justice Gray in *Jackson* v. *Phillips,* 14 Allen (Mass.), 539, and generally accepted as correct by the modern American authorities, is that it is "a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings, or works or otherwise lessening the burdens of government." 6 Cyc. p. 900 and cases cited. By every test and according to every definition, gifts for educational purposes are public charities. *Vidal* v. *Girard's Executors,* 2 How. (U. S.), 127.

3. Lastly, it is contended that the trustees named had no power to sell and convey, during the life of Ella Hare, the real estate devised under the will. The terms of the devise do

not confer upon the trustee less power over the disposition of the property during the life of Ella Hare than it does after her death. The devise is absolute; and unless the power of disposition at any time after the death of the testatrix is conferred, then it is not conferred at all, and the property must be held in perpetuity. It is undoubtedly the well settled rule that trustees for infants can never, unless power is conferred by the instrument creating the trust, break into the capital of the trust fund or dispose of the *corpus* of the estate for any purpose, yet we think that the power of disposition for the purposes named in the will is plainly implied from the terms and provisions of the instrument itself. The only limitation upon the power of the trustee is as to the use of the property. During the life of Ella Hare one-half of the estate must be used for her support and maintenance, and for no other purpose. It is not contended that there had been any abuse of the power of sale, if it exists at all, nor that there has been any misappropriation of the proceeds. The objection is only to the exercise of the power at all. The authority of the Mother Superior to execute a conveyance for and in the name of the corporation is also questioned, but we think that her authority is sufficiently shown by the resolution passed by the Sisters of Mercy composing the chapter.

We find no error in the decree, and the same is in all things affirmed.

HILL, C. J., disqualified and not participating.

BOOK v. POLK.

81 244
83 277

Opinion delivered December 17, 1906.

81 244
82 534

LEVEE DISTRICT—CONTRACT ULTRA VIRES—ESTOPPEL.—If a levee district, having power to sell lands for cash, has no power to sell partly for cash and partly for credit, it will be estopped, where it sold partly for cash and partly on credit and received the cash and notes for the purchase money, to deny the validity of the sale.

81 244
87 392

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

H. F. Roleson, for appellant.

1. The president of the levee district is restricted in his disposition of the land to the terms and conditions of the grant. He was therefore unauthorized to sell the land on credit. Acts 1893, p. 172; 67 Ark. 413.

2. Receipt of taxes by the officers of the district does not amount to a ratification of the act of the president. Where an act is void, there can be no ratification. 58 Ark. 270; 40 L. R. A. 621; 37 L. R. A. 711; 10 Wall. 683. The public is presumed to deal with the officers of the levee board with a full understanding of their authortiy. 59 Ark. 513; 34 L. R. A. 262; 34 Am. Rep. 648.

P. D. McCulloch, for appellees.

1. The provision in the act requiring that the treasurer shall certify payment of the price to the president, who shall execute a deed, is directory merely, and not a condition precedent to a valid conveyance.

The opinion in 67 Ark. 413, either as originally written or as modified and corrected (56 S. W. 640), is not applicable. There is a difference between the power of the president to sell the timber from the land and the power to sell the land partly on a credit. In a deed the fixing of the time and manner of payment of the purchase price does not create a condition upon which the title passes. 111 Ga. 65; 55 L. R. A. 513; 71 Ala. 102.

2. Appellant will not be permitted to pursue inconsistent remedies. When he accepted the McVeigh & Bodkin notes, he voluntarily created the relation of debtor and creditor between them and himself; and he cannot be heard to say that the conveyance of the land which constituted the consideration for the notes was invalid. 15 Cyc. 257-8; 49 N. Y. 301; 121 N. Y. 161; 74 S. W. 596; 102 Wis. 436; 211 Ill. 597; 124 Ia. 332; 123 Wis. 116; 49 Mich. 53; 97 Wis. 446; 64 Ark. 213; 7 Enc. Pl .& Pr. 361, 363; 52 Ark. 467; 95 S. W. 808; 65 Ark. 380; 69 Ark. 271; 75 Ark. 50; 57 Ark. 632.

HILL, C. J. McVeigh and Bodkin purchased of the Board of Directors of the St. Francis Levee District a tract of land at its graded price, and paid one-fourth of the purchase price thereof

in cash, and executed promissory notes for the balance payable in one and two years, respectively, bearing interest from date until paid.

The president of the board executed a deed to said purchasers, reciting such purchase, payment and notes for balance, and in consideration of such payment and notes conveyed said land to them. Subsequently the board sold the same land at the same price to others, and this suit is a contest between parties claiming under said sales from the levee board, and turns on the validity of the deed to McVeigh and Bodkin.

The act creating the levee district (act of March 29, 1893) in the first section confers this power of sale on the board: "The said levee district may sell said lands for the minimum prices of $2.50, $1.50 and 50 cents per acre as to grade, or may issue the bonds of said levee district secured by a mortgage on said lands or any part thereof, and payable as the board of directors may determine, and the treasurer of the levee board of said district, upon receipt of payment for any part or parcel of said lands, shall certify the same to the president of said board, who shall execute a deed in the name of said corporation to the purchaser of said lands, the money arising from such sales or issuance of bonds to be applied solely to the construction and maintenance of the levee of said district."

It is argued that only a power to sell for cash is conferred, and that this deed shows on its face that it was partly for cash and partly on credit, and is therefore void. *Myers* v. *Hawkins*, 67 Ark. 413, is principally relied upon by appellant to sustain his position. The opinion in that case was modified, but inadvertently the original and not the modified opinion was published. See correct opinion 56 S. W. Rep. 640.* But there is nothing in said opinion, even as originally drawn, which sustains appellant. The point decided was that under the express terms of the act there was power to sell the land, but not the timber separate and apart from the land; and the action was to prevent the execution

* The paragraph on page 415, 67 Ark. (*Myers* v. *Hawkins*) beginning, "Moreover, it is clear," etc., and the following paragraph, were stricken out of the opinion after the Clerk certified to the Reporter the original opinion for publication. The remainder of the opinion was unchanged. The attention of the Reporter was never called to the modification until now. (Reporter.)

of the contract by enjoining the cutting and removal of the timber. Here there is an undoubted power to sell and at the price sold, and the only departure from the statute alleged is in making deed before all the purchase price was paid.

A municipal or other corporation may be estopped to avail itself of *ultra vires* contracts where the contracts are executed and the contracts themselves are over a matter within the corporate power to contract. *Searcy* v. *Yarnell,* 47 Ark. 269; *Newport* v *Railway Co.,* 58 Ark. 270; *Frick* v. *Brinkley,* 61 Ark. 402; 1 Beach, Pub. Corp. § § 223, 227; 1 Dillon, Municipal Corp. § § 223, 227; 1 Dillon, Municipal Corp. § § 457, 458; *School District* v. *Goodwin, ante* p. 143.

The case of *Hitchcock* v. *Galveston,* 96 U. S. 341, is much in point. Payment for work under a contract was made in negotiable bonds, the issue of which, it was contended, was beyond the power of the corporation. The court said: "The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only *ultra vires;* and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate powers may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it can not object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." Here the district received the benefits of the sale in cash and notes. The purchaser was as effectually bound by his notes as by his cash, and, having received the benefit, it does not lie in the mouth of the district, or those claiming under it, to deny the validity of the mode of performance on its part.

Judgment affirmed.

Mr. Justice McCULLOCH disqualified and not participating.

ARKADELPHIA LUMBER COMPANY *v.* WHITTED.

Opinion delivered December 17, 1906.

81	247
90	412
90	480

1. APPEAL—HARMLESS ERRORS.—Errors of the court in giving or refusing instructions were not prejudicial if the undisputed evidence shows that the judgment of the court was right upon the whole record. (Page 252.)

2. MASTER AND SERVANT—WHEN RISKS NOT ASSUMED.—Where a servant, by reason of his youth and inexperience, does not appreciate the danger incident to the work which he is employed to do or to the place which he is engaged to occupy, he does not assume such risks until the master apprises him of the danger; and if the master fails of his duty in this respect, and the servant is injured thereby, the master is bound to indemnify him. (Page 253.)

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

T. B. Morton and *John H. Crawford,* for appellant.

1. The court erred in giving the third instruction asked for by the plaintiff, and in refusing to give the fourteenth instruction asked for by the defendant. Rules are generally only necessary to be promulgated by railroads and like corporations. 58 Ark. 332. They are required only to avoid accidents, and when from the dangerous nature of the business accidents would most likely occur without them. 64 Am. St. Rep. 785; 20 Am. & Eng. Enc. of L. (2 Ed.), 101. They need not necessarily be written or printed and posted up; if verbal, and sufficient to protect the employees working about the premises when acted upon, nothing more is reqired. It is for the court to say whether such regulations are reasonable. 58 Ark. 334; 52 Ark. 406. See also 31 N. E. 234; 43 Pac. 230.

2. The first, second, fourth and sixth instructions given for plaintiff were erroneous, in this: that they fail to tell the jury that before the defendant can be held liable it must appear that the negligence complained of contributed to and caused the injury. 76 Ark. 436; 75 Ark. 263. The fourth is also abstract.

3. The fifth instruction is erroneous in submitting to the jury the question whether the defendant directed the plaintiff to remove the sawdust, etc., when the machine was stopped. There was no evidence that defendant or its foreman ever gave such direction. Moreover, it permits a verdict against the defendant for injuries resulting from the negligent act of a fellow servant. 39 Ark. 19.

4. The eighth instruction given for plaintiff was erroneous because there was no evidence as to how much plaintiff could earn before the injury nor how much he could earn afterwards. 15 Am. Cent. Dig., cols. 2321-2; 69 Ark. 380.

Hardage & Wilson and *Scott & Head,* for appellee.

1. "If the danger of employment is patent, and the servant, by reason of his youth and inexperience, does not know or appreciate the danger incident to the service he is employed to do, it would be the duty of the master to warn him of it, and instruct him how to avoid it, so far as it can be, before exposing him to it." 73 Ark. 49. The fourth instruction was correct.

2. It is the duty of the master, in the operation of dangerous machinery, to adopt and enforce such rules as will afford reasonable protection to the employees working about the same. In this case, defendant's rule, if it had any, was insufficient; and if it was sufficient, it was not observed. 54 Ark. 289.

3. It was the master's duty to see that the machine was clear, and that no one was in danger before starting; and when it delegated this duty to Blackburn, as appears by the testimony, it placed him in the relation of vice-principal to the plaintiff, and not of fellow servant, and is bound by his acts and negligence. 44 Ark. 530. Even if Blackburn were a fellow servant, yet, if defendant had no rule requiring notice to persons working about the machine when it was about to start, it was guilty of negligence, and liable for the injury. 2 Am. Neg. Rep. 37. If injury results from the negligence both of the master and of a fellow servant, then the master is liable. 66 Wis. 268.

4. The questions as to whether plaintiff, by reason of his youth and inexperience, knew or appreciated the danger incident to his service, and whether he was warned of such danger or instructed how to perform the service required of him, were questions for the jury. 11 Am. Neg. Rep. 599; 115 Mich. 484; 9 Am. Neg. Rep. 482; 1 *Id.* 6; 2 *Id.* 37.

BATTLE, J. Emmet Whitted, by his next friend, brought this action against the Arkadelphia Lumber Company to recover damages occasioned by injuries sustained by him while in the service of the defendant. The lumber company owned and operated a machine for manufacturing staves. In the machine and a part of it were saws so constructed that, when in operation, they vibrate up and down and to the right and left at a great rate of speed, and can be stopped and put in motion independently of other parts of the machine. The plaintiff, a lad about eleven years of age, was employed by the defendant to assist in the

operation of these saws by "picking sticks," and removing out of the way of the saws sawdust and shavings. Before he was sent to work, the foreman showed him the saws, and told him to be careful and not get hurt, and to remove the sawdust and shavings when the machinery was not in motion. No instructions were given him as how he should do the work; and he was not instructed as to the dangers to which he was exposed by the operation of the machinery, and how to guard against the same. On the 17th day of May, 1905, while he was engaged in clearing dust and shavings away from the saws, his left hand was caught, and his fingers, except the thumb, were severed by the saws. Some witnesses say that when he commenced removing the sawdust and shavings the saws were not in motion, but after he had been so engaged for a short time the machinery was suddenly started, without signal, notice or warning to the boy, and the injury was inflicted; and others say that it was in motion all the time he was so employed in cleaning. There was no rule or regulation adopted by the defendant for the protection of its employees against such accidents, unless it was an instruction to the operator to look and see that no one was in danger before putting the machine in motion.

Upon this state of facts the court instructed the jury that tried the issue in the case, over the objections of the defendant, in part as follows:

"No. 1. You are instructed that if you find from the evidence that defendant, by its foreman, ordered the plaintiff, Emmet Whitted, to perform work at the defendant's stave machine, and that the said stave machine was a dangerous and deceptive machine, and that the plaintiff, by reason of his youth and inexperience, did not know or appreciate the danger incident to the service about said machine, and that defendant's foreman did not warn him of such danger or explain to him how to perform the service required of him, and that by reason of the failure to give him proper instructions how to perform the service required of him, or to warn him of the danger incident to the performance of such service about said stave machine, together with the plaintiff's want or lack of knowledge or appreciation of the danger incident to such service, on account of his youth and

experience, he was injured, then it will be your duty to find for the plaintiff.

"No. 2. You are instructed that if you find from the evidence that the plaintiff was employed by defendant, and was by the defendant's foreman ordered to perform services upon and about defendant's stave machine, and that said stave machine was a dangerous machine, and that defendant's foreman did not instruct plaintiff how to perform the services required of him, so that said services might be done in a reasonably safe way, and the danger incident to the same be obviated or lessened if the same can be done, and the plaintiff, by reason of his youth and inexperience, did not know or understand how to perform said service without danger to himself, and that, in attempting to perform the said service required of him, he was injured, defendant is liable, and your verdict will be for the plaintiff.

"No. 3. You are instructed that it is the duty of the master, the defendant, to make and establish such rules and regulations in the management of their stave mill for the protection of their employees against the dangers incident to the performance of their duties; and in this case if you find from the evidence that they had no such rule or regulations, or if they had them and knew that they were not observed or were insufficient to afford reasonable protection against the danger incident to the performance of their duties, and by reason of defendant's failure to make and establish such rules and regulations, or on account of the insufficiency of same, plaintiff was thereby injured, defendant is liable, and your verdict will be for plaintiff.

"No. 4. You are instructed that, although you may believe that the danger incident to plaintiff's employment in and about defendant's stave mill was patent, yet, if you find that on account of plaintiff's youth and inexperience he did not know or appreciate the danger incident to the service he was employed to do, and that the defendant did not warn him of such danger or instruct him how to avoid it, so far as it could be avoided, before exposing him to such danger, your verdict will be for the plaintiff."

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

"No. 8. From the evidence introduced in this case the court

instructs you that the man, Will Blackburn, whose duty it was to feed the defendant's stave machine, and to start and stop the said machine, was a fellow servant with the said Emmet Whitted, and that the defendant will not be liable to the plaintiff for the act or acts of a fellow servant with the said minor; and in this case if they find from the evidence that the said stave machine was stopped and at rest, and that, while the said minor, Emmet Whitted, was engaged in cleaning up under and around the said stave machine, the same was, by Will Blackburn and without the knowledge or consent of the defendant, or its foreman, Frank Duval, suddenly started, by reason of which sudden starting the said Emmet was injured, then you are told that the said injury was the result of the act of a fellow servant, and your verdict should be for the defendant."

"No. 14. If the jury find, from the evidence in this case, that Will Blackburn was the feeder of what was known as the stave machine in the mill of the Arkadelphia Lumber Company, at which the plaintiff's son, Emmet Whitted, was injured, and that it was the duty of said feeder to start and stop the said machine, and that in this case the said Will Blackburn was properly instructed by defendant, or by some one for it, to be careful to see that no one was in a dangerous position about said machine before starting the same, or instructions to the same effect, then and in that event the defendant cannot be held to be liable in damages for the failure to make and promulgate further rules for the protection of the other employees working in and about the said stave machine, notwithstanding the jury may believe that the said Blackburn failed to comply therewith."

The jury returned a verdict in favor of plaintiff for $3,000, and the defendant appealed.

The giving of instruction numbered 3, if incorrect, and the refusal to give instructions numbered 8 and 14, if correct, were not prejudicial.

In *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 238, it is said: "If * * * the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the danger incident to the work he is employed to do or to the place he is engaged to occupy, he does not assume the risk of his employment until the master apprises him of the dangers. It would be

a breach of duty on the part of the master to expose a servant of this character, even with his consent, to such dangers, without first giving him *such instructions and caution as would,* in the judgment of men of ordinary minds, understanding and prudence, be *sufficient to enable him to appreciate the danger, and the necessity for the exercise of due care and caution, and to do the work safely, with proper care on his part.* For a breach of his (this) duty the master is bound to indemnify such servant against the consequences. He can not escape this liability by delegating the duty to instruct or inform to another person." *Glover* v. *Dwight Manufacturing Co.,* 148 Mass. 22; *King-Ryder Lumber Co.* v. *Cochran,* 71 Ark. 55; *Ford* v. *Bodcaw Lumber* Co., 73 Ark. 49.

The court instructed the jury that it was the duty of the appellant to warn appellee of the dangers incident to the service he was employed to do, and how to avoid it, so far as it can be, before exposing him to it. It (appellant) did not warn him of the danger to which he was exposed, and how to do his work so as to avoid the same, which could have been done by the use of a stick.

The undisputed facts in the case show that the injury to appellee was due to the failure of the master to properly caution and instruct him. The judgment of the court is right upon the whole record.

Judgment affirmed.

DAVIES v. PUGH.

Opinion delivered January 7, 1907.

1. SUBROGATION—PRIOR VALID SECURITY.—One who surrendered a prior valid mortgage upon his debtor's homestead for another which proves to be invalid because the signature of the debtor's wife thereto was forged is entitled to be subrogated to the lien of the prior valid mortgage. (Page 256.)

2. AGREEMENT TO HOLD PRIOR SECURITY—WHEN IMPLIED.—From proof that plaintiff took up an outstanding note and mortgage which had been

executed by defendant, and held them until defendant executed to him a new note and mortgage, an agreement will be inferred that he should hold the old mortgage as security until a new one should be executed, although the old mortgage was not assigned to him, and there was no express agreement with defendant that he should hold the old mortgage as security. (Page 257.)

3. SUBROGATION—LIMITATION.—If the statute of limitations applicable to mortgage foreclosures applies to a suit to enforce the right to be subrogated to a mortgage, such a suit will not be barred where the debt has been kept alive by a new note executed by the debtor. (Page 257.)

Appeal from Carroll Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

F. O. Butt, for appellants.

1. The fact that one who pays off a prior lien retains in his own possession the note and deed evidencing such lien is not sufficient to give a right of subrogation. 44 Ark. 504. A mere loan of money for the purpose of enabling the borrower to pay a debt is not sufficient to entitle the lender to be subrogated to the rights of the creditor whose debt is thus paid. One who advances money to pay off a lien, even at the request of the debtor, and takes a note or mortgage to secure the repayment of the advance, is not thereby entitled to be, in addition, subrogated to the rights of the creditor whose debt has been paid with the money loaned. 39 Wis. 643; 50 Ark. 108; 95 Ill. 39; 10 Heisk. (Tenn.) 522; 47 Ark. 111; 44 Ark. 504. One who volunteers to pay the debt of another is not entitled to subrogation. 24 Am. & Eng. Enc. of L. 244; 104 Ind. 41; 25 Ark. 129; 86 Ky. 191. If appellee was entitled to subrogation at all, he being under no obligation to pay the debt, it must depend on contract between himself and appellant. 24 Am. & Eng. Enc. Law, 273; 116 Ill. 216; 23 Am. Dec. 773; 3 Paige (N. Y.) 117; 95 Mich. 81; 134 U. S. 534.

2. If appellee were entitled to be subrogated to the bank's lien, he was still barred from claiming under that lien. One seeking subrogation to the rights of a prior lienor stands, with respect to the statute of limitations, in the same position as the lienor would have occupied. 44 Ark. 504. See also 54 Ark. 441.

3. The statute of limitations is as binding in equity as at

law. 46 Ark. 25; 47 Ark. 304; 20 Ark. 359; 43 Ark. 469. And even in equity the statute is absolutely binding unless the party who would be barred by it is thus barred through the fraud of the beneficiary, or by ignorance of his own as to facts without adequate means of informing himself. Herman on Estoppel, 235; 52 Pa. 400. In equity it is not even necessary to plead the statute. 39 Ark. 158.

J. V. Walker, for appellee.

1. Having paid the debt of appellant to the bank at his request, and received from it the note and mortgage, appellee acquired all the rights which the bank originally had, and was entitled to subrogation. Sheldon on Sub. § § 243-247; 44 Ark. 507.

2. If one advances money to pay off an incumbrance, upon an agreement with a debtor that the security shall be assigned to him or a new one given, he will be subrogated to the rights of the original creditor. 66 Md. 530; 125 Ill. 415; 68 Mich. 641; 128 Ind. 293; 49 N. E. 1064.

3. If the security was defective by reason of being a homestead, the wife not having joined in the conveyance as required by law, appellee would be substituted to the rights of the Carroll County Bank, unless equal or superior rights of others would be prejudiced. 37 Mich. 82; 74 Ala. 507; 48 Wis. 198; 39 Ark. 531.

4. The acts and conduct of appellants in the execution and delivery of the note and mortgage, and their subsequent conduct, created an estoppel against them, and they can not succeed upon the plea of limitation against the original note and mortgage. 2 Story's Eq. Jur. § § 804, 805.

McCULLOCH, J. Appellants, J. R. Davies and wife, Clara L. Davies, executed to the Carroll County Bank, to secure payment of an indebtedness of the former to said bank, a mortgage on lands owned by him which constituted his homestead. After the debt fell due, appellee, D. B. Pugh, at the request of appellant J. R. Davies, paid the debt, and the mortgage and note were delivered to him (appellee) by the bank. Subsequently J. R. Davies executed to appellee his promissory note for the amount of said debt, and, as security for payment of said note, also

delivered to him a mortgage which he executed and acknowledged on the same land, and which purported to be executed and acknowledged by his wife. Upon delivery of the last note and mortgage to appellee he surrendered the old ones. Afterwards appellee brought suit in equity to foreclose his mortgage, a decree of foreclosure was rendered, and the land was sold by commissioner of the court and purchased by appellee.

The present suit was instituted by appellants later to vacate and set aside the decree of foreclosure and sale of the land on the alleged ground that the land constituted the homestead, that Clara L. Davies did not sign or acknowledge the mortgage to appellee, and that she was not served with summons in said foreclosure suit. Appellee filed his answer and cross complaint, denying the allegations of the complaint, and praying that, in the event the court should find that Clara L. Davies did not sign the mortgage, he be decreed a lien on the land by way of subrogation to the rights of the Carroll County Bank under the mortgage executed to it.

Appellants filed separate answers to the cross complaint, denying appellee's right of subrogation under the old mortgage, and pleading the statute of limitation against the debt originally secured by same.

The court rendered a decree vacating and setting aside the foreclosure decree and sale, but decreed a lien on the land in favor of appellee for the amount of the debt paid by him to the Carroll County Bank, and the taxes, etc., subsequently paid on the land.

It is fully proved that Mrs. Davies did not sign the mortgage to appellee, and the chancellor so found, but he also found that appellee did not know this when he accepted it as security for the debt and surrendered the mortgage executed to the Carroll County Bank, which he then held, and which was a valid and subsisting lien on the land. He accepted the new mortgage with the name of the wife signed to it and with a proper certificate of acknowledgment appended, and was justified in assuming that it was signed and acknowledged by her. Having surrendered a valid security for another which proved invalid because of the failure of the wife to join in the conveyance, appellee was entitled to be subrogated to the rights under the former. *Chaffe*

v. *Oliver;* 39 Ark. 531; *Wyman* v. *Johnson,* 68 Ark. 369.

But it is said that appellee is not entitled to subrogation because the mortgage was not assigned to him when he paid the debt to the bank, and he has not proved an express agreement with Davies at that time that he should hold the mortgage as security for the debt, or that the latter would execute another valid mortgage to secure the debt. It is shown, however, that appellee took up the note and mortgage when he paid the money to the bank and held them until the new mortgage was executed. He does not show an agreement at the time that he should hold the mortgage as security, but he did in fact hold it, and under the circumstances such an agreement may fairly be inferred. It is not essential that the agreement should have been expressed in so many words. *Rodman* v. *Sanders,* 44 Ark. 504; 6 Pom. Eq. Jur. § 921; Sheldon on Subrogation, § 247; *Denton* v. *Cole,* 30 N. J. Eq. 244; *Dillon* v. *Kauffman,* 58 Tex. 696; *Gans* v. *Thieme,* 93 N. Y. 225; *Warford* v. *Hankins,* 150 Ind. 489.

This court, in *Rodman* v. *Sanders, supra,* said: "The mere lender of money, which the borrower applies in part payment of the purchase money on land, is not substituted to the rights and remedies of the vendor. But one who pays a debt at the instance of the debtor is not a volunteer; and if, when he made the payment, he manifested an intention to keep the prior lien alive for his protection, he will be deemed in equity a purchaser of the incumbrance."

The transaction between appellee and Davies was not a mere loan of money which was used in paying off a debt due to another. It was more than that. Appellee paid the debt for Davies, took up the note and mortgage, and held them until new security was executed, which afterwards proved invalid. His taking up of the mortgage and retention of it in his possession was the clearest sort of manifestation of his intention to keep the security alive until he was induced to part with it in exchange for the new security. It is clear to us that an agreement for the holding of the security by appellee must be implied from these circumstances, and that he is entitled to subrogation to the old security since the new has proved invalid.

Appellants insist that the note secured by the old mortgage

is barred by the statute of limitation, and that the right of subrogation is also barred. It is sufficient, in answer to this contention, to say that the debt was kept alive by the new note executed by Davies, the debtor. If it be held that the statute of limitation against suits to foreclose mortgages (Kirby's Digest, § 5399) applies to a suit to enforce the right of subrogation upon a state of facts shown in this case, still the cause of action set forth in the cross-complaint is not barred, as the debt itself has been kept alive, and is not barred.

Decree affirmed.

CONNERLY v. DICKINSON.

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Opinion delivered December 24, 1906.

1. ADVERSE POSSESSION— EXTENT.—One who takes possession of a part of a tract of unoccupied land under deed describing the whole is deemed to have constructive possession to the limits of the tract. (Page 261.)
2. SAME—BY CONSTRUCTION.—Constructive possession follows the title, in the absence of actual possession adverse to it. (Page 261.)
3. SAME—CONTINUITY.—Proof that parties have claimed certain land for a number of years, have paid taxes thereon, have occasionally cut timber thereon, and caused their agents to maintain a watch so as to prevent other persons from trespassing, does not establish such continuous and notorious holding as will give title by adverse possession. (Page 261.)
4. SAME—BY PAYMENT OF TAXES.—Kirby's Digest, § 5057, providing that "wild and uninclosed land shall be deemed and held to be in possession of the person who pays taxes thereon," has no application where part of the tract upon which the taxes have been paid as a whole by defendants has been in the actual possession of plaintiffs. (Page 263.)
5. APPEAL—COMPUTATION OF TIME.—In computing the year allowed by Kirby's Digest, § 1199, for appeals, the day on which the judgment or decree was rendered must be excluded, and a full year after that day be given for appeal. (Page 263.)
6. TAXATION—LIEN.—On canceling a void tax sale, the tax purchaser is entitled to a lien for the purchase money and subsequent taxes paid, with interest on the whole at ten per cent. per annum from date of the several payments. (Page 263.)

Appeal from Chicot Chancery Court; *Marcus L. Hawkins, Chancellor;* reversed.

Action by Mrs. Katie Connerly and others against J. W. Dickinson and another to quiet title to land. Judgment was for defendants, from which plaintiffs appeal.

Baldy Vinson and *June P. Wooten,* for appellants.

1. As between Mrs. Dickinson and Thornton, the question as to whose is the better title has been settled. 65 Ark. 610. Since by that decision his title was established to the twenty acres east of the brake, it extends to the whole of the tract described in the Jones deed. 57 Ark. 97. Where one buys a tract of land, it is not necessary that he put a fence around the whole, in order to hold it. 10 Pet. 412; 10 Wall. 519. Possession and cultivation of a portion of the tract is constructive possession of the whole, unless the remainder is being held adversely. 144 U. S. 526; 4 Dak. 196; 30 O. St. 417; 25 Cal. 132; 25 Fla. 837; 15 Ill. 273. And constructive possession follows the legal title where there is no actual adverse possession. 57 Ark. 523; 60 Ark. 163; 43 Ark. 485; 67 Ark. 411.

2. Before appellee is entitled to all the land except the twenty acres east of the brake, she must show actual, open, adverse and continuous possession of it for the statutory period; and possession can not be established by evidence of general reputation in the community. 90 Ga. 52. Cutting wood, or making rails from timber on the land, or taking possession and deadening the timber on the land, is not sufficient to show adverse possession. 68 Ark. 551; 49 Ark. 266. "Fitful acts of ownership in connection with the payment of taxes and claim of title are not such notice as to put the owner upon his guard against a continuous disseizin and adverse possession for seven years." 64 Ark. 100; 68 Ark. 551; 75 Ark. 415.

3. By reason of irregularities in connection with the sale, the same is void, and the deed of the clerk made under it conveyed no title. Unless notice of the sale of delinquent lands is recorded, and unless a certificate is made at the foot of the record showing in what newspaper the list was published, etc., the sale is void. Kirby's Digest, § 7086; 55 Ark. 218; 61 Ark. 36; 65 Ark. 595; 68 Ark. 248. Unless notice of sale is published

for the length of time required by law, the sale is a nullity. Kirby's Digest, § 7085; 30 Ark. 661; 55 Ark. 192; 55 Ark. 213; 68 Ark. 426. Where the clerk fails to keep separate books of sales of delinquent lands and of sales made, the sale is void. 70 Ark. 326. Where the land sells for an excessive amount of taxes, penalty and costs, the sale is void. 56 Ark. 93; 55 Ark. 30; 57 Ark. 195; 60 Ark. 215; 61 Ark. 36.

J. W. Dickinson, for appellees.

1. The transcript was lodged here too late. The appeal was prayed in lower court November 11, 1904, and the year expired November 10, 1905.

2. Appellants could not maintain an action for recovery or possession of the land unless they can show that they or their grantors were seized or possessed thereof within two years next before the commencement of the action. Kirby's Digest, § 5061. See also Kirby's Digest, § 7105; 53 Ark. 418; 71 Ark. 107; 57 Ark. 523; 59 Ark. 460; 60 Ark. 499; 60 Ark. 163; 71 Ark. 390.

3. Appellants are barred by the seven-year statute of limitation. Kirby's Digest, § 5056; 39 Ark. 158; 67 Ark. 320; 70 Ark. 371; 61 Ark. 527.

McCULLOCH, J. On March 7, 1901, appellants commenced this suit in chancery court of Chicot County against appellees to quiet title to the north half of the northwest quarter of section 19, township 14 south, range 3 west. They claimed title as follows: Donation deed from State of Arkansas March 18, 1877, to Peter Jones, conveying said northwest quarter; deed from Peter Jones to Joseph Thornton for same land; deed from Thornton to plaintiffs July 28. 1885, conveying undivided half of said land, and partition deed October 24, 1900, from Thornton's heirs conveying the north half of said northwest quarter. They alleged that Thornton had continuously held possession from time of his purchase from Jones, and that plaintiffs had continuously held possession since their said acquisition of title.

The defendants answered, denying title in plaintiffs and claiming to have held possession adversely under a deed executed to them by one Carleton in 1878. They also claimed title under a sale by the collector of taxes in June, 1898, for the taxes of 1897.

No attack is made upon the donation deed to Jones, so that must be accepted as having placed the title in Jones. Jones took possession of the tract, and he and his grantee, Thornton, cleared up and put in cultivation about 20 acres on the east part of the quarter section. One of the appellees brought an action of ejectment against Thornton for these 20 acres, and a trial of the case resulted in a judgment for Thornton, and, on appeal to this court, the judgment was affirmed. *Dickinson* v. *Thornton,* 65 Ark. 610.

Appellees claim title to the remainder of the tract by reason of having had actual possession for more than seven years before the commencement of this suit. The chancellor decreed the 20 acres to appellants and the remainder to appellees.

Does the proof sustain appellees' claim of actual, adverse possession?

Appellants and their grantors having taken and held possession of 20 acres of the land under a deed describing the whole of the quarter section, their possession is deemed to have extended constructively to the limits of the premises therein described. *Pillow* v. *Roberts,* 12 Ark. 829; *Elliott* v. *Pearce,* 20 Ark. 508; *Sparks* v. *Farris,* 71 Ark. 117.

Constructive possession follows the title, in the absence of actual possession adverse to it. *Gates* v. *Kelsey,* 57 Ark. 523; *Woolfolk* v. *Buckner,* 67 Ark. 411; *Haggart* v. *Ranney,* 73 Ark. 344.

It is necessary, therefore, for appellees to show actual possession—*possessio pedis*—continuing for the statutory period, in order to make out title by limitation. The proof does not show this. The most that is shown by the evidence is that appellants have for a number of years claimed ownership of the land, paid taxes thereon, occasionally cut timber thereon and caused their agents to maintain a watch so as to prevent other persons from trespassing thereon. These are only "fitful acts of ownership" which this court has held do not constitute title by limitation. *Brown* v. *Bocquin,* 57 Ark. 97; *Driver* v. *Martin,* 68 Ark. 551; *Boynton* v. *Ashabranner,* 75 Ark. 415; *John Henry Shoe Co.* v. *Williamson,* 64 Ark. 100.

In *Driver* v. *Martin, supra,* the court, in speaking of such acts of ownership, said: "They lack the continuity that is neces-

sary to constitute the seven years unbroken possession that will bar the recovery of the land by the true owner and vest the title in the adverse occupant. They were disconnected trespasses, and vested title in no one."

In *Boynton* v. *Ashabranner, supra,* we said: "The payment of taxes, the claim of ownership, and the exercise of fitful and disconnected acts of possession are insufficient to create title by adverse possession. The cutting of timber and firewood from this place did not evidence the continuity of possession and hostile and notorious holding which are necessary to give title."

Appellees introduced testimony to the effect that Mary Jackson, one of the heirs of Jos. Thornton, cleared and put in cultivation about three acres of the land in controversy, that they caused her arrest in 1896 for criminal trespass, and that she then agreed to attorn to appellees as her landlords, and executed to them her note for $5 as rent of the land she was cultivating. This, however, occurred within seven years before the commencement of this suit; and if it be conceded to be an act of adverse possession on the part of appellees commencing when Mary Jackson attorned to them, it is evidence that they were not in possession prior to that time.

It is also shown that a man named Dickey at one time leased a part of the land from appellees, deadened about three acres, and cleared and fenced a small patch, containing about half an acre. It does not appear, however, when this occurred, and we can not assume that it occurred more than seven years before the commencement of this suit; nor is it shown the length of time the occupancy of Dickey continued. These matters are considered, even when taken as having transpired within the period of limitation, in passing upon the continuity of appellees' alleged possession, but, considering together all of the alleged acts of adverse possession, we think they fall short of establishing continuous adverse possession by appellees for a period of seven years.

One of the appellees in his testimony and some of the other witnesses state in general terms that appellees were in possession of the land, and that it was generally understood to be in their possession, yet they do not specify acts which collectively amount to continuous adverse possession. We are clearly of the opinion

that the plea of adverse possession is not sustained by the evidence.

Appellees also prove payment of taxes as acts of possession. The whole of the northwest quarter of section 19 was assessed for taxes as an entirety, and the taxes thereon were paid as a whole. Part of the tract has been in actual occupancy of appellants and their grantors, so the statute providing that "improved and uninclosed land shall be deemed and held to be in possession of the person who pays taxes thereon" (Kirby's Digest, § 5037) has no application. *Wheeler* v. *Foote*, 80 Ark. 435.

The sale of the land for taxes in 1898, under which appellees also claim title, is void, and the tax deed conveyed nothing. The final decree below was rendered on November 11, 1904, and an appeal was granted by the clerk of this court on November 11, 1905. Appellees contend that the time for appeal expired November 10, 1905, and that the appeal was improperly granted. The statute provides that "an appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed." Kirby's Digest, § 1199. In computing the time allowed for appeal the day on which the judgment or decree was rendered must be excluded, and a full year after that day given for appeal. The appeal was granted and perfected within the time allowed by law.

The decree of the chancellor is erroneous, and the same is reversed and remanded with directions to enter a decree for appellants quieting their title to lands described in the complaint, and also declaring a lien thereon in favor of appellees for the amount of taxes and penalty paid by them on the land in purchasing the same at tax sale in 1898, and all taxes paid by them since then, together with interest on the whole at ten per cent. per annum from date of the several payments.

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

Opinion delivered January 7, 1907.

RELEASE—REPUDIATION—REFUNDING MONEY.—A release of damages obtained by fraud from a person incapable of contracting may be repudiated by him without refunding the consideration received for such release.

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

B. S. Johnson, for appellant.

1. The verdict ignores the complete accord and satisfaction of all claims made by the plaintiff before suit was brought.

2. The court erred in refusing the fourth instruction asked for by the appellant. 86 N. Y. 79; 61 Fed. Rep. 54; 65 Fed. 460; 113 Fed. 915; 62 Ark. 278. And also in refusing the 5th and 10th instructions on the same point.

3. There can be no recovery for fright, hence the 3d instruction given was erroneous. 69 Ark. 405. In the absence of physical injury, and upon a mere showing of fright and nervous shock, as appears from this record, appellee is not entitled to recover. 64 Ark. 544; 65 Ark. 180; 67 Ark. 123; 25 Iowa, 268.

C. V. Teague, for appellee.

The proof is clear that the claim agent took advantage of her condition—that she signed the release at a time when she was not in a mental condition to realize what she was doing. Obtaining the release under such circumstances was such a fraud as to vitiate the contract. 73 Ark. 43. And it was not necessary to tender back the consideration received before suing. *Id.;* 6 Wash. 202; 109 Ill. 120; 18 Kan. 58. See also 75 Ark. 88; 6 Gray (Mass.) 279; 201 Ill. 152; 67 N. C. 122.

BATTLE, J. On November 22, 1904, Carrie Sandidge was a passenger on a train of the St. Louis, Iron Mountain and Southern Railway Company. On that day, near Swifton, Arkansas, the train was wrecked by a collision with a freight train of the company, and the car in which Mrs. Sandidge was seated was derailed, and she was seriously injured. On the same day she

received a check of the company for one hundred dollars to compensate her for her damages, and she executed to it an instrument of writing in which she released and discharged it from all claims or liability growing out of the accident. On the 25th day of March, 1905, she brought this action against the railroad company to recover damages suffered from the injuries received in the wreck, and the defendant pleaded the release in bar of the same.

In a trial before a jury evidence was adduced tending to prove the following facts:

Prior to the 22d of November, 1904, Mrs. Sandidge was in good health and earned her living. On the day named she was a passenger on a train of the defendant. On that day the train was wrecked, and she was knocked senseless, and during the day was hardly conscious; suffered great pains in her head and spine, and was compelled to take morphine for relief; took two or three doses. The morphine made her dull; she could not control her thoughts, and talked at random. She was extremely weak, nervous and hysterical, and seemed to be bewildered. While in this condition she signed an instrument of writing in which, for the consideration of a check for one hundred dollars, she released the railroad company from all liability for the injuries she received. She did not know what she was doing when she signed it. On the night of the 22d of November, 1904, she arrived at Hot Springs, Arkansas, her former home, and was nearly crazy; did not know her own son; did not know where her grip was, or where she was; grew worse for several days after the wreck; was nervous and dazed. On the 21st day of December, 1904, she consulted a physician. He found her in a very nervous condition, trembling, cold hands, complaining of pains in the head and neck, noises in the ears, fainting spells, and had dilations of the pupils, and suffering from traumatic neurosis of the spine. Every ten days she has severe spells of pain in her head and spine; has to take medicine most all the time; does not sleep well. When frightened or excited, has spasms and fainting spells and falls down. When she has the fainting spells, she is sick in bed for two or three days. She has to have an attendant when she goes out in town, she being afraid that she might have spasms, faint and fall in the street. She collected the check for the one hun-

dred dollars, but did not know, at the time, the contents of the release, and was not resposible for what she was doing. Soon after the accident she was forgetful and could not remember as she did before. She has been unable to work since the accident; before, she earned from forty to fifty dollars a month. Evidence was also adduced tending to prove facts in conflict with the foregoing, which it is not necessary to state, as the question for us to decide is, was there evidence, if true, sufficient to sustain the verdict?

Among other instructions the court gave to the jury the following:

"If the plaintiff, while under the influence of opiates to such an extent as to be incapacitated to contract, executed a release of damages for personal injuries, it is not obligatory on her, and is no defense to this action.

"3. If you find from the evidence in this case that plaintiff, while a passenger on one of defendant's trains, was injured in a wreck of the train on which she was a passenger, and that the wreck was caused by the negligence of defendant, as explained in other instructions, that she was frightened, injured and shocked to such an extent that opiates were administered to her, and by reason thereof her mental faculties were impaired to the extent of rendering her incapable of entering into a contract, as explained in other instructions, and while in that condition defendant's agents procured her signature to the release introduced in evidence, it is no defense in this action.

"2. You are instructed that a settlement and receipt in full of an unliquidated demand, when made with a complete knowledge of all circumstances and the mental capacity to contract, is a bar to a subsequent action upon the demand; therefore, if you believe from the evidence in this case that the plaintiff accepted $100 in satisfaction of all demands against the defendant growing out of the wreck, and that she at the time knew all the circumstances, your verdict must be for the defendant.

"13. Even if you should find from the evidence that plaintiff signed the release at a time when her faculties were so impaired that it would not be binding on her, still if you find from the evidence that, after she got to Hot Springs, and two or three days after she had taken any opiates, and while she was in pos-

session of her faculties and capable of understanding what she was doing, she collected the money, and she knew at the time that said amount was in full satisfaction of all claims against the defendant, this is a ratification of the contract, and your verdict must be for the defendant."

And the court refused to give the following at the request of the defendant:

"4. When a person receives money in consideration of making an agreement, and where the agreement is not obtained by fraud, and afterwards seeks to avoid the agreement and to have it set aside, he must first give back the money received; and if plaintiff has not done this, your verdict must be for the defendant.

"5. You are instructed that the plaintiff in this case had no right of action at law, until she had rescinded the agreement and returned or offered to return the money received from defendant upon such agreement; and if you find from the evidence that the plaintiff has not done this, you must find for the defendant."

The jury returned a verdict in favor of the plaintiff for $3,000, less $100 which had been paid; and the defendant appealed.

There was evidence adduced at the trial which was sufficient to sustain the verdict of the jury. The remaining question is, did the court err in refusing to give instructions numbered 4 and 5, asked for by the appellant? In other words, was it the duty of appellee to refund the one hundred dollars received by her from appellant as compensation for injuries, before bringing this action? According to the ruling of this court in *St. Louis, Iron Mountain & Southern Railway Company* v. *Brown*, 73 Ark. 42, it was not. See 24 American & English Encyclopedia of Law, 320, and cases cited.

Judgment affirmed.

JONESBORO, LAKE CITY & EASTERN RAILROAD CO. *v.* GUEST.

Opinion delivered January 7, 1907.

RAILROAD—STOCK CASE—DEFECTIVE HEADLIGHT.—Evidence, in an action against a railroad company for negligently killing stock at night, that,

if defendant's headlight had been in good condition, the animal could have been seen in time to avoid killing him, is sufficient to support a verdict against the company.

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

Brown & Driver, for appellant.

The *prima facie* case of negligence resulting from proof of the killing of the horses was overcome by the testimony of the engineer and the witness Jones, which showed that they were keeping a proper lookout, and that the engineer stopped the train as quickly as possible after discovering the animals on the track in the effort to avoid injuring them. Their testimony ought not to have been arbitrarily disregarded by the jury. 67 Ark. 516; 43 Ark. 225; 57 Ark. 21; 66 Ark. 439.

Lamb & Caraway, for appellee.

BATTLE, J. J. W. Guest sued the Jonesboro, Lake City & Eastern Railroad Company for killing two horses, of the value of $300, and his property, and recovered a verdict and judgment for $300. The question is, was the verdict sustained by the evidence?

The horses were of the value of $300, the property of the plaintiff, and were killed by the defendant's train on the track of its railroad. There was evidence adduced tending to prove the following facts:

First. The defendant was running its train with a headlight so dim that nothing could be seen more than fifty yards in advance of the train.

Second. The horses ran from one hundred to one hundred and twenty-five yards ahead of the train and between the rails before going into the trestle where the horses were killed.

Third. Between a curve over which the train passed before killing the horses and the trestle is a quarter of a mile of straight track.

Fourth. That there was every opportunity for the engineer to have seen the horses, if his headlight had been in a condition to enable him to see for a quarter of a mile before he struck them.

Fifth. That the train was stopped "in about its length."

From this evidence the jury might reasonably have concluded that, if the headlight had been in good condition, the engi-

neer could have seen the horses in time to avoid killing them, if he had been keeping a lookout. The evidence was sufficient to sustain the verdict.

Judgment affirmed.

REMMEL v. GRIFFIN.

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Opinion delivered January 7, 1907.

1. INSURANCE—WHEN POLICY ACCEPTED.—One who takes out a policy of life insurance is required to examine it within a reasonable time after he receives it, or he will be deemed to have accepted it, and become liable upon his note for the premium. (Page 271.)
2. SAME—EFFECT OF FAILURE TO READ POLICY.—One who has received a policy of life insurance and has failed to notify the insurance company or its agent of his objections to the policy within a reasonable time can not avoid the payment of his premium note upon the ground that he did not read the policy, unless he was induced by the insurance company or its agent not to do so. (Page 271.)

Appeal from Sevier Circuit Court; *James S. Steel,* Judge; reversed.

Otis T. Wingo, for appellant.

It is admitted that the appellee was of sound mind and business ability, and was able to read and write with ease. It was his duty to examine the policy on receiving it, or within a reasonable time thereafter. Failing therein, he must abide the consequences of his own negligence. 31 Ark. 170; 7 Ark. 167; 30 Ark. 686; 11 Ark. 58; 26 Ark. 28; 19 Ark. 522; 22 Ark. 244.

BATTLE, J. This is an action on a note executed by W. A. Griffin to R. M. Carter, or order, for the sum of $78.96, on the second day of September, 1903, and due on the first day of December, 1903, and transferred by Carter to H. L. Remmel. The action was brought by Remmel against Griffin.

The defendant, answering, admitted the execution of the note, but alleged that it was given in payment of the first year's premium on a policy of insurance, and that the policy delivered was not such as that for which he contracted.

In the trial before a jury the defendant testified as follows: "About the first of September, 1903, R. M. Carter, an agent of the insurance company, sold me a policy of insurance. It was to be a ten-pay policy for $2,000. I executed the note sued on, * * * gave this note in payment of the first premium on the policy I was to receive. Relying upon the agent to give me the policy promised, I signed the application without reading it to see what kind of a policy it called for, further than to see that it was a ten-payment policy. I did not examine the policy when it came to see if it was the kind promised, but signed the receipt attached to the deposition of Mr. Lewis without reading or examining the policy. I did not examine the policy until a month or so after I received it, and then for the first time noticed that it was not a ten-pay policy, as I had expected, but instead it was a twenty-pay twenty-year distribution policy. I returned the policy in a few days, but Mr. Carter returned it to me, advising me that it could not now be canceled, as it was in force for one year, and that the note, which was then due, would have to be paid. I am 40 years old, a tie contractor by occupation, and can both read and write with ease."

The court instructed the jury over the objection of the plaintiff as follows:

"Gentlemen of the Jury: This is an action on a note given by the defendant for the first year's premium on a policy of insurance. There is no controversy as to the execution of the note, but it is contended by the defendant that the policy that was delivered to him was not such a policy as he contracted for, and which the agent promised him. If you believe from the evidence that the policy delivered to the defendant was not the class of policy promised him by the agent, and that he returned the policy to the agent within a reasonable time after he discovered that it was not the kind promised him, then you will find for the defendant. Upon the other hand, if you find by a preponderance of the evidence that the defendant did not return the policy within a reasonable time after he *discovered* that the policy delivered was not what he contracted for, then in that event you will find for the plaintiff the amount of the note sued on with interest as stipulated therein."

The jury returned a verdict in favor of the defendant; and the plaintiff appealed.

About the first day of September, 1903, appellee contracted with "The Mutual Life Insurance Company of New York" for a policy of insurance. He executed his note to Carter, the agent of the insurance company, for the first year's premium on the policy, due on the first day of December following. On the 31st day of October, 1903, he received from the insurance company a policy. It was his duty to examine the policy in a reasonable time after he received it, that is in such a time as he could have done so, and if he rejected it to so inform the insurance company or its agent; and, failing to do so, he is deemed to have accepted it and is liable upon his note. After such acceptance he can not avoid the payment of his note on the ground that he did not read the policy, unless he was induced by the insurance company, or its agent, not to do so. *New York Life Ins. Co.* v. *McMaster,* 87 Fed. Reporter, 63. The instruction of the court was erroneous and prejudicial.

Reverse and remand for a new trial.

FULTZ v. CASTLEBERRY.

Opinion delivered January 7, 1907.

EXEMPTION—DISALLOWANCE—EFFECT OF APPEAL WITHOUT SUPERSEDEAS.—Where property levied upon under execution was claimed as exempt, and the claim of exemption was disallowed, and an appeal was taken from such disallowance without a supersedeas bond being filed, the taking of the appeal did not bar the officer from selling the property under execution, nor render him liable therefor, on a subsequent reversal of the judgment; the extent of the officer's liability being for so much of the proceeds of the execution sale as the officer had in his hands after paying the judgment to the plaintiff, which sum would be a credit on the defendant's claim against plaintiff for having procured a sale of exempt property.

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

Gaughan & Sifford, for appellants.

Upon appeal from the action of the justice of the peace it was the duty of the plaintiff, appellee here, to file a bond as required by statute, Kirby's Digest, § § 3908, 4666. And if the appeal is taken without bond it does not operate to suspend proceedings on the judgment appealed from, nor to recall an execution issued. *Id.* § 4667. See *Id.* § 3096. Had the sheriff failed to levy the execution or make sale of the property after levy, he would have been liable to the execution plaintiff. *Id.* § § 3286, 4487.

It was appellee's duty to see that a supersedeas issued; otherwise he waived his right thereto. 43 Ark. 17; 47 Ark. 400.

Thornton & Thornton, for appellee.

Exemption laws are to be liberally construed. 31 Ark. 652; 38 Ark. 112; 25 Ark. 101; Thompson, Homestead and Ex. § 4; Waples, Homestead and Ex. § 4; 11 Heiskell (Tenn.), 575. The law gave the plaintiff the right of appeal, and without reference in that connection to the giving of a bond. Statutes are to be construed according to the intention of the Legislature. After the intention is discovered, then the courts have nothing to do with its policy, but must enforce it if constitutional. 37 Ark. 494; 3 Ark. 285; 11 Ark. 44; Sedgwick, St. and Const. Construction, 309. The sheriff must know at his peril that the property levied on is subject to sale on execution. Murfree on Sheriffs, 492. If forced to sell, he ought to have held the funds until the circuit court's decision on the schedule. His deputy's attendance in justice court and his own attendance in circuit court was sufficient to put him on notice of the appeal. Waples on Homestead and Ex. 777. If sued for refusal to sell, he could have justified on the ground that the property was exempt. Murfree on Sheriffs, § 455; Waples on Homestead and Ex. 857.

HILL, C. J. The undisputed facts of this case are: Mrs. Martha J. Wild had a judgment in justice of the peace court against G. S. Castleberry, and execution was issued thereupon and placed in the hands of Fultz, a deputy sheriff, who levied upon one bale of cotton as the property of Castleberry.

Castleberry gave notice to Mrs. Wild that he would claim the bale as exempt from execution and sale, and there was a hear-

ing upon this claim of exemption before the justice, and the justice denied it and refused to issue supersedeas. Thereupon Castleberry appealed to the circuit court, but did not give supersedeas bond. Fultz, acting under his execution after the supersedeas was denied, and before the trial on appeal, sold the cotton and paid the judgment and costs to the plaintiff therein, Mrs. Wild, and tendered the surplus, $24.95, to Castleberry, who refused to accept it. On the hearing in circuit court, Castleberry's claim to exemption was sustained, and he thereafter brought suit against Fultz and his principal, Sheriff Sevier, for the value of the bale of cotton. Sevier and Fultz answered, justifying under the process in their hands, and again tendered the surplus of the sale, $24.95. Castleberry recovered judgment, under issues sent to the jury, and the sheriff and deputy appealed. It is unnecessary to go into any questions as to the correctness of the instructions or rulings as to the evidence, for the facts admitted in the agreed statement, summarized above, show that Castleberry had no case against the officers except for the surplus, and that was tendered before suit and in the suit.

The exemption law provides: "An appeal may be taken to the circuit court from any order or judgment rendered by the justice of the peace upon the filing of the affidavit and executing the bond required in other cases of appeal." Kirby's Digest, § 3908. This shows that appeals from an order refusing a supersedeas are to be governed by the general law controlling appeals from justice court; and, turning thereto, it is found: An appeal may be taken by complying with certain named conditions, one of which is the execution of an appeal bond; but an appeal may be taken without such bond, on the express condition that "such appeal shall not operate as a suspension of the proceedings upon the judgment appealed from, and no certificate shall be given the appellant stating that an appeal in the cause has been allowed, and no execution be recalled." Kirby's Digest, § § 4666, 4667. Therefore it follows that Castleberry could not stay the execution without giving the bond, and it was the duty of the sheriff to obey the process in his hands.

Castleberry's subsequent judgment in the circuit court sustaining his claim to the bale of cotton as exempt from the execution established his right to the property against Mrs. Wild,

and she is, of course, liable to him for the value of it. The only claim he ever had against the sheriff was for so much of its proceeds as he had in his hands after paying the judgment to Mrs. Wild, and this would be a credit on his claim against Mrs. Wild, and the sheriff has always offered payment of that sum.

Reversed and remanded.

FOSTER v. BEIDLER.

Opinion delivered December 24, 1906.

1. APPEAL—REVERSAL—LAND TITLES.—Where real estate is involved, the practice, on reversal, is to remand the cause to the trial court, in order that the title may be cleared and supplementary proceedings be had where the land is situated. (Page 274.)
2. SAME—REVERSAL—RIGHT TO RESTITUTION.—Where a decree awarding possession of land to plaintiff was reversed on appeal, and the complaint dismissed, the effect of the reversal was to vacate the decree for possession, and the trial court should, after proper notice, make restitution of what was taken under its erroneous decree, if possession was in fact taken under it. (Page 275.)

Appeal from Miller Chancery Court; *James D. Shaver*, Chancellor; petition for writ of possession denied.

For the facts see *Foster* v. *Beidler*, 79 Ark. 418.

Webber & Webber and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

J. D. Cook, for appellee.

PER CURIAM. Appellants ask the court for a writ of assistance to restore them to possession which they allege was taken from them under the decree appealed from.

It is the practice, in cases where real estate is involved, to remand the cause, on reversal, to the trial court, in order that the title may be cleared and any supplementary proceedings had where the land is situate. It was a clear oversight in this case that the complaint was dismissed here, instead of remanding the cause to the trial court for it to be dismissed there and for

other appropriate remedies flowing from the adjudication that there was no equity in the complaint. Had the attention of the court been called to it during the term, the judgment would have been modified.

This court can not conveniently take up these supplemental matters, and should not do so except where necessary in order to give effect to its judgments.

The effect of the reversal is to vacate the decree for possession, and the chancery court should, after proper notice, make restitution of what was taken under its erroneous decree, if possession was in fact taken under it.

The appellants also have a clear right at law to regain possession taken under a decree now vacated.

Motion for writ here denied.

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

Opinion delivered January 7, 1907.

1. MASTER AND SERVANT—DAMAGE BY OPERATION OF TRAIN—PRESUMPTION.—Where an employee of a railroad company, while riding on a handcar, is struck by a train and killed, a *prima facie* case of negligence is made against the company, and it devolves upon it to show that its employees in charge of the train exercised due care or that the deceased was guilty of contributory negligence, unless these facts appear from the evidence of plaintiff. (Page 277.)
2. DAMAGES—LOSS OF PARENT'S TRAINING.—Where it was shown that deceased was an honest and industrious man, that he was kind to his children, that he sent them to school and labored for their support, it was not improper for the court to tell the jury that if they found for plaintiffs, who were deceased's minor children, they could, in assessing the damages, take into consideration any damages sustained by them from loss of parental instruction and training, if they believed from the evidence that they would have been thus benefited. (Page 277.)

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

B. S. Johnson, for appellant.

1. The court erred in instructing the jury, that, the killing by the operation of appellant's train being proved, the presumption was that it was due to negligence on the part of those in charge of the train, and that, unless deceased was guilty of contributory negligence, the burden was on appellant to prove that its employees were not negligent in operating the train. 79 Ark. 76; 44 Ark. 527; 46 Ark. 555; 51 Ark. 467; 1 Cold. (Tenn.), 611; Wood, Master & Servant, § 382; 51 Ark. 467; 179 U. S. 658; 123 Fed. 61.

2. Appellee having rested her case after proving the killing by appellant's train, and appellant having shown by uncontradicted testimony that its train was running on its schedule time, rounding a curve, and that the engineer stopped the train as quickly as possible, after discovering the danger of deceased, it was error to refuse appellant's request for a peremptory instruction.

3. The court erred in giving its 11th instruction on the measure of damages, because there was no proof that deceased gave his children any instruction, or physical, moral or intellectual training.

Oldfield & Cole and *Wright & Reeder,* for appellee.

1. The killing by one of appellant's trains being proved, a *prima facie* case of negligence was made out against appellant, and the burden devolved upon it to prove that its operatives in charge of the train were not negligent. Kirby's Digest, § § 6607, 6773; 65 Ark. 235. The burden of proof placed upon the appellant inures to the benefit of its employees as well as other persons. 2 Labatt, Master & Servant, 2321. Neither the foreman of the section crew, the fireman nor the engineer was a fellow-servant of deceased. Kirby's Digest, § § 6658, 6659; 65 Ark. 138. See, also, 39 So. 845; 116 Ill. 356; 77 S. W. 890; 78 S. W. 275; 58 Ga. 485.

2. The peremptory instruction asked by appellant was properly refused. The jury were warranted by the physical facts in disbelieving the engineer's testimony that he was keeping a constant lookout and did all he could to stop the train. 54 Ark. 214.

3. The eleventh instruction on the measure of damages was based on competent testimony, and was properly given. 57 Ark. 306; 60 Ark. 559; 71 Ark. 258.

RIDDICK, J. This is an action by the widow and children of T. Y. Standifer against the Iron Mountain Railway Company to recover damages for his death. Standifer was employed by the company as a section hand, and while he, with other employees, was on a handcar which was being propelled along the railway track the car was overtaken and struck by the engine of a passenger train, and Standifer was killed.

The circuit court told the jury in substance that, as Standifer was struck and killed by the train of the defendant company, this made out a *prima facie* case of negligence against the company, and that to escape liability the company must show either that its employees in charge of the train were not guilty of negligence or that Standifer was guilty of contributory negligence. Counsel for defendant contends that this instruction was erroneous for the reason that Standifer was an employee of the company at the time of the accident. It is true that it has been held by this court that when an employee of a railway company is injured by a defect in the machinery or track of the railway company, the injury under such circumstances does not of itself raise a presumption of negligence on the part of the master. *St. Louis & S. F. Rd. Co.* v. *Hill,* 79 Ark. 76; *St. Louis, I. M. & S. Ry. Co.* v. *Harper,* 44 Ark. 529; *Patton* v. *T. & P. Ry.,* 179 U. S. 658, 663.

But the death of Standifer was not caused by a defect in machinery or track. He was not one of those in charge of the train that caused his injury. While riding on a handcar, he was struck by a train and killed. If the accident was due to the negligence of the employees of the company in charge of the train, it was either negligence in failing to keep a lookout or negligence in failing to stop the train after Standifer and those on the handcar were seen on the track.

Now, the statute not only requires that the employees in charge of a running train shall keep a constant lookout for persons and property on the track, but provides that in case of an injury "the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed." Kirby's Digest, § 6607.

Another statute provides that railroads in this State "shall be responsible for all damages to persons and property done or caused by the running of trains in this State." Kirby's Digest, §. 6773. The construction given to this latter statute is that where, in an action for damages against the company for causing the death of a person, it is shown that the person was killed by being struck by a train, a *prima facie* case of negligence is made against the company, and it devolves on the company to show that its employees in charge of the train exercised due care, or that the deceased was guilty of contributory negligence, unless these facts appear from the evidence of plaintiff. The fact that the person struck by the train was in the employ of the company at the time of the accident does not change the rule in this respect, though it may bring in the question of assumption of risks or other questions of that kind. We are therefore of the opinion that the objection to this instruction must be overruled. *Little Rock & Ft. Smith Railway Co.* v. *Blewitt,* 65 Ark. 235.

It was shown that Standifer was an honest and industrious man, that he was kind to his children, sent them to school as much as his means allowed, and labored for their support. Under these circumstances it was not improper for the court to tell the jury that if they found for plaintiffs, the minor children of Standifer, they could, in assessing the damages, take into consideration any damages sustained by them from loss of his parental instruction and training if they believed "from the evidence that he would have been thus beneficial." *St. Louis, I. M. & S. Ry. Co.* v. *Sweet,* 60 Ark. 559.

The only other contention is that the verdict is not sustained by the evidence. It is said that the train approached the place of accident around the curve, and that it was within three hundred feet of the handcar before it could have been seen, and that it was impossible to stop the train within that distance. But there was also evidence tending to show that a person on the side of the engine where the fireman sat, which was on the inside of the curve, could have seen the handcar and those upon it at a much greater distance than three hundred feet. This evidence to some extent contradicted that of the engineer and fireman, and

the question as to whether the train could have been stopped in time to have avoided the injury was therefore one for the jury.

Judgment affirmed.

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STURDIVANT v. COOK.

Opinion delivered December 24, 1906.

1. EXECUTION SALE—INNOCENT PURCHASER.—One who purchases at her own execution sale and credits the amount of her bid on the judgment is not an innocent purchaser for value, but takes title subject to prior equities of other persons. (Page 282.)
2. EQUITY—LACHES.—Where there has been an unexplained delay of nine years in asserting a lien on land, and where the lien claimants have permitted defendant to prosecute expensive and troublesome litigation over the title without asserting their claim, they will be held to be barred by laches. (Page 283.)
3. SAME—REQUIREMENT THAT PLAINTIFF DO EQUITY.—Where a debtor's interest in a tract of land was sold under judgment against him, equity will not permit him subsequently to enforce a prior lien upon the same land in favor of himself as one of the heirs of his father, at least without requiring him to do equity by paying the judgment. (Page 285.)
4. MORTGAGE—MERGER OF LIEN AND DEBT.— As one can not be both creditor and debtor at the same time, the effect of a mortgagor acquiring the mortgagee's interest by inheritance and purchase is merely to extinguish the debt, and the mortgage lien can not be used to cut out the intervening rights of third persons. (Page 285.)

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

W. C. Rodgers and *W. P. Feazel*, for appellants.

1. The plea of limitation is personal to the debtor. If he elects to waive it, or for any reason refuses or neglects to claim its benefits, a stranger will not be heard to complain. 45 W. Va. 620; 44 W. Va. 229; 71 Ark. 302.

2. As to the litigation between appellee, Mrs. Cook, and W. A. J. Sturdivant, not having been a party to that suit, J. S. Sturdivant was not bound by anything decided therein. 13 Ark. 214; 17 Ark. 203; 54 Ark. 273; 60 Ark. 369; 64 Ark. 330;

65 Ark. 278; 66 Ark. 305; 75 Ark. 524. The heirs of J. S. Sturdivant, when he died owing no debts, became absolute owners of whatever rights he had.

3. Even if the conveyance from J. B. Sturdivant to W. A. J. Sturdivant was fraudulent, it was effective to pass whatever title he had. 11 Ark. 411; 30 Ark. 453; 47 Ark. 301; 67 Ark. 325. And, purchasing at her own execution sale, paying nothing on her bid, but crediting the amount thereof on her judgment, Mrs. Cook was not an innocent purchaser. 31 Ark. 252; 32 Ark. 346; 33 Ark. 621; 34 Ark. 85; 72 Ark. 494. The law of estoppel does not apply here. That can only arise where injury has resulted, and equity does not require that one having title to, or a lien upon, property should seek out a party who is about to purchase it from a supposed owner and inform him of his title. 63 Ark. 289, 300. Nor would it require him to do so after the purchase.

4. The possession by W. A. J. Sturdivant, and his tenants, of the land was notice to the defendants of the nature of their claim. 68 Ark. 150; 66 Ark. 167; 26 N. J. Eq. 70; 3 Paige, Ch. 421; 13 Ves. 114; 4 N. H. 307; 40 Ala. 486; Wade on Notice, § 279. "Such possession is equivalent to actual notice of the title, rights or equities of the occupant." 76 Ark. 25. Moreover, the sale at which Mrs. Cook purchased was forbidden by W. A. J. Sturdivant, which was also actual notice.

5. Whether the conveyance from W. A. J. to J. S. Sturdivant was a deed or a mortgage, appellees are in no position to complain. They are not injured, and they can not complain, even at a fraud which does not result in injury to them. 43 Ark. 454; 53 Ark. 275; 71 Ark. 305; 74 Ark. 68.

D. B. Sain and *McRae & Tompkins,* for appellee.

1. The interest in the land proceeded against in this suit was conveyed by J. B. to W. A. J. Sturdivant by a deed which has been set aside for fraud. Since that deed was void for fraud, W. A. J. Sturdivant could pass no title to his father, and neither he nor the other heirs could acquire any from the father.

2. The claim is stale, and is barred by limitations. 43 Ark. 469; 19 Ark. 21; 16 Cyc. 150; 46 Ark. 25; 74 Ark. 316. The debt was long since barred; and if the alleged deed was a

mortgage, it was barred when the debt was barred. Kirby's Digest, § 5399. The burden was on appellants to show that they were not barred. 69 Ark. 311; 70 Ark. 598.

3. A mortgage is not a lien unless acknowledged and recorded, and is not notice even against one with actual notice of its existence. Kirby's Digest, § 5396; 9 Ark. 112; 49 Ark. 457; 71 Ark. 517; 22 Ark. 136.

4. Although a purchaser at his own execution sale is not an innocent purchaser, yet he is a purchaser for value, not a purchaser *mala fide,* and ought to be protected against latent equities of which he had no notice. 97 Cal. 575; 15 L. R. A. 45. The case relied on by appellant, 31 Ark. 252, in so far as it holds that all purchasers at execution sales are not innocent purchasers, has been overruled. 58 Ark. 252.

5. The testimony of J. S. Sturdivant that W. A. J. Sturdivant owned the land estops appellants to claim an interest now. Thomp. Tenn. Cases, 145; 39 Tenn. 605; 130 N. Y. 662; 35 L. R. A. 743; 48 Ark. 409.

McCULLOCH, J. This is a suit in equity instituted by J. B. Sturdivant, W. A. J. Sturdivant, J. S. P. Sturdivant, Nancy J. Morphew and Arminnie McCarley, children and heirs at law of J. S. Sturdivant, who died intestate on April 10, 1904, against Katie J. Cook and certain other persons to enforce a lien on lands in which the defendants claim an interest.

The facts set forth in the pleadings and established by the evidence are substantially as follows:

The lands in controversy were purchased by J. B. and W. A. J. Sturdivant in the year 1891 from one Reed, and were paid for with money borrowed from their father, J. S. Sturdivant. In 1894 J. B. Sturdivant conveyed his undivided half of the lands to his brother, W. A. J. Sturdivant. J. B. Sturdivant was engaged in the mercantile business, became insolvent, and in December, 1894, all his property was taken under attachment and sold in an action brought against him by his father for debt.

In 1896 W. A. J. Sturdivant executed to J. S. Sturdivant a deed conveying said lands. This was in the form of an absolute conveyance, but was intended and agreed to be only a security for a debt of $3,000 owing by W. A. J. to said J. S. Sturdivant, which included the money borrowed for use in paying for the

land when purchased from Reed. The deed was never recorded, and has not been produced in this record, but its execution and contents are proved. W. A. J. Sturdivant remained in possession of the land, and J. S. Sturdivant never at any time obtained possession.

The defendant Katie J. Cook obtained a judgment for debt against J. B. Sturdivant, and on April 15, 1899, caused an undivided half of these lands to be sold as the property of J. B. Sturdivant under execution issued upon her judgment, and bought said interest in the land at the execution sale. Mrs. Cook then brought suit in equity against W. A. J. Sturdivant to cancel the said deed executed to him by J. B. Sturdivant, alleging that the same was executed for the purpose of defrauding the creditors of J. B. Sturdivant. The chancery court in that case rendered a decree, declaring said deed to be fraudulent and void as against creditors, and canceled it, and quieted Mrs. Cook's title to the undivided half of the land purchased at the execution sale. The decree was appealed from, and was affirmed by this court on June 25, 1904. After the affirmance of the decree Mrs. Cook conveyed an undivided fourth of the land to her attorneys, D. B. Sain and W. V. Tompkins, in payment for their services rendered in the litigation. Suit was then brought in the chancery court for partition between W. A. J. Sturdivant and appellees, Cook, Sain and Tompkins, and the lands were sold for partition.

The present suit was instituted on March 28, 1905, to enforce the lien claimed on the land by virtue of the conveyances executed by W. A. J. to J. S. Sturdivant for payment of said debt of $3,000 and interest.

The institution of this suit was the first information Mrs. Cook or her said grantees received of any lien or other claim upon the land by J. S. Sturdivant, or of the execution of said unrecorded conveyance to him by W. A. J. Sturdivant.

The chancellor dismissed the complaint for want of equity, and the plaintiffs appealed to this court.

Mrs. Cook purchased at her own execution sale. The amount of her bid was credited on the judgment, and therefore she was not an innocent purchaser for value, but took the title subject to prior equities of other persons. *Allen* v. *McGaughey,*

31 Ark. 252; *Pickett* v. *Merchants' National Bank,* 32 Ark. 346; *Hill* v. *Coolidge,* 33 Ark. 621; *Williams* v. *McElroy,* 34 Ark. 85.

Are appellants, as heirs of J. S. Sturdivant, barred from asserting a lien on the land?

The deed under which the lien is asserted has never been recorded, and appellees had no notice of it. J. S. Sturdivant testified as a witness in the suit of Mrs. Cook against W. A. J. Sturdivant to cancel the J. B. Sturdivant deed, and failed to disclose his alleged interest in or lien upon the land. A period of nine years elapsed from the date of the deed until the lien was asserted under it, and in the meantime Mrs. Cook purchased at the execution sale, prosecuted her suit to successful termination against W. A. J. Sturdivant to cancel the fraudulent deed executed by her debtor, J. B. Sturdivant, then conveyed an interest in the land to her attorneys, and caused the land to be sold for partition.

The deed to J. S. Sturdivant, though absolute in form, was intended to be in effect a mortgage, and appellants are seeking to enforce it as such. The defendants plead the statute of limitation against its enforcement, and also plead the staleness of the demand.

We need not determine whether or not the enforcement of this lien is barred by the statute limiting the time within which suits to foreclose mortgages may be instituted. Act March 25, 1889, Kirby's Digest, § § 5399-5400.

Chief Justice ENGLISH, in delivering the opinion of this court in *Wilson* v. *Anthony,* 19 Ark. 16, said:

"But where the statute is not relied on as a defense, or where there is no statute of limitation, a court of equity will not aid in enforcing stale demands, where the party has been guilty of negligence, or has slept upon his rights. The chancellor refuses to interfere after an unreasonable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have been obscured by time and the evidence may be lost."

In *Ringo* v. *Woodruff,* 43 Ark. 469, the court said: "Courts of equity have never favored stale claims and demands, but, on the contrary, from the commencement of their jurisdiction and before the enactment of any positive statute by any legislative

body for the limitation of actions at law, have invariably and decidedly discountenanced laches and neglect. Until Parliament fixed the time in which action at law should be commenced, they maintained no definite period of limitation, but refused relief to those who slept on their own rights an unreasonable length of time, and in determining what lapse of time was a bar in each case were governed by the peculiar circumstances of each case."

Again in *Gibson* v. *Herriott,* 55 Ark. 85, this court quoted with approval the language of Lord Camden in *Smith* v. *Clay,* 3 Brown, Ch. Rep. 640, note: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of jurisdiction, there was always a limitation to suits in this court."

This doctrine has found application in many other decisions of this court upon varying facts. *Patterson* v. *Fowler,* 23 Ark. 459; *Thomas* v. *Sypert,* 61 Ark. 575; *Buck* v. *Davis,* 64 Ark. 345; *Fitzgerald* v. *Walker,* 55 Ark. 148.

For an application of this doctrine, see *Godden* v. *Kimmel,* 99 U. S. 201; *Abraham* v. *Ordway,* 158 U. S. 416; *Walet* v. *Haskins,* 68 Tex. 418; *Bauseman* v. *Kelley,* 38 Minn. 197; 1 Beach, Mod. Eq. Juris. § 17.

Mr. Justice Harlan, in delivering the opinion of the Supreme Court of the United State in *Abraham* v. *Ordway, supra,* said: "But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the relief asked."

Now in the case at bar there was an unexplained delay of about nine years in asserting the lieu. Mrs. Cook had the land sold under execution against J. B. Sturdivant, bid it in, and her judgment was satisfied by credit of the amount bid. She prosecuted, doubtless at great expense and trouble, her suit against

W. A. J. Sturdivant to cancel the deed of J. B. Sturdivant, and finally succeeded in the suit. J. S. Sturdivant knew of this suit and the particular controversy involved therein. He testified as a witness for his son, and said not a word about having a lien on the land. He gave no notice to Mrs. Cook that her effort to recover the land would be a fruitless one, even if she won that suit, because of his superior lien, nor did he record his deed. If he were alive now, asserting a lien, we think a court of equity should turn a deaf ear to his prayer for relief, and his heirs are in no better attitude.

We think, for other reasons, the plaintiffs were properly denied relief.

Appellant J. B. Sturdivant seeks to enforce a lien on lands sold to satisfy a judgment against himself. Certainly a court of equity will not aid him in depriving his judgment creditor of the fruits of a sale made to satisfy the judgment, at least not without requiring him to do equity by paying the judgment.

Nor is W. A. J. Sturdivant in any better attitude to ask equitable relief. The lien which he seeks to enforce is for his own debt to his father, J. S. Sturdivant. He created the lien by executing the deed to his father, has bought the interests of the other heirs, and now attempts to collect the debt which he owes himself out of the lands which have been previously adjudged to Mrs. Cook in the suit which she brought against him to cancel the J. B. Sturdivant deed. Should a court of equity aid him in having his own debt paid out of property owned by another? Certainly not.

Learned counsel argue that the adjudication in the former suit between Mrs. Cook and W. A. J. Sturdivant does not bar the rights of the latter acquired by inheritance from his father and by purchase from the other heirs. Concede that to be true, yet he is attempting to coerce the payment of a debt for which he is primarily liable out of land which, aside from this lien, belongs to Mrs. Cook, and has been adjudged to her. The debt and lien being of his own creation, the effect of his inheritance from his father and purchase from the other heirs was merely to extinguish them. It amounted to a payment of the debt, because he could not be creditor and debtor at the same time.

Taking either view of the case, the chancellor was correct in his decree, and the same is affirmed.

CRESCENT HOTEL COMPANY v. BRADLEY.

Opinion delivered December 24, 1906.

MUNICIPAL CORPORATIONS—IDENTITY OF IMPROVEMENT DISTRICTS.—The object of Mansf. Digest, § 832, providing that where there is more than one improvement district in a city for the same general purpose, "the same member may be on two or more boards, or the boards of different districts may combine so as to form only one board for the whole territory to be thus improved so as to make the whole improvement uniform, but no money raised by assessment in one district shall be expended in another district," was to secure uniformity in the character of the improvement to be constructed, without destroying the separate identity of the several districts.

Appeal from Carroll Chancery Court; *T. H. Humphreys*, Chancellor; reversed.

STATEMENT BY THE COURT.

The city council of the City of Eureka Springs, by an ordinance passed September 6, 1889, created and laid out an improvement district known as "Water District No. 3" for the purpose of constructing a system of waterworks for the territory embraced in said district; and at the same time also created out of contiguous territory another district known as "Water District No. 4" for the purpose of constructing waterworks in that territory. Afterwards the city council created another improvement district known as "Water District No. 5" covering the entire City of Eureka Springs except the territory embraced in the other two districts, for the purpose of constructing waterworks for that territory.

A board of improvement was duly appointed by the city council for the respective districts, plans for said improvements were formed and estimates of the cost thereof duly made. By proper ordinances of the city council the cost of said improvements was levied upon the real property in the respective dis-

tricts, and assessments were duly levied on the property in accordance with the statute. It being found that all of said districts had been formed for the same general purpose, the several boards of improvement of the districts were combined so as to form only one board for the whole territory to be improved, in order that the improvement might be uniform. Thereafter on May 19, 1894, the combined board of improvement entered into a contract with one Brownell for the construction of the waterworks in the territory, at a cost of $75,600, to be paid for $10,000 in cash and the balance in bonds of the districts, in accordance with the plans and specifications. The work was completed by Brownell, and the board of improvement paid him in cash the sum of $10,000 ($7,600 out of funds of District No. 3, $2,400 out of funds of District No. 4) and issued to him bonds of said districts aggregating $65,000, divided as follows between the several districts: $25,200, District No. 3; $6,000, District No. 4; and $34,000, District No. 5.

On December 28, 1903, appellees, who are citizens and owners of real property in Water District No. 3, instituted this suit in equity against the board of improvement of said districts to compel them to readjust the liability of the several districts for the cost of said improvement and charge District No. 4 with the sum $6,200.25 of the bonded debt of District No. 3.

The complaint, after setting forth the facts as hereinbefore stated, contained the following allegations:

"That the said Brownell completed and performed said contract, and the said waterworks system was accepted by said commissioners, and in payment thereof said commissioners paid the said Brownell as follows out of the funds of said water improvement districts, towit: District No. 3, $7,600 in cash, in bonds $25,200; District No. 4, $2,400 in cash, in bonds $6,000; District No. 5, in bonds $34,400—making in all the sum of $75,600—of which amounts, as will be seen, said districts three and four paid in cash and bonds the sum of $41,200 on said contract to said Brownell.

"Plaintiffs say that, in making said apportionments of the amounts paid by said districts on said contract, said original commissioners did fraudulently, arbitrarily, and without just reason, or by mistake or oversight, prorate the payment of the cost of

said waterworks system, as follows, towit: District No. 3, $32,800; District No. 4, $8,400; and District No. 5, $34,400.

"Plaintiffs state that said apportionment, so fraudulently and arbitrarily made, was, as to District No. 3, unjust and disproportionate, as to the actual cost of the improvements in said district, and the same is unjust and disproportionate as to the relative cost of said improvements made in said districts three and four according to the assessed valuation of the real property in said districts.

"Plaintiffs say that from careful estimate made, taking as a basis the amount as a whole paid by said districts three and four for the improvements made in said districts, towit: the sum of $41,200, the same should have been apportionad as follows: District No. 3 should only have paid the sum of $26,590.06, or thereabouts, instead of $32,800 actually paid, which amount, $26,590.06, includes an amount of $1,933.26, paid for the laying and building of about 984 feet of eight-inch pipe, laid from the stand-pipe to the end of White Street, part of which pipe is outside of said district, which is used simply as a feeder for the systems in said two districts.

"In District No. 4 the cost of the improvement should have been for the actual improvements made in said district, on the basis above mentioned, the sum of $14,609.06, instead of the sum of $8,400, paid in cash and in bonds; leaving a deficit due by District No. 4, on the above basis, to District No. 3, of about $6,209.94 with six per cent. interest from date of the bond issue. That is, the amount of bonds that should have been issued by District No. 3, according to the basis above mentioned, after deducting the cash payment of $7,600 made, was only the sum of $18,990.06, instead of $25,200, as was issued, and the amount of bonds that should have been issued by District No. 4 should have been the sum of $12,209.94, instead of $6,000, as was issued; that is, admitting that the cash payments made were proper, which plaintiffs claim were far in excess of District No. 3, as to its proportionate share; and far too low in District No. 4, as to its proportionate share.

"Plaintiffs state that the inequitable distribution of the cost of the water system between said districts is made plain and apparent by the fact that District No. 4 has paid out its indebted-

ness in eight years, with a surplus of $500 in cash to its credit; while District No. 3 was bonded for sixteen years, and in an amount far in excess of its known resources, and far in excess of its just proportionment and its ability to pay.

"Plaintiffs say that the maturing accounts or bonds of said District No. 3 were so placed or made that the later payments of said bonds are far in excess of its annual resources, and it will be an utter physical and financial impossibility for it to meet its indebtedness, as matters stand now, unless the aid sought herein is granted, and is unjust to these plaintiffs and the other taxpayers in said district.

"Plaintiffs say that District No. 3 is now insolvent, and will be unable to meet its obligations and maturing bonds as the same become due. That the apportionment of the cost of the improvements made in said districts 3 and 4 was and is a fraud, and is unjust and inequitable as to these plaintiffs and other taxpayers of said district, and that the same was fraudulently and arbitrarily made, without regard to the rights of the taxpayers of said District No. 3.

"Plaintiffs say that in justice and equity said District No. 4 ought to pay at least the sum of $6,220.65 with interest at six per cent. per annum from date of bond issue of the said indebtedness of said District No. 3, so as to help and enable said District No. 3 to meet its maturing bonds and indebtedness, which amount plaintiffs say should have been charged to said District No. 4, and its bonds issued for that amount, instead of the same having been issued by District No. 3.

"Plaintiffs say that to not compel the payment of said sum by said District No. 4 will cause these plaintiffs and the other taxpayers in said District No. 3 great and irreparable injury, by causing said district to become greatly and hopelessly in debt and absolutely bankrupt, and will work great injury and loss to the bondholders of said district."

The prayer of the complaint is as follows:

"Wherefore, the premises being considered, plaintiffs on behalf of themselves, and on behalf of the other taxpayers of said district, pray that the defendants, as a Board of Water Commissioners in and for Improvement Districts 3, 4 and 5 as consolidated, be compelled to answer herein and to show cause, if

any, why this court shauld not, upon final hearing of this cause, render its judgment and an order of this court compelling the defendants, as commissioners of said Water Districts 3, 4 and 5, as consolidated, and their successors in office, to readjust the liability by the payment of at least $6,220.65, of the bonded indebtedness of said District No. 3, and make same a charge against said District No. 4, with interest at the rate of 6 per cent. per annum from date of bond issue, and that the said amount to be paid out of the funds of said District No 4, and that said commissioners be required to continue to collect said improvement district taxes in said District No. 4 until said amount, with interest, is paid, as is provided by the ordinances of the city of Eureka Springs, and for all other orders in the premises [to which] plaintiffs are in equity and justice entitled, and for all proper and necessary relief, and that they have judgment for their costs."

The Crescent Hotel Company, a corporation owning real property in District No. 4, was allowed to intervene as a defendant, and it filed an answer to the complaint, denying that there had been any fraud or mistake in apportioning the cost of improvement among the several districts, and alleging that the board of improvement in letting the contract for the work to Brownell acted for each district separately, and that the contract was entered into and the improvement made and paid for in money and bonds upon separate estimates for each district, so that no district became responsible for or paid for any work done outside of its own territory.

It is conceded that the apportionment of cost of improvement to District No. 5 is correct, and the aggregate amount, $41,200, apportioned to the other two districts, No. 3 and No. 4, is correct.

The court, in its final decree, found "that said apportionment had been arbitrarily made by said Brownell, and that same was not in accord with the estimates as had been previously made by the board to the city council, upon which estimates the council passed the ordinances levying the tax in said districts for payment of the improvements therein; that according to said estimates District No. 3 should have paid the sum of $27,466 of said $41,200, and District No. 4 should have paid the sum of $13,733.33

of said $41,200; that the board erred and made a mistake in apportioning said costs, as had been arbitrarily made by said Brownell, to each of said districts, towit: the sum of $32,800 to District No. 3, and the sum of $8,400 to District No. 4, and that the same was unjust and inequitable as to said District No. 3. The court also finds that District No. 4 was entitled to a credit of $8,400 already paid by it on said bond issue, and that it was entitled to a further credit of the sum of $1,679, amount paid by it for a pipe line previously laid in said district prior to the contract with Brownell which was incorporated and used in constructing said system, leaving a balance due said District No. 3 the sum of $3,654.33 with interest from date of this decree at the rate of six per cent. per annum."

The court thereupon decreed that Water District No. 4 pay to Water District No. 3 said sum of $3,654.33 with interest aforesaid from date of decree.

Both parties appealed to this court.

G. J. Crump, for appellant.

1. In the organization of improvement districts, each, when formed, is an independent district. While the law provides for the consolidation of the boards of various districts, it can only be done for the purpose of making the improvement uniform. Kirby's Digest, § 5674. "No money raised by assessment in one district shall be expended in another district." *Ib.*

2. The evidence fails to establish fraud. Equity will not interfere unless facts are established from which a fraudulent intent may be fairly imputed to the contracting parties. 55 Ark. 148; 8 How. 134; 37 Ark. 145; 38 Ark. 419.

3. Before a contract will be reformed on the ground of mistake, it must appear that the mistake was mutual. 56 Ark. 320; 49 Ark. 425; 71 Ark. 614; 74 Ark. 336.

James & Fuller, for appellee.

1. The wrong as well as fraud perpetrated upon the taxpayers of District No. 3 is that, in letting the contract as a whole, this district is burdened with more than its proportionate share of the cost. It is not sought to reform the contract, but only to compel a recipient of its benefits to pay its proportionate share of

the cost. It is fundamental law that no person shall be deprived of life, liberty or property without due process of law. Const., art. 2, § 8. See, also, § 22, *Ib.* And the taking of property or levying of taxes for special improvements is within the doctrine of "due process of law." 1 Cooley on Taxation (3 Ed.), 51; 96 U. S. 108; 111 U. S. 701; 110 U. S. 516.

2. Every taxpayer has a right to be heard in court in reference to any erroneous levying of taxes against his property. 2 Cooley on Tax. (3 Ed.), 1377. And he may institute suit on behalf of himself and all others interested to protect the inhabitants of a county, city or town against the enforcement of any illegal exactions whatever. Const., art. 16, § 13; 30 Ark. 102.

3. Under the state of facts in this case, equity alone can do complete justice, and it will always intervene in cases of fraud, accident or mistake. 2 Cooley on Tax. (3 Ed.), 1414, 1459, 1460. And it will take jurisdiction where it is shown that there is fraud, intentional wrong or error in the method of assessment. 63 Ark. 576. Any intentional favoritism, even though from motives of public interest, if without express authority of law, will render void the tax procedings. 24 Mich. 173. See also 10 Ark. 416; 15 Ark. 275; 22 Ark. 557. No tax is legal which is not equally and impartially laid on the taxpayers. 24 Pac. 831. In their official capacity, boards of improvement districts are agents of the property owners of the districts. 42 Ark. 152; 48 Ark. 386; 52 Ark. 107; 55 Ark. 157.

The funds provided by the special assessments in districts 3 and 4 were trust funds to be used to the best advantage, and equity has jurisdiction to prevent the misapplication of public funds. 52 Arn. 541. It has jurisdiction, even if the individual taxpayer has an adequate remedy at law, in order to prevent a multiplicity of suits. Pomeroy's Eq. Jur. (3 Ed.), § § 243, 260; 30 Ark. 109. In equity fraud includes all acts which are injurious to another, and which involve a breach of trust or confidence, or of legal or equitable duty. 1 Story, Eq. Jur. § 187. And it may be inferred merely from relationship of trust and confidence between the parties. 16 Cyc. 85. See, also, 2 Pom. Eq. Jur. § 122; 1 Story, Eq. Jur. § 259.

G. J. Crump, for appellant, in reply.

Appellee's argument that they are being deprived of their property without due process of law has no application here. It is admitted that no more than the legal amount of taxes for the time was levied, and that it is being collected in the manner provided by law. As to the jurisdiction of the chancery court, that is conceded.

McCULLOCH, J., (after stating the facts.) The determination of this case turns mainly upon the question of fact whether the contract for the construction of the improvement apportioned the cost thereof to each district separately, or whether the board of improvement contracted for the work as a whole, and after its completion undertook to apportion the cost to the several districts. The preponderance of the evidence seems to sustain the contention of appellees that the apportionment of cost made by the board of improvement was more favorable to District No. 4 than the facts warranted (though this is not altogether clear, for the reason that the cost of the improvement under the contract with Brownell was less than the original estimates prepared under direction of the board and submitted to the city council when the assessments on property were levied); and if this was erroneously done by the board after the letting of the contract and the completion of the work, we can not say that the taxpayers of District No. 3 would be without remedy for correction of the mistake. On the other hand, if the board made a contract for construction of the improvement, apportioning the cost thereof separately to each district for the amount of work done in each, as it was their legal duty to do, then one of the districts can not be made to share an unjust burden imposed upon another district by a harsh contract entered into either through fraud or mistake of the board of improvement. The spirit of the Constitution, as well as the express letter of the statute, forbids that "money raised by assessment in one district shall be expended in another district," or that improvements contracted for in one district shall be paid for with money raised by assessments in another. The contract entered into by the board of improvement must be looked to in ascertaining whether or not the money about to be expended is for improvements made in this district; and if the board have wrongfully by fraud or culpable negligence imposed an unjust burden upon the district by a contract for excessive cost of the

improvement, the remedy is against them, and not against the taxpayers of another district who have been fortunate in securing a more favorable contract for the construction of improvements in their district.

Learned counsel for appellees have brought to our attention numerous authorities, including many decisions of this court, to the effect that a citizen and taxpayer should find ready relief against unlawful and oppressive taxation; but none of them would sustain a contention that the taxpayers of one locality can be called upon to share the burden of oppressive taxation in another, nor that one improvement district, which has secured a favorable contract for the construction of its improvement, can be required to share the burdens of its less fortunate neighbor, even though both districts be controlled by the same board, and the contracts made in the same way, at the same time and with the same contractor.

The statute in force at the time of organization of these districts provided that "where there is more than one district in the city for the same general purpose, the same member may be on two or more boards, or the boards of different districts may combine so as to form only one board for the whole territory to be thus improved, so as to make the whole improvement uniform; but no money raised by assessment in one district shall be expended in another district." Mansf. Digest, § 832.

Under this statute the separate identity of each district was intended to be preserved, so that "no money raised by assessment in one district shall be expended in another district;" and in order to accomplish the same end it was essential that separate contracts for the work in each district should be entered into. Not necessarily separate instruments or forms of contract, but contracts whereby the improvement and cost thereof in each district could be separated. Uniformity in the character of the improvement to be constructed, without destroying in any degree the separate identity of the several districts, was the sole object to be accomplished by the combination provided for in the statute.

This brings us to a consideration of the controlling question of fact, whether or not the contract was let upon separate estimates of the cost of the improvement in each district. We think that the evidence fully establishes the fact that it was let

upon separate estimates, and that, though the contract was a joint one for the work in the three districts, it was separate as to the work in each district. The original written proposal submitted to the board by the contractor was to do the whole of the work in all of the districts for a gross sum, but the contractor and three members of the board testify that separate estimates were made of the work in each district before the letting of the contract. The plans and specifications upon which the contract was based have been lost, and were not introduced in evidence. The contract recites a gross sum to be paid for the work, $10,000 of it payable in cash, and the remainder in bonds of the districts. The contract does not specify the proportion in which the cash was to be paid by the three districts, but it does specify the amount of bonds to be issued by each district to the contractor in payment for the improvement.

The witnesses state how much cash was to be paid, and was paid, by each of the districts.

There is very little conflict in the testimony upon this point. The only conflict grows out of a contradictory statement made by the contractor Brownell in a public speech wherein he said that, in apportioning the cost of the improvement, he could not figure it out, and that he had "arbitrarily" apportioned it. Now, if we should disregard the license usually accorded to political speakers in dealing with facts in a heated campaign, and hold this man literally to his words spoken under such circumstances, they do not tend to make out a case for the plaintiffs. If the contract for the improvement was let upon estimates apportioning the cost to the districts separately, and if the several districts entered into a contract for construction of the work according to the separate estimates, the fact that the estimated cost was "arbitrarily" apportioned affords no reason why District No. 4 should be required to pay more than it contracted to pay for its part of the improvement.

We conclude that the plaintiffs have shown no right to recover from District No. 4, and the decree was erroneous.

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

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EARLE IMPROVEMENT COMPANY v. CHATFIELD.

Opinion delivered January 7, 1907.

1. JURISDICTION TO REMOVE CLOUD.—A complaint which states that plaintiff is in possession of certain lands, sets up his title, and asks to have same quieted, states a cause of action within the jurisdiction of equity. (Page 300.)

2. TAX SALE—PUBLICATION OF DELINQUENT LIST.—A tax sale is void where the county clerk fails to certify to the publication of the list of the lands and the notice of sale, as required by Kirby's Digest, § 7086. (Page 301.)

3. REMOVAL OF CLOUD—LACHES.—Failure of the owner of land to pay taxes thereon for seven years will not debar him from suing to remove a void tax sale as a cloud upon his title, although the tax purchaser has paid taxes thereon for five years since acquiring his title, and although the land since the tax sale has greatly increased in value. (Page 301.)

4. LIMITATION—RULE IN EQUITY.—In the absence of some intervening equity calling for application of the doctrine of laches, equity by analogy follows the law, and will not divest the owner of title by lapse of time shorter than the statutory period of limitation. (Page 302.)

5. SAME—ADVERSE POSSESSION OF WOOD LAND.—In order to acquire title to wood land by adverse possession, there must be actual use and occupancy of it of such unequivocal character as will reasonably indicate to the owner visiting the premises during the statutory period, not a mere occasional trespass, but exclusive appropriation and ownership. (Page 303.)

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

Albert H. Chatfield was in 1897 the owner of the northeast quarter of section thirty-three, township eight north, range six east. Taxes for that year not having been paid, the land was sold for said taxes on June 13, 1898, to W. N. Brown, Jr.; and, the same not having been redeemed within two years, a deed was made to said Brown by the clerk on the 7th day of July, 1900, which deed was put on record July 11, 1900.

Brown paid the taxes of 1897 by his purchase at the tax sale, and subsequently paid the taxes of 1898, 1899, 1900, 1901, 1902 and 1903.

Chatfield filed his complaint in chancery against the Earle Improvement Co., the Southwestern Improvement Co., and R. G. Brown, trustee, on the 12th day of December, 1904, alleging that he was in the possession of said land at the date of the filing

of the complaint; that the tax sale was void (a) because the lands were never published as being delinquent for the taxes for the years aforesaid, and (b) because the proof of the advertisement of the delinquent list was not made as required by law; that the tax deed was a cloud upon his title; that the Earle Improvement Co., successor in title to W. N. Brown, Jr., was about to commit trespass on said land by cutting timber therefrom. The prayer of the complaint was that the defendants be restrained from cutting the timber, and that the deed be set aside as a cloud upon plaintiff's title.

The defendants moved to transfer to the law court, upon the ground that the complaint does not aver that the lands are wild lands; that the complaint affirmatively shows that the defendants are in possession of the lands, exercising acts of dominion and control over same, and claiming title thereto; and the defendants averred that they and their grantor, W. N. Brown, Jr., had been in the open, notorious and adverse possession of said lands since the 7th day of July, 1900. This motion to transfer was, on March 1, 1905, overruled, and the defendants saved exceptions.

Defendants then filed their answer, admitting that the title to the lands was in Chatfield at the date of the tax sale; denying that there was any informality in the tax sale, or that same was void for any reason; denying that the plaintiff was in the possession of the lands, or had ever been since the date of the deed to W. N. Brown, Jr.; and admitting that the Earle Improvement Co. was at the date of the filing of the complaint engaged in the cutting of the timber on the lands.

The answer further averred affirmatively that Brown and his grantees had paid the taxes of 1897, 1898, 1899, 1900, 1901, 1902 and 1903, before the institution of the suit, and pleaded section 5057, Kirby's Digest, as a defense.

The defendants further averred that the plaintiff had been guilty of laches in not commencing his action sooner; that the land had largely increased in value since the purchase at the tax sale; that they had been sold and transferred of record, with warranty of title; and that the situation of the parties had greatly changed.

The defendants further affirmatively pleaded that, after

Brown had obtained his tax deed from the clerk in 1900, he went into the open, notorious and visible possession of the lands, using them as a wood lot and pasture appurtenant to his farm lands, which lie adjacent to same; and that he and his grantees have ever since been in the open, notorious and visible possession of same, claiming them against all the world. The defendants therefore pleaded the two years' statute of limitations (S. & H. Digest, § 4819) in bar of the action.

The defendants further averred that the action, while in form a bill to quiet title and to remove cloud from title, was, in fact, an action to obtain possession of the land; that the plaintiff had not tendered the defendants the amount of taxes paid by them and their grantor, W. N. Brown, Jr., since the date of the tax sale, with interest, penalties and costs, nor had he filed in the office of the clerk an affidavit showing such tender before the issuance of the writ herein. Defendants therefore pleaded such failure to make such tender and to file said affidavit as a defense to the action.

Issue was thereupon joined upon the above pleadings.

Evidence was introduced tending to prove the alleged defects in defendants' tax title.

There was evidence tending to show that W. N. Brown, Jr., during the years 1900-1903 cut timber from this land, which he used for firewood, rails, posts, boards, etc., and that at various times he permitted several of his tenants, occupying other land, to cut several hundred cords of wood from this land.

There was evidence that in 1900 the land was worth $1 per acre, and in 1904 $10 per acre.

The court decreed for plaintiff on his refunding the taxes paid by defendants. The latter have appealed.

R. G. Brown, for appellants.

1. The case should have been transferred to law. In denying that plaintiff was in possession at the date of filing suit, both in the motion to transfer to law and in the answer, this raised an issue of fact, which the defendant was entitled to have tried by a jury. 57 Ark. 594.

2. In an action to quiet title, the defendant is entitled to have all taxes paid by him refunded; and the court in this case

erred in refusing to give judgment for the taxes of 1897 paid by defendant's grantors. 70 Ark. 256.

3. The facts in this case disclose such *laches* on the part of plaintiff as ought, in equity, to defeat him. 143 U. S. 224; 169 U. S. 237; 145 U. S. 317; 91 U. S. 587.

4. The land had been, at the time suit was brought, in the open, notorious, actual and adverse possession of appellants and their grantors for more than the statutory period.

Cutting firewood and timber on an adjoining farm is an act of possession. 48 Ark. 312. See also 89 S. W. 1002.

Neither actual occupation, cultivation or residence is necessary to constitute actual possession when the property is so situated as not to admit of any permanent or useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. 35 Miss. 490; 85 Miss. 292; 1 Cyc. 893. There is no rule of law that title by adverse possession can be gained only by certain particular methods of occupation. 135 Miss. 13. If a person enters upon land under claim of title, and uses it thereafter as a wood lot appurtenant to his farm in the usual and ordinary way, and exercises such acts of ownership over it as are necessary to enjoy it, such acts amount to actual possession. 87 Ill. 587; 18 Ill. 539; 29 Ia. 502; 122 Mich. 6; 65 Mich. 670; 111 Mo. 404; 87 Me. 316.

T. E. Hare, for appellee.

1. The sale was void by reason of the failure to record the delinquent list and notice of sale, with his certificate at the foot of the record showing in what newspaper the list was published, before the day of sale. 55 Ark. 218; 68 Ark. 248; 61 Ark. 36; 65 Ark. 595.

2. If the cutting of wood and getting of timber oocurred on the land as testified to, it was not sufficient to give title by adverse possession under the tax deed, these acts being at best only fitful acts of ownership, which do not start the statute of limitations or constitute adverse possession. 75 Ark. 421; 68 Ark. 551; 57 Ark. 97; 49 Ark. 266; 43 Ark. 486.

3. There was no error in refusing to transfer to the law court. A bare allegation in the motion that defendants were in actual possession, not supported by affidavits, was not sufficient to require the court to transfer to the law court. Neither did they, after answering, produce proof to justify a transfer.

4. There is no such showing of *laches* appearing in the record as will defeat the claim of the appellee. The increase in value of the land involved is not peculiar to that particular land, it has increased in value throughout the country; and the claim of various sales and transfers of the land is not supported by the proof—no deed of conveyance affecting the land is brought into the record. There is no showing of *bona fide* purchases of the land. Hence no one is injured by delay in bringing the suit. 76 Ark. 525; *ib.* 172; 75 Ark. 382. The length of time during which the party neglects to assert his rights which must pass in order to show laches, varies with the peculiar circumstances of each case. It is not subject to arbitrary rule. The length of time must be so great and the relations of the defendant to the rights such that it would be inequitable to permit the plaintiff to assert them. 152 U. S. 416.

WOOD, J. First. The court did not err in overruling the motion to transfer to law. The complaint stated that plaintiff was in possession of the land, set up his title, and asked to have same quieted. This gave the chancery court jurisdiction. *Lawrence* v. *Zimpleman,* 37 Ark. 645. The court must look to the allegations of the complaint, *in limine,* to ascertain whether it had jurisdiction. The complaint did not affirmatively show that the defendants were in possession, as alleged in the motion to transfer.

The chancery court did not lose its jurisdiction because defendants moved to transfer to law, alleging that they were in possession. Defendants answered, alleging a tax title, and setting up adverse possession under the two years' statute of limitation. But nothing was developed in the proof to show that the cause was not one of original equitable cognizance.

The lands, it appears from an agreement of record, were wild and unoccupied. The appellee had the legal title. He asked to have appellants' tax title cancelled as a cloud on his title.

Second. Appellants' tax title was void because of the failure of the clerk of the county court to comply with section 7086 of Kirby's Digest, as often held by this court. *Martin* v. *Allard,* 55 Ark. 218; *Cooper* v. *Freeman Lumber Co.*, 61 Ark. 36; *Taylor* v. *State,* 65 Ark. 595; *Logan* v. *East Arkansas Land Co.,* 68 Ark. 248; *Birch* v. *Walworth,* 79 Ark. 580.

Appellee had the right to have this title cancelled unless barred by laches or the two years' statute of limitations set up as defenses.

Appellants contend that appellee failed to pay taxes for seven years, that there were, after the sale of the lands for taxes, three transfers of record of which appellee was affected with notice, and a great increase in the value of the land, and that these facts should bar appellee by laches from maintaining this suit. In the recent case of *Jackson* v. *Boyd,* 75 Ark. 194, we held that, "until there is an interference with possession, there is no occasion for action, and payment of taxes by another is not sufficient of itself to call for action;" also, that "the bare lapse of time will not cure defects in an invalid tax title." We have held also that conveyances, "payment of taxes and color and claim of title are all insufficient to start the statute of limitations." See *Calloway* v. *Cossart,* 45 Ark. 81.

In *Rozell* v. *Chicago Mill & Lumber* Co., 76 Ark. 525, we said: "If the land is wild and unoccupied, and the delay has not prejudiced the rights of the defendants, they have no reason to object on that ground" to quieting the title of plaintiff.

Appellants, deriving their title from the void tax sale, had notice of the defects therein. They can not claim that they were injured or misled by any omissions of appellee to bring suit or pay taxes. See *Black* v. *Baskins,* 75 Ark. 382. They had notice of his title and the defects of their own. So the question is, will a failure to pay taxes for seven years bar the owner from maintaining a suit to cancel a void tax deed and other conveyances based thereon, where those acquiring the tax deed have paid the taxes continuously since their purchase for a period of five years, and where the lands since the purchase for taxes have greatly increased in value? The law in our State will divest the true owner of his title to land that has been in the actual open, continuous, exclusive and adverse possession

of another for a period of seven years, and will invest the adverse occupant with the title thereto. Section 5056, Kirby's Digest; *Crease* v. *Lawrence,* 48 Ark. 312; *Jacks* v. *Chaffin,* 34 Ark. 534; *Logan* v. *Jelks,* 34 Ark. 547; *Wilson* v. *Spring,* 38 Ark. 181.

Where the lands are wild and uninclosed, the law makes seven years' successive payments of taxes under color of title equivalent to seven years of acutal adverse possession, and vests the title to such lands in one who shows that he has paid the taxes during the period required by the statute. Section 5057, Kirby's Digest; *Towsen* v. *Denson,* 74 Ark. 302.

Under these statutes and decisions the owner of the land, as well as the adverse claimant, knows that there is no divestiture of title unless the conditions obtain as prescribed.

While it is true that the length of time during which a party may neglect to assert his rights and not be guilty of laches varies with the peculiar circumstances of each case, and is subject to no arbitrary rule like the statute of limitations (*Halstead* v. *Grinnan,* 152 U. S. 416; *Brinkley* v. *Willis,* 22 Ark. 1), yet, in the absence of some supervening equity calling for the application of the doctrine of laches, a court of chancery should and will by analogy follow the law, and not divest the owner of title by lapse of time shorter than the statutory period of limitations. *McGuire* v. *Ramsey,* 9 Ark. 518; *Ashley* v. *Rector,* 20 Ark. 359-377; *McGaughey* v. *Brown,* 46 Ark. 25; *Ringo* v. *Woodruff,* 43 Ark. 469.

The owner has two years to redeem from tax sale. No statute of limitation begins to run against him until the expiration of that period, and equity, by analogy, should not start laches against him until that time, and should not bar him from the assertion of his title until seven years after the period for redemption, unless he has done something or omitted to do something more than merely to fail to pay, and thus to permit the adverse claimant to pay the taxes. There is nothing in this record to show that appellee had acquiesced in the assertion of adverse rights by appellants. Appellee had no actual notice of appellants' claim. Had possession been taken, appellee would have been affected with notice that appellants were claiming in their own right under their recorded deeds. *Far-*

gason v. *Edrington,* 49 Ark. 207. But such was not the case. There was nothing to put appellee on notice that appellants were claiming the land in their own right. The payment of taxes for only five years, even with a great increase in the value of the land, we do not think would justify a court of equity in depriving the true owner of the right to have his title quieted, because the payment of taxes gave appellants no right to or interest in the land; and a court of equity, as a condition precedent to the ruling sought, should, by appropriate order, see that the adverse claimant is reimbursed for the taxes paid by him. *Penrose* v. *Doherty,* 70 Ark. 256. And, until there has been an equal or greater lapse of time than that shown by the legislative policy in the matter of limitations, a court of chancery should not divest the title of the owner by laches simply because, during his failure to pay taxes, there has been a great enhancement in the value of his land. We are of the opinion that the circumstances in this case do not entitle appellant to invoke the equitable doctrine of laches.

Third. The two years' statute of limitations set up by appellants can not avail, for the reason that the proof does not show such occupation of or dominion over the property as is required to give title by adverse possession. The Supreme Court of Maine in *Adams* v. *Clapp,* 87 Me. 316, says: "In order to acquire title to wood-land, there must be actual use and occupation of it of such unequivocal character as will reasonably indicate to the owner visiting the premises during the statutory period that, instead of such use and occupation suggesting only occasional trespass, they unmistakably indicate and assert exclusive appropriation and ownership."

This is the correct rule for courts and jurors to apply in determining from the facts of each particular case whether or not there is title by adverse possession. Measured by this rule, the chancellor's finding in favor of appellee is supported by the preponderance of the evidence.

The fact that Brown and his tenants, residents of the town of Earle, for several years cut timber from the land in controversy for firewood, rails, posts, boards, etc., to the extent of several hundred cords, and that no one except Brown and those whom he gave permission cut the timber for the various

purposes named after the tax purchase by Brown, would not of themselves constitute adverse possession. The cutting of the timber that was used for any one or all the purposes named was not all done upon one continuous and unbroken incursion upon the land, nor by many continuous successive trespasses. The timber, in other words, was not all cut at any one time, or continuously for a certain period. It was cut from time to time at intervals, as the occasion for it arose. The disconnected acts of cutting timber would indicate oft-repeated trespasses upon the land, but they were not sufficient in our opinion to show such continuous and notorious occupation and dominion over the land as would indicate to the true owner an unmistakable intention by another to own and exclusively appropriate the land.

We see nothing in the facts of this case to differentiate it in principle from *Connerly* v. *Dickinson, ante* p. 258; *Boynton* v. *Ashabranner,* 75 Ark. 421; *Driver* v. *Martin,* 68 Ark. 551.

The decree is affirmed.

McLEAN v. STATE.

Opinion delivered December 10, 1906.

81 304 / 85 352 / 85 356 / 85 469

1. MINES AND MINING—VALIDITY OF SCREEN LAW.—Acts 1905, c. 219, § 1, providing that "it shall be unlawful for any mine owner, lessee or operator of coal mines employing ten or more men underground at bushel or ton rates to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof before the same shall have been weighed to the employee," etc., was designed to furnish a basis of the miner's compensation and to secure to him payment for all the coal he mines, and is a valid exercise of the State's police power. (Page 306.)

2. POLICE POWER—REGULATION OF WEIGHTS AND MEASURES.—It is within the State's police power to adopt a uniform system of weights and measures, and to require all persons whose business transactions require the use of same to conform thereto. (Page 308.)

3. CONSTITUTIONAL LAW—EQUALITY OF RIGHTS.—Acts 1905, c. 219, in regulating only those coal mines which employ ten or more men under-

ground, does not conflict with the provisions of the State Constitution (art. 2, § § 2, 3, 8) and of the Fourteenth Amendment to the Federal Constitution securing to all persons liberty and equality of rights under the law. (Page 308.)

4. SAME—RIGHT OF LEGISLATURE TO MAKE CLASSIFICATIONS.—The Legislature may make reasonable classifications and discriminations between different classes of corporations and individuals, so long as equal protection of the laws is not denied to all persons similarly situated. (Page 308.)

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

John McLean was convicted of violating Acts 1899, c. 219, known as the Screen Law. It was agreed that he violated the terms of the statute, and the only question raised by the appeal is whether the act is valid.

Ira D. Oglesby, for appellant.

The act is in violation of the State Constitution, art. 2, § § 2, 3, 8, 29. And of the Federal Constitution, 14th Amendment, § 1. Similar statutes have been declared unconstitutional. Cooley, Const. Lim. 484-6; Tiedeman on Police Power, 572; 32 N. E. 364; 40 N. E. 156; 22 S. W. 350; 165 U. S. 150; 7 N. E. 631; 35 N. E. 62; 25 Am. St. Rep. 863; 43 N. E. 624; 59 Pac. 340; 184 U. S. 555; 183 U. S. 79; 48 L. R. A. 265; 83 Am. St. Rep. 116.

Robert L. Rogers, Attorney General, and *Brizzolara & Fitzhugh,* for appellee.

The act is valid as coming within the police power of the State. Its object is to protect the miner, to see that he is honestly paid for his labor, and to prevent fraud in the measurement of the coal mined. Freund on Police Power, § § 272 to 275. The same law has been enforced many years in other States. Digest, Mo. Stat. 1899, § 8786; Acts W. Va. 1891, c. 82; Gen. Stat. Kan. 1899, § § 4000-5; Rev. Stat. Ind. 1897, § 7840; 36 W. Va. 802; 61 Kan. 34. See also 69 Ark. 521; Snyder on Mines, § 1675. Liberty of contract must give way to public welfare, and the State's right to exercise its police power in restraint of liberty of contract, where the exercise of such power is in the interest of the public welfare, is well estab-

lished. Many laws have been upheld which restrict the freedom of contract concerning matters not affected with a public use in the true sense, but only in the sense of the nature or extent of the private business being affected with public interests. 190 U. S. 169; 183 U. S. 13; 83 Fed. 157; 157 U. S. 160; 113 U. S. 703; 169 U. S. 366; 94 U. S. 113; 9 Me. 54; 10 S. E. 143. Neither is the law invalid because it is made to apply only to coal companies employing ten or more men underground. Freund on Police Power, § § 721-738; 127 U. S. 205; 173 U. S. 404; 125 U. S. 680; 165 U. S. 628; 143 U. S. 517; 179 U. S. 328; 109 Fed. 847; 155 Ill. 166; 182 Ill. 551; 21 Or. 406; 16 Wis. 399. Equal protection is not denied where the law operates alike upon all persons similarly situated. 128 U. S. 578; 42 La. Ann. 8; 104 N. C. 714; 96 Mo. 44; 113 U. S. 32; *ib.* 709; 120 U. S. 68; 129 U. S. 26; 115 U. S. 321; 170 U. S. 282.

WOOD, J. This appeal questions the constitutionality of the following statute:

"It shall be unlawful for any mine owner, lessee, or operator of coal mines in this State, where ten or more men are employed underground, employing miners at bushel or ton rates or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employee sending the same to the surface, and accounted for at the legal rate of weights as fixed by the laws of Arkansas, and no employee, within the meaning of this act, shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions thereof, and any provisions, contract, or agreement between mine owners, lessees or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled, shall be void and of no effect, and the coal sent to the surface shall be accepted or rejected; and, if accepted, shall be weighed in accordance with the provisions of this act, and right of action shall not be invalidated by reason of any contract or agreement; and any owner, agent, lessee, or operator of any coal mine in this State, where ten or more men are employed under-

ground, who shall knowingly violate any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for each offense, or by imprisonment in the county jail for a period of not less than sixty days nor more than six months, or both such fine and imprisonment; and each day any mine or mines are operated thereafter shall be a separate and distinct offense; proceedings to be instituted in any court having competent jurisdiction." Acts 1905, c. 219, § 1.

This legislation is clearly within the scope of the police power. The manifest purpose of the statute is to prevent those who operate coal mines from perpetrating fraud upon laborers whom they have employed to mine coal *by the quantity*. It will be observed that the act does not interfere with the right of the operator to contract with the miners in his employ for the mining of coal by the hour or day, or in any other manner, regardless of quantity, that he deems proper. He is not compelled to have his coal mined and pay for same according to the quantity produced. But if he elects to employ miners to mine coal and to pay for same according to the quantity produced, then the purpose of this law is to secure the laborer against the use by him of any screen or other device "that shall take any *part from the value thereof* before the same shall have been weighed and duly credited to the employee" producing same. Under the provisions of the statute, the operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miners. The coal "shall be accepted or rejected." But "if accepted," then it "shall be weighed in accordance with the provisions of the act."

The plain purpose of the act therefore is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded. In other words, under this statute, the miner, having contracted with the mine owner or operator to produce a bushel, ton, or

any other quantity of coal at a certain price for the quantity produced, is entitled to have such quantity ascertained by the legal rate or system of weights adopted by the State of Arkansas; and that too without having the output or quantity of coal mined passed over any screen or other device which would take any part from the value thereof, *i. e.*, which would reduce, as ascertained by the weight, the quantity of coal which he had actually mined under his contract. It is certainly within the police power of the State to adopt a uniform system of weights and measures, and to require that all persons whose business transactions require the use of same conform thereto. Kirby's Digest, c. 159; *Blaker* v. *Hood*, 53 Kan. 509; *State* v. *Wilson*, 61 Kan. 34; *State* v. *Peel Splint Coal Co.*, 36 W. Va. 802; Freund on Police Power, § § 272 to 275. The purpose of these statutes, as applicable to coal mines, is, as said by Mr. Snyder, "to furnish a reliable means upon which to base the miner's compensation and to protect him in the payment for all the coal he mines." He therefore "not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record kept of it." 2 Snyder on Mines, § 1675.

The operators are prohibited from using screens or other device "which shall take any part from the value thereof." The words quoted show the intent of the Legislature to protect the miner from the use of any device by his employer that will enable such employer to deprive the miner of the value of his labor on the basis of the quantity mined as per contract.

We see nothing in the statute under consideration that contravenes the provisions in our State and Federal constitutions securing to all persons liberty and equality of rights under the law. State Const., art. 2, § § 2, 3, 8; Fed. Const., Fourteenth Amendment.

That the law applies only to mine owner, lessee, or operator of coal mines where ten or more men are employed underground does not subject it to the interdiction of the above provisions. The coal industry of our State, on account of the great number engaged in it and dependent upon it for a livelihood, and the still greater number who are affected by it, is of vast importance. Indeed, it can be truthfully said to be an

industry of great interest to the public, if not affected by a public use. It is eminently proper that the Legislature should take supervision over it for the protection and benefit primarily of those who are engaged in it and dependent upon it, and, secondarily, for the welfare of those who are incidentally affected by it. This duty has been recognized and entered upon, as evidenced by laws intended to insure, as far as practicable, the safety, health and comfort of the miner while engaged in his hazardous employment; and also to insure him, if possible, against any fraud or imposition that might or could be practiced upon him by an unscrupulous employer, if there should be one, who would defraud him of the fruits of his toil. Kirby's Digest, § § 5337 to 5358, inclusive. Legislation of the latter class is as much warranted under the police power as the former. As the object of such legislation is to protect those miners who need protection from fraud, broad latitude must be given the Legislature in the matter of the classification of the mines and miners. The principle announced in the case of *Consolidated Coal Co.* v. *Illinois,* 185 U. S. 203, is applicable here. "In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operators would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a large scale, or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for discrimination here."

The Supreme Court of West Virginia, in passing upon a similar clause in a similar statute, said: "The distinction drawn in favor of the smaller operators would indicate that the Legislature thought that the evils of fraud and danger of imposition did not extend to the smaller classes of operators, and hence the remedy was not extended to their employees. It is impossible to see how this distinction renders the act amenable to

the charge of violating the Fourteenth Amendment of the Federal Constitution;" citing *Budd* v. *New York,* 143 U. S. 517. See *State* v. *Peel Splint Co.,* 36 W. Va. 831. The authorities are quite numerous holding that the Legislature may make classifications and discriminations between different classes of corporations and individuals. Likewise that such laws are not open to impeachment by the courts as violative of the Fourteenth Amendment of the Federal Constitution, and the rights of civil liberty and equality, and of contract, guarantied by State and Federal constitutions, so long as equal protection is not denied to all persons similarly situated, and where it appears from the face of the act that no unreasonable, arbitrary, or unjust discrimination was intended or could be effected. Along this line see the many authorities cited in the able brief of counsel for appellee.

We do not consider the cases decided by the Supreme Court of the United States cited and relied upon in the brief of learned counsel for appellant as applicable to the statute under consideration. We believe the opinion we hold conforms to the decisions of the Supreme Court of the United States. No unjust or unreasonable discrimination against one class of persons or corporations and in favor of others can be found in this statute, as was found in the statutes in the cases cited that fell under the condemnation of the Supreme Court of the United States because repugnant to the Fourteenth Amendment of the Constitution. It must be presumed that the Legislature, through the local members from the districts affected especially by the legislation, or its committees appointed for the purpose, received information of the conditions which made such legislation necessary or expedient, and that it intended to put its enactments in the form to meet the requirements.

The act applies to "coal mines in this State, where ten or more men are employed underground." It may be fairly inferred from this language that the Legislature considered as *mines* only those places that had been developed to the extent of requiring the labor of ten or more men underground in the work of mining coal. Those places where the development work had not been carried on to the extent of requiring the labor of ten men underground were evidently regarded by the

Legislature as only in the prospective or experimental stage. We have no right to assume, from the act, that the Legislature intended to discriminate against them, but rather that they were not included because they did not need the protection afforded the class mentioned.

Similar laws have been enacted in several of the coal-producing States and, where tested, have received the sanction of the highest courts of the States, as a valid exercise of police power. Section 8786, Dig. Mo. Stat., 1899; chapter 82, Acts of W. Va., 1891; *State* v. *Peel Splint Coal Co.*, 36 W. Va. *supra;* Stat. of Kan., § § 4000-5, 1899; *State* v. *Wilson,* 61 Kan. 34; Revised Stat. of Ind., § 7840.

This court, in *Woodson* v. *State,* 69 Ark. 521, upheld a similar law as to a corporation, under the State's constitutional power to amend charter, and to prescribe conditions on which foreign corporations might continue to do business in this State. As the appellant in this case is the agent of a foreign corporation, the act could be sustained under the authority of that decision. For we do not find that the present law is so essentially different from that as to require a different ruling, and in the opinion of the court that case announces the correct doctrine.

Finding no error, the judgment is affirmed.

ROBERTS & SCHAEFFER COMPANY *v.* JONES.

Opinion delivered January 7, 1907.

1. JUDGMENTS—AMENDMENTS.—The judgments and orders of the court in any case may be corrected to speak the truth only by the court, and not by the judge in vacation. (Page 314.)

2. SAME.—Where the record shows that time was given to appellant to file a bill of exceptions at an adjourned term of court, and appellant contends that the order giving time was made by the judge after the court had adjourned for the term, it was not competent to amend the record so as to show this adjournment by proceedings before the judge had after the adjournment. (Page 314.)

Appeal from Sebastian Circuit Court; *Styles T. Rowe,* Judge; motion to strike out bill of exceptions postponed.

T. B. Pryor, for appellee, in support of motion.

1. When the court fixed the time in which to file the bill of exceptions, and that time has been permitted to pass without application for, and order by, the court changing the limitation of time originally fixed, the court is thereafter without jurisdiction to extend the time for filing the bill of exceptions. Compare Arkansas and Missouri statutes, Kirby's Digest, § 6222; Rev. Stat. Mo., § 2168. 83 S. W. 539; 119 Mo. 69; 113 Mo. 559; 24 Ind. 347. Wells on Questions of Law and Fact, 640; 3 Enc. of Pl. and Pr. 482-3; 3 Cyc. 42-3; 53 Ark. 415; 39 Ark. 558; 42 Ark. 488; 58 Ark. 112.

2. The court had no jurisdiction, after appeal granted, to set aside an order, but only retained jurisdiction to settle the bill of exceptions. 2 Cyc. 966.

3. It is shown conclusively that there was no order of adjournment on January 23. Special adjourned sessions of a court may be held in continuation of the regular terms, upon its being so ordered by the court or judge in term time and entered by the clerk on the record of the court. Kirby's Digest, § 1531. When the time came to convene the circuit court of Scott County, the circuit court of Greenwood District of Sebastian County, *ipso jure,* became adjourned. 69 Ark. 457. An order can not be antedated so as to create a legal session when there was no adjournment to a day certain. 21 Mo. App. 322.

Read & McDonough, for appellant, opposing motion.

1. The order of the court denying the motion of the appellees was not a judgment or final order of an inferior court from which an appeal may be presented to this court. Kirby's Digest, § § 1189, 1190; 26 Ark. 468; 27 Ark. 113. There is, therefore, nothing before this court for consideration other than the regular transcript of the record, which shows that the court was regularly in session at the time named. On appeal a bill of exceptions presented by the appellee will not be considered. 15 Mo. App. 585.

A court, in this State, has control over its orders and judgments during the term in which they are made, and for suffi-

cient cause may modify or set them aside. 27 Ark. 295. The action of the court or judge in signing or refusing to sign a bill of exceptions is not a subject of exception which may be brought before this court on appeal. Kirby's Digest, § 6221; 33 Ark. 569; 46 Md. 226; 2 Ark. 512.

2. It was within the power of the court to set aside the order allowing 90 days in which to file the bill of exceptions. 39 Ark. 448; 57 Ark. 10; 2 Ark. 229; 65 Ark. 404; 32 Ark. 278; 58 Ark. 110; 53 Ark. 415; 52 Ark. 554.

3. It was in the discretion of the judge to say whether or not he would testify, and his refusal can not be taken as impeaching the record. Kirby's Digest, § 3144; 60 Ark. 85; Rapalje on Witnesses, § 45. The record is presumed to be correct. 20 Ark. 92.

McCULLOCH, J. Appellee, T. E. Jones, sued appellant, Roberts & Schaeffer Company, a corporation, to recover damages for personal injuries alleged to have been sustained while working for appellant, and upon trial of the cause before jury he was awarded damages, and judgment was rendered accordingly. Appellant filed its motion for a new trial, assigning various errors; the same was overruled by the court on January 18, 1906, and time was allowed within which to present and file a bill of exceptions. The bill of exceptions was not filed within the time allowed, but the record filed here shows that on a subsequent day of the term the court extended the time, and that the bill of exceptions was filed within that time.

Appellee contends that the term of the court lapsed on January 23, 1906, and that the order subsequently entered extending the time for filing the bill of exceptions is a nullity. The transcript certified by the clerk contains orders of the court adjourning over from January 23, 1906, to March 12, and from that day to May 1, the day on which the order was entered extending the time for filing the bill of exceptions. Appellee filed his motion on a later day of the same term to correct the record and to set aside the record entry of the order extending the time, and introduced testimony tending to show that there was no adjournment over from January 23, but that the presiding judge vacated the bench without ordering an adjourn-

ment. This motion was overruled, and he brings up the additional record on the hearing of the motion.

We must, until the record entries are corrected by proper orders of the court, accept the certificate of the clerk as being absolutely true, and the frailty of appellee's position is that he sought to have the trial court, on a subsequent day of the same term, to make a finding that the term had previously lapsed and set aside a former record entry on that account. If the term had in fact lapsed, then the court was not, on a subsequent day of the same term, legally in session, and could not adjudicate the validity of the former record entries. The court only, and not the trial judge, can order the amendment of the record.

Appellee further contends that the court, even if legally in session, was powerless to extend the time for filing the bill of exceptions after the expiration of the time first fixed. We will not pass upon that question until it is determined whether or not the court was in fact in session when the order of extension was made.

The consideration of appellee's motion to strike out the bill of exceptions is therefore postponed until the date set for the submission of the cause so as to allow him, if he is so advised, to apply to the lower court in term time to correct the alleged erroneous record entries of the orders of adjournment.

COOPER v. DEVALL.

Opinion delivered December 17, 1906.

RAILROADS—DISCRIMINATIONS BETWEEN HACKMEN AT DEPOT—REMEDY.—Conceding that a railroad company can not legally give to one hackman the exclusive right to the use and occupancy of a portion of its depot grounds, the remedy for an unlawful discrimination in this respect is by action at law for damages, and not by injunction in equity, in the absence of any allegation of insolvency on the part of the railroad company or of other irreparable injury.

Appeal from Garland Chancery Court; *Alfonso Curl*, Chancellor; reversed and dismissed.

L. E. DeVall sued Cooper Bros., the Little Rock & Hot Springs Western Railroad Company, and George R. Belding, as mayor of Hot Springs, alleging that plaintiff and defendants Cooper Bros. were engaged in the livery and transfer business at Hot Springs and in hauling passengers to and from defendant's depot; that the railroad company entered into an agreement with the Coopers whereby they obtained the exclusive right to approach the depot at a certain point and to solicit business there; that Belding, as mayor, through his policemen, endeavored to secure to the Coopers the exclusive rights above mentioned. Plaintiff asked that defendants be restrained from enforcing this agreement.

A temporary restraining order was granted by the court. A demurrer to the complaint was overruled, whereupon the Coopers and the railroad company answered, alleging that the railroad company had made a contract with Simon Cooper, one of the brothers, "whereby he was to transfer the United States mail from the depot to the postoffice in the City of Hot Springs, and had given to Cooper access to *certain portions* of its platform, to get said mails, with which it permitted no one to interfere." They denied that the railroad company had given to Simon Cooper the exclusive right to use or have any certain part of its depot platform, or that Cooper had ever obtained the exclusive right to solicit business or secure passengers who might alight from its trains on said platform at Hot Springs. The answers admitted that the said Cooper had the exclusive right, however, to solicit passengers and baggage upon the railway trains. They denied that there was any written contract between the railway company and Cooper, or that they had combined together to injure or destroy the plaintiff's business. They alleged that what had been done was for the purpose of expediting the railroad company's business, and for the convenience and safety of the passengers and patrons of said railroad, and then asked to be dismissed with costs.

The court found the facts as follows:

"1. That the plaintiff is engaged in the livery and transfer business in the City of Hot Springs, and, among other things, by means of regular transfer vehicles transfers passengers to and from the passenger station and the defendant Little Rock

& Hot Springs Western Railroad Co., at Hot Springs, from and to different points in the city of Hot Springs. That the defendants Cooper Bros. are also engaged in the same business at the same place, and that there are also several other persons engaged in the same business at the same place.

"2. That the passenger depot of the defendant railway company is situated between Valley Street and Elm Street in the city of Hot Springs; that a platform on which for passengers to alight from the trains of defendant company, and from which passengers enter the cars of said company, extends along the front or northeast of the depot building and the railroad track, and that from the southeast end of this platform there is extended along the track a raised gravel walk, protected by a curb, for a distance of 160 feet, which is also used by passengers in entering or leaving trains; that said platform and graveled walk are both covered and protected by one continuous shed designed for the protection of passengers in rainy weather; that on the southeast side of the depot, and between the above-named gravel walk and Elm Street, there is an open yard; and that vehicles bearing passengers to the station, or coming to the station to receive passengers from the trains of the defendant company, enter this yard, and deliver or receive at the curb under the above-named shed, and that the railway company is the owner of this shed for depot purposes.

"3. That the defendants Cooper Bros. have a contract or agreement with the defendant railway company by which the said Cooper Bros. handle and carry the United States mails to and from between said passenger depot and the postoffice in Hot Springs, and that under said agreement the defendants Cooper Bros. have the exclusive privilege of sending a solicitor for patronage for passengers and baggage on the cars of the defendant railway company; that said Cooper Bros. also had an agreement with the defendant railway company by the terms of which Cooper Bros. are to have the exclusive privilege of approaching the above-named graveled walk and shed with vehicles for the receipt of passengers alighting from the trains of the defendant railway company.

"4. That at the time, and before the institution of this action, the defendants Cooper Bros. and the defendant Little

Rock & Hot Springs Western Railroad Company, acting upon this latter agreement, denied to the plaintiff the rights to approach with his vehicles the curb and graveled walk under said shed, and alongside of said graveled walk, for the purpose of receiving or soliciting the patronage of passengers alighting from the trains of defendant company, and had excluded him and his teams and vehicles therefrom, and in so doing they had been aided by the police officers of the City of Hot Springs."

As matters of law the court found:

"1. That the contract between the defendants Cooper Bros. and the Little Rock & Hot Springs Western Railroad Company, by which the said Cooper Bros. have the exclusive right to travel in the trains of the defendant railway company to solicit patronage, is valid.

"2. That the defendant railway company has a right and may designate any place at or about its depot for and at which the said Cooper Bros. may receive and deliver United States mails, in furtherance of the contract for carrying to the same, provided that no more space than is necessary is appropriated for that purpose.

"3. That the agreement between the said defendant railroad company and Cooper Bros., by which the latter have the exclusive privilege of approaching the above-named graveled walk or shed with their vehicles, for the receipt and delivery of passengers alighting from or desiring to board the trains of the defendant company, is unlawful and void; and that actions of the defendants, Cooper Bros. and the Little Rock & Hot Springs Western Railroad Company, be and they are perpetually enjoined from excluding or depriving the plaintiff from the privilege of approaching with his vehicles the above-named graveled walk or shed, or at any other place on or about the passenger depot of said railroad company, at Hot Springs, which passengers alight from, or are received on the trains of said railway where the defendants Cooper Bros. are permitted to go with their vehicles for the receipt and discharge of passengers alighting from or embarking on said trains, and from in anywise discriminating between the plaintiff and the said Cooper Bros. in the matter of ingress to and egress from such points for the purpose or receiving and delivering passengers, and for

soliciting the patronage of such passengers, and that the plaintiff have and recover of and from the defendants Cooper Bros. and the Little Rock & Hot Springs Western Railroad Company, all his costs in and about this action accrued or expended."

Cooper Bros. and the railroad company have appealed.

B. S. Johnson and *Tom M. Mehaffy,* for appellant.

1. It appears both by the complaint and proof that the plaintiff had an adequate and complete remedy at law; and there is no allegation either of insolvency on the part of either defendant or of irreparable injury, so as to afford a ground for equitable relief. 44 Ark. 191; Fletcher's Pl. & Pr. § § 75, 87, 90.

2. A railroad company may permit one carrier of passengers and their luggage to come upon its premises and exclude all others engaged in the same business. 33 Am. & Eng. R. Cas. 488; 16 R. I. 649; 50 Am. & Eng. R. Cas. 1; *Id.* 9, note; 84 Mich. 194; 75 Hun, 355; 22 Am. St. 699; 68 L. R. A. 792.

R. G. Davies, for appellee.

A railroad company can not give one hack and 'bus company the right to use and occupy a portion of its depot grounds to the exculsion of all others. Kirby's Digest, § § 6725, 6804, 6808; 84 Mich. 194; 101 Mo. 247; 50 Am. & Eng. R. Cas. 5. See also Const. 1874, art. 17, § § 3, 6; 3 Wood on Railroads, 1176, § 287.

HILL, C. J. The Reporter will state the facts, and it will be seen therefrom that this suit is an effort by one hackman to prevent by injunction a rival hackman from alleged preferential stational facilities. The contention of appellee is that the law as thus stated controls the rights of this hackman, towit: "By the weight of authority in this country, a railroad company can not legally give to one hack and omnibus company the right to the use and occupancy of a portion of its depot grounds, to the exclusion of others engaged in the like business of the carriage of freight and passengers from its depot." 1 Fetter on Carriers of Passengers, § 245.

Concede that this is a sound principle and applicable to the facts, and it is at once apparent that an injunction will not lie. The gravamen of the complaint and the evidence under it is

that the railroad company has given Cooper a preference which he was not entitled to under the law as thus stated, and that it unlawfully discriminated in favor of Cooper and against him, DeVall, to his damage, for which judgment was prayed as well as injunctive relief to prevent further damage. If Devall had a case under the law and facts, it was a plain and simple suit at law for damages against a public carrier for denying him equal privilege with a rival hackman.

The common law and the statutes cover such actions completely, and there was no allegation of the insolvency of the railroad company preventing the adequacy of his legal remedy or any other showing of cause for equitable jurisdiction or relief.

If appellee's facts entitled him to anything, it was to a judgment for damages; and as this was not brought in a law court, and is not an appeal therefrom, it would be *obiter* to discuss whether he has a suit at law. Certainly he has no cause for an injunction.

Reversed and dismissed.

SAWYER v. WILSON.

Opinion delivered January 14, 1907.

1. TAX SALE—SUFFICIENCY OF DELINQUENT LIST.— Where a list of delinquent lands states, in appropriate columns, the valuation of the land, the total taxes, the penalty, the various fees and the total taxes, penalty and costs, the court will take notice that the dollars are stated in whole numbers and the cents and mills decimally. (Page 324.)
2. TAX SALE—SUFFICIENCY OF DELINQUENT LIST.—A tax sale is not void because the delinquent list blends all the taxes due on the land into a lump sum, as the amounts due to the various funds can readily be ascertained by references to the tax books. (Page 324.)
3. SAME—PRESUMPTION IN FAVOR OF CLERK'S DEED.—Under Kirby's Digest, § 7104, providing that a clerk's tax deed is a "*prima facie* evidence that all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in the transaction relating to or affecting the title conveyed," etc., there is

a presumption in favor of such deed that the collector attached his oath to the list of delinquent lands as required by law. (Page 325.)

4. SAME.—FAILURE OF ASSESSOR TO TAKE OATH.—A tax sale is not invalidated by the failure of the assessor to take the special oath prescribed by Kirby's Digest, § 6956. (Page 325.)

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

S. S. Semmes, for appellant.

1. The title of appellee's vendor was divested by previous tax forfeitures, occuring in 1871 and 1882, so that the ancestor of the vendor had no title at the time of his death which could pass to or vest in his heirs at law under the patent obtained by them in 1903. Hence neither appellee nor those under whom he claims to hold had any title at the time of collector's sale in 1895. No title having since been acquired by them from the Federal Government or from the State, appellee was barred by the statute. Kirby's Digest, § 7105. Moreover, appellee must recover by the strength of his own title and not upon the weakness of his adversary's. 92 S. W. 537.

2. The tax sale was valid. Only such sales are absolutely void as are made in violation of constitutional requirements, whereby the owner is deprived of some substantial right. 46 Ark. 107; 55 Ark. 199. In this case, the "record of the list and notice of sale of delinquent lands sets out in parallel columns the names of the landowners, parts of section, section, township, range, area, valuation, total tax, penalty, clerk's fees, collector's fees, advertising, and total tax, penalty and cost charged to and affecting each tract, followed by the notice of sale properly worded, signed and sealed by the clerk, and at the foot of the list the clerk's certificate, made before the day of sale, shows the publication of the list and notice in the manner and for the time required by law. This is such a substantial compliance with the statute as furnishes both the owner and the prospective purchaser with all information necessary for their protection. *Supra;* Kirby's Digest, § § 7085, 7086; 22 Ark. 561.

3. Appellant, having paid seven years taxes in succession under color of title, has acquired title by limitation. Acts 1899, March 18; 74 Ark. 310 *et seq.;* 68 Ark. 211.

If appellant's certificate of purchase under the collector's sale in 1895 be construed as sufficient to start the statute to running, then appellant's defense was complete, he having from that date paid nine successive yearly taxes on the land. 71 Ark. 386.

J. T. Coston and *Murphy, Coleman & Lewis,* for appellee.

1. The tax sale was void. (a) Examination of the record of the list and notice of sale of lands delinquent for the taxes of the year 1894 discloses nothing to indicate what the numerals set out in the parallel columns under the various headings appearing at the top of the same, represent,—nothing to show whether they represent dollars, cents, mills, or mere numerals. No presumption can be divulged that they represent an amount of money. 38 S. W. (Tenn.) 285; 20 Ill. 341; 6 Cold. (Tenn.) 400; 30 Cal. 610; 31 Cal. 132; 90 Cal. 444; 86 Ind. 51; 2 Utah, 114; 7 Mackey, 94; 3 Sawy. 22; 1 Wall. 398.

(b) It was void also because the taxes were blended so that the owner could not determine the amount of each tax, State, county, municipal, etc., he was to pay, and hence could not tell whether or not he was charged with any illegal or excessive tax. Kirby's Digest, § 7060; 68 Ark. 248; Blackwell on Tax Titles, 163; 1 Idaho (N. S.), 667; 1 Green (15 (N. J. L.), 326; 39 Ill. 108; 1 Pick. 482; 96 Mich. 155; 18 N. J. L. 11; Cooley on Taxation (3 Ed.) 792; Welty on Assessments, § 223.

(c) The collector failed to attach his affidavit to the delinquent list. When the certified copy of the delinquent list fails to show the verification of the collector required by law, it must be taken that the list was not verified. 1 Cooley on Taxation, 824-7.

(d) The assessor failed to endorse his oath upon the assessment books. Kirby's Digest, § 6956; 34 Fed. 701; 140 U. S. 634.

(e) The clerk failed to certify on the record of the list and notice of sale the length of time the sale was published before the second Monday in June then next ensuing.

2. The complaint alleges, and the answer admits, that the State issued patent to appellee's grantors in 1903,—after the

tax forfeiture of 1895. Appellee is therefore within the exception named in the statute. Kirby's Digest, § 7105. The State's patent will prevail unless the defendant shows that prior thereto the legal or equitable title had passed from the State and to a person from whom he deraigns title. 73 Ark. 30. The tax sale to appellant in 1895 was void because the land was not then subject to taxation. A forfeiture of State land for taxes is void. 75 Ark. 146. If, as is contended by appellant, the land was forfeited to the State in 1884, it then became the property of the State, and there is nothing to show that it had again become subject to taxation at the time of the tax sale in 1895, under which he claims. He having shown that it had ceased to be taxable, it is presumed to have continued so until the contrary is shown. Kirby's Digest, § § 7025, 6977; Greenleaf, Ev., 16 Ed., 138, § 41; 4 Ark. 456 22 Ark. 466; 25 Ark. 458; 48 Ark. 551.

3. There is no allegation in the answer nor any proof whatever that the land was either unimproved or uninclosed during any of the time appellant was paying taxes on it, and this was an affirmative defense which it was necessary for the appellant to allege and prove in order to bring him within the terms of the act of March 18, 1899.

Appellant's tax deed having been executed on December 6, 1897, his first payment of taxes thereafter being on January 17, 1898, and suit being commenced on September 12, 1904, his claim of title by virtue of seven years' payment of taxes can not avail. 1 Wall. 637; 23 Ill. 387; 47 Ill. 477; 96 Ill. 415; 99 Ill. 372; 183 Ill. 538; 99 N. W. 855. A certificate of purchase at a tax sale is not color of title within the meaning of the act. A certificate of title vests in the purchaser neither the legal nor the equitable title to the land sold. 26 Ark. 48; 73 Ark. 221; *ib.* 344; 23 Ill. 512; 183 Ill. 548. See also 14 Neb. 361; 66 Ver. 173; 37 Mo. 310; 5 McLean, 189; 58 Ga. 350; 34 N. H. 544.

W. J. Lamb, amicus curiae.

Seven consecutive annual tax payments are equivalent to seven years' possession under the act, and seven years need not necessarily pass between the date of the first payment under

color of title and the date of filing suit. This court has held that the words * * * "shall have paid such taxes for at least seven years in succession," mean seven annual payments of taxes, and that time is not the criterion. Compare, § § 5057 and 665, Kirby's Digest; 68 Ark. 211; 74 Ark. 302.

BATTLE, J. R. E. Lee Wilson brought suit against E. L. Sawyer in the chancery court of the Chickasawba District of Mississippi County, in this State, to quiet his title to a certain tract of land, described in his complaint, by setting aside a deed executed to the defendant by a county clerk, conveying such tract to him on account of his purchase thereof at a sale in the year 1895 of the tract in controversy and other lands returned delinquent and sold for the taxes of 1894. He admits the sale, the purchase by the defendant, and the execution of the deed, but insists that the sale is void for the following reasons:

First. In the record of the list and notice of sale of lands delinquent for the year 1894, in parallel columns, appear the headings, names, parts of section, section, township, range, acres, valuation, total taxes, 25 per cent. penalty, clerk's fees, advertising, sheriff's fees, total taxes, penalty and costs, and under these headings respectively are the following: Ozark Land Company, N. E. ¼ 9, 14, 12, 127, 150, 2.25, .56, .15, .25, .10 and 3.31. He alleges that there is nothing to indicate what the figures 150, 2.25, .56, .15, .25, .10, 3.31 denominate; that they may be dollars, or cents, or mills; but there is nothing to show that they indicate an amount of money at all.

Second. The taxes are blended, that is, the State, county and other taxes are not kept separate, so that the owner can tell the amount of each tax he was required to pay.

Third. The collector failed to attach his affidavit to the delinquent list returned by him.

Fourth. The assessor failed to indorse his special oath upon the assessment books.

Fifth. The clerk failed to certify on the record of the list of delinquent lands and notice of sale "the length of time the sale was published before the second Monday in June then next ensuing."

The chancery court found the sale void, and set aside the deed; and the defendant appealed.

First. The following is a copy of the record of the list of so much of the lands delinquent for the year 1894, in Mississippi County, Arkansas, as is involved in this suit, valuations, etc.

NAMES	Parts of Section	Section	Township	Range	Acres	Valuation	Total Taxes	25 per ct. Penalty	Clerk's Fees	Advertising	Sheriff's Fees	Costs, Penalty and Total Taxes
X	X	X	X	X	X	X	X	X	X	X	X	X
OZARK LAND CO	N.E.	$9\frac{1}{4}$	14	12	127	150	2.25	.56	.15	.25	.10	3.31
X	X	X	X	X	X	X	X	X	X	X	X	X

Lands in this State are assessed in dollars and cents. Taxes are payable only in money or its representative. "Our denominations of money are dollars, cents and mills—the dollars being stated in figures, in whole numbers, and the cents and mills decimally, as .05 for five cents, and .005 for five mills." In the foregoing list, under the heading clerk's fees, we know that .15 means fifteen cents, under advertising .25 means twenty-five cents, and under sheriff's fees, .10 ten cents, these being fees of such officers fixed by law and chargeable against lands sold for taxes. From this it appears that .56 under the heading .25 per cent. penalty means fifty-six cents, and 3.31 under total taxes, penalty and cost means three dollars and thirty-one cents, and 150 under the head of valuation is for one hundred and fifty dollars. This is common knowledge; and the delinquent list is sufficient.

Second. There is no law prohibiting the blending of all taxes in a delinquent list of lands as published for sale. This is immaterial, and can not affect the owner. The taxes and amount of each charged against the land can be readily ascertained by reference to the tax books. *Scott* v. *Watkins*, 22 Ark. 556, 561.

Third. There was no evidence that the collector failed to attach his oath to the list of lands returned by him delinquent, as required by law; and the deed executed by the clerk is *prima facie* evidence of that fact. Kirby's Digest, § 7104.

Fourth. The tax sale was not invalidated by the failure of the assessor to take the special oath prescribed by section 6956 of Kirby's Digest. *Barton* v. *Lattourette,* 55 Ark. 81.

Fifth. The clerk certified on the record the length of time that the lands delinquent on account of the non-payment of the taxes of 1894 was advertised for sale before the second Monday in June, 1895. The sale was on the 10th of June, 1895. The clerk certified that the list of lands delinquent for such taxes was published in the *Osceola Times,* a newspaper published in the town of Osceola, Mississippi County, Arkansas, for two weeks, weekly, the first publication being on May 25th, the next June 1st, and the last June 8th, 1895, and was also published in the *Mississippi County Democrat,* a newspaper published in the town of Osceola, Mississippi County, Arkansas, the first publication being May 23d, the second May 30th, and the last June 6, 1895. The certificate shows the length of time for which the list was published for sale.

The sale and deed are valid.

Decree reversed, and the cause remanded with directions to the court to dismiss the complaint for want of equity.

SAINT LOUIS AND SAN FRANCISCO RAILROAD COMPANY *v.* PORTIS.

Opinion delivered January 7, 1907.

RAILROAD—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE.—A railroad company is not liable to the owner of a horse and wagon injured by a train at a crossing where the person in charge thereof drove upon the track without looking at a time when, if he had looked, he could have seen the train and avoided the accident.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; reversed.

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

Where one drives upon a railroad track without looking to see if there is an approaching train, as a matter of law he is guilty of contributory negligence, and can not recover if injured. 54 Ark. 431; 56 Ark. 457; 61 Ark. 549; 62 Ark. 156; 64 Ark. 364; 65 Ark. 235; 69 Ark. 134; 78 Ark. 55. The train in this case was in plain view, as is admitted by the driver. He is charged with having seen it. 79 Ark. 241. See also 95 U. S. 697; 114 U. S. 615; 174 U. S. 379; 63 S. W. 360; 90 S. W. 136; 24 Atl. 747; 16 Atl. 623; 54 Atl. 276; 55 Atl. 627; 3 Elliott on Railroads, § 1166; 4 *Id.* § 1703.

Walker & Walker, for appellee.

BATTLE, J. J. P. Portis brought this action against the St. Louis and San Francisco Railroad Company to recover damages caused by the killing of a horse and the destruction of a wagon and harness by a train of the defendant, the horse, wagon and harness being his property. He recovered judgment, and the defendant appealed.

Tolbert Davis was driving a delivery wagon for appellee. He had delivered some goods on Hill Street in Fayetteville, Arkansas, and before leaving Hill Street, and while driving south, and a block distant from the railroad crossing, he looked in both directions for a train, and then drove on in the direction of the railroad. He looked south no more until after he had driven on the railroad, when it was too late. The train of the defendant struck and killed the horse and destroyed the wagon and harness, and the driver left the track as the train struck the horse, barely making his escape. The train was in full view before he drove on the track, and, had he looked south before driving on the track, he would have seen the train and avoided the accident. He was guilty of contributory negligence and appellant is not liable for damages. *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.,* 78 Ark. 55; *Railway Co.* v. *Cullen,* 54 Ark. 431; *Railway Co.* v. *Tippett,* 56 Ark. 457; *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549; *Martin* v. *Little Rock & Ft. S. Ry. Co.,* 62 Ark. 156; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 64 Ark. 364; *Little Rock & Ft. S. Ry. Co.* v. *Blewitt,* 65 Ark. 235; *St. Louis & S. F. R. Co.* v. *Crabtree,* 69 Ark. 134. Appellee

sues in this action for the value of the horse, wagon and harness. He is not entitled to recover.

Judgment is reversed, and cause is remanded for a new trial.

JONESBORO, LAKE CITY & EASTERN RAILROAD COMPANY *v.* CHICAGO PORTRAIT COMPANY. [81 327 / 87 206]

Opinion delivered January 7, 1907.

1. APPEAL—INSUFFICIENCY OF ABSTRACT.—Failure of the trial court to give an instruction asked by the appellant will not be ground for reversal if the appellant fails to abstract the instructions of the court and the testimony in the cause. (Page 327.)
2. SAME—INSUFFICIENCY OF BILL OF EXCEPTIONS.—Where the bill of exception fails to show that it contains all the evidence that was introduced at the trial, it will be presumed that there was evidence to sustain the verdict and that the jury were correctly instructed. (Page 328.)

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

STATEMENT BY THE COURT.

This is a suit by appellee against appellant for the loss of four boxes of picture frames and pictures alleged to have been lost and converted by appellant, to appellee's damage, etc.

Brown & Driver, for appellant.

Charles D. Frierson, for appellee.

WOOD, J., (after stating the facts.) The appellant abstracts the pleadings in the case, but fails to abstract the evidence. Only the testimony of two witnesses (both for appellant) is abstracted, while the testimony of appellee, plaintiff below, upon which the verdict and judgment were rendered, is not abstracted at all. None of the instructions were abstracted, although it is shown by a statement in appellant's brief ("the court in its ninth instruction said") that at least nine instructions were given. Appellant complains of the refusal of the

court to give its third request for instruction, but does not abstract the instruction, or even state its substance. Appellant says "that the thirty-two hours shown by the proof, being the time the goods were deposited in the depot, were ample time for the consignee to call for the goods." But only the testimony of a witness for appellant tending to show the time that the goods were deposited in the warehouse of appellant is abstracted. What the testimony of the witnesses for appellee may have been with reference to that matter we can not know without looking to the record. There is no abstract of the instructions and the testimony in the cause, and, under recent decisions of this court, the judgment must be affirmed. *Shorter University* v. *Franklin,* 75 Ark. 571; *Beavers* v. *Security Mutual Insurance Co.,* 76 Ark. 138; *Merritt* v. *Wallace,* 76 Ark. 217; *Carpenter* v. *Hammer,* 75 Ark. 347; *Koch* v. *Kimberling,* 55 Ark. 547; *Houghton* v. *Moseley,* 80 Ark. 259.

But, if we should let that pass, still the judgment would have to be affirmed.

The bill of exceptions has no statement showing that it contains all the evidence that was introduced at the trial. In fact, there are statements in the bill of exceptions which show that it does not contain all the evidence. It must be presumed in such case that the jury was correctly instructed, and that there was evidence to sustain the verdict. *Western Coal & Mining Co.* v. *Jones,* 75 Ark. 76, 83; *Hardie* v. *Bissell,* 80 Ark. 74; *Kansas City, F. S. & M. Rd. Co.* v. *Joslin,* 74 Ark. 553, and cases cited therein; *Railway Company* v. *Amos,* 54 Ark. 159.

NALER v. BALLEW.

Opinion delivered January 7, 1907.

1. CROSS COMPLAINT—BRINGING IN NEW PARTIES.—Under Kirby's Digest, § 6088, third persons and co-defendants may be made parties defendant in a cross bill only where the cause of action therein affects the subject-matter of the principal action. (Page 330.)
2. HUSBAND AND WIFE—TENANCY BY ENTIRETIES.—A deed conveying land to a husband and wife jointly creates in them an estate in entirety under which the survivor takes the fee. (Page 330.)

3. SAME—TRANSACTIONS BETWEEN.—The object of the rule that gifts from wife to husband are to be scrutinized with great jealousy is to ascertain, but not to defeat when ascertained, the real intention of the donor. (Page 331.)

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

Jones & Hamiter, for appellant.

In transactions between husband and wife whereby her property become vested in him, the *onus* is on him, and on those holding under him, to show the *bona fides* of the transactions. Where a disposition of her property is attempted which is beneficial to him and injurious to her, he becomes her trustee, and every reasonable intendment is indulged against him. Harris, on Contracts by Married Women, § 599; 30 Miss. 161; 36 Miss. 510; *id.* 640; 39 Miss. 462.

J. I. Alley and *Hal L. Norwood,* for appellee.

1. Where a husband receives fund of his wife and with her knowledge and consent invests it in real estate in his own name, the law raises a *prima facie* presumption of a gift. 40 S. E. 341; 50 W. Va. 226.

A gift of personal property by the wife to the husband, though viewed with caution, will not be set aside, unless undue influence is shown. 48 S. W. 158. The object of a careful scrutiny of such gifts is to ascertain, and not defeat when ascertained, the real intention of the parties, where the transaction is free from fraud. 75 Ark. 127. See also 88 S. W. 976.

2. The findings of a chancellor will be sustained unless clearly against the weight of evidence. 73 Ark. 486; 72 Ark. 67; 71 Ark. 605.

HILL, C. J. Baker Ballew, the appellee, brought suit in equity against appellants, who are the brothers and sister of his deceased wife and her next of kin, to quiet his title to a half block of ground in Mena. They answered, asserting title to said property, and by cross-complaint sought to recover of Ballew other property in the hands of other persons, who were made defendants to the cross-complaint, and also sought to hold Ballew trustee for them for another lot in Mena alleged to have been bought with money belonging to his deceased wife of which title was taken in himself, and for a judgment against him for

money received from his wife. On motion the court struck out all that part of the cross complaint not relating to the half block mentioned in the complaint. The striking out of these other matters is assigned as error. Section 6088, Kirby's Digest, prescribes the office of a cross-complaint where parties other than the plaintiff are proceeded against. Third parties and co-defendants can only be brought in where the cause of action affects the subject-matter of the principal action. *Trapnall* v. *Hill,* 31 Ark. 345. Such was not the case here, and the action of the court was right, so far as these third parties were concerned; and whether it was right or not as to the other lot in Mena and the money derived from Mrs. Ballew as between them and Ballew is immaterial, in view of the opinion of the court on the subject of the gift of the money to Ballew. The issue is thus limited to the half block concerning which the suit was brought. The deed to this half block was made to the husband and wife jointly, and created in them an estate in entirety, and the survivor took the whole fee. *Robinson* v. *Eagle,* 29 Ark. 202; *Branch* v. *Polk,* 61 Ark. 388; *Simpson* v. *Biffle,* 63 Ark. 289.

It was shown that this land was purchased and improved with funds received by Mrs. Ballew from her father's estate. She received $4,285 from that source, all in checks payable to herself, which she indorsed and delivered to her husband, and which he deposited to his own credit in banks at Mena. He testified that she gave him this money. In some respects his testimony is inconsistent with established facts, and in several matters he is contradicted by both interested and disinterested witnesses, and of course this weakens the force of his testimony that his wife gave him her inheritance. But it is an established fact that she did indorse and deliver these checks to her husband, and that he forthwith deposited them to his own credit, and thereafter drew upon these deposits as his own from time to time, and it is also established by a disinterested, uncontradicted and unimpeached witness that Mr. and Mrs. Ballew brought him the deed in question for information in regard to its phraseology in reciting the receipt of the consideration. Her attention was shown to have been sharply drawn to the deed made jointly to her husband and herself, and that it

was so carefully scrutinized by her that she sought advice in regard to a formal matter therein, and was seemingly satisfied with it being made jointly to her husband and herself, notice of which was thus shown to have been brought to her before the deed was recorded and probably before it was accepted. Ballew testified that it was made to them jointly pursuant to an understanding and agreement to that effect between them. Against these established facts there is no testimony except evidence of inconsistent and contradictory statements of Ballew; but these statements are only as to the time, method and manner of the gift to him, and not of the fact of gift itself, which is strongly corroborated by her delivery of the checks to him and the purchase with her knowledge of the property in their joint name, and the improvement of it through the money inherited by her. The following statement in *Hannaford* v. *Dowdle,* 75 Ark. 127, is as applicable to this case as to that:

"Appellees invoke the elementary rule of law that gifts from the wife to the husband are to be scrutinized with great jealousy. Citation of authority is unnecessary to sustain this salutary rule. But, after all, the demand for such scrutiny is to ascertain, and not to defeat when ascertained, the real intention of the parties, where the transaction is free from fraud. Notwithstanding that relation, the court will, after having ascertained the intent of the parties to the transaction and found that there had been no fraud or imposition, uphold rather than frustrate their acts." The property was improved to the extent of some $1,500 or more before Mrs. Ballew's death, and it was plain that she knew this money was deposited to her husband's credit or under his control, for otherwise these expenditures could not have been made as he owned little property and had no cash with which to meet small debts before this inheritance.

The gift was not an unnatural one. This couple had been married nearly thirty years, and were childless, and the husband was poor, while the brothers and sister had each presumably as much from the father's estate as had Mrs. Ballew, for the testimony showed she received this money in a division of the estate of her father. There is nothing to contradict Ballew's statements that his wife was grateful to him for years of kindness and consideration to her.

The chancellor has credited the testimony proving the gift, and, after it is weighed and scrutinized as required in such cases, the court is satisfied that the finding was correct, and the decree is affirmed.

WILLIAM R. MOORE DRY GOODS COMPANY v. THOMAS.

Opinion delivered January 7, 1907.

APPEAL—BRINGING EVIDENCE INTO RECORD.—Depositions which were read in an action at law, but were not made part of the record by bill of exceptions or order of the court, will not be considered on appeal, though the judgment recites that the evidence was in writing and on file in the case.

Appeal from Hempstead Circuit Court; *W. S. Eakin,* Special Judge; affirmed.

McRae & Tompkins, for appellant.

W. M. Greene, for appellee.

BATTLE, J. William R. Moore Dry Goods Company brought this action against J. H. Thomas on a promissory note executed by the defendant and D. G. Hart to the plaintiff, on the first day of October, 1897, for the sum of $245, and six per cent. per annum interest thereon from date until paid, and due on the first day of October, 1898. The defendant answered, and pleaded payment and the statute of limitation. The issues in the action were tried by the court sitting as a jury. The evidence heard was in depositions. The court rendered judgment in favor of the defendant. It is stated in the judgment that the evidence was in writing and on file herein. The judgment overruling the motion for a new trial closes by saying, "And as the proceedings in this case are in writing and on file, the plaintiff takes no bill of exceptions, but prays an appeal to the Supreme Court, which is granted." No bill of exceptions was filed.

The depositions upon which the issues were tried were not made a part of the record by bill of exceptions or order of the court. The reference to them in the judgment was not suffi-

cient to make them so. *School District No. 14* v. *School District No. 4,* 64 Ark. 488; *Lawson* v. *Hayden,* 13 Ark. 316; *Boyd* v. *Carroll,* 30 Ark. 527; *Smith* v. *Hollis,* 46 Ark. 17, 21; *Ashley* v. *Stoddard,* 26 Ark. 653; *Scott* v. *State,* 26 Ark. 521; *Dillard* v. *Parker,* 25 Ark. 503; *Lenox* v. *Pike,* 2 Ark. 14; *Hall* v. *Bonville,* 36 Ark. 491.

As no error appears in the record, the judgment is affirmed.

WOODBURN v. DRIVER.

Opinion delivered January 14, 1907.

1. REPLEVIN—LIABILITY OF SURETIES IN RETAINING BOND.—Where a defendant in replevin gives a retaining bond, the liability of the sureties therein, by Kirby's Digest, § 6870, is limited to the value of the propty in case its return can not be had, and the damages sustained by its detention. (Page 334.)
2. ERRONEOUS JUDGMENT—PRESUMPTION.—Although the transcript on appeal does not contain the evidence upon which the decree appealed from was based, the presumption will not be indulged that the evidence was sufficient to warrant the decree, if the decree was inconsistent and erroneous on its face. (Page 335.)

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

Appelants *pro se.*

The sureties in a delivery bond in replevin are only liable for a return of the property if a return is adjudged, or for its value if a return can not be had, for damages for its retention, if awarded, and for costs. Kirby's Digest, § 6870; 47 Ark. 316.

W. J. Driver, for appellees.

The record failing to disclose the testimony from which this court may determine the facts upon which the decree is based, it will be presumed that the decree is correct and based upon sufficient testimony. 58 Ark. 135; 63 Ark. 513; 64 Ark. 609.

The findings of a chancellor upon a question of fact will be sustained unless clearly contrary to the weight of the testimony. 67 Ark. 287; 68 Ark. 134; *Id.* 314; 71 Ark. 605.

McCULLOCH, J. Appellees, Driver and McVeigh, instituted an action of replevin in the circuit court of Mississippi County against appellants Woodburn and Pope to recover possession of a lot of personal property (sawmill machinery) claimed under a chattel mortgage executed by the latter to the Bensack Lumber Company, and by that company transferred to appellees. An order of delivery was duly issued and served, and the defendants executed a retaining bond in statutory form with their co-appellants, Stewart, King, Crawford, Davis and Simpson, as sureties.

The defendants filed their answer and cross-complaint, denying any indebtedness under the mortgage, and alleging that the Bensack Lumber Company was indebted to them in a large sum in excess of the mortgage debt, and that the transfer of the mortgage to Driver & McVeigh was fraudulent. On their motion the Bensack Lumber Company was brought in as a party, and the cause was transferred to the chancery court. That court, upon the pleadings and proof, rendered a final decree in favor of Driver & McVeigh and the Bensack Lumber Company against said defendants and their said sureties on retaining bond for $1,851.59, the amount of the note and interest secured by said mortgage, together with costs of suit, and declared the same to be a lien on the property described in the mortgage. The commissioner of the court was ordered to sell said property for the satisfaction of the decree.

At the next term said sureties presented to the court their petition to have the decree against them set aside, and the prayer of the petition was by the court denied. An appeal was granted by the clerk of this court within a year from the date of the original decree, and this appeal brings up the whole record.

The question presented by the appeal is whether or not the chancellor erred in rendering a decree against the sureties on the retaining bond of the defendants for the amount of the debt due to the plaintiffs by the defendants.

The action was instituted at law for the recovery of personal property, and the statute provides that in all such actions "where the defendant has given a delivery bond, * * * the court or jury trying the cause may not only render judgment against the defendant for the recovery of the property, or its value, together with all damages sustained by the detention thereof, but also,

upon motion of the plaintiff, render judgment against the sureties upon said delivery bond for the value of the property and also all damages as aforesaid, as the same may be found and determined by the court or jury trying said cause." Kirby's Digest, § 6870.

The liability of the sureties was not enlarged by the transfer of the case to the chancery court. They were not parties to the action except for the purposes of rendering the summary judgment against them as provided by the statute, and their rights were not affected by the transfer of the case. The chancery court could render against them only such a judgment as the statute authorizes, which is for the return of the property, or its value, and damages for detention thereof.

It has been held by this court in the case of *Cathey* v. *Bowen,* 70 Ark. 348, that a judgment against the defendant in replevin need not be in the alternative for the property or its value, but may be for its value, where the record shows that a judgment for delivery could not be executed. It does not appear, however, from the record in this case that the delivery of the property could not have been had. On the contrary, the decree declared a lien on the property, and directed the commissioner to sell it for satisfaction of the debt. It was delivered to the commissioner, and by him sold. The court made no finding as to the value of the property, nor of any damages for detention thereof, but rendered a decree against the sureties for the amount of the indebtedness secured by the chattel mortgage. This was error.

The transcript does not contain the evidence upon which the decree was based, and counsel for appellees invoke the rule that this court must indulge the presumption that the evidence was sufficient to warrant the decree. *Carpenter* v. *Ellenbrook,* 58 Ark. 134; *Simpson* v. *Talbot,* 72 Ark. 185.

The decree in this case is inconsistent and erroneous on its face, and it is not aided by any presumption as to the sufficiency of the evidence. It appears from the face of the decree that the property could be returned, and other parts of the record show that it was delivered to the commissioner and sold by him. No damages for detention were assessed by the court nor value of the property.

The decree against the sureties on the bond for the amount of defendant's debt to plaintiffs is reversed, and the cause is

remanded with directions to enter a decree against them in accordance with this opinion.

BATES v. STATE.

Opinion delivered January 14, 1907.

LIQUORS—SALE OF NATIVE WINE.—Under Kirby's Digest, § 5100, a grower of grapes and berries in the State may sell wine made therefrom anywhere except where especially prohibited in the three-mile districts by order of the county court, regardless of the vote on the question in the county, township or ward.

Appael from Montgomery Circuit Court; *James S. Steel,* Judge; reversed.

Gibson Witt and *Pole McPhetrige,* for appellant; *Wort Williams,* of counsel.

Robert L. Rogers, Attorney General, for appellee.

McCULLOCH, J. The question involved in this appeal is whether a person who raises grapes or berries in this State may make wine thereof and lawfully sell the same in quantities of not less than one-fifth of a gallon in any county, township and ward where the vote at the preceding general election was "against the sale of wine." We hold that such sale is lawful except in localities where such sales have been prohibited by an order of the county court entered upon petition of a majority of the adult inhabitants of such locality as now provided by law.

Section one of the act of March 29, 1899 (Kirby's Digest, sec. 5100), which is the latest legislation on the subject, reads as follows:

"Any person who grows or raises grapes or berries may make wine thereof and sell the same in quantities not less than one-fifth of a gallon, or in sealed bottles, anywhere in the State without license when the same has been properly labeled as provided for in section 5101; provided, that the people shall have the right to petition the county court to prohibit the sale of native

wine as now provided by law, but native wine shall not be included under section 5129, unless by special petition against wine; provided, further, that the growers of wine as above mentioned shall have the right to sell the same in original packages of not less than five gallons, as is now granted to manufacturers and distillers of whisky and brandy, under section 5093."

According to this statute, the last expression of the legislative will, a grower of grapes or berries in the State may sell wine made therefrom anywhere except where expressly prohibited in three-mile districts by order of the county court. This statute relates solely to the sale of native wine by growers of the grapes or berries from which it is made; and the same may be sold by the growers in such quantities and manner as is provided in the act, regardless of the vote on the question in the county, township or ward. *State* v. *Mullins,* 67 Ark. 422.

The only method of prohibiting the sale thereof by the grower in quantities not less than one-fifth of a gallon is by an order of the county court made upon a petition of a majority of the adult inhabitants praying specially for prohibition against the sale of native wine.

The Attorney General files a confession of error, and the same is sustained.

Reversed and remanded.

MASSEY v. DIXON.

Opinion delivered January 7, 1907. [81 337 / 89 374]

SALE—CONSTRUCTION—WHEN QUESTION FOR JURY.—Although, where a written contract unequivocally manifests the intention of its parties, the court should declare its effect, yet, if it is not clear from the instrument whether the parties intended a present or future sale, the question should be submitted to a jury for determination.

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

Dixon Brothers sued Massey Brothers and one Hudson in replevin for a certain carload of cedar posts.

Plaintiffs claimed to have purchased the cedar posts from one Robert Sanders, under the following agreement:

"This agreement made and entered into this the 20th day of May, A. D. 1904, by and between Robert Sanders, of Shipp's Ferry, Ark., party of the first part, and Dixon Brothers, of Mount Olive, Ark., party of the second part.

"Witnesseth: That the said Robert Sanders has this day sold to the said Dixon Brothers all the red cedar timber that is on his land at and near Shipp's Ferry, Ark., at the following prices, when delivered at any siding, spur or shipping point on the White River Railroad: [Here follows a scale of prices for different dimensions.]

"The said Robert Sanders agrees to use all diligence in working and getting out the said timber, and further agrees to have all of said timber worked out and on the railroad within twelve months from date of this agreement. The said Robert Sanders further agrees to work said timber up into such sizes and lengths as may be suggested by the said Dixon Brothers.

"The said Dixon Brothers agree to and have this day advanced to the said Robert Sanders the sum of two hundred dollars ($200.00) as a payment on said timber. They further agree to advance the said Robert Sanders an additional two hundred dollars as soon as he has placed enough of said cedar timber at some shipping point on the White River Railroad to cover the amount of the first payment.

"The said Robert Sanders agrees to have timber to the amount of two hundred dollars on said White River Railroad within 30 days from date of this agreement, and further agrees to have an additional two hundred dollars' worth on said railroad within 30 days from date of second payment by said Dixon Brothers. Then the said Dixon Brothers agree to pay the said Robert Sanders for timber as he places same on the White River Railroad in carload lots or more or at such times as the said Robert Sanders may designate. The said Dixon Brothers further agree to at all times give the said Robert Sanders a fair and honest inspection of said timber.

"Witness our hands and seals, this May 20, 1904.

"ROBERT SANDERS, [Seal.]

"DIXON BROTHERS, [Seal.]"

Defendants Massey Brothers claimed to have purchased the cedar posts from defendant Hudson, who bought from Sanders.

The court gave the following instructions, viz:

"1. If the jury believe from the evidence that, before the sale from Sanders to Hudson, Sanders had sold the timber to Dixon Brothers, then Sanders had no title to convey to Hudson, and you may find for plaintiffs, unless you find that plaintiffs are estopped as hereinafter mentioned.

"2. You are instructed that if you find from the evidence in this case that the title to the timber was immediately to pass to Dixon Brothers as soon as writing relied upon was delivered, you should find the right of possession of the posts in question in Dixon Brothers, unless you further find from the preponderance of the evidence that Dixon Brothers are estopped as hereinafter set out; and if you fail to find from the preponderance of the evidence that the title was to pass immediately upon the delivery of the contract, but was to depend upon the delivery of the posts when delivered on the railroad, then you should find for the defendants.

"3. That the burden of proof is on the plaintiff to establish his title to the property in controversy; and, before you should be authorized to find for the plaintiffs, you must find from a preponderance that plaintiffs were the owners of the property.

"4. That if you believe from the greater weight of the evidence in this case that Owen Dixon, one of the firm of Dixon Brothers, who are plaintiffs in this case, stood by and permitted, by his acts and conduct, Hudson to buy from Sanders the cedar posts in controversy without protest, then Dixon Brothers would be estopped in law from asserting a claim of prior ownership against Hudson; and you should find for defendant. Unless you so believe, you should find for the plaintiffs on the question of estoppel.

"5. That if you believe from the evidence that Hudson had notice of Dixon Brothers' claim to the timber, but, notwithstanding said notice, Hudson went upon the timber and per-

formed work upon it, and although Dixon Brothers knew of this, yet plaintiffs are not thereby estopped by such knowledge of such work. The plaintiffs claim this property by virtue of a contract and sale from one Sanders. The defendants, Massey Brothers, and Hudson, who is also a party defendant in this case, claim by virtue of a sale and delivery from Sanders to Hudson and from Hudson to Massey Brothers. I read you certain instructions to guide you in the determination of these questions in issue. The first question is, whether or not the property belonged to Dixon Brothers at all. The second question is, if it did belong to them, did they lose it by being estopped by their acts and conduct as herein defined? So I instruct you that if you believe from the evidence that, before the sale by Sanders to Hudson, Sanders had sold the timber to Dixon Brothers, then Sanders had no title to convey to Hudson, and you should find for plaintiffs, unless you should further find that plaintiffs were estopped as heretofore mentioned. If you find from the evidence in this case that the title to the timber was to immediately pass to Dixon Brothers as soon as the title relied upon by the plaintiffs was delivered, you should find the right of possession of the posts in question in Dixon Brothers, unless you further find from a preponderance of the testimony that Dixon Brothers were estopped as hereinafter set out."

The court refused to give the following instructions to the jury asked by defendants:

"1. The jury are instructed that standing timber is realty, and a conveyance of realty to be valid must be in writing. And if you find from the evidence that the sale by Sanders to Hudson [evidently means Dixon Brothers] was not in writing, then such sale was void.

"2. The jury are instructed that if they find from the evidence that it was intended by the writing in evidence from Sanders to Dixon Brothers to sell the red cedar upon certain lands near Shipp's Ferry to Dixon Brothers, with the right in said Dixon Brothers to pay therefor as delivered, it passed the title of all of said timber to said Dixon Brothers."

There was a verdict for plaintiffs, and defendants have prosecuted this appeal.

Horton & South, for appellants.

1. A sale is not complete so as to invest title in the purchaser so long as anything remains to be done between the buyer and seller before the commodity is to be delivered. 31 Ark. 162; 24 Ark. 550; 19 Ark. 567; 5 Ark. 161. Under the contract, appellees did not and could not become the owners of the timber until it was cut into posts and delivered as stipulated in the contract. Benjamin on Sales, 652, 661; Tiedeman on Sales, § 84*a*; Story on Sales (4 Ed.), § 315.

2. The terms of a written contract can not be varied by parol testimony. 30 Ark. 197; 21 Ark. 71.

3. The contract, when construed, shows that it was intended to create a lien in favor of appellees for a debt owed by Sanders at the time of its execution and for future advancements—an unrecorded and unacknowledged chattel mortgage. Hence Hudson could lawfully buy and sell the timber without regard to such lien. 40 Ark. 536; 33 Ark. 203. See, also, 20 Ark. 590; 2 Parsons on Contracts (6 Ed.), 491, 492.

Gustave Jones, for appellees.

The question of delivery by deed or contract is one of intention, which, when manifest, must control, and when the circumstances show unmistakably the grantor intended to divest himself of title and to invest same in the grantee, the delivery is complete. 1 Warvelle, Vendors, 492. The rule that title to goods does not pass so long as anything remains to be done to ascertain the quantity and price or cost of the article sold does not apply when there is delivery with intention to pass title. 31 Ark. 162; *Id.* 131; 62 Ark. 592; 60 Ark. 613; 68 Ark. 307; 35 Ark. 197.

2. Appellees bought all the timber then in the brake, and Sanders was proceeding to cut and haul it for them, of which Hudson had actual notice. When he went on the land and cut and removed timber, he became a trespasser, and appellees were entitled to recover the timber or posts in an action of replevin. 44 Ark. 210; 55 Ark. 310; 48 Ark. 277; 69 Ark. 442; 70 Ark. 99.

WOOD, J. First. The correctness of the judgment depends primarily upon whether or not the contract under which appellees claim was a completed bargain and sale or an executory contract of sale. "Both these contracts being equally legal and

valid, it is obvious that, whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it."

"It is always a question of intention, gathered from all the circumstances." Benjamin on Sales, page four and cases cited in American note, also p. 263; *Chamblee* v. *McKenzie,* 31 Ark. 162. If the written contract unequivocally manifests the intention of the parties, the court should declare its effect. But where, as in this case, it is not clear from the instrument, taken as a whole, as to whether the parties intended a present or future sale, the court properly submitted the question to the jury for determination.

It is said in *Chamblee* v. *McKenzie, supra,* that if it clearly appears to have been the intention of the parties that the property should be delivered and the title to have been passed, the mere fact that something remains to be done will not govern such intention.

There was no error in the instructions, and the verdict and judgment are sustained upon principles recognized in the above and recent cases. See *St. Louis, I. M. & S. Ry. Co.* v. *Wynne Hoop & Cooperage Co., post p.* 373; *Anderson-Tully Co.* v. *Rozelle,* 68 Ark. 307.

Second. The court did not err in refusing appellant's request for instructions one and two. These were covered by instructions given. No exceptions are reserved in the motion for new trial to the refusal to give requests numbered three, four and five.

Third. The question as to whether appellees were estopped by their conduct from treating the contract as an absolute bill of sale was also properly submitted to the jury in its instructions.

Judgment affirmed.

PATTERSON COAL COMPANY *v.* POE.

Opinion delivered January 21, 1907.

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MASTER AND SERVANT—ASSUMPTION OF RISK.—Where a servant voluntarily proceeds with his work in the face of a danger of which he is fully aware, and which is one of the risks ordinarily incident to his employment, he is deemed to have assumed the risk, although he has made complaint to the master, who has promised to furnish him the means to avoid the danger.

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

Joseph M. Spradling and *Geo. S. Evans,* for appellant; *Geo. W. Dodd,* of counsel.

The verdict is not supported by the evidence. The rule is settled that when one enters the service of another he takes upon himself the ordinary risks of the employment in which he engages. If the servant, having sufficient intelligence and knowledge to enable him to see and appreciate the dangers to which he will be exposed, knowingly assents to occupy a place set apart for him by the master, and does so, he thereby assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place. 68 Ark. 316; 56 Ark. 237; 57 Ark. 76; 48 Ark. 346; 53 Ark. 117; 39 Ark. 17; 20 Am. & Eng. Enc. of L. (2 Ed.), 124; *id.* pp. 128, 130, 131.

S. F. Lawrence and *John W. Goolsby,* for appellee.

The owner, agent or operator of a mine is required to keep a sufficient amount of timbers to be used by the miners to prevent the mine from caving, and also to deliver them at the place where the cars are delivered. Kirby's Digest, § 5352.

While it is true that where a person engages to work for another he assumes all the risks ordinarily incident to his employment, it is equally true that he does not assume the risk of any injury caused by the negligence of his employer.

Joseph M. Spradling and *Geo. S. Evans,* for appellant in reply; *Geo. W. Dodd,* of counsel.

The negligence of the master must be the proximate cause of the injury before the servant can recover on the strength of

the master's negligence. 20 Am. & Eng. Enc. of L. (2 Ed.), 55; 8 *id,* 561; 56 Ark. 279.

McCULLOCH, J. Appellee was a coal miner, employed by appellant in the coal mine operated by the latter in Sebastian County, and instituted this action to recover damages sustained by reason of appellant's negligence while at work in the mine. He was at work in one of the rooms of the mine when the roof fell in on him, and he was severely injured by a falling rock. Negligence of appellant is alleged in failing to furnish necessary timbers with which to prop the roof. The jury returned a verdict in favor of plaintiff, and the defendant appealed.

The defendant denied the allegations of negligence, and pleaded that plaintiff's injury resulted from his own negligent act, and also that the injury resulted from one of the ordinary risks and dangers incident to his employment which he assumed.

The plaintiff was a coal miner of long experience, and was well acquainted with his duties and the danger incident to the work in which he was engaged. The details of his injury, as related by himself on the witness stand, are as follows: He was at work in the mine digging coal when he was directed by the pit boss to go to work in another room, the room in which he subsequently received the injury. He went to the new room assigned to him and first examined it, sounding the top with his pick, and, finding only one or two props, he returned to the entry and told the pit boss to bring some props for his use. The latter promised but failed to do so. He worked in the room a portion of that day. This was on Monday, and, as operations in the mine were suspended for a week, he did not resume work until the following Monday. On that day he returned to his work in the room, and again called for props, which were again promised, but none were furnished. He said that the room was just as he left it except that the three shots he had put in on the former day had been fired. He went to work digging down the coal, and, after having worked from about seven o'clock in the morning until some time during the afternoon, when he was on his knees "taking down draw slate" a rock fell down on him from the top and inflicted the injury.

The seam of coal at this place was about four feet thick, and between it and the solid rock above there is a thin stratum

of slate, called "draw slate," which varied in thickness. The draw slate usually falls down of its own weight when the coal is removed, and in case it does not fall the miner picks it down and removes it before putting in props to hold the roof of solid rock.

Plaintiff states that if he had had the props he could and would have put them in as he took down the draw slate, and could thereby have prevented the falling in of the roof. It is therefore clear that the plaintiff's injury resulted from the failure to prop the roof so as to prevent the same from caving in.

A statute of this State provides that "the owner, agent or operator of any mine shall keep a sufficient amount of timber when required to be used as props, so that the workmen can at all times be able to secure the said workings from caving in, and it shall be the duty of the owner, agent or operator to send down all props when required and deliver said props to the place where the cars are delivered." Kirby's Digest, § 5352.

It was the duty of the miner to use the props so as to make safe the room where he worked. The plaintiff was an experienced miner, and knew the danger of rock falling from an unsupported roof, and was fully advised of his duty in making the place of his work safe. The fact that he repeatedly called for props shows that he fully realized the necessity for their use and the danger of proceeding with his work without propping the roof. He says he observed that it was insufficiently propped, and he would have put in props as he took down the draw slate if he had had them. The danger was manifestly one that was incident the work in which he was engaged. It was the duty of the master to furnish the props, but the duty of the servant to put them in and to exercise his own judgment in determining when they were needed. Was it a risk which he assumed by proceeding with his work?

The question of risks assumed by an employee as an incident to his work received much attention in the case of *Choctaw, Oklahoma & Gulf Rd. Co.* v. *Jones,* 77 Ark. 367, and the subject is treated at length in the opinion of the court. In that case it was held that the servant did not assume the risk because it was not one of the ordinary risks of the employment, but was an unusual one brought on by the negligence of the master; and because the servant was proceeding in his work under direct command of the

foreman and under an implied assurance that it was safe to do so. The court there said: "In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and where it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them; and if he negligently fails to de so, he will still be held to have assumed them."

Now, in the case at bar it was the duty of the plaintiff to discover the danger and guard against it, and it is obvious that he realized the danger, for he called for material to use in guarding against it. The fact that he proceeded with his work without waiting for the props renders it no less certain that he was aware of the risk which to some extent attended the situation, but rather manifests his willingness to assume the risk. While it is true that the servant is never deemed to have assumed risks brought about by the negligence of the master, yet where the risk is one ordinarily incident to his employment, and he voluntarily proceeds with his work in the face of a danger which he is aware of and fully realizes, he is deemed to have assumed the risk and can not recover.

In *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 232, this court said: "It is well settled that when one enters the service of another he takes upon himself the ordinary risks of the work in which he engages. * * * If, having sufficient intelligence and knowledge to enable him to see and appreciate the dangers to which he will be exposed, he knowingly assents to occupy a place set apart for him by the master, and he does so, he thereby assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place. It is then no longer a question of whether such place could not with reasonable care and diligence be made safe. Having voluntarily accepted the place occupied by him, he can not hold the master liable for injuries received by him because the place was not safe." *St. Louis & S. F. R. Co.* v. *Marker,* 41 Ark. 542; *Railway Co.* v. *Davis,* 54 Ark. 389; *Southwestern Telephone Co.* v. *Woughter,* 56 Ark. 206; *Arkadelphia Lumber Co.* v. *Bethea,* 57 Ark. 76; *Brinkley Car Works & Manufacturing Co.* v. *Lewis,* 68 Ark.

316; *Paule* v. *Florence Min. Co.,* 80 Wis. 350; 1 Labatt on Master & Servant, § § 260, 266, 267.

The case of *Kansas & Texas Coal Co.* v. *Chandler,* 71 Ark. 518, presents a state of facts to some extent similar to those in the case at bar, but the court disposed of that case and reversed a judgment rendered against the mine owner for alleged negligence in failing to furnish props, without laying any stress upon the question of assumed risk. There was, however, one important and controlling distinction between that case and this, in that the servant proceeded with his work of digging coal under an unsupported roof at the direct command of the foreman, and upon the implied assurance that it was safe to do so. The attention of the court seems to have been directed entirely to the question of contributory negligence, and the opinion contains no discussion of assumed risk. We find nothing in that opinion in conflict with the views herein expressed.

We are therefore of the opinion that, according to the plaintiff's own statement of the facts of the case, his injury resulted from one of the ordinary dangers of his employment, the risk of which he voluntarily assumed, and that he is not entitled to recover damages from his employer, notwithstanding the failure of the latter to furnish props for the room.

Reversed and remanded.

GRAVES *v.* MELIO.

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Opinion delivered January 7, 1907.

SALE—BREACH—WAIVER.—Where a vendee commits a breach of contract of sale by refusing to receive the goods bought at the price agreed, the vendor will not be held to have waived such breach by selling a portion of the goods to the vendor at the highest price he would pay for them.

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

Melio brought suit against Graves and Solomon, alleging that, on January 1, 1905, he entered into a verbal contract with

defendants to deliver to them, at their place of business in the city of Helena, during the months of February and March following, 400 bushels of potatoes at the price of $1.10 per bushel, and to make the deliveries at such times and in such quantities as defendants should direct him; that pursuant to said contract, he delivered to defendants, between the 1st day of February and the 15th day of March, 136 bushels, and that on said last named day defendants failed and refused to receive any further amounts of the potatoes, and notified him that they would not receive any further deliveries under the contract. That he was, at all times during the period of the contract, ready and willing to perform fully his part of the contract, but that he was prevented from doing so by reason of the failure and refusal of defendants to receive the potatoes when tendered to them. That, after such failure and refusal on the part of defendants, he went out into the market and used his best endeavors to sell the balance of the 400 bushels, which he had contracted to sell defendants, and that he did sell 119 bushels to local merchants, 104 bushels of which he was compelled to sell at $1.00 per bushel. That, although he used due diligence to dispose of said potatoes, he was unable to do so, and that, at the expiration of the time for delivery of same, he had 145 bushels in good condition, which, through no fault of his, rotted and became utterly worthless, thereby damaging him in the sum of $159.50, for which he prayed judgment, together with the further sum of $10.40, his loss by reason of the reduced price at which he was compelled to sell 104 bushels.

Defendants answered, admitting the making of a verbal contract whereby plaintiff agreed to deliver to them at various times after January 1, 1905, as they should be needed, 400 bushels of sweet potatoes at the price named, but they denied that on the 5th day of March, 1905, or on any other day they refused to receive any further deliveries of potatoes. They denied that all times after the time alleged in the complaint the plaintiff was ready and willing to deliver said potatoes in the manner agreed upon, and denied that he was prevented from performing fully the terms of the contract by reason of the failure of and refusal of the defendants to receive said potatoes, and further denied that said potatoes were tendered them. They denied that said plaintiff disposed of any potatoes to any merchant whatever after the last

installment of potatoes were received by them, and denied that the plaintiff used any diligence whatever to dispose of the said potatoes. They denied that, at the expiration of the time for the delivery of said potatoes to defendants according to contract, he had in his possession 145 bushels of potatoes in good condition. They denied that they failed to comply with their contract and that plaintiff was damaged in the sum of $159.50 on account of their failure to comply with said contract and the additional sum of $10.40 resulting from the reduced price at which he was compelled to sell said potatoes. They denied that he was damaged in any sum whatever. Wherefore defendants prayed they go hence with their reasonable costs.

The court refused to give the following instruction asked by defendant:

"2. You are instructed that if you find from the evidence that 400 bushels of potatoes were to be delivered in the months of February, March and April, and that in the month of March before the delivery of the 400 bushels, and after only 136 bushels had been delivered, there was a refusal on the part of the defendants to receive any more potatoes, such a refusal was a breach of contract. However, if after such breach the plaintiff continued to deliver potatoes, and the defendants to receive them, without objection, then this amounts to a waiver of the breach; and if the defendants continued to receive the potatoes until the plaintiff refused to further deliver them, without objecting to the size or amount delivered, you will find for the defendants."

There was a verdict for plaintiff, and defendants have appealed.

Bevens & Mundt, for appellants.

1. It appears from the evidence that on various dates after the alleged breach of contract appellee delivered to, and appellants received, the potatoes in quantities and at practically the same price as previously. There was no ground here to claim breach of the contract. Fed. Cas. No. 8911. A party who, with knowledge of fraud or other grounds of revocation in his favor, permits the other party to the contract to proceed with the performance is considered to have waived his rights. 6 N. W. 1014; 29 Am. & Eng. Enc. of L. 1106; 4 McLean, 530; 10 Ala. 776; 3

La. Ann. 285; 103 Mich. 607; 55 N. Y. Sup. Ct. 173; 1 Rob. 325.

2. Before the contention can avail that deliveries made after the date of the alleged breach of contract were made in the course of trade and without regard to the old contract, it must be clearly shown that appellant had notice of appellee's intention to rescind contract, unless by the terms of the contract such notice was unnecessary. 137 U. S. 78; 88 Ky. 303; 118 N. C. 737; 29 Am. & Eng. Enc. of L. 1103; 14 Ala. 9; 81 Ind. 350; 151 Mass. 207; 115 N. Y. 387; 8 Jones (N. C.), 211; 10 Humph. (Tenn.), 577.

R. W. Nicholls and *W. G. Dinning,* for appellee.

1. The issues as to the breach of contract and the amount of damages resulting from the breach were fairly submitted to the jury under proper instructions of the court. The rule is firmly established that this court will not disturb the verdict of a jury where there is evidence to support it.

2. The contention that appellee waived the breach by selling to appellants afterwards was not made an issue below, and can not be raised here for the first time. 96 S. W. 993. There was no error in refusing appellant's instruction No. 2. The law requires appellee, after appellant's refusal to receive more potatoes under the contract, to go into open market and sell them to the best advantage, in order to reduce the damages arising from the breach. That he sold part of them to the appellant in this manner did not amount to a waiver. 96 S. W. 142.

Bevens & Mundt, for appellants in reply.

1. This court will not hesitate to reverse where the verdict is contrary to the evidence, or where it is not legally sufficient to sustain the verdict. 21 Ark. 468; 24 Ark. 224; 13 Ark. 71; 8 Ark. 155; 10 Ark. 309; 5 Ark. 640.

2. The allegation in the answer that there was a continuance of the delivery after the alleged breach was sufficient to raise the issue of waiver. If the issues joined are such as necessarily require proof of facts not specifically set out, such omission is cured by verdict. 2 Ark. 212. Pleadings will be considered as amended to conform to the facts as proved. 76 Ark. 468; 65 Ark. 422; 76 Ark. 551; 62 Ark. 262; 75 Ark. 176; 67 Ark 426; 80 Ark. 74; 78 Ark. 47.

WOOD, J. The only questions presented for our consideration are:

First. Whether or not there was a breach of contract by appellants?

This question was properly submitted to the jury, and, while the evidence tending to show a breach is not very satisfactory to us, we are of the opinion that there was legally sufficient evidence to sustain the verdict.

Second. Appellants contend that, if there was a breach of contract by the appellants, such breach was waived by appellee. And on this theory of the case they presented prayer for instruction number 2, and urge that the refusal of the court to give it was error for which the judgment should be reversed.

The court did not err in refusing this prayer for instruction. Under the pleadings and proof there was no question of a waiver of a breach of the contract by appellee in the case. The only issue presented was whether or not there had been a breach of the contract. No objection is made here to the charge of the court as given. But if the question of waiver was an issue in the case, still the prayer asked was erroneous under the proof, because, if there was a breach of contract by appellants in refusing to receive the potatoes from appellee, then the fact that appellee after such breach continued to deliver, and appellants to receive, potatoes until appellee refused further to deliver was not a waiver. It was the duty of appellee, if there was a breach of the contract by appellants, to dispose of the potatoes he had on hand after and by reason of such breach for the best price obtainable and in the most expeditious manner possible in the exercise of reasonable care, and it was no waiver because, in the disposition of the potatoes he had on hand, he continued to let appellants have potatoes without objecting to the size of the amount that appellants were receiving.

If appellants had breached the contract, they had no right to suppose that appellee, by thereafter delivering them potatoes, was waiving any of his rights under the contract. Such conduct would, rather than otherwise, tend to show an intention on the part of the appellee to insist on his rights under the contract.

If the question of waiver were applicable, the doctrine of this court in *Arkansas & Texas Grain Co.* v. *Young & Fresch*

Grain Co., 79 Ark. 603, would show the unsoundness of the rejected prayer.

Judgment affirmed.

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TURNER v. BURKE.

Opinion delivered December 31, 1906.

REMOVAL OF CLOUD—LACHES.—A suit to remove a cloud upon the title to land will be barred by laches where the plaintiffs have waited thirty-eight years, and until the land has become much more valuable, before claiming the land or offering to pay the taxes accrued thereon.

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

W. G. Dinning and *J. W. & M. House,* for appellants.

1. It is admitted that the sale for taxes of 1868 is void. The State acquired no title by virtue of the overdue tax forfeitures under the law of 1881. The commissioner appointed to perform the decree of the court failed to certify to the county clerk the sale of any of the lands involved in this suit to the State, and the latter likewise failed to make a certificate of like purport to the Commissioner of State Lands; and if the certificate had been made, then the owners had two years in which to redeem. 34 Fed. 701; 140 U. S. 634; 55 Ark. 218; 65 Ark. 595; 70 Ark. 326. These provisions are mandatory, and failure to comply with them renders the tax forfeitures void. 66 Ark. 539.

2. Failure to include in the final decree the amounts to be paid to the attorneys, printer and commissioner rendered the decree void. 56 Ark. 419. As to the lands in sections 10 and 23, the decree was void because no amount was fixed in the decree for which the several tracts in these sections were to be sold. 62 Ark. 443; 58 Ark. 39.

3. The defects in the decree could not be cured by a *nunc pro tunc* order purporting to extend the taxes, penalty and costs against the lands. 55 Ark. 36; 65 Ark. 595. The record could have been amended so as to speak the truth only after notice to

the parties against whose interests such corrections were sought to be made. 72 Ark. 185; *ib.* 21; 20 Ark. 636; 23 Ark. 18; 34 Ark. 300; 75 Ark. 12.

4. The judgment rendered in the attachment suit of W. G. Phillips against the father of appellant was void on its face. Constructive service will not support a personal judgment. 20 Ark. 12; 20 Am. Dec. 179; 50 *id.* 666; 45 Am. Rep. 632; 95 U. S. 714; 119 U. S. 189; 38 Mo. 395. If if was not a personal judgment, and if the statutes with reference to proceedings upon constructive service had been strictly complied with, still the judgment, not having described therein the lands of the defendant, could have no effect as against any lands except such as were described; and the clerk could not lawfully change the description of the lands after the adjournment of the court. 75 Ark. 420; 71 Ark. 226. The warning order was not indorsed upon the complaint as required by statute, hence the court acquired no jurisdiction. 71 Ark. 318; 70 Ark. 409; 69 Ark. 592; 52 Ark. 312; 51 Ark. 34; 55 Ark. 30.

5. Mere payment of taxes or mere lapse of time during which the plaintiffs did not bring suit is not evidence of laches or abandonment. 75 Ark. 197; *ib.* 312. Wild and unoccupied lands are in the constructive possession of the true owners. 74 Ark. 386; 63 Ark. 1.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1 There is no allegation or proof that the United States ever parted with its title, or that the State had title when it executed its patent to Oscar Turner, under whom appellants claim. They can not ask to quiet their title without alleging and proving a good title in themselves. 47 Miss. 402; 37 Ark. 647.

2. The deed executed in an overdue tax sale imports a valid sale. To overturn it, the entire record must be produced, and that must disclose the absence of a valid judgment. 3 Wigmore on Ev. § 2110; 38 Ark. 181; 47 Ark. 120. On the question as to the failure of the commissioner to certify to the county clerk a list of the lands sold to the State, and the failure of the latter to certify the same to the Commissioner of State Lands, see 74 Ark. 202, which settles the point. The contention that the decree was void because the allowances to the printer, commissioner and attorney were left blank in the decree is also untenable. *Id.*

3. The omission in the original decree to extend the tax due on a small part of the lands affected was a clerical misprision only, and was properly corrected by *nunc pro tunc* order. Whether or not notice was given is not disclosed by the record; but if it was necessary the court will presume that it was given. After confirmation, all things are adjudicated in favor of the validity of the sale. Overdue Tax Act, § 15; 74 Ark. 206. But notice was not necessary. 136 Fed. 29; 34 Ark. 301; 40 Ark. 231; 1 Freeman on Judgments, 102.

4. As to the attachment suit: The evidence does not disclose whether the error in description was corrected before or after the record was read and approved by the court; but when interlineations or erasures appear on the face of a record, it will be presumed that they were made at a time when the officer was authorized to make them. 2 Cyc. 242; 117 Ala. 454; 21 N. Y. 539; 12 Ind. 670. Officers are presumed to do their duty, and not to exceed their authority. 9 Pet. 311; 73 Fed. 950. The alteration merely evidences the judgment really pronounced by the court, and such a correction may be made at any time and without notice. *Supra;* 33 Ark. 220. See also 59 Ark. 558; 68 Ark. 345; 1 Freeman on Judgments, 38, 46, 47; 77 Cal. 220; 44 N. Y. 376; 10 Ia. 398. That the warning order was not indorsed on the complaint is not jurisdictional matter, and does not subject the judgment to collateral attack. 72 Ark. 106; 73 Ark. 32; 74 Ark. 181. The recital in the judgment that the defendant had been cited by warning order published as required by law is evidence of the fact, and settles the question of jurisdiction. Kirby's Digest, § 4425; 72 Ark. 265; 57 Ark. 49. A court of equity will not set aside a void judgment unless a meritorious defense is shown, or where the judgment does substantial justice. 50 Ark. 458; 52 Ark. 80; 72 Ark. 106; 51 Ark 344.

5. Appellant is barred under the doctrine of laches. Equity will not entertain a claim of parties to lands who have for over a generation evaded payment of taxes due the State thereon and disregarded the interests of others asserting *bona fide* claims to the lands. Unreasonable delay alone, in the absence of fraud, bars the claim to equitable relief. 72 Ark. 106; 18 Cyc. 120; 190 U. S. 538; 139 U. S. 384; 150 U. S. 201.

W. G. Dinning and *J. W. & M. House,* for appellant in reply.

1. This court will take judicial knowledge of the acts of Congress granting swamp lands to the State, and those taken in connection with the patent from the State make complete claim of title. 13 N. Y. Supp. 493; 19 N. E. 752; 47 How. Prac. Rep. 424.

2. The *nunc pro tunc* order itself is fatally defective because it is impossible to determine what the figures extended opposite the several tracts of land mean, whether dollars or cents—nothing showing the amount for which any tract sold. 26 Minn. 201; 76 Am. Dec. 709; 30 Cal. 619; 1 Wall. 398; 71 Am. Dec. 275; 46 Tenn. 400; 2 Utah, 114; 3 Fed. Cas. 1093.

3. It is not laches for the owner of a legal title to fail to assert his rights therein until the legal title is assailed in a court of chancery. 126 Fed. 46. The doctrine of laches does not apply where the suit is for land, and the adverse claimant is not in actual possession thereof. 46 S. E. 603. See also 76 Ark. 525.

HILL, C. J. In 1859 Oscar Turner, the first of the name in this record, purchased of the State the land in controversy, a tract of nearly two thousand acres of wild and unoccupied lands. It is alleged that the State conveyed it under the swamp land act, and for the purpose of this case it may be taken that it was properly selected and listed to the State as swamp lands under the act of Congress. Oscar Turner, the first, conveyed to Oscar Turner, Jr., his son, who was for a time a member of Congress from Kentucky, and was in Washington during the time the judgment hereinafter referred to was rendered against him. This Oscar Turner died in 1902, and by will left his property to the appellants, his wife and infant son, Oscar Turner, the third. This was a suit to remove the clouds from the title and to quiet it in appellants, who were plaintiffs in the chancery court, and was brought in 1904. Plaintiffs offered to pay taxes and interest thereon, and attacked the overdue tax decrees upon which defendant's titles rested. The bill was dismissed, and the plaintiffs brought the case here. The Turners did not pay any taxes at any time since 1859, and the land was forfeited for taxes a few years after the war. Like most tax sales at that time they were void, but there is no evidence that the taxes were illegal. All of the lands were sold under overdue tax decrees in 1883. Some of it was sold to parties at said sales, and various defendants,

claiming several of the tracts in controversy, deraign the title directly to the purchase at such sales. Much of the land in controversy was not sold to individuals under the overdue tax decrees, but was struck off to the State, and different tracts were purchased from the State by the various defendants. These purchases ranged from 1891 to 1902. All the tracts passed through the overdue tax decrees of 1883, and the only difference in them is some of the defendants deraign directly through the sales, and others through the State, the State's title resting on the overdue tax decrees.

About 1897 Oscar Turner, Jr., entered into a contract with S. B. Crowder, of Louisville, Ky., under which Crowder was authorized to represent his interests in these lands and clear the title for him, and to receive fifty per cent. of the land recovered; Crowder to pay redemption charges and expenses. Crowder came to Phillips County, and investigated the situation, and found out the facts about the titles and the character of the land, and ascertained the cost of redemption. He employed counsel in these matters, and had him call upon several darkies, who had donated some of the Turner lands from the State, looking towards a settlement with them. No payment of taxes or redemptions were made. Later Turner himself came and investigated the situation—this was in 1898—and decided that the lands were not worth the cost of redemption. In 1900 Mr Phillips, the attorney employed by Crowder, and with whom Turner had consulted, sued him for a fee, and attached all the land in controversy except a half section.

This suit proceeded to judgment, and most, if not all, the defendants have procured title from that sale, doubtless intending to fatten the title based upon the overdue tax decrees.

The evidence shows that up to 1899 the land was of little value, but since that time has rapidly risen in value, and at the institution of this suit was worth about $15 per acre. Just how much they were worth per acre when Oscar Turner, Jr., died in July, 1902, is not shown exactly, but it is shown that the rise was rapid after 1899, which made them worth many hundred per cent. more than when he decided not to redeem them in 1898. He had notice of the attachment suit against him in 1900. He was then a member of Congress, and a copy of the judgment was

served upon him in Washington, but he declined to attend to it on account of an error of description of the land as shown in the copy served upon him. The gravamen of this bill is an attack upon the overdue tax decrees and upon the judgment in the attachment suit.

To sustain appellant's title, the overdue tax decrees must be held void, and as to most of the land also the judgment in the attachment suit must be declared void. The court, however, declines to go into the investigation of the grounds of the attack on the overdue tax decrees, and it is not necessary to notice the attachment suit, as it is but a second hurdle for appellants to cross, and they have fallen before the first one is reached.

The laches of the Turners, father and son, not including the infant of the third generation, barred these appellants of relief in equity. To escape laches, appellants appeal to *Jackson* v. *Boyd,* 75 Ark. 197, *Williams* v. *Bennett,* 75 Ark. 312, and *Rozelle* v. *Chicago Mill & Lumber Co.,* 76 Ark. 525. In *Jackson* v. *Boyd* there was no evidence of increased value of the land, no change in the status of any one towards the land, no evidence of an abandonment because of insufficient value to assume the burdens against it; and it was pointed out that the absence of these or any other grounds causing the doctrine of laches to be invoked prevented the application in that case after a lapse of thirteen years. In *Williams* v. *Bennett, supra,* the doctrine of *Jackson* v. *Boyd* was reiterated, and it was held inapplicable where some of the well-known equitable causes for its invocation were present, and held the parties barred under such circumstances after a lapse of 35 years, during which time papers which were supposed to support a decree were lost. *Rozelle* v. *Chicago Mill & Lumber Company* merely decides that on a demurrer a complaint seeking to cancel a deed to wild and unoccupied land is not bad for failing to allege reasons for the delay where it did not appear that the rights of the defendants were prejudiced thereby. Here the defendants are prejudiced because the taxes refunded with interest do not meet the justice of the case, as it did in *Jackson* v. *Boyd.* The principles of these cases are against appellants, and *Clay* v. *Bilby,* 72 Ark. 101, is directly against them, where the following statement is as applicable to this case as to that: "The appellants failed to show that they had any merito-

rious defense in the suit instituted under the overdue tax act. They do not allege that the taxes for which the land was sold were illegal or paid. Not a single ground for equitable interposition appears. *State* v. *Hill,* 50 Ark. 458. Without one palliating excuse, they show themselves guilty of the grossest negligence. They knew their land was subject to taxation, and liable to be sold if the taxes were not paid, yet they waited thirty-eight years before they offered to pay taxes. There is nothing in their case "to call forth a court of equity into activity." Counsel point to the well known condition of civil war prevailing from 1861 to 1865, and say that the troublesome times extending thereafter until 1874 should be also treated as a period when the performance of duties to civil government should be excused. If both these periods be excluded, it does not help appellants, for there is no excuse offered for omitting duties to the State after 1874, and all of this land could have been redeemed until after the overdue tax decrees in 1883, and much of it thereafter from the State, and this suit could have been brought in 1883 as well as in 1904. But the Turners have not contributed one mill to sustain the State and county governments at any time. Oscar Turner, Jr., was acquainted with the situation, and from his service in Congress was doubtless familiar with the general condition and in touch with Representatives from the section where his land was located. He concluded that the lands were not worth their tribute to the State, but the appellees had more faith in their future and discharged the duty of landowners to the State, and whose equity is the stronger? The statement of the case answers it. The appellants are seeking to reap where they have not sown, and to gather where they have not strawed, and this is not the first time such conduct has caused loss. Matt. 25, 15-30.

Mr. Justice Brewer, speaking for the Supreme Court of the United States in *Underwood* v. *Dugan,* 139 U. S. 380, so aptly described the very situation here and the equitable viewpoint thereof that it is adopted as controlling:

"And this doctrine of laches rests on no arbitrary or technical rule. It is founded on the plainest principles of substantial justice. Ownership of property implies two things: First, attention to it; second, a discharge of all obligations, of taxation or

otherwise, to the State which protects it. When it appears that one who now asserts a title to property, arising more than the lifetime of a generation ago, has during all these years neglected the property and made no claim of title thereto, a reasonable presumption is that, whatever may be apparent on the face of the instrument supposed to create the title, were the full facts known, facts which can not now be known by reason of the death of the parties to the transaction, it would be disclosed that no title was in fact obtained; or, if that be not true, that he considered the property of such little value that he abandoned it to the State which was protecting it. So, if, the title being beyond challenge, during these years he pays no taxes thereon, makes no effort to improve or increase its value, and, by the labor and efforts of others, under the protecting powers of the State, large value has been given to to it, the State may properly say to him, as may also the individuals who have thus wrought this change in value: You abandoned this property when it was comparatively valueless; you have taken no share in the burdens of taxation or the support of the State; others have toiled, paid taxes, and made the property valuable; therefore, because of your shirking of the duties and obligations, you shall not, whatever may have been the nature of your title in the first instance, be permitted to appropriate the value thus produced by others."

For these reasons the court declines to investigate the matters urged to avoid the overdue tax decrees of 1883.

Judgment affirmed.

Mr. Justice McCULLOCH disqualified and not participating.

MILLER v. STATE.

Opinion delivered Jauanry 21, 1907.

LIBEL—VARIANCE—HEADLINE OF NEWSPAPER.—While the headline of a newspaper article may be considered as part of the article for the purpose of determining its meaning, and may itself constitute a libel, yet it is so distinct from the article that a charge of criminal libel based upon a newspaper article will not be sustained by evidence merely that

defendant published a headline to an article in which the alleged libelous words appeared, without proof of the contents of the article itself.

Appeal from Pulaski Circuit Court; *Robert J. Lea,* Judge; reversed.

W. H. Pemberton, for appellant.

1. In this case, before the State could properly ask for a conviction, it was necessary to prove that the appellant published a newspaper article containing the libel set out in the indictment. Proof of what was contained in the headline alone was not sufficient to sustain the allegation. To charge that one offers a bribe can not properly be construed to mean that he commits the crime of bribery, nor can the indictment in this case be aided by innuendo. 93 Am. Dec. 54; 11 Am. Rep. 534; 46 Am. Dec. 730; 13 Metc. (Mass.) 278; 13 Am. & Eng. Enc. of L. (1 Ed.), 465-7; 24 Ark. 603; Townshend, on Slander & Libel, § 336 *et seq.*

2. The court erred in instructing the jury that the words used were libelous *per se,* and that they meant that the prosecuting witness committed the legal crime of bribery and forgery. The jury should have been permitted to pass upon the meaning of the alleged libelous matter, giving to the words of the article complained of their usual and ordinary meaning. 24 Ark. 603; 36 Ark. 310; 55 Ark. 494; 25 Am. Dec. 213; 15 *id.* 122; 3 *id.* 383; 2 *id.* 488; 4 Wis. 231; 114 Pa. St. 554; 13 Am. & Eng. Enc. of L. (1 Ed.) 378-381; *id.* 384; Townshend on Libel & Slander, pp. 137, 142; 85 Am. Dec. 456; 93 *id.* 49; 5 Am. Rep. 396; 11 Kan. 480; 2 Am. Rep. 525; 3 Am. & Eng. Enc. of L. (1 Ed.), 349.

Lewis Rhoton, Prosecuting Attorney, for appellee.

1. The State makes no contention that the declaration can be aided by innuendoes, but that the words "Bob Rogers offers a bribe" charges him with having committed the crime of bribery; and that the words "and commits forgery" unequivocally charges him with having committed the crime of forgery. In determining the meaning of words charged to be libelous, the court, or jury, should place itself in the position of the hearer or reader, and determine the sense or meaning of the language in question according to its natural and popular construction. Townshend, Libel & Slander, § 133. And when the language is unambiguous it

is the province and duty of the court to determine its meaning. 114 Pa. St. 554, 559. See also 25 Am. Dec. 513. In this State it is a felony to offer a bribe. Kirby's Digest, § 1602; art. 5, § 34, Const. 1874. The offense of bribery is complete when the offer to bribe is made. 1 Am. & Eng. Enc. of L., 878. If the words complained of are unambiguous, and obviously charge an offense, no innuendo is necessary; and if the indictment is good without the innuendo, it may be rejected as surplusage. 13 Enc. of Pl. & Pr. 103; 15 Pick. 321; 6 Ga. 276; 12 Mo. App. 511. See also 5 Blackf. (Ind.), 453; 77 Mich. 133.

2. In an indictment for libel it is only necessary to set out such words as are the basis of the complaint. It is not necessary to set forth the whole publication in which the alleged defamation occurs. 13 Enc. of Pl. & Pr. 102; 2 Gray, 292; 8 Mo. App. 600; 32 Me. 550; 61 Minn. 142; 18 Atl. 331; 9 Minn. 181.

McCULLOCH, J. Appellant Henry J. Miller was convicted of the crime of libel under the following indictment (omitting the caption and formal part) towit:

"The said Henry J. Miller in the county and State aforesaid, on the 6th day of March, 1906, unlawfully, knowingly, wickedly and maliciously did write, print and publish a false, malicious and defamatory libel in the form of a newspaper article containing false, malicious and defamatory matters and things of and concerning one Robert L. Rogers, according to the terms and effect following: That is to say, 'Bob Rogers offers a bribe and then commits forgery,' thereby meaning by 'Bob Rogers' the said Robert L. Rogers, and thereby meaning by said words falsely and knowingly to charge that the said Robert L. Rogers had committed the crime of bribery and forgery, he, the said Henry J. Miller, then and there well knowing the said malicious and defamatory libel to be false, against the peace and dignity of the State of Arkansas."

Appellant was proved to be the editor, proprietor and publisher of a newspaper called the *Argenta Daily News,* printed and published in the City of North Little Rock, Arkansas, and the prosecuting attorney introduced a witness who read to the jury, as a part of his testimony, a heading of that newspaper of the date of March 6, 1906, as follows: "Bob Rogers offers a bribe, and then commits forgery."

No other part of the newspaper was offered in evidence. The defendant objected to the evidence, and also asked the court to instruct the jury that it was insufficient to sustain the allegation of indictment as to the publication of the libel. The court overruled both the objection to the evidence and the request for instruction, and exceptions to the rulings were duly saved.

The court, at the request of the State's attorney, instructed the jury, over the objection of the defendant, that the words read in evidence from the newspaper charged the person named with having committed the crime of forgery and bribery, and, if false, were libelous *per se*.

The indictment charges that the defendant printed and published the defamatory words in the form of a newspaper article, meaning to charge that the person named had been guilty of the crime of bribery and forgery. To sustain the allegation, the State was permitted to prove that the defendant printed and published a headline containing the alleged defamatory words, and the court held this to be sufficient to sustain the charge.

The headline of a newspaper or other publication is a summary or index of that which follows. "The line at the head or top of a page." Webster. "The line at the top of the page, which contains the folio or number of the page, with the title of book (technically known as the running head), or the subject of the chapter or the page." Century Dictionary. An article is defined to be "a literary composition on a specific topic, forming an independent portion of a book or literary publication, especially of a newspaper, review, or other periodical." Century Dictionary.

In a certain sense the headline is a part of the article or chapter which follows, but, strictly speaking, it is separate, and the terms convey a different meaning than that of the article or chapter itself. It may be considered as a part of the article for the purpose of determining the meaning of the latter, and the headline itself may constitute a libel. *Landon* v. *Watkins,* 61 Minn. 137; *Hayes* v. *Press Co., Ltd.,* 127 Pa. St. 642; *Clement* v. *Lewis,* 7 Moore, C. P. 200, 10 Price, 181; *McAlester* v. *Detroit Free Press Co.,* 76 Mich. 336. But here the indictment charged the defendant with having published a libel in the form of

a newspaper article, and that the State introduced in evidence only the headline of an article which the court held to be libelous *per se*. In ascertaining the meaning of the words spoken or written to determine whether or not they are libelous the entire conversation or writing must be considered (18 Am. & Eng. Enc. L. pp. 983, 984 and cases cited); and where the defendant is accused of having published a newspaper article which is libelous on its face, it is not sufficient to prove only the headline or index to such article. Conceding that the court was correct in holding the words contained in the headline, when considered by themselves, to be libelous *per se,* yet the body of the article may have qualified or explained those words to the extent that it would have been a question for the jury to determine whether they amounted to a libel. The article itself was not introduced, nor did the defendant ask permission to introduce it, but the introduction of what purported to be merely a headline, index or synopsis presupposed that the article to which it related followed, and that, too, should have been introduced. The defendant was not bound to introduce the article. He had the right to insist on the State sustaining the allegations of the indictment by proof which conformed thereto. The proof must always conform to the allegation; and the State could not sustain an allegation of libel contained in a newspaper article by proof merely of language used in the headline which was libelous. Having alleged that the article was libelous, the State should have been required to prove it.

We do not mean to hold that the libel could not be contained in the headline to the article, nor that under this indictment the headline could not be introduced in the evidence as a part of the article. We do not say, either, that a statement printed in a newspaper in the form of a headline, but which in fact is disconnected from any article, and has no reference to any article, may not be described in the indictment as an article. But where it is what it purports to be, a headline or an index to the article which follows, then proof of its contents, without proof also of the article to which it relates, will not sustain an allegation of libelous matter in the article itself.

The justice of this view of the law becomes more apparent when we consider the defense which the defendant undertook

under his plea of justification, and which was practically denied him by the ruling of the court. He undertook to show by evidence that the prosecuting witness had offered to pay money to certain parties, Dyer and Hatley, by name, in consideration that they should make a statement as to the good character of said prosecuting witness, but the court held that such offer did not constitute the crime of bribery, and would not justify the defamatory statement. He also undertook to show that the prosecuting witness had without authority signed the name of Hatley to a certain written statement concerning his (witness') good character; but the court held that the said writing was not such an instrument as could be the subject of the crime of forgery, and that such act would not justify the defamatory statement as to the prosecuting witness having committed forgery.

Now, if the newspaper article had been introduced in evidence, it might have qualified the headline, and shown that the defendant had only stated that the prosecuting witness offered a bribe to Dyer and Hatley for the purpose named, and forged the name of Hatley to the instrument in question. In other words, that he had not accused the prosecuting witness of having technically committed the crime of bribery and forgery. In that event the charge could not have been libelous *per se,* and the defendant would have been entitled to have the question submitted to the jury to determine whether the words used were in fact libelous, and, if so, whether they were in fact false or true.

The court, therefore erred in admitting in evidence the headline to the article without the article itself. Reversed and remanded for a new trial.

Note by the Court. Chief Justice HILL was present when this case was considered, and concurs in the judgment of reversal on the grounds stated in the opinion.

CASTSTEEL v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Opinion delivered January 21, 1907.

1. RAILROAD—LIABILITY FOR DAMAGES IN OPENING RIGHT OF WAY.—A railroad company is not liable to a lessee of land for injuries to his crop

by opening its right of way if it acquired its right of way prior to the execution of his lease. (Page 367.)

2. SAME—DUTY TO FENCE TRACK.—A railroad company is under no obligation to fence its track where it enters a farm, unless it contracts to do so. (Page 367.)

Appeal from Baxter Circuit Court; *J. W. Meeks,* Judge; affirmed.

W. S. Chastain, Baldy Vinson and *June P. Wooten,* for appellant.

1. The building of a depot on the land before the execution of a deed was a condition precedent; and no title passed to appellee nor right to a deed, upon which rested the license lawfully to enter upon the land for the purposes of track laying, etc., until this condition was performed. The depot was built in the latter part of the summer of 1903, and the deed is dated September 28, 1903. Appellant's lease had long previously been made.

2. Appellee's deed was in existence, and had been duly recorded. It was error in the court to permit the witness Riley to testify to having heard two of the four owners of a half interest in the land make a verbal contract with the agent of appellee for a right of way through the land. It was introduced for the purpose of proving title. 2 Greenleaf on Ev. (15 Ed.), 82.

B. S. Johnson and *Horton & South,* for appellees.

It is conclusively shown that as to the year 1903 appellant was the tenant of Riley, and not of the joint owners. The condition of the title of the whole tract, or the relation Lock bore to his landlord, can not enter into the consideration of this case. Having become the tenant of Riley, appellant can not question his title. 31 Ark. 470; 53 Ark. 532. It is also shown by the evidence that appellant rented the land for 1903 in the latter part of 1902, after appellee, by the consent and under the direction of Riley, had made its grade through the land and removed the fences from the same. He therefore took with knowledge that the appellee would prosecute its work, and is presumed to have known that it would be necessary to erect fences between the line of railroad and his crops in order to protect them.

Since appellee in building the road through the land was acting under the directions of Riley, appellant's landlord, it was as much the owner of its right of way as if it had procured a deed or condemned a right of way by judicial proceedings. Elliott on Railroads, § § 418, 937, 949; Randolph on Em. Dom. § § 209, 210, 212. Appellant's own negliience caused the injury complained of. Mills on Em. Dom. § 47; Lewis on Em. Dom. § 306; Randolph on Em. Dom. § § 145-6, 152; 23 N. Y. 42; 135 N. Y. 393; 139 Mass. 389; 113 Pa. 26; 38 N. J. L. 339; 51 N. Y. 476; 50 N. J. L. 285; 136 Mass. 239; 27 Fed. 770; 7 Am. & Eng. Enc. of L. (2 Ed.), 371 n. 4; 54 Ark. 424; 78 Ark. 366.

A deed from the landowner is not necessary. Consent is all that is necessary to authorize a railroad to enter upon land and take possession of its right of way. Kirby's Digest, § 6574, subdiv. 3. Having this consent, appellee's acts were lawful, and no one can complain of the results of the lawful acts of another. 50 N. J. L. 235; 39 Minn. 168; 136 Mass. 239. Although there may have been error in the instructions, still, if the verdict was right on the whole case, the judgment should be affirmed. 64 Ark. 238; 64 Ark. 228; 64 Ark. 619.

BATTLE, J. W. L. Caststeel brought this action against the St. Louis, Iron Mountain and Southern Railway Company to recover damages caused by alleged trespasses. He states his case substantially as follows: During the year 1903 he was in possession of a part of a certain farm on White River, known as the "Mississippi Bend Farm," in Baxter County, Arkansas. He held and cultivated the upper end of it under a lease. During the year 1903 he had a crop upon it, consisting of eight acres of cotton and twenty acres of corn, being in the months of June, July and August and the first of September of the year 1903 an average crop of the value of $410. The defendant, about the first of June, 1903, entered upon his premises, tearing down the fences or a portion of the same which enclosed the farm and trespassed thereon, damaging the plaintiff in the sum of $330, for which he asks judgment. The defendant answered, and denied these allegations.

The defendant recovered judgment, and plaintiff appealed.

The facts in the case are as follows: The defendant laid out and graded its railroad track over and through the farm culti-

vated by the plaintiff with the consent and under the direction of H. H. Riley, the duly authorized agent and representative of the owners of one undivided half thereof. It entered the farm in the "first part" of the year 1902 and graded through the same in that year. In the latter part of 1902 the plaintiff rented of Riley the interest of the owners represented by him for the year 1903. J. B. Lock rented the other half interest in the farm for the same year; and plaintiff and Lock divided the farm between themselves, plaintiff taking the "upper end" and Lock the lower. About the first of March, 1903, the defendant finished the grading of its roadbed through the farm, plaintiff built a fence across the defendant's right of way at the upper and lower ends of the farm. About the latter part of May or first of June, 1903, the employees of the defendant "came along, laying ties and rails, making the track on the roadbed, and tore the fences out. They left them down. Stock got in and damaged his crop." He drove the stock out and rebuilt the fence, but every time he rebuilt his fences they would tear them out and run its engine through; and stock continued to get in his field and injure his crops until they destroyed his corn crop and one-half of his cotton, damaging him in the sum of $332.

The damages sued for were caused by injuries to crops in 1903. Apellee acquired a right of way for its railroad over the farm cultivated by the appellant before he leased it for 1903. Its title to such right of way for and during the year 1903 and subsequent years was prior to his lease for 1903, and consequently was superior; and it (appellee) was entitled to an open right of way, and was under no obligation to fence it, unless it had contracted to do so. *St. Louis, Iron Mountain & Southern Railway Company* v. *Walbrink,* 47 Ark. 330; *Railway Company* v. *Knott,* 54 Ark. 424; *White River Ry. Co.* v. *Hamilton,* 76 Ark. 333. The fact that he and Lock, who leased the other half of the farm, had divided the farm, gave him no greater right to the half set apart to him. He held such half by virtue of the lease by the owners represented by Riley. It was set apart to him as the part he should cultivate under such lease. Mr. Lock's lessor was not a party to such division. Each held the part set apart to him under his lessor, and no other person.

Defendant was not liable to appellant for damages.

Judgment affirmed.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. BRYANT.

Opinion delivered January 7, 1907.

1. RAILROAD—DUTY TO TRESPASSER ON RIGHT OF WAY.—To a trespasser on its right of way a railroad company owes no positive duty of care, but only the negative duty to exercise ordinary care not to injure him after his perilous position is discovered. (Page 371.)

2. SAME—DISCOVERY OF PERIL OF TRESPASSER—EVIDENCE.—The uncontradicted testimony of employees on a train, who were under no duty to keep a lookout, that they did not see a trespasser on the right of way, if consistent and reasonable, can not be disregarded by the jury. (Page 372.)

3. SAME—NEGLIGENCE OF EMPLOYEE OUTSIDE OF EMPLOYMENT.—A railroad company is not liable for the negligent act of the foreman of a bridge gang in casting a water cooler from a moving train whereby a person on the right of way is injured, if such act was outside of the scope of such foreman's employment. (Page 372.)

Appeal from Monroe Circuit Court; *George M. Chapline,* Judge; reversed.

STATEMENT BY THE COURT.

James Bryant was a laborer on his father's farm, through which the appellant's railroad ran. On July 14, between one and two o'clock in the afternoon, appellee was going to his work on the farm, and was walking along a path near the railroad track. A freight train passed, to which was attached a boarding car on which was a bridge gang. Nelson was the foreman of of the gang, and was in the employ of the appellant at the time, doing bridge work. He told the cook in his employ to throw off of the car an old water cooler that had become worthless. The foreman said he supposed the water cooler belonged to him. The man who had the outfit before he came into possession of it was discharged, and the cooler was with the outfit when Nelson took charge. He directed his cook to give it to some one along the track, that if he saw anyone to whistle and give it to him. As they were passing along through the Bryant farm, they saw some one in the field. Nelson whistled, the party looked up, and the cook put the cooler out of the door. Neither the foreman nor the cook, according to their evidence, saw the appellee. They saw other parties in the field, and the foreman whistled to attract their attention, and when they looked up the cook put the cooler

out of the door. The train was running about fifteen miles per hour. Neither the foreman nor the cook could see the appellee from where they were in the car. The foreman was about midway of the car, and the cook could not have seen the appellee unless he had put his head out of the door. The cooler was put out of the door as they passed along. The cooler weighed forty pounds. It fell upon the appellee's head and shoulder, and injured him severely. Appellee and his witnesses testified that the parties on the freight train could have seen appellee. He was in plain view, and if they had looked they could have seen him. When the cook threw the cooler out, he said, "I have hit a man." The foreman and the cook looked back and saw that a man had been hit. They did not notify the conductor or engineer, and did not stop the train and go back to ascertain the injury done.

Appellee sued appellant for damages for the injuries thus received, alleging the negligence of the appellant. Appellant denied negligence, and denied its liability for the injuries received by appellee.

The court, at the request of the appellee, instructed the jury as follows:

"The jury are instructed that if they find from a preponderance of the evidence in this case that the employees of the defendant company, while working for defendant, were disposing of or casting aside a water cooler from the defendant's car, and did so in such a reckless, wilful and wanton manner as to throw same upon the plaintiff, and if you further find that the plaintiff was in plain view of said employees at the time it is alleged they so recklessly, wilfully and wantonly threw same upon him, you will find for the plaintiff and assess his damages in such sum as will compensate him for his pain and suffering and injuries as has been shown by the evidence.

"You are instructed that, in order to hold the defendant liable in this case, the burden of the proof is on the plaintiff to show wilful and wanton negligence on the part of the defendant company, which negligence directly caused or contributed to plaintiff's injury; and all the circumstances are to be taken into account when the question involved is one of negligence, as in this case. And negligence, in a legal sense, is no more nor less than a failure to observe for the protection of the interest of another person that

degree of care, precaution and vigilance which the circumstances justly demand, whereby such other persons suffer injury."

The appellant requested the court to give the following: "The jury are instructed to return a verdict for defendant." This the court refused, and the appellant excepted.

The court gave, over the objection of appellant, the following:

"1. If you find from the evidence in this case that the employees of the defendant threw a water cooler from the car because it was damaged, and that at the time it was thrown the party throwing it did not see the plaintiff, and did not know of his position at the time, then the defendant would not be liable, and you will find for the defendant.

"2. If you find from the evidence that the party who threw the cooler from the train was in the employ of the employee of the defendant company, and the employee directed the party to throw the cooler out, it would be the act of the employee, and the company would be liable for injury inflicted. provided you further find that the perilous position of the plaintiff was known to the employee at the time.

"3. All these instructions are taken together. There are two or three issues in this case. On the part of the plaintiff, it is contended that the defendant knew the perilous position of this party. If you believe that to be established, it is your duty to find for the plaintiff. The other is that it was thrown out without the knowledge of his perilous position. If you find that to be the case, you will find for the defendant."

The verdict and judgment were for $425. A motion for new trial, assigning all the alleged errors reserved at the trial, was filed and overruled.

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

1. Appellant was entitled to a peremptory instruction. (1) The accident was such as could not have been reasonably foreseen or anticipated. Appellee was a trespasser on the right of way, and the only duty appellant owed him was the duty not to intentionally injure him. 23 Am. & Eng. R. Cas. (N. S.), 449; 13 Am. & Eng. Ry. Cas. 786; 9 *id.* N. S. 230; 24 L. R. A. 215; 74 Ark. 610; 63 Ark. 636; 76 Ark. 10; 48 Ark. 49. (2) The mas-

ter can not be held liable for the negligent acts of its servants unless it be made to appear not only that the servant's negligence caused the injury but that the act which caused the injury was done in the course of his employment. 26 S. W. 360; 139 Mass. 556; 75 Ark. 587.

C. F. Greenlee, for appellee.

1. Appellant was not entitled to a peremptory instruction. It was not an act of inevitable accident, as contended, but, on the contrary, it was the result of negligence and wanton carelessness of appellant's employees. Under the circumstances appellee was not a trespasser. He had a right to walk along the right of way going to and from his work.

The amount of care bestowed must be equal to the emergency. One who is about to do any act which may result in injury to another is required to exercise such reasonable care and to take such reasonable precautions as may be necessary to warn passers-by of the danger and prevent injuring them. Failure therein is negligence, and, if injury results, the negligent party is liable. 98 Mass. 577; 65 Mo. 22; 53 Ark. 381; 57 Ark. 429; 56 Ark. 387; 65 Ark. 636.

2. The foreman, being in full charge of the car, and in control of all the articles therein, was acting within the scope or line of his employment.

WOOD, J. (after stating the facts.) Appellee had no right upon appellant's right of way, and especially to be walking upon a path in such proximity to appellant's railroad track at a time when one of its trains was passing thereon. In so doing he was a trespasser, and appellant owed him no positive duty of care, and only the negative duty to exercise ordinary care not to injure him after his perilous position was discovered. *Johnson* v. *Stewart*, 62 Ark. 164; *St. Louis S. W. Ry. Co.* v. *Underwood*, 74 Ark. 610; *St. Louis, I. M. & S. Ry. Co.* v. *Neely*, 63 Ark. 636; *Burns* v. *St. Louis S. W. Ry. Co.*, 76 Ark. 10; *St. Louis, I. M. & S. Ry. Co.* v. *Fairbairn*, 48 Ark. 491; *Penn. Ry. Co.* v. *Martin*, 23 Am. & Eng. R. Cas. (N. S.), 449; *McGrath* v. *Eastern Ry. Co.* 13 Am. & Eng. R. Cas. 768; *Fletcher* v. *Baltimore & P. Ry. Co.* 9 Am. & Eng. R. Cas. (N. S.), 230; *Poling* v. *Ohio River R. Co.* 24 L. R. A. 215.

It was in no sense the duty of Nelson, the foreman of the bridge gang, or his cook, to "keep a lookout" for persons on the track. That duty devolved upon the employees who were operating the train. As the keeping of a lookout was not in the line of the employment of the foreman of the bridge gang and his cook, their testimony that they did not see appellee at the time of casting the cooler from the car is entirely consistent and reasonable, and the jury could not arbitrarily disregard it. *Kansas City So. Ry. Co.* v. *Lewis,* 80 Ark. 396; *St. Louis, I. M. & S. Ry. Co.* v. *Landers,* 67 Ark. 514, and cases cited there. It is not like those cases where the fireman, engineer or other employee, whose duty it is to keep a lookout, swear that they did not, although in the discharge of their duty, see a person in plain view upon the track. In such cases the jury might well conclude that the testimony was inconsistent and unreasonable, and refuse to believe it. But here the testimony, uncontradicted, disclosed an unfortunate but nevertheless real accident. The presence of appellee so near the track was not and could not have been reasonably anticipated by the foreman and his cook.

The court should have given appellant's request for peremptory instruction.

The instructions given were abstract because, as a matter of law, upon the undisputed evidence there was no question of wilful, wanton or intentional injury to be submitted to the jury. Moreover, the casting of the cooler from the car was clearly an act out of the scope of the foreman's employment. If the cooler belonged to the foreman as proof tends to show, he could do as he pleased with it; and if he negligently cast it from the car, it was his act, and not that of the company. His employment with the company was that of building bridges. So far as the proof discloses, there is nothing to show that it was in the line of the duty of the foreman of the bridge gang to provide appointments for the cars in which he was transported from place to place. The burden was upon the appellee to show appellant's liability. To discharge this burden it was incumbent upon appellee to show that the act of the servant causing the injury was negligent and in the course of his employment. *St. Louis, I. M. & S. Ry. Co.* v. *Grant,* 75 Ark. 579.

For the error indicated the judgment is reversed, and the cause remanded for further proceedings.

McCULLOCH, J. not participating.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. WYNNE HOOP & COOPERAGE COMPANY.

Opinion delivered January 7, 1907.

1. CARRIER—FAILURE TO FURNISH CARS.—A complaint, in an action against a railroad company for failure to furnish cars for shipment, in which it was alleged that plaintiff placed a lot of elm sawlogs along defendant's track for shipment, and made repeated demands of defendant for cars upon which to load and ship the logs, which defendant failed to supply, states a cause of action. (Page 385.)
2. SAME—ADMISSIBILITY OF EVIDENCE.—An allegation in a complaint, in an action against a carrier for failure to furnish cars to a shipper, that the shipper demanded the cars of the carrier was sufficient to let in proof as to the agent on whom demand was made and that such agent had authority to furnish cars. (Page 385.)
3. PLEADING—DEFECT CURED BY VERDICT.—Where defendant goes to trial on the merits of a case upon proofs introduced without objection which supplied any defects in the complaint, the error in overruling a demurrer to the complaint was cured after verdict. (Page 386.)
3. CARRIER—LIABILITY FOR FAILURE TO FURNISH CARS.—A railroad company is responsible for the deterioration of sawlogs tendered for shipment, where such deterioration is due to its failure to furnish cars for shipment. (Page 387.)
4. SAME—DUTY TO FURNISH CARS.—It is the duty of common carriers to furnish transportation facilities for such goods as they undertake to carry to all who apply therefor in the regular and expected course of business; but they are excused for not having anticipated an unprecedented press of business. (Page 388.)
5. SAME—DUTY TO FURNISH CARS.—It is the duty of a carrier to furnish transportation facilities for such goods as it undertakes to carry to all who may apply for same in the regular and expected course of business; but where there is an unprecedented press of business, the carrier is excused for not having anticipated it. (Page 388.)
6. SALE—CONSTRUCTION OF CONTRACT.—An agreement which recites that C is to have all the timber controlled by A and B, who, for an

agreed price, agreed to haul same and load on board the cars, is an agreement for a present sale of timber. (Page 389.)

7. EVIDENCE—ORAL TESTIMONY IN AID OF WRITING.—Where the memorandum of a contract does not state the entire contract, it was not error to admit oral evidence of what the entire contract was. (Page 389.)

8. CARRIER—RULE—WAIVER.—A carrier may waive the nonobservance by shippers of its own rule requiring demands for cars for shipment to be in writing. (Page 391.)

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

STATEMENT BY THE COURT.

The complaint, after alleging the incorporation of plaintiff, is as follows:

"That the plaintiff was owner of a lot of elm sawlogs placed along defendant's tracks at Crawfordsville, Arkansas, during the months of September, October, November and December, 1903, for shipment to its sawmill located at Wynne, Cross County, Arkansas; that during the said months plaintiff had made often and repeated demands for cars upon which to load and ship out logs; that it received only an occasional car, which it used as best it could; that it made repeated demands for cars during the months of February, March and April, 1904, but defendant company neglected and carelessly refused to furnish a sufficient number of cars and negligently permitted 312,000 elm logs and timber of the value of $6,377.60 to remain alongside its tracks at Crawfordsville from January 1, 1904, to May 1, 1904, a period of four months. That, by reason of defendant's refusal to furnish said cars, said logs and timber deteriorated to the amount of ninety per cent. of its value, whereby plaintiff was damaged in the sum of $6,377.60, for which it prayed judgment."

Appellant, defendant below, moved to make this complaint more definite and certain as follows:

1. By stating the amount or quantity and value of the logs named placed along defendant's track at Crawfordsville, Arkansas, during the months of September, October, November and December, 1903, for shipment, and to give an itemized and detailed statement of such logs, where and the time when placed.

2. By stating the particular days or time when plaintiff made orders for cars; whether said demands were in writing or

otherwise, and, if so, by exhibiting copies of said written demands; and, if verbal, by stating the time when, where and upon whom the demands were made and the number and kinds of cars called for and names of the agents of the railway company upon whom demands were made.

3. By stating the date and time when cars were received and the number thereof.

4. By stating the number and capacity of the cars demanded and the number and capacity of the cars received from defendant.

5. By stating specifically the terms of the contract between plaintiff and defendant, if any, as to furnishing cars for shipment of logs during the time complained of.

In response to this appellee filed the following:

"1. In response to paragraph No. 1 of said motion plaintiff says that it placed more than 312,000 feet of logs along the side of defendant's track at Crawfordsville from September 1 to December 31, 1903, but in this cause only complains of the failure of defendant to transport said 312,000 feet. Plaintiff can not give or furnish a more detailed or itemized statement of said logs or when so placed than to say that they were being hauled and placed in said position almost daily.

"2. In response to paragraph two of said motion plaintiff says demand was made upon defendant almost daily for cars upon which to ship said logs; that one or perhaps more of said demands was in writing, and that the original of any such written demands was delivered to defendant, and, as plaintiff believes, is now in its possession, and plaintiff has no copies or copy thereof; one of said written demands was made on or about November 1, 1903, and was for one car daily until all of said logs were shipped. In said demand plaintiff did not ask for or demand any particular kind of car upon which logs could be shipped and offered to receive them at any time or in any numbers.

"3. Plaintiff can not now state the date or time when it received cars from defendant for shipment of such logs or lumber, but says defendant has a complete record of the time and place when said cars were offered and placed and used.

"4. In response to paragraph four of said motion plaintiff says that it believes that about 78 cars of usual and average capacity would have been required to ship said logs, and that

long after said demands for cars were made, and long after the expiration of a reasonable time after said demands, defendant did furnish cars in about said numbers, plaintiff believes, but can not state the capacity thereof.

"5. In response to paragraph five of said motion plaintiff says that in March, 1903, defendant specifically agreed to ship all of said logs to Wynne on or before June 1 of said year, but failed so to do until in August of said year, but at other and many times defendant promised to furnish cars for said shipments, but plaintiff can not give dates of said many and repeated and violated promises."

Plaintiff further states that all the information sought by said motion is in possession of said defendant, and most thereof is a matter of record in the offices of defendant.

Appellant renewed its motion to make more definite and certain. The motion was overruled, and exceptions saved. Appellant then demurred to the complaint. The demurrer was overruled, and appellant saved exceptions to the ruling. Appellant then answered as follows:

1. It denied each and every allegation in the complaint specifically, and especially the ownership of the logs.

2. It denied that any loss or detriment in value of any timber and logs was the result of any negligent act or default on the part of the defendant railway company, or that it was in any manner the proximate cause of any such loss or deterioration.

3. It charged that, if there was any such loss or deterioration in value of such logs or timber, same was caused and contributed to by the carelessness and neglect of the plaintiff, its servants and employees, together with other persons with whom plaintiff had contracted in regard to furnishing and disposition of said timber and logs.

By an amended answer defendant said that if plaintiff suffered any damage, loss or deterioration in value of its timber and logs, it was not occasioned by any neglect of failure on defendant's part, but that it did all in its power to furnish cars without discrimination as to its customers or places, and defendant furnished all cars as fast as possible without any discrimination.

During the trial, on the cross-examination of witness

Eldridge, secretary of plaintiff's company, the following contract was read to the jury:

"Wynne Hoop & Cooperage Company,
"Wynne, Ark., Sept. 21, 1903.

"This is to certify that we, Dolph Smith and..... of Crawfordsville, Arkansas, agree to let the Wynne Hoop & Cooperage Company of Wynne, Arkansas, have all the timber controlled by us, and further agree to haul same and load on board cars within fifty miles of Wynne, Arkansas, for the sum of $10 per thousand, said timber to be hauled as fast as possible, and said timber being good elm, and further agree not to sell any elm timber to anyone else before the 1st of January, 1904. The Wynne Hoop & Cooperage Company hereby agree to furnish the sum of $600 to the said Dolph Smith and J. A. Thomas, in advance, on this timber, and to retain $100 per week from their payroll thereafter, until said sum has been paid. $600.

[Signed] "Wynne Hoop & Cooperage Company.
"By Geo. W. Eldridge, Secretary.
[Signed] "Dolph Smith."

Witnesses, over the objection of appellant, were permitted to testify that under the contract the title to the logs vested in the Wynne Hoop & Cooperage Company, "when it scaled them and put its stamp on them on the ground at the spur." Witnesses, over objection of appellant, were also permitted to testify that it was a uniform custom in logging localities and the locality of Wynne and Crawfordsville that the title to the logs passed to the purchaser thereof when they were "taken up and stamped and the advancement made, notwithstanding the fact that in the contract the sellers were to load them."

There was testimony to the effect that appellee advanced $7 per thousand upon these logs when they were delivered on the ground at the side track. Appellant preserved its exceptions to all the above testimony.

The testimony of the secretary of the appellee is as follows:

The plaintiff (appellee) entered into the contract (set out *supra*) with Smith and Thomas. Under the contract Smith and Thomas delivered the logs at Crawfordsville; that the logs were the property of the plaintiff; that repeated demands

were made both at Crawsfordsville and Wynne for cars. "I demanded cars almost daily from September 1, 1903, to July 21, 1904. There were about 312,000 feet of logs on the ground at Crawfordsville May 1, 1904. There were ample facilities for loading the logs at Crawfordsville and unloading them at Wynne. The railway company did not require payment of freight in advance. Logs were placed on the side track from about September 1, 1903, to January, 1904. We hauled in September, October, November, December and some in January. The damaged logs began showing up about the first of March, and we afterwards found that they were really worthless. We could not ascertain their condition at Crawfordsville, but had to saw them first; there was but little timber that would make marketable hoops. The logs were damaged 80 per cent. by reason of their not being shipped at the proper time. Mr. King is superintendent of transportation of the defendant, and has his office at Little Rock. I met him at Wynne, and he asked me for information, and I told him that the logs would have to be delivered at our mill rapidly then, and this was the first of April. I told him why, and he promised to move them by the first of the month. He did not do so. From May 1 to July 1 we received and shipped seventy-eight cars with 312,000 feet. I did not personally demand cars at Crawsfordville, but Thomas and Smith told me, in the presence of the agent there, that they had made demands for cars, and I believe a written notice was given for one hundred or two hundred cars. Our superintendent went to Crawfordsville, and scaled and branded the logs, and took them up as we do when making advances on them. Then Thomas and Smith would load the logs. Smith and Thomas without their derrick could load four cars per day with six men. They had chains, wagons, mules and men. When cars arrived, they stopped hauling and loaded. It was the duty of plaintiff and of Thomas and Smith to procure cars. We paid the full amount of $10 per thousand to Smith and Thomas. From September 9 to January 23 we received 143 cars. We advanced $7 per thousand upon delivery of the logs upon the ground at the sidetrack. We received cars from September 1903, to April, 1904 as follows: September 17, October 4, December 7, January 13, February 11, March 4. An elm log will remain in the weather two or three months without be-

coming sour or spoiled. There were three places at Crawfordsville for loading logs."

The superintendent of the company, whose duty it was to scale the logs, keep time, make pay rolls, and see that the timber was manufactured, among other things, testified as follows:

"I recollect those logs. They were elm. I saw them at Crawsfordsville. They were unloaded as near the railroad track as could be, and I know how logs should be placed for loading. These were conveniently placed. There were two or three places for loading. There are skidways there, and there are other places where the logs could be rolled on to the cars. Some of the logs were placed back away from the track because there were so many of them. In loading those that came in first and were placed nearest the track were loaded first. Smith and Thomas loaded at every opportunity. I was with Smith and Thomas several times when they demanded cars from the agent. They wanted and needed all the cars they could get. The agent told them he had made requisition for cars, and would get them as soon as he could. About the 1st of January, 1904, as near as I can remember, I know there was a written request made by Thomas for one hundred cars. We did not get them. The logs were on the track. The plaintiff could unload all the cars they could get. Mr. Smith, the chief dispatcher at Wynne, was the representative of the defendant with whom the matter of furnishing cars was taken up. He had charge of that matter. He would promise to furnish cars within ten days, but they were not furnished. On some occasions he said they did not have them, and on others said they could not furnish cars at Crawfordsville to haul logs for two dollars per thousand when they could haul piling north on long hauls and get seventy-five and a hundred dollars for it. It is thirty miles from Wynne to Crawfordsville. There is one local train daily that hauls logs. Through freights do not haul them. The logs were delayed at Crawfordsville, and got sour and brittle, and the life was gone. The damage to them was 80 per cent. of their value. I thought in sawing that the damage was 60 per cent., but 20 per cent. more damage developed after shipment. When they arrived at the cooper shop, and were going into barrels, they were shipped back, and I saw some of them in the back yard. I examined the hoops not shipped, and the

damage to them was the same as that claimed upon those that were shipped, and the hoops were alike. Timber should be cut when the sap is down, if it is to remain out any length of time, that is, from the middle of September until spring; these logs were cut from about the middle of September up to January. The weather was fine. I can not tell the amount of logs on the railway track at any given date. I know in January when they were through hauling there were about 500,000 feet on the siding. We finally received all the logs. They began coming in September, 1903. They commenced loading as soon as they hauled any. I know that some cars were furnished and not loaded for several days, but they were pushed down where they could not be got at to finish loading them. I do not recollect when the derrick came, but they could not use it because the railroad company had promised to raise the wires, but did not do so for two weeks. I do not know the date, but it was after the first of January. Sometimes they used the same men in loading that they did in cutting and hauling, and at other times would get other men. Sometimes Smith and Thomas had two or three men, and at other times eight to ten. It is not necessary to have more than three men to load a car without a derrick. The logs were piled two or three on top of each other. The ground was flat and level."

J. A. Thomas, for plaintiff, testified as follows: "I live at Earle, and am the same Thomas mentioned in the contract with plaintiff and Thomas and Smith. I bought Smith out early in 1904. Both before and after that I made demands for cars. I had an order in for one hundred cars. They made me sign an agreement to take a car a day. I did not need but a car or two a day. They made me sign an agreement to take a car a day for one hundred days. That was about the time I began for myself. I could not get anything done. They would not set in any cars where I could load them. I have seen them come in and kick cars down out of the way and leave them for six or eight days before I could get them back. "The railroad people (probably meaning the agent) never did exact me to pay him anything for the cars, but I would have to pay the other fellows." Q. "What other fellows do you mean?" A. The people who were running the local trains. They told me I was not paying enough. They said: 'You see the other people are getting cars.' Q. Did you say

the agent referred you to the train men? A. Yes, sir. Q. Did you go to them? A. They came to me." "There was never but three cars with any demurrage due. I was loading one car when they kicked it out. It was about one-fourth loaded, and they charged me demurrage on that one. I could not get it back to load it. They pushed it 115 or 120 yards on the switch. When I signed the written order, I told them I wanted a car a day, but I did not get them that often. The agent was Mr. Bunn. I did not delay loading, waiting to get my derrick up. I was feeding my mules at $2.50 per day, and trying to load every day. In the fall of 1903, and up to January, the weather was nice, and you could haul at Crawfordsville as well as anywhere. We had no more time to load in January than at any other time. We used the hauling teams and could load at any time." Appellant objected to the testimony of the above witness because the court permitted it to be introduced after both parties had closed their evidence the day previous. But the record shows that an attachment had been issued for this witness, and appellee had given notice that it would introduce him when he appeared. Smith testified for the plaintiff substantially the same as Thomas.

The appellant adduced evidence tending to prove that the rules of the company require that orders for cars must be in writing, stating how many cars are wanted, what kind of cars are wanted to be loaded, and destination, routing, etc.; that there were no written orders by appellee or Smith and Thomas for cars; that verbal requests were made; and that appellant's agent did not object to verbal requests, but in response thereto furnished cars. The list of cars furnished appellee at Crawfordsville showed that sixty cars were furnished between September 9, 1903, and April 30, 1904. The chief dispatcher of appellant at Wynne said that there was no written order for cars to ship logs from Crawfordsville, but he also said that he knew that the Wynne Hoop & Coopage Company wanted cars to ship logs to Wynne, because Eldridge and Mack would come in and speak to him for cars, and he would order all he could for them.

There was other testimony on behalf of the appellant tending to show that appellant furnished to appellee cars as fast as appellee could load same, and the delay in the shipment of the logs in controversy was not caused on account of failure to furnish ap-

pellee cars, but on account of the failure of appellee to load the cars after they were furnished. There was testimony also on behalf of the appellant tending to show that the delay and loss of the logs and consequent damage to appellee was caused by the manner in which appellee loaded its logs, and not by appellant's failure to furnish cars.

The appellant presented requests for instructions numbered respectively from 1 to 13. The court refused to grant 1, 2, 3, 8 and 9 of these requests, and modified and gave as modified 3, 8, 9 and 11 of appellant's requests; appellant objecting to the refusal to give its requests as asked and objecting to the court's modifications and to the giving of the instructions as modified.

The court on its own motion gave the following:

"1. If it was understood between Dolph Smith and the plaintiff that the title to these logs should pass to the plaintiff when they were delivered at the point of shipment branded, and the advancement of seven dollars per thousand was made upon them, the logs thereupon became the property of the plaintiff, and the deterioration in value of the logs thereafter, if any, was the loss of the plaintiff. On the other hand, if the logs were not to become the property of the plaintiff until loaded upon the cars, any deterioration on them between the time of their deposit at the place of shipment and loading on cars would be the loss of Smith, for which there can be no recovery in this case.

"No. 2. If they were plaintiff's logs, and they were delivered for shipment at a usual point of shipment on defendant's line of railway, and plaintiff thereupon requested defendant to furnish cars to transport them to Wynne by request definite as to the time and number of cars wanted, it was the duty of defendant to furnish such cars within a reasonable time after such request."

Court's instruction not numbered:

"If you find for the plaintiff, and find that the logs deteriorate in value by reason of the failure to furnish cars, you will assess the damages at such sum of money as would represent the difference in value between the value of the logs at Crawfordsville at the time the cars should have been furnished, if such cars had been furnished as stated in these instructions, and their value at the time the cars were furnished, in so far as such deterioration arose from the failure to furnish cars. If the deterioration re-

sulted from any other cause, defendant is not liable for it; and if there was a deterioration from any other cause, you will deduct from said difference the amount of said deterioration from such cause.

"4. The duty on the part of defendant as a common carrier to furnish plaintiff with cars sufficient to transport timber was not an absolute one; but its only duty was to furnish with reasonable promptness after demands made therefor, and to exercise reasonable diligence and care to provide transportation facilities to meet any such requirements as might be made in the usual course of its business, considering the general demand for such cars and the general condition of freight traffic. Defendant was not obliged to discriminate against any other shippers or other places nor supply plaintiff with any sudden demand for cars.

"5. If it was the custom of the plaintiff to accumulate logs or timber upon or near the railway right of way for shipment, and if this was not a delivery of such logs or timber to the defendant, and if, after the demand for cars was made, the defendant used such diligence as an ordinarily prudent person would have done under the circumstances to procure cars for such shipment, considering the general demand for cars and the general freight traffic, then your verdict should be for the defendant.

"6. If the general freight traffic was congested at Wynne and upon the railway therefrom to Memphis, embracing the station at Crawfordsville, and if such congestion of traffic was such that cars could not be furnished for plaintiff to transport the logs and timber in question, without discriminating against various other shippers and persons interested in shipments in such congested conditions, then your verdict should be for the defendant.

"7. If you should find for the plaintiff, there must appear from a preponderance of the evidence the extent of its damage; and you are not at liberty to guess at it, but must find it from the proof. The burden of proof is upon the plaintiff upon all issues in this case; and if it has failed to establish its case by a preponderance of the proof as to negligence on the part of the defendant, or as to the measure of damages, then your verdict should be for the defendant.

"11. Even if you should find that there was negligence on the part of the defendant in this case, yet if there was any negli-

gence whatever, in any manner or degree, on the part of the plaintiffs or any persons acting for them, causing or contributing to any damage complained of as to the logs and timber claimed by plaintiff, then the plaintiff can not recover."

This was modified by adding the word "therefor" and given as modified.

"12. If the Wynne Hoop & Cooperage Company and Dolph Smith had a contract sale of the logs and timber in question, and such timber and logs were to be loaded on the cars by Smith or persons under his supervision, or under contract with him, other than the Wynne Hoop & Cooperage Company, and if the Wynne Hoop & Cooperage Company was not to receive such logs and timber until loaded on cars, and it was not the property of the plaintiff, it can not recover.

"13. The mere fact of the Wynne Hoop & Cooperage Company causing marks to be placed on the logs in question, if they did so, is not in itself sufficient to constitute a delivery or complete a sale to the Wynne Hoop & Cooperage Company before being loaded upon the cars, but is only a circumstance to be considered by you, together with the contract, and all other circumstances relating thereto, as to whether or not delivery was to be made upon the cars as a completed sale to plaintiff."

The verdict was for $2496.

A motion for new trial preserving all the exceptions and claiming that the verdict was excessive was overruled, and this appeal prosecuted.

B. S. Johnson, for appellant.

1. It was an error to overrule appellant's second motion to make the complaint more definite and certain. Pomeroy's Rem. & Rem. Rights, § 552; 59 Ark. 169; 69 Ark. 363; 66 Ark. 278; 85 S. W. 85; 22 Ark. 227; 52 Ark. 380; 61 Ark. 562.

2. The complaint does not set up facts sufficient to constitute a cause of action against the defendant. It would be an injustice to parties litigant to adjudicate their rights upon an issue never raised in the court below, and the plaintiff can not be permitted to recover on a case not made in the complaint. The *allegata* and *probata* must correspond. 46 Ark. 96; 29 Ark. 501; 40 Ark. 309; 69 Ark. 586; 75 Ark. 66. To allege that plaintiff

caused its property to be placed along the side tracks of defendant, and left same there awaiting the furnishing of cars until, by reason of exposure to the weather, it was damaged, etc., does not constitute a good cause of action, or fasten any liability upon the defendant. 56 Ark. 288.

3. Under the contract between appellee and Smith title did not vest in appellee until the logs were loaded on board the cars, and the court should have so instructed the jury. Construction of a contract is one of law for the court, and not of fact to be left to the jury. 20 Ark. 590; 25 S. W. 1077; 106 Mass. 216; 46 O. St. 30; 52 Fed. 359.

4. The court erred in permitting the introduction of inadmissible testimony, the effect of which was to vary, contradict, or add to the terms of the written contract. 12 Met. 257; 50 Ark. 395; 75 Ark. 165.

Smith & Smith and *Lamb & Caraway,* for appellees.

1. The response to the motion to make the complaint more definite and certain was treated as an amendment, and that, taken with the complaint, undoubtedly states a cause of action. 76 Ark. 220; *Ib.* 66; 69 Ark. 584; 52 Ark. 378.

2. If the writing between appellee and Smith is to be treated as a bill of sale, the title of the logs passed at its date, to appellee. 62 Ark. 592; 68 Ark. 308. Where a writing does not purport to contain the entire contract, oral proof of other provisions in it may be made. Beach on Mod. Law, Cont. § § 31 and 722. Where a contract, either oral or written, or partly oral and partly written, is silent as to any essential feature, the custom of the trade may be proved. *Id.* § 752.

WOOD, J., (after stating the facts.) The complaint and response to the motion to make more definite and certain, which was treated as an amendment to the complaint, stated a cause of action. The complaints which failed to state a cause of action for failing to furnish cars in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Carl-Lee,* 69 Ark. 584, and *St. Louis, I. M. & S. Ry. Co.* v. *Moss,* 75 Ark. 66, differ in essential respects from the original complaint in this case. Here the allegations is that "the plaintiff had placed a lot of elm sawlogs along defendant's track for shipment, and had made often and repeated demands of defendant for cars upon

which to load and ship out logs." In the cases *supra,* while substantially the same allegations were made as to the demand for cars for shipment, it is specifically alleged that the demand was made upon certain agents of the company, naming them, and there was no allegation that these agents had authority to furnish cars, or that it was within the scope of their employment to furnish cars, or to receive notice of the demand for cars on the company. In such cases we held that there was no allegation of a tender for shipment or a demand for cars upon an agent authorized to furnish same. But here the allegation is not only that the logs were placed for shipment along the tracks, but that demand was made for cars upon the *defendant.* The pleader did not undertake to specify the particular agents upon whom demand was made. If he had done so, it would have been incumbent upon him to have also alleged that receiving the notice for or furnishing the cars was within the scope of their employment. But here the general allegation that demand was made of the defendant, coupled with the allegation that the logs were placed along the tracks of the defendant at Crawfordsville for shipment, was sufficient to show a tender for shipment and a demand upon the appellant, whose duty it was to furnish cars. An allegation that plaintiff made demand of defendant was sufficient to admit proof as to the agent on whom demand was made, and that such agent had authority to furnish cars. But the case at bar differs essentially also from the cases named *supra* in that in both those cases the railway company stood on its demurrer to the complaint. Here the appellant answered over and went to trial on the merits. Even if the complaint as amended was still defective, the appellant's answer, taken in connection with the allegations of the complaint, tendered an issue before the jury as to whether or not appellant negligently failed to furnish cars which resulted in appellee's injury and damage as set forth in the complaint. Having gone to trial on the merits of this issue upon proofs introduced without objection, which supplied any defects in the complaint, the error, if any, in the court's ruling was cured after verdict. *Sevier* v. *Holliday,* 2 Ark. 512; *Davis* v. *Goodman,* 62 Ark. 262, and other cases collated in 2 Crawford's Digest, p. 714, "k."

The whole case having been developed on the proof, the only questions here are those presented by the assignments of

error in the rulings of the court relating to the admission of testimony, the declarations of law, and the sufficiency of the evidence to support the verdict.

Second. The complaint, after alleging that appellee placed logs along appellant's track for shipment, and its repeated demands upon appellant for cars on which to "load and ship same," and that the appellant neglected and carelessly refused to furnish a sufficient number of cars, etc., proceeds to charge: "That by reason of defendant's refusal to furnish said cars said logs and timber deteriorated in value, from exposure to the weather and from rot, to the amount of ninety per cent. of its value, or a total sum of $6,377.60; *that, by reason of the negligent refusal of the defendant company* to so furnish cars as aforesaid, this plaintiff is damaged, etc." These allegations were sufficient to charge that the negligence of the company in failing to furnish cars was the proximate cause of appellee's injury. The testimony also was sufficient to warrant the jury in finding that the delay of appellant to furnish cars was the direct cause of the damage sustained by the appellee. Appellant contends that these allegations of the complaint show that "exposure to the weather" was the proximate cause of the injury, and that the complaint therefore fails to state a cause of action. The case of *Railway Company* v. *Neel,* 50 Ark. 279, is cited and quoted from to support this contention. But the facts in that case differentiate it from this. That was a suit for damages from alleged breach of contract to ship cotton. But the proof showed in that case, and the court held, that the damage to the cotton unshipped was not caused by a breach of contract to ship, but was caused by "exposure of the cotton to mud and rain." The court said: "If the cotton had been properly cared for, the delay would not have caused any deterioration in quality, and the market price is shown to have advanced pending the delay. The only injury in proof came from the failure to properly care for the property." But in this case the injury in proof did not come from the failure of appellee to properly care for the property. On the contrary, the jury were warranted in finding that the logs were properly placed and properly handled, that appellee tendered the logs to appellant for shipment, and took such care

for their preservation during the delay of the railway company to furnish transportation as ordinary prudence in the handling of such property in the usual course of business demanded. It must be taken as a matter of common knowledge that cotton and sawlogs differ in their inherent qualities. Cotton can be stored and thus protected from the elements, and a short delay in its transportation would not cause decay and a consequent depreciation in value. It was shown here that the only value of the elm timber consisted in its use for hoops, and to be valuable it had to be manufactured into these before the logs decayed. After the elm logs had been cut for a period of three months they would begin to turn sour at the ends, become brittle, worms would infest them, the bark would peel off, and the process of decay go on. Hence any delay in shipment which prevented their manufacture into hoops before this process of decay began would directly contribute to and be the proximate cause of any deterioration in value of the timber. If shipped promptly, it could be manufactured into hoops before the decay produced by delay took place. The logs in this suit were cut during the months of September, October, November and December, 1903. The logs cut during this period would keep for a period of three months. Decay in the logs unshipped began to be noticed about the first of March, 1904, and on May 1, 1904, there were about 312,000 feet of elm logs left on the ground at the station of Crawfordsville for injury to which on account of delay in shipment, caused by the alleged failure of appellant to furnish cars, this suit was brought.

This court in recent cases has declared the duty of common carriers, by the common law and by statute, to furnish transportation facilities for such goods as they undertake to carry to all who may apply for same in the regular and expected course of business. Where there is an unprecedented and unexpected press of business, such as the carrier could not by ordinary prudence in the usual course of the traffic have contemplated, he is excused for not having anticipated and provided against such extraordinary conditions. *St. Louis S. W. Ry. Co.* v. *Clay County Gin Co.*, 77 Ark. 357; *Choctaw, Oklahoma & Gulf R. Co.* v. *State*, 73 Ark. 373. See also *Little Rock & Ft. S. Ry. Co.* v. *Oppenheimer*, 64 Ark. 271; *Little Rock & Ft. S. Ry. Co.*

v. *Conatser,* 61 Ark. 562. See also Hutch. on Car. § 292; 4 Elliott, Railroads, § 1470; 6 Cyc. 372, and cases cited in note.

The court declared the law bearing on these questions in instructions numbered four, five and six given at appellant's request. There was evidence to sustain the verdict, and the verdict was not excessive. The evidence tends to show that there was on the ground at Crawfordsville, May 1, 1904, 312,000 feet of elm logs. At this time decay had already commenced. As we understand the pleadings and proof, appellee contends that it was the failure of appellant to furnish cars for this 312,000 feet before the decay set in that caused its damage. It would have taken 78 more cars than appellee received up to May 1, 1904, to have shipped these logs, for a carload was 4,000 feet. The proof showed that the logs at Crawfordsville, undamaged, were worth $10 per thousand feet or $3,120. The jury might have found from the evidence that the logs were damaged on account of the delay in shipment to the extent of 80 per cent. of their value, or $2,496, the amount of the verdict.

Third. There was no prejudicial error in submitting to the jury the question as to when the title of the logs in controversy passed under the contract between appellee and Smith and Thomas. The verdict of the jury was in accord with the proper construction of the contract. The purpose of the contract, as shown by the proof, was to enable appellee to control the entire output of elm logs cut by Thomas and Smith or controlled by them. Under the written agreement the court should have told the jury that the title to the elm logs that should be got out by Smith and Thomas passed to appellee on the day the written agreement was executed, September 21, 1903. It was a present sale of the timber with an agreement for future services concerning same. *Lynch* v. *Daggett,* 62 Ark. 592; *Anderson-Tulley Co.* v. *Rozelle,* 68 Ark. 308. Wherever the logs were cut within fifty miles of Wynne by Thomas and Smith, they belonged to appellee. But Smith and Thomas were to haul and load them on the cars. But the writing was no more than a memorandum, as shown by the evidence *aliunde.* It did not contain all the terms of the contract between the parties. The evidence showed that there was an agreement as to the dimensions of the logs, that they were to

be scaled weekly, stamped, and when this was done $7 per thousand feet was to be advanced on them. The contract is silent as to these things, yet they were essential features of the contract as a whole, and show that the writing did not purport to be, and was not, the whole contract. The court therefore did not err in permitting oral evidence of what the entire contract was. Nothing in the oral proof contravened the terms of the writing, but only showed that it did not contain all the provisions of the contract between the parties. If it was error to prove the custom of the trade as to when the title to logs passed, it was not an error of which appellant can complain; for, as we view the writing, the jury construed it as the court must have done, had it not submitted the question to them.

Fourth. We find no prejudicial error in the refusal of the court to give appellant's eighth and ninth prayers as asked, and in giving them as modified. The substitution of the words "logs less liable to damage" for the words "newer and fresher logs and timber" in the eighth prayer conveyed the same idea intended by the words in the prayer as asked, but in more appropriate terms. The addition of the words, "but such method and order of loading, if it occurred, would not bar a recovery unless plaintiff had reason to believe that defendant would not furnish a sufficient number of cars to remove all the logs before damage thereto would occur," was not prejudicial.

Witness Coleman testified that the people at Crawfordsville had a number of logs "piled along at a certain skidway, and when they were loading they would take up the logs that were handy right next to the skidway and then haul again and bring the logs next to the skidway and load these, and in that way cause the fresh logs to be hauled out first." But the witness, although asked, does not identify appellee's agents as the people who were loading in that way. The positive proof on the part of appellee was to the effect that the logs were loaded in the order in which they were hauled, or in such manner as to ship out first the logs most liable to injury. Moreover, there was abundant evidence from which the jury might have found that appellant, by its oft-repeated promise to furnish cars, gave appellee reason to believe that no injury to his timber was to be apprehended from a delay in its shipment. Substituting the words "for the timber so dam-

aged" for the word "therefor" in the ninth prayer did not change its meaning. There was no error in the court's charge. It fully presented the law applicable to the facts proved.

Fifth. While the evidence tended to show that appellant had a rule requiring demands for cars to be in writing, and that appellee did not observe this rule, the testimony also tends to show that the observance of this rule on the part of appellee was waived by appellant. No written demands were insisted upon by appellant. Moreover, there is no assignment of error in the motion for new trial for failure of appellee to observe the rules of appellant requiring written demand for cars.

The record presents no reversible error, and the judgment is therefore affirmed.

WHIPPLE v. TUXWORTH.

81 391
84 140

Opinion delivered January 7, 1907.

1. CORPORATION DE FACTO—POWERS.—A corporation *de facto* may sue and be sued, and, as a rule, may do whatever a corporation *de jure* can do, and no one but the State can call its existence in question. (Page 399.)

2. SAME—REQUISITES.—To constitute a corporation *de facto,* there are three requisites: (1) a charter or general law under which such a corporation might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise. (Page 400.)

3. CORPORATION—IMPROVEMENT DISTRICT.—Improvement districts organized by city and town councils, which are given a particular name, are endowed with perpetual succession until their object is accomplished, and are impowered to make contracts, incur debts, issue bonds, collect assessments, and sue and be sued, are in effect corporations, though they are not denominated such. (Page 402.)

4. DECREE—PRESUMPTION.—A decree enforcing a lien in favor of a *de facto* improvement district upon property in the district raises a presumption that the district was legally organized. (Page 403.)

5. DE FACTO IMPROVEMENT DISTRICT—WAIVER OF DEFENSE.—Where a *de facto* improvement district recovered a decree enforcing a lien on property within the district, the defense that the district was not legally organized was waived where it was not made in such proceeding, and can not be set up in a subsequent suit. (Page 405.)

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

William G. Whipple, for appellant

The suit by the board of improvement to sell the land for unpaid taxes was one *in rem.* 50 Ark. 188; 55 *Id.* 398. The Code provisions as to persons constructively summoned do not apply in a suit against land for taxes. 57 Ark. 49. When the jurisdiction of a court of general jurisdiction depends upon facts not appearing upon the record, they will be presumed in a collateral proceding. 64 Ark. 464. A court of general jurisdiction is presumed to have had jurisdiction of the parties as well as the subject-matter. 12 Ia. 204; 39 *Id.* 539. Where taxes are sought to be collected against land, notice by publication is sufficient to bind all owners, because the proceeding is *in rem.* 193 U. S. 92. The decree of such a court that it had jurisdiction of the person can not be inquired into except upon appeal. 11 Ark. 519.

Judgments by default are as effective and binding as though rendered after the trial of the issues. Freeman on Judgments, secs. 330 and 532. A judgment *in rem* binds only the property within the control of the court which renders it. 139 U. S. 156; 34 Ark. 291; 57 *Id.* 97; *Id.* 227; 50 *Id.* 551; 71 *Id.* 599; 60 *Id.* 369. Complainant can not go into evidence at large to establish error in the decree. 13 Pet. 6. One losing a suit by his own neglect can not be aided by bill of review. 1 S. C. 232. Inadequacy of price cuts no figure in tax sale. Cooley on Taxation, p. 345.

John B. Jones, E. B. Kinsworthy and *G. D. Henderson,* for appellee.

Want of jurisdiction can always be set up against a judgment when sought to be enforced. 48 Ark. 156. If land has been actually sold and conveyed for a tax, the original owner remaining in possession may have the validity tested by a bill in equity filed for the purpose of quieting his title. Cooley on Taxation, vol. 2, 1457. A void judgment or decree is a mere nullity, and has no force either as evidence or by way of estoppel. 60 Ark. 369.

BATTLE, J. Frank Tuxworth filed a complaint against Du-

rand Whipple, in the Pulaski Chancery Court, on the 13th day of September, 1904. He alleged in his complaint that he was the owner of lot No. 14 in block No. 17 in Fleming & Bradford's Addition, in the city of Little Rock; that it is vacant and unimproved; that he was a non-resident of this State; that suit was brought in the Pulaski Chancery Court in July, 1902, by the alleged Improvement District No. 60 against the unknown owners of the lot for assessment charges against the same for the years 1899, 1900 and 1901, amounting in the aggregate to $9.72; that plaintiff was not served with process, and had no knowledge of the suit until April, 1904; that there was no Improvement District No. 60, but attorneys for the so-called district falsely represented to the court that there was such a district, and that the assessments were due, and on these representations the court, on the first of October, 1902, rendered a decree, ordering the lot to be sold; that the suit in which this decree was rendered was numbered 7752; that on the 3d day of November, 1902, the lot was sold by a commissioner of the court to the defendant for the assessments and costs; that on the 15th day of January, 1904, the commissioner executed a deed to the defendant. He asked that the decree, sale, and deed be set aside and declared void.

Afterwards plaintiff filed an amendment to his complaint in which he stated there was no such district as Improvement District No. 60; that ten resident owners of property within the boundaries of the alleged district never signed a petition to the city council of Little Rock to take steps towards making the improvement district according to section 5665 of Kirby's Digest, and the city council had no jurisdiction to pass an ordinance establishing such district. That the ordinance, the acts of the persons named as commissioners, and the assessments were void and of no effect. That the decree rendered by the court was void for four reasons:

"(1). There was no such plaintiff in existence as Improvement District No. 60 at the time of the commencement of said cause No. 7752; that, there being no plaintiff, there was no cause of action before the court to be adjudged, and that the complaint filed in said cause was not a pleading in any cause

in said court for adjudication; and the court had no power to take any steps to adjudicate such cause.

"(2). The court had no jurisdiction over the subject-matter of said complaint for the reason said lot was not situated within any improvement district; that the court by law had authority only to decree sale of land situated within an improvement district to satisfy assessments for improvement of property.

"(3). That plaintiff was not a party to said cause No 7752, and had no notice of said cause or pretended decree until April, 1904; that the allegations that the owner of said property was unknown were untrue; that the parties pretending to be commissioners had notice of facts from which they could easily have found plaintiff was the owner.

"(4). That the decree and sale of said lot without jurisdiction in the court to render the same in cause No. 7752 deprived plaintiff of the property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and the decree and sale are therefore void."

The defendant answered, and stated that the plaintiff did not pay the assessments on the lot in controversy for the years 1899, 1900 and 1901; and that Improvement District No. 60 has always been a *de facto* improvement district from the date of its organization in May, 1892, and that it was recognized by the plaintiff and predecessors in title by the repeated payment from year to year of assessments levied on said lot by the board of improvement of said district; that in the case of the board of improvement of said district against the unknown owners of lot 12, 13 and 14, block 8, in said district, this court rendered a decree on December 26, 1893, sustaining the legality of the organization of said district, although in that case its legality was vigorously contested; that since said adjudication some three hundred suits have been brought in this court (chancery) by said board of improvement of said district against delinquent owners of lots in said district, and successfully maintained; that a large amount has been expended by said board in said district in improving the streets and building bridges therein; that the allegations made in said complaint in suit No. 7752 were neither false nor fraudulent, and defendant alleges that the statements therein made are true; that said lot 14, block

17, in said Fleming & Bradford's Addition in said district was delinquent for the assessments for the years 1899, 1900 and 1901, for the amounts set forth in said complaint, and that the said lot is within the boundaries of said district; that the statements made in said complaint to the effect that no notice was served upon the unknown owners of said lot in said suit are untrue; that the said owners were duly and fully notified as required by law, in every particular, of the bringing of said suit; that the process was regular, and that the said complaint contained the averment that the owners of said lot were unknown, as required by section 5346 of the Digest; that the summons was duly posted on the lot, and was duly published in the proper newspaper, for the proper period; that the proper proof was duly made and filed in said court, showing the same; that the attorneys for the said board in said suit did not make any false representations to the court, as alleged in said complaint. Defendant admits the bringing of the suit in said case, numbered 7752, the decree therein, the advertisement, and the sale by the commissioners of this court (chancery), and the execution of the deed to defendant as alleged in said complaint. Defendant alleges that full proof was duly made to the court of all the steps required for constructive service in said case, as required by law, as is shown by the records and files of the court; that it was the duty of said plaintiff, as a provident owner, to have known of all these steps in said suit, especially *since many assessments had previously been made upon said lot, and paid from year to year, either by the plaintiff or by some one acting in his behalf, from which it follows that he was charged with notice that the annual assessments would probably continue;* that it is not true that when defendant purchased said lot he knew that said district had no legal existence, and that the said decree was void; that said decree is valid and binding, and said deed is a legal and valid deed."

The defendant also answered the amendment to the complaint, and alleged that the improvement district in question was a *de facto* district, and the board of improvement a *de facto* board, at the time of the rendition of the decree; that the lot involved was within the territorial boundaries of the district, which was known as "Street Grading District No. 60," of the

city of Little Rock; that all persons interested in the lot were parties to the suit, it being *in rem;* that the plaintiff had constructive notice of the bringing of the suit; and that the allegation in the complaint in suit numbered 7752 that the owners of the lot were unknown was true in fact, as neither the complainants nor their agents or attorneys had any knowledge as to who the owners were at the time the decree was rendered, and had no available means of knowing who they were.

The cause was heard, in part, on the following agreed statement of facts:

"First. That the plaintiff holds title to the lot claimed in this case by him by and through the title as set forth in the complaint, except as the same may be affected by deed therein mentioned as held by the defendant.

"Second. That all exhibits to plaintiff's complaint are true copies of the records, and are admitted as evidence if properly certified to by the proper officer.

"Third. That plaintiff was a nonresident when said suit 7752, mentioned in plaintiff's complaint, was brought, and has been ever since, and is now, a non-resident of this State.

"Fourth. That plaintiff was never personally served with notice of said suit No. 7752, and never entered his appearance therein, and that the only notice given of said suit was such a notice is shown by the papers therein, with returns thereon, which are admitted in evidence in this case.

"Fifth. That the plaintiff had no personal knowledge that suit No. 7752 had been brought, or that the lot claimed by him had been sold under the decree in said case, or that the defendant had purchased the same until April, 1904, after the terms of this court (chancery) at which said decree was rendered, said sale made and said deed executed to defendant had expired.

"Sixth. That said suit No. 7752 was a suit against the unknown owner of certain lots, including the lot claimed by plaintiff, and that plaintiff had no personal notice of any kind of said suit until April, 1904.

"Seventh. That the decree in said suit No. 7752, under which the lot claimed by plaintiff was sold to defendant, was taken without the introduction of proof except as to such service as is shown by the papers with the returns thereon, and

the complaint and other papers in said case; and that there was no issue joined and tried in said case as to whether or not there was such a thing as Improvement District No. 60, or as to whether or not there were any taxes, assessments or penalties due to said district on the lot claimed by plaintiff; that the decree in said case was a default decree given on the complaint therein and such service as is shown by the papers therein.

"Eighth. That plaintiff has regularly paid all taxes due on said lot claimed by him since he has owned the same, except that claimed by said alleged Improvement District No. 60.

"Ninth. That it is admitted that no petition signed by ten resident owners of real property within the territory embraced in said alleged Improvement District No. 60 was ever presented to the city council of Little Rock, Arkansas, asking that said district be established, as required by section 5322 of Sandels & Hill's Digest, and that said District No. 60 was never legally created.

* * * * * * * * * * *

"Eleventh. That when the lot claimed by plaintiff was sold under decree in case No. 7752, the defendant purchased it and said lots 12 and 13, in the same block, for $28.12, and that each of said lots was worth at the time he purchased same, and is now worth, $400.

* * * * * * * * * * *

"Fourteenth. That the plaintiff would testify that he did not know that there was claimed to be such a thing as said alleged Improvement District No. 60 until April, 1904, and that he never knowingly paid any taxes or assessments to said district on lot 14, and the same is admitted as the evidence of plaintiff in this case, as if properly taken and filed herein to that effect; but it is admitted that the assessments on said lot claimed by said alleged Improvement District No. 60, prior to those for the year 1899, were paid by some one.

"Fifteenth. It is also further agreed that said suit No. 7752 was brought for assessments claimed to be due on said lot to said improvement district and unpaid; that the decree therein was rendered upon default of any answer or demurrer, and the said lot was sold in the usual manner to the defendant by the commissioner appointed by this court therefor, and was sold after due advertisement, at the time and place described therein, at

public sale to the highest bidder for cash; and that the defendant paid the purchase money therefor to said commissioner in cash, and a certificate of sale therefor was executed and delivered by said commissioner to this defendant in the usual manner as directed by statute; and that at the expiration of the period of redemption from sale of one year, no redemption having been made from said sale, the said commissioner executed and delivered to this defendant a deed to said lot, in pursuance of said decree, and as ordered by the said court; and that said decree has never been appealed from, reversed, set aside or modified, and has whatever force and effect it had when first rendered.

"Sixteenth. It is also agreed that what was supposed to be Improvement District No. 60 collected assessments on property therein from May, 1892, until the decision of the case of *Board of Improvement District No.* 60 v. *Cotter,* 71 Ark. 556, and that those in charge of same, from time to time during said time, expended considerable sums of money in improving the streets and erecting bridges over a creek within the territory embraced by said alleged district. It is also agreed that during said time there were several suits in this court (chancery), including one in which the legality of said district was directly attacked and involved, in which this court (chancery) held the organization of said district to be legal and valid; but it is also agreed that plaintiff was not a party to any of these suits, and that none of these suits affected the property claimed by plaintiff, and that he had no notice of same."

It was shown by competent testimony that notice of the institution of suit numbered 7752 was given to the defendants by publication as required by statute in suits against unknown owners.

The court rendered a decree in this cause in which it found that "Frank Tuxworth, the plaintiff, is the owner of said lot 14; that the plaintiff is and was when the suit was commenced a non-resident; that the suit was brought by an alleged improvement district; that there was no service on the plaintiff other than that mentioned in section 5696 of Kirby's Digest; that plaintiff had no actual notice of the pendency of the suit; that a decree was rendered against said lot for assessments claimed to be due said district for the sum claimed in said suit; that the plaintiff did not

enter his appearance in said suit; that the decree was by default, and ordered said lot to be sold for said assessments, penalty and costs; that at said sale defendant Whipple purchased for the amount decreed against said lot; that the plaintiff did not redeem from said sale, having no actual notice of the sale; that the sale was approved and deed executed to said purchaser of said lot; that there was no Improvement District No. 60, such as above described, and such pretended district was void and of no legal effect whatever, for the reasons alleged in the complaint and shown by the agreement of facts; that all proceedings under said decree were void; that said deed is a cloud upon the title of plaintiff. It therefore orders and adjudges that the decree in said No. 7752, and the said sale thereunder, be and the same are declared void, and that said deed is void and held for naught."

The decree in the suit numbered 7752 is attacked upon the ground that the alleged improvement district in that case was not legally organized in every important particular. That was not necessary. A corporation *de facto* can sue and be sued, and, as a rule, do whatever a corporation *de jure* can do, and none but the State can call its existence in question. *Tulare Irrigation District* v. *Shepard,* 185 U. S. 1; *Searcy* v. *Yarnell,* 47 Ark. 269; *West* v. *Carolina Life Insurance Co.,* 31 Ark. 476; *Mississippi, etc., R. Co.* v. *Cross,* 20 Ark. 443; *Hammett* v. *Little Rock, etc., R. Co.,* 20 Ark. 204; 10 Cyclopedia of Law and Procedure, 256, and cases cited.

The rule, as stated by Judge Cooley in his work on Constitutional Limitations (6 Ed.), on page 309, is as follows: "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under *color of law,* and recognized by the State as such. * * * And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the State, and private parties could not enter upon any question of regularity. And the State itself may justly be precluded, on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition."

The requisites to constitute a corporation *de facto* are three: (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise. *Tulare Irrigation District* v. *Shepard,* 185 U. S. 1.

In Clark on Corporations, on page 90, it is said: "Most of the courts hold that there is a corporation *de facto* whenever there is a valid law under which a particular kind of a corporation may lawfully be organized, and persons having the required qualifications undertake, in good faith, to organize such a corporation thereunder, comply at least *colorably* with the law, and afterwards assume to act as a corporation, though particular provisions of the law are not complied with. And they hold that it is altogether immaterial in such case whether compliance with the particular provisions was intended by the Legislature as a condition precedent to the formation of the corporation or not." See cases cited.

Again, in the same book, on page 94, it is said: "There are some cases that hold, and some that seem to hold, that there can not be even a *de facto* corporation unless the corporators have substantially complied with all the conditions precedent prescribed by the statute; that, without such compliance, the pretended corporation does not come into existence for any purpose; and that, in the absense of elements of estoppel, the objection may be raised by a private individual as well as by the State, and collaterally as well as directly. These cases, however, are contrary to the great weight of authority, and some of them are not easily reconciled with other decisions of the same court. To constitute a corporation *de facto,* there must, it is true, be colorable compliance with the statute, but there need not be more. There need not be a substantial compliance. A substantial compliance makes the body a corporation *de jure.*"

In *Finnegan* v. *Noerenberg,* 52 Minn. 239, it is said: "Color of apparent organization under some charter or enabling act does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure.* But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to

perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure;* but if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto.*" *Stout* v. *Zulick,* 48 N. J. L. 599; *Eaton* v. *Walker,* 76 Mich. 579.

In *Swartwout* v. *Michigan Air Line Railroad Co.,* 24 Mich. 393, Judge Cooley, in delivering the opinion of the court, said: "It is obvious that all questions of regularity in the proceedings on the part of the associates in taking upon themselves corporate functions purporting to emanate from the sovereignty are questions which concern the State, rather than individuals, and should only be raised in a proceeding to which the State has seen fit to make itself a party. The trial of an issue, on a complaint by the State, of usurpation would determine the matter finally, but the trial of the same issue in a suit with an individual would settle nothing for future controversies, but the same question might arise again and again, and perhaps be decided differently on different trials. This point would have been open to no controversy whatever, had the plaintiff been organized under a special charter, and had we had no constitutional provisions forbidding the granting of such charters. Proof of charter and of user under it would have been sufficient to establish a *prima facie* right in the plaintiff to sue. * * * * And this *prima facie* case an individual would not be suffered to dispute, for the reason already suggested, that the question is not to be tried in a suit where it would only arise collaterally, and where the State, as the party chiefly concerned, could not be heard by its counsel. * * * But both in reason and on authority the ruling should be the same where an attempt has been made to organize a corporation under a general law premitting it." *McFarlan* v. *Triton Insurance Co.,* 4 Denio, 392; *Spring Valley Water Works* v. *San Francisco,* 22 Cal. 434; *Mackall* v. *Chesapeake & Ohio Canal Co.,* 94 U. S. 308; 3 Cook on Corporations (4 Ed.), § 637.

In *Dean* v. *Davis,* 51 Cal. 406, it was held that "an act of the Legislature which requires the supervisors of a county, upon the petition of persons in the possession of more than one half of the acres of any specified portion of the county, to erect such specified portion into a levee district for the purpose of reclaiming the same from overflow, and then provides the details by which the

reclamation shall be effected, makes a levee district organized by the board of supervisors a corporation, and a public corporation, even if the act does not in terms declare it a corporation." The court said: "In authorizing the district to be organized under a particular name, and endowing it with so many of the powers of a natural person, and particularly with the power to make contracts, incur debts, issue bonds, levy and collect assessments, and have perpetual succession, it would appear to be manifest that the intention was to endow it with corporate rights." *People* v. *Reclamation Dist.,* 53 Cal. 348; *People* v. *Williams,* 56 Cal. 647; *Hoke* v. *Perdue,* 62 Cal. 546; *People* v. *La Rue,* 67 Cal. 528.

In the same case the court held that "in such case, if the petition to the board of supervisors appears on its face to be signed by persons owning a majority of acres, and the district is in fact exercising corporate powers, the validity of its corporate existence can be tested only by proceedings in behalf of the people, and it can not be shown in a collateral action that persons owning a majority of acres did not sign the petition, and that the charter was therefore procured through fraud."

Irrigation districts organized by boards of supervisors upon the same plan as districts for reclamation of lands in *Dean* v. *Davis, supra,* with similar general powers in many respects, were held to be corporations. *Central Irrigation District* v. *De Lappe,* 79 Cal. 351; In re *Madera Irrigation District,* 92 Cal. 296; *Quint* v. *Hoffman,* 103 Cal. 506.

Improvement districts in this State are organized by the city councils of cities and towns under a valid law. They are given a particular name, and endowed with perpetual succession until their object is accomplished, with power to make contracts, incur debts, issue bonds, collect assessments, to sue, and to compel the city council by mandamus to make assessments. *Morrilton Waterworks Improvement District* v. *Earl,* 71 Ark. 4; *Lenon* v. *Brodie, ante* p. 208. The effect of the statutes is to make them corporations, though they are not denominated such.

The sections of Kirby's Digest which empower city councils to organize improvement districts in this State are as follows:

"Section 5665. When any ten resident owners of real property in any such city or incorporated town, or of any portion thereof, shall petition the city or town council to take steps to-

ward the making of any such local improvement, it shall be the duty of the council to at once lay off the whole city or town, if the whole of the desired improvement be general and local in its nature to said city or town, or the portion thereof mentioned in the petition, if it be limited to a part of said city or town only, into one or more improvement districts, designating the boundaries of such district so that it may be easily distinguished; and each district, if more than one, shall be designated by number and by the object of the proposed improvement.

"Section 5666. Within twenty days after the designation of such district or districts the clerk of said city or town shall publish the ordinance of the council establishing the district in some newspaper published in said city or town, for one insertion.

"Section 5667. If within three months after the publication of any such ordinance a majority in value of the owners of real property within such district adjoining the locality to be affected shall present to the council a petition praying that such improvement be made, which petition shall designate the nature of the improvement to be undertaken, and that the cost thereof be assessed and charged upon the real property situated within such district or districts, the city council shall at once appoint three persons, owners of real property therein, who shall compose a board of improvement for the district."

The decree in suit numbered 7752 was based upon the presumption that Improvement District No. 60 was legally organized under the foregoing sections of the Digest. *Kansas City, Pittsburg & Gulf Railway Company* v. *Waterworks Improvement District No. 1,* 68 Ark. 376, 378. That presumption attends the decree until it is overcome by competent evidence, and in this case the burden to do so is upon the appellee. He attempts to do so by an admission of parties "that no petition signed by ten resident owners of real property within the territory embraced in said alleged Improvement District No. 60 was ever presented to the city council of Little Rock, Arkansas, asking that said district be established, as required by section 5322 of Sandels & Hill's Digest, and that said District No. 60 was never legally created." This does not show that ten owners of real property in the district did not sign the petition, but that there were not ten of such owners resident in the district who signed the petition, and how

much less than ten does not appear. This was the only defect in the organization of the district.

What was meant by the use of the words, "ten resident owners of real property in any city or incorporated town," whether residents of the city or town owning real property in the district proposed, or ten residents of such district owning real property therein, was a subject of much doubt, a question about which lawyers and courts differed until the opinion in *Board of Improvement District No. 60* (the district now in question) v. *Cotter,* 71 Ark. 556, was delivered. The city council of Little Rock took the former view. This court held that the latter was correct. In view of the ambiguity of the statute, the effort to organize the district is presumed to have been made in good faith. There is no reason assignable why it was not. After its organization it collected assessments on property therein from May, 1892, until the decision in *Board of Improvement District No. 60* v. *Cotter,* 71 Ark. 556, which was on the 24th of October, 1903, more than eleven years, expended considerable sums of money in improving the streets and erecting bridges over a creek within the territory embraced in the district, and brought many suits in the Pulaski Chancery Court, including one in which the legality of the district was directly attacked and involved, and the court held the organization thereof to be legal and valid. All of which and the organization were sufficient to constitute it a corporation *de facto.*

It is true that it was held in *Board of Improvement District No. 60* v. *Cotter,* 71 Ark. 556, that " the filing of the petition prescribed by section 5665, *supra,* supported by the signatures of ten resident property owners of the proposed district, was mandatory and jurisdictional;" and that "all the proceedings of the city council in the attempted establishment and operation of Improvement District No. 60 were void." But that suit was brought for the purpose of collecting certain assessments which, it was alleged, were a charge on the property of appellee. The existence of the district as a corporation *de facto* was not involved in that suit, and what is held in that case does not affect its existence as such. The failure to file the petition of ten resident owners of real property in the district was pleaded as a defense in bar of the collection of the assessment. As a corporation *de facto,* it may

be entitled to bring an action, and still be unable to maintain it. The assessment in the Cotter case was void. It was made by the city council, and the defects which rendered it void did not affect the district as a corporation *de facto*. Its existence as such can be questioned only by the State in a proceeding instituted for that purpose.

The district as a corporation *de facto* was entitled to institute the suit numbered 7752 against the lot in question. The failure of the ten resident owners of real property to file the petition as prescribed by section 5665, *supra,* could have been set up as a defense in that suit; but, as it was not done, the effect of the decree therein was to sweep it away, and to debar it from being set up in any subsequent suit. *Roth* v. *Merchants & Planters Bank,* 70 Ark. 203; *Ellis* v. *Clarke,* 19 Ark. 421; *Bell* v. *Fergus,* 55 Ark. 538; *Davis* v. *Brown,* 94 U. S. 423.

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

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

Opinion delivered January 14, 1907.

1. RAILROADS—DUTY TO PROVIDE FOR SAFETY AND COMFORT OF PASSENGERS.—It is the duty of railroads, as common carriers of passengers, to provide their stations and cars with reasonable appointments for the safety and essential comfort of their passengers. (Page 411.)
2. SAME—INGRESS AND EGRESS INTO AND FROM COACH.—Where a train was delayed for several hours in a city, it was not negligence for the railroad company to lift the trap door and open the upright door to a vestibuled coach, as the passengers would otherwise be deprived of ingress and egress into and from the coach. (Page 411.)

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; reversed.

STATEMENT BY THE COURT.

The complaint alleges that plaintiff was a passenger on defendant's train between Brentwood, Arkansas, and Kansas City,

Missouri. That he was transported to Fort Scott, Kansas, at which point he arrived at about 3 o'clock in the morning of the 12th of July. That defendant disconnected the said car in which the plaintiff was being transported as a passenger from its regular train, and placed it upon a side track at Fort Scott, Kansas, where said car remained for about one or two hours. That, after the said car was so placed upon the said sidetrack, the plaintiff remained in the seat provided for him by the said defendant for about one or two hours until it became and was necessary for the plaintiff to go forward to the front end of the said car. That at the time it became and was necessary for the plaintiff to go to the front end of the said car, as aforesaid, the night was dark, and there were no lights near the said car, either upon or near the said track, by which a person could learn or ascertain the condition surrounding the said front platform. That plaintiff, without fault or negligence on his part, proceeded along the aisle of said car to the front platform, and after reaching said platform, on account of the fault and negligence of defendant railroad company in not causing to be kept down in its place the trap door over the steps leading into the said car and in not keeping closed the upright door for the entrance from the ground into said car by means of steps attached thereto and in keeping said trap door open and said upright door open, and in failing to provide lights on or about the front platform of said car and steps, without fault or negligence on his part, fell from said platform down said steps onto the ground, breaking his shoulder, his arm, and his ribs, and injuring him internally about the breast, back and sides and sustained permanent and lasting injuries.

The first paragraph of the answer contained a general demurrer; the second denied each allegation of the complaint; the third set up contributory negligence; and the fourth assumed risk.

The evidence showed that the appellee was a native of Denmark, and unable to speak English, was eighty-one and a half years old, was a passenger on the defendant's train, intending to

go from Brentwood, Ark., to Milwaukee, Wis., via Kansas City, Mo. That he changed cars once with the help of the conductor between Brentwood and Fort Scott, and that, after his train reached Fort Scott, the car he was in was detached from the train and switched to the sidetrack. That, after remaining on the sidetrack, the plaintiff, who was old and feeble, was compelled to answer a call of nature and got up from his seat and went forward to a point where he supposed a water-closet to be. When he got to this point, he found the door locked, and, thinking perhaps he was at the wrong door, and having a short time before seen some employee of the defendant lock a door near that end of the car and then go out of the door at the end of the car, and thinking that he would either find a closet or the man whom he had seen lock the door by going forward, walked out into the vestibule, and, the trap door over the steps being up and the upright door being open, he fell and received the injuries complained of.

The proof shows that he was an inexperienced traveler, not well enough acquainted with the different kinds of railway cars to tell what kind of a car he got in at Monett.

The exact language of appellee as to how he fell is as follows: "After I failed to get into the water closet, I went to the door, but I could not describe the room out there because it was dark, and that, of course, was when I fell off. Did not see any other door outside. When I went to the car door, it was dark; I could not see any door."

Henry Bassett, porter of the train, testified that there was no provision for lighting the vestibule except with an electric light, and that the electric light in the roof of the vestibule is on the same circuit as the electric light in the roof of the inside of the car, and that the lights in the upper deck, both inside the car proper and in the vestibule, can not be turned down so as to shine dimly, but must either be turned off entirely or left shining with full force; and also that any attempt to turn out any one light in the upper deck inevitably results in turning out all the lights in the upper deck, both inside the car and in the vestibule.

He also testifies that there were lights on the sides of the car, which could be turned on or off without any reference to the lights in the upper deck, and that these lights on the sides were so arranged that a part of the lights on the side could be turned off and part left shining. The car was equipped with electric lights, Pintsch gas and coal oil lamps. On the night of appellee's injury the lights in the upper deck were burning. The lights in the lower deck were turned out. Only one kind of light was used at a time. The electric light was the best; if that gave out, they used gas; and if, for any reason, the electric and gas light failed, they used coal oil lights which are set around on the sides and ends of the cars. Several witnesses for appellant, including the conductor, testified that the electric lights were burning in the upper deck, and that the vestibule was lighted with the electric light and well lighted, while one or two witnesses for appellant testified that the lights were dim in the vestibule.

All the witnesses for appellant establish the fact that the light on the platform was good, and their testimony tends to prove that, from the lights that were on the platform and other places, it would be perfectly safe for passengers to go on and off the car where this car was located, even if the lights on the car had not been burning. It was shown that the car was at the passenger depot opposite the baggage room at the passenger platform.

There was proof on behalf of appellant to the effect that the coach remained at Fort Scott about 20 or 30 minutes. The proof was that the car was unattended, after being left on the track, by any of the company's employees. It was the uniform custom in cities the size of Fort Scott to lock the water closets on the cars at the stations. It was shown that the platforms of the vestibule coaches were raised to enable the brakemen to discharge their duties. This was customary in cities like Fort Scott.

Ola Larsen, who was called to Fort Scott by telegram after the injury of his father, testified in part as follows: "I took the

four o'clock train. Got to Monett about eight or nine o'clock. Remained there until eleven o'clock or a few minutes after. I changed cars at Monett, and when I changed again the train pulled right up by another train, and we stepped right off one train onto the other. It was at Pittsburg that I changed the second time, where the train pulled right up by the side of the train I was on. They were Frisco trains. I got into Fort Scott fifteen minutes after three in the morning. The train that arrives at Fort Scott at that time is the same train my father arrived on. Arrived at the same time, regular train. The car I was in was a vestibule car."

Over the objection of appellant he was permitted to continue his testimony as follows:

"When the car I was riding in got to Fort Scott, the train that it was attached to came in on the third track. There were two tracks between our track and the depot. The track in front next to the depot is the one the train comes in on that goes on. I never had been in Fort Scott before. Never had been off the train there before, and this was in the night, and it was very dark. The moon went down just as we left Pittsburg. When the train stopped, I was very anxious to get there, very anxious to get to my father, and I had not slept any during the night. The train stopped on the third track, as near as I can tell. The front end of the car was right half way between the depot and the telegraph office."

Q. "Was the car that you were on switched upon this track, or just run in there, the train run in there on that track, or was the car disconnected and switched upon this track?" A. "I did not feel any switching. We run right in on that track. I did not feel any switching. I found when I got off the car there—some railroad men gave me the information—where I would find my father. I saw a whole lot of yard men with lanterns. I had started off towards the telegraph office, where they had telegraphed me, to see if I could get any information where I could find my father, and find out whether he was all right or not now, and met these railroad men, and they told me where I could find him, and that he was all right." Q. "You got off the car at that point. Now, where did you go? A. "I

was there in the night yardmaster's office for a while. I went then and got some breakfast. I had not eaten anything since I left home, and then I went out and inquired the way to the hospital, and found that it was two miles away, but that the street cars run right by there, and in the meantime I was out around the yards a good deal before I started away." Q. "Now, you were back in that car again after you went out of it—went back in there with the night yardmaster." A. "Yes, sir, me and the night yardmaster were there a half hour; all of a half hour." Q. "Now, on the front of the coach, was that well lighted?" A. "No, sir. The yardmaster had his lantern there." Q. "Was that a vestibule car?" A. "Yes, sir."

(To the admission of each and all of said questions the dedefendant at the time objected and excepted.

Other facts stated in opinion.

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

Appellant's manner of lighting and opening doors and raisings the platforms in order to enable the trainmen to perform their services was not negligence. 106 N. Y. 136; 60 Am. R. 433; 12 Am. & Eng. R. Cas. 163. The court erred in the admission of evidence as to the condition and lighting of train three or four days subsequent. 58 Ark. 454; 6 Am. Neg. R. 199; 48 *Id.* Ev. § 52. It is only where a passenger is injured by the operation of a train or by a defective appliance that the presumption of negligence arises. 70 Ark. 481; 27 Am. & Eng. R. Cas. 132; 11 Atl. 815; 28 Atl. 140. No act of negligence alleged by the plaintiff was the proximate cause of the injury. 69 Ark. 402; 58 Am. & Eng. R. Cas. 448; 4 Am. Neg. Cas. 294. In walking upon this platform without any precaution and stepping into space without knowing where he was going, he was guilty of contributory negligence. 24 S. W. 563; 71 Ark. 590; 46 *Id.* 528; 18 Atl. 663; 60 Am. R. 433.

J. V. Walker, for appellee.

Appellee by walking into the vestibule of the car under the circumstances was not negligent, and assumed no risk by so doing. 95 Va. 187. Ordinarily a person would be guilty of contributory negligence for occupying a dangerous position in a car, but even this has its modifications. 108 U. S. 288; 20 S. W. 182; 39 Mo.

468; Elliott, Railroads vol. 4, § 1633. The negligence complained of applied to the platform of the car. There was no error in the admission of the testimony of appellee's son; for it all referred to the condition of things at the place where the injury occurred.

WOOD, J. (after stating the facts.) It is the duty of railroads as common carriers of passengers to exercise ordinary care to provide their stations and cars with reasonable appointments for the safety and essential comfort of their passengers. *St. Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136, and authorities cited.

The particulars of alleged negligence to which the complaint directs inquiry are: "in not causing to be kept down in its place the trap door over the steps leading into the said car, and in not keeping closed the upright door for the entrance from the ground into said car by means of steps attached thereto, and in keeping said trap door open and said upright door open, and in failing to provide lights on or about the front platform of said car and steps."

All these allegations of negligence, in the opinion of the majority of the judges, are without evidence to sustain them. The uncontradicted proof that the trap doors to the vestibule coaches were raised in order to enable the brakeman to discharge their duties in the switching of the cars, and that it was customary to raise them in cities the size of Fort Scott should have elicited a verdict in its favor upon all the allegations of negligence except the failure to provide lights on or about the front platform of the car and steps. The proof showed that in cities the size of Fort Scott it was customary to lock the water closets to the coaches. That being true, it was absolutely essential to the comfort of the passengers that they should not be deprived of egress and ingress from and into the cars. The lifting of the trap doors and opening the upright doors to the vestibules, which are alleged as negligent acts, not only show the absence of any negligence, but the exercise of proper care for the safety and comfort of passengers. For otherwise the passengers, during the time the coach was detained for transfer, would be imprisoned with no opportunity to answer just such a call as appellee had in this case, or any other emergency that the necessities of the situation might demand. This, aside

from the requirements of the switching service, shows that these allegations of negligence were groundless.

The majority of the court are also of the opinion that the verdict should have been in favor of appellant upon the undisputed facts on the alleged negligence "in failing to provide lights on or about the front platform of the said car and steps."

The testimony of appellee himself, as bearing on this point, is as follows: The reason he came there to the door, he was hunting the water closet; thought he might have got to the wrong door when he tried the one that was locked, and as he come to the door and stopped and looked out, it was so dark that he could not see out there; the dark part is on the side the water closet was on, on the left side. He says on the other side near the depot there was a big light. "I guess it was an arc light, but it did not shine in there." Says when he came to the door he hammered on the door; thought perhaps the man was still out there. He knocked on the door, and did not hear anything, and he looked and did not see anything out there, and he took a step on the platform and fell to the ground. He was asked if he saw the lights shining in there between the top and the floor of the car on the steps on that side, and answered "No." He says he did not see any lights; just what little light that comes through the car door. He also said that he did not remember to have seen any light on the steps.

The testimony on behalf of appellant shows that the platform was well lighted by electric arc lights on both sides of the track on which the coach was standing when appellee was injured. The whole testimony, taken together, causes the majority to conclude that the appellant had exercised all the care that the law required to light its car platform, that under the circumstances the law did not require that the company have lights in the vestibule of the car. That the lights in the car and from the depot building, and especially the arc lights on both sides of the track on which the car was located, met every requirement of ordinary care to provide the passengers a reasonably safe exit and entrance upon the car, should they desire, for any reason, to debark therefrom while the car was in waiting.

The court is therefore of the opinion that the verdict is

contrary to the undisputed evidence, that the trial court erred in refusing appellant's first prayer for instruction declaring "that the proof has failed to show any act of negligence of the defendant company."

The court deems it unnecessary to discuss other questions. While voicing the opinion of the majority, I do not concur in the conclusion that the court erred in refusing the first prayer of appellant for instruction. I am of the opinion that the questions of negligence and contributory negligence, upon the whole, were for the jury.

I concur in the judgment of reversal, however, upon the ground that the court erred in admitting the testimony of Ola Larsen. It related to a subsequent trip, by appellee's son, necessarily under different circumstances, and was therefore clearly incompetent and prejudicial. I am also of the opinion that the court erred in its rulings in granting, refusing and modifying certain prayers for instructions. But my individual views upon these could serve no purpose.

Judge BATTLE concurs in the judgment of reversal for the reason that in his opinion the undisputed evidence shows that appellee was guilty of contributory negligence. He is of the opinion that the question of negligence was for the jury.

The judgment is reversed, and the cause is remanded for further proceedings.

MARION COUNTY v. BONDS.

Opinion delivered January 21, 1907

COUNTY—LIABILITY FOR EXPENSES OF SMALLPOX CASES.—Kirby's Digest, § 1457, regulating claims against counties for nursing persons afflicted with smallpox, provides "that no person shall be allowed a greater sum for services rendered * * * under the provisions of this act than is customary for such services in other cases." *Held,* that the county court could allow such amount for services performed in smallpox cases as would be reasonable for similar services in other cases.

Appeal from Marion Circuit Court; *Elbridge G. Mitchell,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee Ritter filed an account against Marion County "for waiting on and nursing smallpox patients at J. D. Hardy's under direction of board of health, ten days at $5 per day, from April 24, to May 5, 1906," total $50.

Appellee Bonds filed an account "for waiting on and nursing the family of Chas. Covington, under the direction of board of health, while afflicted with smallpox, for twenty-six days at $5 per day, total $130; also for assisting in burial of three persons who died of smallpox, $25. The county court allowed Ritter's account for $25.71 and Bonds' for $150. Both appealed to the circuit court.

The causes were by consent tried together before the circuit court sitting as a jury. The testimony to sustain the judgment in favor of appellee Bonds was, that he waited upon the family of one Chas. Covington, which was afflicted with smallpox; that he attended them day and night for twenty-six days, and had to do all the work. He not only waited on the sick patients during the time, but did other work at the house and barn. They were a large family. Several of them died. The fever was loathsome. He had no help except as the members of the family would help him as they got well. Two of the members of the medical board agreed to pay $5 per day.

Appellee Ritter nursed two families ten days, and charged $5 per day for his services. He did the same character of work, nursing smallpox patients and doing other work about the premises during the time. Both Bonds and Ritter, in addition to nursing the smallpox patients, did cooking, washing and milking for the families while the affliction was on. The work was heavy. Several witnesses testified that $5 per day was a reasonable charge. Both Bonds and Ritter agreed to do the nursing for $18 per week, but when they saw the character of the work concluded that they should have $5 per day, and put in their claim for that amount. The appellee Ritter says that, if he had been receiving the pay in cash, three dollars a day would have been reasonable, and that he made the charge because

he found the pay would be in scrip, and he had to leave his farm and pay a hand meanwhile seventy-five cents per day to run it.

There was evidence on behalf of appellant to the effect that it was worth about $18 per week to nurse smallpox patients; also that nurses were employed to nurse a lady in Yellville who was afflicted with nervousness at from $7 to $15 per week.

The court refused to declare the law as follows:

"The court declares the law to be that nurses who wait upon smallpox patients are to receive no greater compensation than is granted in other case of fever in the locality where the work is performed, and under this rule of law $18 per week is a reasonable charge to have been made by these two plaintiffs, and the judgment will be for $18 a week for the time that they worked, and each of them worked.

"3. The court declares the law to be that, L. L. Ritter having admitted that his work was worth only three dollars a day, and having admitted that he expected to receive $18 a week for his services, the said L. L. Ritter is estopped to charge any greater sum than three dollars a day, and the judgment will be for him for the time that he worked at three dollars a day."

The court declared the law as follows: "That the plaintiffs were entitled to the value of their services according to the market value for such labor in other fever cases; that is, according to the wages paid for labor generally in like services, and declares that five dollars a day was reasonable wages for the plaintiffs, and declares that they were entitled under the evidence to this sum."

Exceptions were saved to the court's rulings, and this appeal was duly taken.

G. J. Crump, for appellant.

1. It was error to permit appellees to direct their testimony solely to the reasonable cost of nursing smallpox cases. The test is, What was the reasonable charge for nursing other fever cases? Kirby's Digest, § § 1455-7.

2. If the finding of the trial court is so obviously against the weight of the evidence as to be palpably unjust, this court will reverse. 26 Ark. 371.

3. Ritter, having admitted that $3 per day was all his services were worth, can not be permitted to recover more.

W. S. Chastain, for appellees.

1. The appeal should be dismissed. A county can appeal only by the county judge or some citizen and taxpayer. Kirby's Digest, § 1493; 60 Ark. 516; 5 Enc. Pl. & Pr. 300, 301.

2. If it is held that the record discloses sufficient facts to give this court jurisdiction, then the judgment below should be affirmed because the bill of exceptions reveals no reversible error. No exception to evidence or law as declared by the court is properly saved. The court having tried the case sitting as a jury, appellant, having failed to ask for a declaration of facts, can not now complain. The findings of a court sitting as a a jury upon an issue of fact are conclusive.

3. The evidence was amply sufficient to sustain the findings and judgment.

WOOD, J., (after stating the facts.) Section 1455, Kirby's Digest, provides that it shall be lawful for the county court to allow accounts incurred by any person in preventing the spread of, and in nursing and caring for persons in their respective counties who have not been afflicted with, smallpox.

Section 1456 provides for the method of stating and presenting the account.

Section 1457 provides, among other things, "that no person shall be allowed a greater sum for services rendered * * * under the provisions of this act than is customary for such services in other cases." The purpose of the law was to enable county courts to aid in the suppression of smallpox, but at the same time they are prevented, by the last clause quoted *supra,* from making exorbitant allowances for services rendered during the dread and stress of such contagions. They can not allow greater amounts than customary charges for "such services in other cases," *i. e.,* other cases than smallpox.

The court correctly declared the law. The appellees made out their cases by proof that the charges made were reasonable for the service they rendered. The proof that they worked night and day, not only nursing the stricken ones but doing the household work besides, was sufficient to sustain the court's finding. The criterion for determining the proper amount is

the value of such services, *i. e.* the service of nursing the sick, doing household duties, etc., made necessary on account of the disease, if *such service or similar service* were performed in other cases than smallpox. The lawmakers intended that no unusual and extravagant charge should be allowed on account of the exigencies produced by the dreadful disease. But in the present cases, even if the amount allowed for nursing, under the proof, would have been unreasonable, the fact that appellees performed in addition customary household duties, made necessary by reason of the contagion, amply sustains the court's finding.

There is nothing in the proof to estop appellee Ritter from claiming the amount that was allowed him. He had made no contract with the county, and the question at last was the value of his services as measured by the rule above announced. Judgment affirmed.

FOGG v. STATE.

Opinion delivered January 21, 1907.

1. DYING DECLARATIONS—ADMISSIBILITY.—Before a dying declaration is admissible, it must be shown that it was made under a sense of impending death, which may be inferred from the language or conduct of the declarant, or from other circumstances of the case which tend to show the state of his mind. (Page 418.)
2. SAME—CREDIBILITY.—The admissibility of dying declarations is for the court to determine; their credibility, when admitted, is for the jury. (Page 419.)

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

R. H. Buckner, for appellant.

That portion of the testimony of the witnesses which purported to be the dying declaration of Monroe Nelson should have been excluded. Dying declarations are admissible only when made *in extremis;* when the party is at the point of death, and every hope of the world is gone; when every motive to false-

hood is silenced, and the mind is induced by the most powerful considerations to speak the truth. 1 Greenleaf, Ev. (16 Ed.), 245, § 156; 2 Ark. 229; 2 Johns. 31. See, also, 10 Am. & Eng. Enc. Law (2 Ed.), 368. A belief that he will not recover is not of itself sufficient; there must also be the prospect of almost immediate dissolution. 1 Greenleaf, Ev. (16 Ed.), § 158; 75 Ark. 142.

Robert L. Rogers, Attorney General, and *Sam M. Wassell,* for appellee.

The testimony complained of was competent. If appellant conceived it to be erroneous to admit it, he should have objected to it when offered. 76 Ark. 276; 1 Wigmore on Ev. § 18.

McCULLOCH, J. Appellant, Crawford Fogg, was convicted of murder in the first degree, and appeals to this court from the judgment of conviction. He is accused of killing one Monroe Nelson, in Chicot County, on Sunday, August 19, 1906, about eleven o'clock in the forenoon. Appellant and deceased lived in the same neighborhood, and deceased was shot in the woods not far from his home. Deceased left home in the morning of the killing, and was seen riding off to the woods. Shortly afterwards, according to the testimony of one of the witnesses, appellant left the house of his mother, with whom he lived, and went towards the woods with a gun in his hand, and passed out of sight into the woods. In about half hour afterwards a gun shot was heard by witness, so he testifies, in the direction appellant had gone and also loud hallooing as if some one was in distress. It developed that the hallooing was done by deceased who rode out of the woods and fell from his mule in a short distance from the house where one of the witnesses was staying. He was found to be wounded, and stated that he was going to die, and that appellant had shot him. He stated that, as he rode through the woods, his mule scared at something, and he looked around, and saw appellant, who leveled his gun and immediately fired on him. He died the next day from the effects of the wounds. Several witnesses testified to these statements of deceased, and that he had previously declared his belief that he was going to die, and the testimony went to the jury without objection from appellant, but before the case was finally submitted to the jury his counsel asked the court to exclude all the statements

of deceased on the ground that the proper foundation had not been laid for their admission as dying declarations. It is now contended that the court erred in refusing to exclude the testimony, and that the case should be reversed on that account. The basis of the contention is that the testimony does not show that the alleged declarations were made *in extremis* and under the settled belief that the declarant was beyond hope of recovery from his wounds.

Mr. Greenleaf, in discussing this question, says: "It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death. But it is not necessary that they should be stated, at the time, to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind." 1 Greenleaf, Ev. (16 Ed.), § 158.

The question of admissibility of the declarations as evidence—whether or not the proper foundation has been laid for establishing their competency—is primarily one for the court. The court must first determine whether or not the declarations appear to have been made under circumstances which render them competent as evidence, and then admit them, if found to be competent, for the consideration of the jury, to be given such credit upon the whole evidence as the jury may see fit to attach to them. *Dunn* v. *State*, 2 Ark. 247; *Evans* v. *State*, 58 Ark. 47; 1 Greenleaf, Ev. § 160.

It being the duty of the trial judge to decide the facts upon which the admissibility of the declarations as evidence depend, we must, on appeal, give such effect to his finding as we would to any other finding of fact by the court or jury.

Now, testing the question before us by these rules, we conclude that there was no error in the ruling of the trial court. There is abundant evidence to warrant a conclusion that the alleged declarations were made under such circumstances as to

render them competent as evidence of appellant's guilt. The credit and effect to be given to them was a question for the jury.

When deceased returned from the woods immediately after he was shot, he fell from his mule, and had to be carried, helpless, to the house. He was badly wounded, and died the next day from the effect of the wounds inflicted. He appeared to be suffering great pain, and in this condition he told those present that he expected to die, that appellant shot him in the woods; and he detailed the circumstances. Certainly, the court was warranted in finding from this testimony that deceased was then *in extremis,* and realized his condition.

It is argued that, conceding the declarations of deceased to be competent, the evidence is not sufficient to sustain the verdict. Some of the witnesses were kin to deceased, and the testimony tends to show that some of them were prejudiced against appellant. The acting coroner, who held the inquest, testified that, though these witnesses were present at the inquest, nothing was said then about declarations having been made by deceased fixing guilt upon appellant. These things made the testimony of the witnesses somewhat unsatisfactory; but the jury had the witnesses before them, and evidently accepted their statements as the truth. If credit be given to it, the evidence is entirely sufficient. The case went to the jury upon instructions which were not objected to at the time, and which are not objected to here by appellant's counsel. We see nothing in the record which warrants us in disturbing the verdict. If the witnesses are to be believed at all, appellant is guilty of a shocking murder, and must suffer the penalty of his crime.

The judgment is therefore affirmed.

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MARQUETTE TIMBER COMPANY v. CHAS. T. ABELES COMPANY.

Opinion delivered January 21, 1907.

REFORMATION—SUFFICIENCY OF EVIDENCE.—To justify reformation of a written instrument on the ground of an alleged mistake, the proof of such mistake must be established, not merely by a preponderance of the evidence, but by proof that is clear, unequivocal and decisive.

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

C. P. Harnwell, for appellant.

1. From the testimony it is unquestionable that both Abeles and Savage knew and understood that the property conveyed by the quitclaim deed did not contain one-half of the land in question. It is clear that there was not only no mutual mistake, but no mistake on either side, it being known and understood that Abeles was getting only what was described by metes and bounds. Cases relied on by appellee, 31 Ark. 252, and others, do not apply, the decisions being based upon mutual mistake.

2. The contention that appellant had notice of Abeles's contention because he was in possession is not borne out by the proof, which clearly shows that he was only in possession by leave of appellant.

3. As against Oscar Davis, trustee, no reformation could be had, as it is conceded that he had no notice of Abeles's contention; besides, the deed from Frank Savage to appellant was a warranty deed.

4. Appellee can not attack the validity of the incorporation of the Marquette Timber Company. That is the province of the State in a direct proceeding. One dealing with even an ostensible corporation, as such, is not permitted to deny its corporate capacity. 58 Ark. 103; 47 Ark. 269; *Whipple* v. *Tuxworth, ante* p. 391.

Morris M. Cohn, for appellee.

1. The testimony shows that the conveyance of one-half of the tract was in contemplation of the parties; that appellee paid for the north half of the tract and received a deed therefor supposed to describe the north half according to the description based upon the line fixed by the surveyor. Upon discovery, a few days later, of the error, the attention of Frank Savage was called to it, and he agreed to look into it, and, if true, to remedy it.

2. The fact that parol evidence has to be introduced in connection with plats and writings does not militate against the reformation of an instrument. 69 Ark. 406; 71 Ark. 614; 75 Ark. 524; *Id.* 382; 76 Ark. 189. Mistakes of parties in discrib-

ing lands intended to be conveyed will be corrected, and the conveyances reformed. 48 Ark. 498; 49 Ark. 397; 50 Ark. 179; 51 Ark. 390; 31 Ark. 252; 34 Ark. 85. In none of the above cases was the mutuality of the mistake conceded, but the decisions were based upon the theory that an honest person ought, in the light of the evidence, to have conceded the mistake. See, also, 50 Ark. 179; 60 Ark. 304; 61 Ark. 123.

3. Appellee, being in possession of the strip in controversy long prior to the conveyances to Marquette Timber Company and to Oscar Davis, trustee, which is alleged in the complaint and not denied in the answer, is entitled to reformation as against both; and this is true even if otherwise they were purchasers for value without notice. 76 Ark. 25; 33 Ark. 465; 34 Ark. 533; 37 Ark. 195; 47 Ark. 533. The deed from Frank Savage to Marquette Timber Company being a quitclaim deed, that company and its privies in estate were put on notice. 50 Ark. 322; 34 Ark. 590; 11 Wall. 217; 27 Fed. 160. And by his deed of trust Davis as trustee was put on notice that the timber company held under a quitclaim deed. A vendee is affected with notice of recitals in the vendor's deed. 29 Ark. 650; 43 Ark. 464; 37 Ark. 571; 50 Ark. 322. And a purchaser by quitclaim deed is not entitled to protection as a purchaser for value without notice. *Cases supra;* 12 Wall. 323.

4. The attempted organization of the Marquette Timber Company was void. 1 Thompson, Corp. § § 55, 56. See, also, 5 *Id.* § 5803.

McCULLOCH, J. On April 6, 1903, Frank F. Savage purchased at a sale under decree of the chancery court an irregularly shaped tract of land, containing 18 acres, in Pulaski County near the city of Little Rock, the purchase price being $13,500, which was paid in cash. About the time the purchase was made Savage and Charles T. Abeles, acting for appellee company, entered into negotiations for purchase of a portion of said tract by said company, and on April 15, 1903, Savage conveyed to said company the north part of the tract, describing it by metes and bounds, for the sum of $5,250 cash paid. Soon afterwards he sold and conveyed the remainder of the tract to appellant, Marquette Timber Company, a corporation in which he was a stockholder. The part conveyed to appellee was not quite half of the tract

purchased by Savage at the judicial sale. If the description in appellee's deed had placed the south line of the tract conveyed 15 feet further south, the deed would have embraced one-half of the whole tract purchased by Savage—the north half.

Appellee instituted this suit in equity for reformation of the deed, alleging that Savage sold and agreed to convey to appellee one half of the land he had purchased, but that, on account of mistake in measurement, the deed failed to properly describe the tract intended to be conveyed. The suit was originally brought against Savage and the Marquette Timber Company and a mortgagee of the latter. Savage died after the suit was brought, and before any testimony was taken.

The defendant answered, denying that any mistake was made in describing the land intended to be conveyed, and alleging that appellant, Marquette Timber Company, had purchased the remainder of the tract and paid for same without any knowledge or information concerning any claim of appellee thereto.

The controversy is over the strip 15 feet wide running through the center of the original tract. Appellee says it was intended to be embraced in its deed, and that the deed should be reformed so as to include it.

The evidence concerning the transactions between the parties is furnished principally by Charles T. Abeles, the president of appellee company, and S. M. Savage, one of the officers of appellant company. The latter was a brother of Frank F. Savage, and claims to have been present when the transactions between his brother and Abeles occurred. These witnesses agree upon the point that Abeles wanted half of the tract, but they differ as to the agreement. Abeles says that Frank F. Savage agreed to sell to him for his company the north half of the tract, and to convey it to him as soon as they could measure it and ascertain the correct description. Savage denies this. He says that it had ben previously understood that the Marquette Timber Company should have the whole tract for a mill plant, and that his brother Frank would not agree for Abeles to have the north half of it until they could have it measured and the boundary line ascertained, so as to determine whether the sale of that much of it would interfere with the plans of the timber company.

They agreed upon a surveyor to run the lines dividing the north half from the south half, and to furnish a description of the north half. The surveyor did the work, but made a mistake in fixing the dividing line between the two halves—placing the line 15 feet too far north. He marked off the line, but told both parties at the time (Savage and Abeles) that he was doubtful whether or not it was correct. Notwithstanding this admonition, the conveyance from Savage to appellee company was made according to that description, and Abeles accepted it and paid the price. The witnesses again disagree radically as to what then transpired between them. Abeles says that Savage agreed, when he executed the deed, to correct any mistake in the description that might be subsequently ascertained. S. M. Savage says that nothing of the kind occurred; that the deed correctly described all the land intended to be conveyed; that no more was agreed to be conveyed than the part described in the deed; and that the delivery of the deed and payment of the price finally closed the transactions between them. He testifies further that his brother did not definitely agree to let Abeles have the land until the surveyor ran the line and established the boundary, and that then, after it was seen that the part to be conveyed to Abeles would not interfere with the plant of the Marquette Timber Company, and would leave the quantity of land desired by that company for its mill plant, he agreed to make the conveyance. About a week later the surveyor discovered his mistake in the measurement and reported it to Mr. Abeles, and the latter subsequently reported it to Savage and demanded a correction of the description in the deed.

This is substantially all the testimony, and upon it the chancellor decreed a reformation of the deed.

The testimony of the surveyor, whose description was taken, sheds little light upon the point in controversy, as he only testified to the effect that he was instructed to divide the tract equally, the north half from the south half, and establish the line, and that he made the mistake of 15 feet in fixing the division line. Neither party disputes the truth of his testimony. Appellee's right of reformation depends entirely upon the unsupported testimony of Mr. Abeles, its president; and upon every material point his testimony was contradicted by that of Mr. Savage, who

is equally interested on the side of appellants. Upon this state of the proof ought a court of equity to reform a deed of conveyance executed, delivered and accepted by the respective parties thereto? If so, the written engagements of contracting parties would have little sanctity. The most that can be urged in favor of appellee's side of the controversy is that the testimony, at the crucial points, is evenly balanced. Nor can that much be claimed for it when it is noted in connection with the conflict between the testimony of Abeles and Savage, that the former accepted a conveyance containing a description which, according to his claim, was then of doubtful correctness, paid the purchase price and filed the instrument for record without waiting to ascertain definitely whether the description was correct or not.

The fact that the deed was immediately executed, delivered and recorded as soon as the surveyor established the line, after telling them it was doubtful whether the description was correct, strongly corroborates the claim of Savage that the deed correctly described all the land intended to be conveyed, and that the parties agreed upon the land described as that to be conveyed, whether it turned out to be half of the original tract or not.

This court has often held that even a mere preponderance of parol evidence is not sufficient to overturn the terms of a written instrument and warrant its reformation, and that, in order to accomplish that, the evidence "must be clear, unequivocal and decisive." *McGuigan* v. *Gaines,* 71 Ark. 614; *Goerke* v. *Rodgers,* 75 Ark. 72. The case of *Goerke* v. *Rodgers* was similar to this. There the testimony was evenly balanced, two witnesses of equal credit testifying on each side, and the chancellor decreed a reformation, but this court held that the evidence was insufficient to overturn the written instrument, and reversed the case. The application of that principle is fatal to appellee's right to reformation. It has not established the right, even by preponderance of the evidence; much less by evidence "clear, unequivocal and decisive."

We think the learned chancellor was wrong in the conclusion he reached, and his decree must be reversed.

Appellee questions the validity of the conveyance from Savage to appellant company on the alleged ground that the corporation had not then been organized; but appellee, being denied

the right to a reformation as against its grantor Savage, is in no position to question his subsequent conveyance to appellant.

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

ON RE-HEARING.

Opinion delivered February 11, 1907.

McCULLOCH, J. We are asked to reconsider the case and affirm the decree of the chancellor, or at least to modify our former decision so as to direct a decree against appellants, restraining them from interfering with appellee's use of a railroad spur or switch track running across the strip of land in controversy. After careful reconsideration of the question of appellee's right to a reformation of the deed from Savage, we see no reason to change the conclusions expressed in the former opinion. The evidence is insufficient to justify a reformation of the deed.

The other question of appellee's right to use the switch was not discussed in the former opinion, and we do not now deem it proper to pass upon it as the proof on this issue was not sufficiently developed below to establish the rights of the parties in this respect. It is not shown whether the switch runs across the strip in controversy or whether at that point it is not within the limits of the railroad right of way. Mr. Abeles testified that the railroad company claims a right of way 50 feet wide on each side of the track, and that if it is as wide as that it covers the place where the switch crosses the strip in controversy. The proof does not, however, show definitely the width of the right of way. So we have no means of ascertaining from this record whether the switch is on the land of appellant or of the railroad company. Nor does the proof show that appellant has attempted to prevent appellee from using the switch. We do not, therefore, think there is enough before us to justify us in passing upon the rights of the parties with reference to the switch.

The former judgment of the court will be modified so as to make the dismissal of appellee's complaint without prejudice to

the right to litigate the question which may arise in dispute between the parties with respect to the use of the switch. In all other respects the prayer of the petition is denied. It is so ordered.

DIERKS LUMBER & COAL COMPANY v. CUNNINGHAM.

Opinion delivered January 21, 1907.

1. APPEAL—CONTRADICTION OF DECREE.—A recital in a decree appealed from that evidence was heard which does not appear in the transcript can not be contradicted by the clerk's certificate that the transcript contains all the evidence in the case, as the clerk's duty is limited to sending up a duly authenticated transcript of the record. (Page 428.)
2. SAME—PRESUMPTION.—Where a decree appealed from recites that evidence was heard by the court which has not been preserved in the record and copied in the transcript, it will be presumed on appeal that the omitted evidence sustained the decree. (Page 428.)

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

Sain & Sain and *Kirkpatrick & Schwind*, for appellant.

1. When the appellant introduced its deed from the State, a *prima facie* case was made, and it was under no further obligation to prove the truth of the recitals in the deed. Sand. & H. Dig., § 4569; 49 Ark. 275. By this deed it is shown that the land was the property of the State at the time the deed purporting to convey title to the appellee was executed.

Being the property of the State, appellee could not incumber it by making improvements. 57 Ark. 474.

RIDDICK, J. This is an action by W. P. Cunningham to quiet his title to forty acres of land in Howard County upon which he resides and to cancel a deed executed by the Commissioner of State Lands to the Dierks Lumber & Coal Company conveying this land to that company as land which had been forfeited to the State for non-payment of taxes.

The evidence showed that the plaintiff Cunningham had been in the actual possession of this land for over seven years.

paying taxes on it continuously, claiming it as his own under color of title openly and adversely, and that he was entitled to the relief prayed for if the tax forfeiture on which the deed of the Land Commissioner to defendant was based was invalid.

Now, the chancery court found that the land was sold for $1.02 in excess of the legal taxes, penalty and costs, and that for that reason the sale was void. Counsel for appellant contend that there is no evidence whatever in the record here to support this finding, and that is true. We find nothing in the transcript bearing on the validity or invalidity of this tax title under which defendant claims, but the decree of the chancery court recites that the cause was submitted to that court and heard on the complaint, answer thereto, depositions, etc., "and the tax for the year of 1884 and the record of delinquent lands sold by the collector of Howard County for taxes for the year 1884 on part of plaintiff and the tax deed of the defendant," from which the court found that the forfeiture and sale were void as before stated.

The recitals in the decree therefore show that there was evidence before the chancery court that has not been preserved in the record and copied in the transcript. It is true that the clerk has certified that the transcript is a true, perfect and complete transcript of all the papers, pleadings, exhibits, record entries and evidence in the case, but under our statute the clerk is not required to certify to the fact that the transcript contains all the evidence in the case. His duty is to send up a duly authenticated transcript of the record. Kirby's Digest, § § 1194, 1195. He may have done that in this case, but it does not follow that the recitals in the decree that other evidence was heard by the court is false, for the parties may have failed to make this evidence a part of the record by filing it or by obtaining a proper order of the court to that effect. As the recitals of the decree show that other evidence was heard by the court which has not been preserved in the record and copied in the transcript, the presumption must be that such evidence sustains the judgment. *Carpenter* v. *Ellenbrook,* 58 Ark. 134; *Hershy* v. *Baer,* 45 Ark. 240. For these reasons the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. KNIGHT.

Opinion delivered January 14, 1907.

1. CARRIER—TAKING PASSENGER BEYOND STATION—CONTRIBUTORY NEGLIGENCE.—Where, through the carrier's negligence, a passenger was carried two miles beyond his station before the train stopped, and he walked back in the rain, and became sick from exposure, it can not be said, as matter of law, that he was guilty of contributory negligence in deciding to walk, or that he assumed the risk of doing so. (Page 430.)

2. SAME—ALLOWANCE OF ATTORNEY'S FEE.—Kirby's Digest, § 6621, providing that in all actions at law or suits in equity against any railroad company "for the violation of any law regulating the transportation of freight or passengers by any such railroad, if the plaintiff recover in any such action or suit, he shall recover a reasonable attorney's fee," etc., permits a recovery of such fee only as a penalty for violation of a statutory regulation of rairoads, but not for carrying a passenger beyond his destination. (Page 431.)

Appeal from Prairie Circuit Court; *George M. Chapline,* Judge; reversed in part.

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

1. Conceding that the appellee's testimony is true, still, in view of the facts that he was earning at the time only $45 per month, and that the distance was only about two miles, which he could walk in not exceeding one hour; and in view of the further facts that he could have remained on the train with the loss of only one day's time, and that he voluntarily debarked from the train, knowing the condition of the weather, the verdict was not only excessive, but appellee ought not to have recovered at all because of his own contributory negligence. 67 Ark. 123; 18 Am. & Eng. R. Cas. 254; 74 Mo. 147; 78 Mo. 610; 71 Ill. 391; 54 Ark. 431; 1 S. W. 629; 6 Am. & Eng. R. Cas. 341; 5 Mo. App. 7.

2. The statute, Kirby's Digest, § 6621, can not be invoked in aid of a recovery of an attorney's fee for carrying a passenger beyond his destination, as it was not in violation of any statutory regulation. 80 S. W. 579. See also Rev. Stat. Mo., 1899, § 1107; 20 S. W. 32; Kirby's Digest, § 6212; 55 Mo. App. 123; 67 Mo. App. 156.

Bradshaw, Rhoton & Helm, for appellee.

1. The verdict will not set aside because it is excessive. Kirby's Digest, § 6217; 35 Ark. 494; 58 Ark. 139.

2. Under the statute, upon recovery in such cases, the plaintiff is entitled to recover a reasonable attorney's fee to be taxed as costs. It is not within the province of a jury to tax costs in a case, hence there was no error in the court fixing the amount of the fee.

RIDDICK, J. This is an appeal from a judgment in favor of S. H. Knight against the defendant railway company. On the 4th day of March, 1902, Knight took passage on the train of defendant from Stuttgart to Ulm, both places being on the line of defendant's railway. When the train arrived at Ulm, through some oversight the train did not stop, and plaintiff was carried two miles past the station. It was a rainy and disagreeable day for walking, but, as plaintiff had arranged for a buggy to meet him at Ulm, and as the circumstances made it very inconvenient for him not to stop there, he alighted from the train and walked back to Ulm. He had no umbrella, and was wet and muddy when he arrived at the station, and on account of the exposure he contracted a severe cold, became sick and lost several days from work. The jury assessed his damages at seventy-five dollars, and the court allowed an attorney's fee of fifty dollars.

The first contention is that the amount allowed by the jury was excessive. As plaintiff, according to his own testimony, was only earning forty-five dollars a month, if there was nothing but the fact of the walk back to the station, a distance of two miles, the judgment would be excessive, but plaintiff suffered an attack of sickness as consequence of exposure to rain. It will be conceded that, when this sickness is considered and the loss of time in consequence thereof, this judgment is not excessive. But counsel for defendant contends that this sickness can not be considered, for it was the result of plaintiff's own negligence in exposing himself to the weather. Now, plaintiff was under the impression that if he did not get off the train he could not get another train back until the next day. He had directed that his horse and buggy be taken to Ulm to meet him at the train, so that he could drive across the country to DeVall's Bluff, where he had business to look after. These and

other circumstances in proof show that it would have been very inconvenient and annoying to plaintiff to have been compelled to remain on the train. When the train stopped, he was called on suddenly to decide whether he would walk back to Ulm or remain on the train. The danger of being made sick by exposure to the weather may have seemed to him slight, for it is not often that a man of average health will be made sick by a walk of two miles, even when he is exposed to a shower of rain on the way. The negligence of defendant's employees put plaintiff suddenly in a situation that he was compelled to decide at once whether he would remain on the train and go away from the station to which he wished to go or walk back to the station, and we can not say under these circumstances that he acted imprudently in deciding to walk, or that he assumed the risk of doing so. Counsel for appellant admit that the jury were properly instructed, and, the jury having passed on these questions under proper instructions, we do not think their verdict should be disturbed.

The other question presented is whether the court erred in taxing the defendant with an attorney's fee of fifty dollars. The statute under which this fee was allowed is as follows:

"In all actions at law or suits in equity against any railroad company, its assignees, lessees or other person or persons owning or operating any railroad in this State or partly therein, for the violation of any law regulating the transportation of freight or passengers by any such railroad, if the plaintiff recover in any such action or suit, he shall also recover a reasonable attorney's fee, to be taxed up as a part of the cost therein and collected as other costs are or may be by law collected." Kirby's Digest, § 6621.

In *Kansas City So. Ry. Co.* v. *Marx,* 72 Ark. 357, we said that the Legislature could not discriminate against railroad companies and tax them with attorney's fees when other litigants were not subjected to such liabilities, but that they could authorize them to be taxed with attorney's fees in judgments against them for violating statutory regulations, the fee in such a case being a part of the penalty for violating the statute. The court held that this statute had reference to such violations, and the question as to whether an attorney's fee can be taxed against

the company in this case for the benefit of the plaintiff depends on whether this is an action for the violation of a statutory regulation. Now, it is not alleged in the complaint that any statute was violated by defendant, nor is there any reference to a statute in the complaint. The charge is that, through the negligence of the employees of the company, the train did not stop at the depot, but ran by and stopped some distance beyond. Defendants were liable for the damages caused by such negligence under general rules of law, without regard to any statute, and we do not think that, under the pleadings in this case, the defendant has been tried or convicted of having violated an express statutory provision such as authorized the court to impose a penalty upon the defendant in the nature of an attorney's fee.

For these reasons the judgment as to the attorney's fee will be set aside, and in other respects affirmed.

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OSCEOLA LAND COMPANY v. HENDERSON.

Opinion delivered January 21, 1907.

REMOVAL OF CLOUD—LACHES.—A suit to recover a cloud on the title to land is barred by laches where defendants and those under whom they derive title have paid the taxes on the land for more than thirty years and made vast improvements thereon, while plaintiff and its grantor have slept on their rights until the land has become valuable.

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

Chas. T. Coleman and *J. T. Coston,* for appellant.

1. The tax sale of 1893 was invalid.

2. Compare Arkansas and Illinois statutes on seven-year payment of taxes. Kirby's Digest, § 5057. 1 Wall. 638. The Illinois statute being the earliest enactment, the courts of that State have established the precedents for the construction of such legislation. Without exception such statutes are strictly construed, and it is held, (1) that a purchase at a tax sale, or a

redemption, will not be treated as a payment, and (2) that the payment must be made by, and in the name of, the holder of color of title. 53 Pac. 426; 47 Ill. 21. If it be conceded that, instead of buying the land, Driver actually paid the taxes, such payment by him, he having no color of title, could not inure to the benefit of Henderson, who did have color of title. 26 Ill. 525; 109 Ill. 101; 23 Ill. 392; *Id.* 512; 26 Ill. 521; 129 Ill. 30; 20 Ill. 403; 19 Ill. 385; 107 Ill. 403; 183 Ill. 548; 133 Ill. 313; 47 Ill. 480; 30 Ill. 327; 46 Ill. 521; 45 Ill. 391; 87 Ill. 259.

3. The record affirmatively shows that the seven payments were not made by defendants and those under whom they claim. Being a record required by law to be kept by the clerk and the evidence of what was done at a tax sale, it could not be contradicted by parol testimony. 61 Ark. 42. If the record can not thus be contradicted, the court can not consistently permit a payment to be proved, in the face of a record which shows that there was no payment, but a sale; especially where the effect of such testimony is to take the title from the plaintiff and vest it in the defendant. 21 Ill. 462; 88 S. W. 567.

G. W. Thomason, J. D. Block and *W. J. Driver,* for appellees.

1. In this case the plaintiff must proceed upon the strength of its own title, and not the weakness of the defendants'. 37 Ark. 46-83; 75 Ark. 312. A fatal defect exists in appellant's muniments of title, in this: the decree mentioned as the third muniment, which authorized Jarnigan, as guardian and trustee, to sell and convey the land in controversy, directed a report of the sale to be made by him to the court. This report recites a sale to Wm. H. Chatfield, trustee, and was confirmed, and the guardian and trustee was directed to convey the lands to him. No conveyance was made to Chatfield, but was made to John J. Mitchell, as is shown by appellant's fourth muniment of title. These defects can not be cured by the decree of the Mississippi Chancery Court rendered in 1899 in an action between Haggart & McMasters *v.* A. H. Chatfield, trustee, and Mary C. Gilbert, reciting that John J. Mitchell was the purchaser, and that the report of the guardian that Chatfield was the purchaser was

a clerical misprision. Nowhere in appellant's chain of title does it appear that Haggart & McMasters have ever had or claimed title to the lands in controversy; and the record discloses that, at the time this decree was rendered, H. R. Allen was a claimant under the Jones title, and C. E. L. McCauley was a claimant under a tax title, that neither of them was made a party to the suit, and they are not mentioned in the decree. In so far as it seeks to affect the lands in controversy, the decree is a nullity and subject to attack, either directly or collaterally. 49 Ark. 397; 58 Ark. 181; 59 Ark. 483; 60 Ark. 369; 62 Ark. 439; 34 Ark. 291.

2. The owner of land can show actual payment of taxes; and, in so far as may be necessary in so doing, contradict the record showing of a sale. 35 Ark. 585; 51 Ark. 397; 19 Ill. 183; 26 *Id.* 507; 80 *Id.* 183.

3. Payment of taxes by the holder of the vendor's lien inured to the benefit of appellees. The holder of a vendor's lien is, in contemplation of law, a mortgagee. 14 Ark. 628; 60 Ark. 595. By virtue of their liens and the relation created thereby, Driver & Thompson and Hale & Crenshaw were charged with the duty of paying the taxes on the land, and precluded from purchasing at a tax sale. 2 Cooley on Tax. (3 Ed.) 708; 30 Ark. 453; 73 Ark. 45. See, also, 70 Wis. 111; 73 Ia. 423; 89 Cal. 196; 109 Cal. 268.

4. Under the doctrine of laches appellant's claim is barred. At no time from the year 1879 to the year 1903 did appellant and those under whom it claims pay taxes on these lands, or assert any claim or title thereto. It is apparent that appellant and its immediate vendors regarded the claim as a merely speculative one. Equity will not permit them to remain idle, refuse to pay the taxes lawfully assessed against the land, and speculate upon its enhanced value at this late day. 94 U. S. 159; 120 U. S. 534; 160 U. S. 237; 178 U. S. 207; 42 Ark. 289; 55 Ark. 85; 60 Ark. 50; 75 Ark. 312; 120 Fed. 893.

J. T. Coston and *Murphy, Coleman & Lewis,* for appellant in reply.

1. If the sale made pursuant to the original decree named as appellant's third muniment of title was actually made to

Mitchell, instead of Chatfield, as stated in the guardian's report, and the sale was confirmed, though the name of the purchaser was erroneously stated in the report, this vested the equitable, if not the legal, title in Mitchell, and that is sufficient for the purposes of this suit. 77 Ark. 242. The heirs of Wm. H. Chatfield were duly notified, appeared by attorney, and consented to the *nunc pro tunc* order correcting the record so as to show that Mitchell was the actual purchaser. The court had plenary power to make this correction by *nunc pro tunc* order. 1 Black on Judgments (2 Ed.), § 161; 33 Ark. 475; 9 Ark. 185; 45 Ark 240; 40 Ark. 224; 105 Wis. 323; 50 Mo. 145; 123 N. Y. 520. It may correct a clerical misprision with respect to the names of parties on its own motion at any time, and it is always in the power of the court, even after adjournment of the term, to correct a mistake in the entry of its own judgment. 33 Ark. 218; I Black on Judgments (2 Ed.), § 155; *Id.* § 160; 51 Ark. 287; 24 Wis. 477; 16 Fed. 708; 43 Mo. App. 168; 9 Col. App. 41; 90 Mich. 270; 68 Wis. 248; 62 Minn. 498; 17 Am. & Eng. Enc. of L. (2 Ed.), 818; 33 Cal. 480; 63 Tex. 435; 41 Ala. 292; 8 Mont. 305; 75 Ark. 12. Appellees were not parties to the proceedings to correct the record, could not have objected to the order if they had been present, and were not entitled to notice. 136 Fed. 27. The *nunc pro tunc* decree was admissible against the appellees for the purpose of making out a chain of title. 35 Ark. 321.

2. The sole ground set up in the answer upon which appellees seek to base the application of the doctrine of laches is that appellees have paid the taxes for a number of years. This is not sufficient. 75 Ark. 194; 70 Ark. 256; 50 Ark. 390; 45 Ark. 81.

RIDDICK, J. This action was brought against the defendants by the Osceola Land Company to quiet its title to 1,280 acres of wild and unimproved land in Mississippi County in this State.

In this complaint plaintiff alleges that in February, 1879, the State of Arkansas by its patent conveyed the land in controversy to W. A. Jones. The chain of title under which plaintiff claims the land commences with this conveyance from the State to Jones in 1879. This patent from the State to Jones is

not set out in the record, but there is an agreement of counsel in the following words: "That the abstract of title to the lands in controversy be and the same is hereby agreed to be used in evidence as the evidence of the title under which the lands are claimed in lieu of copies of such records as may pertain to same and which may be mentioned in said abstract of title."

Counsel for defendant by this agreement seems to have admitted that the State by its patent conveyed this land to W. A. Jones in 1879, yet, if we concede that plaintiff holds by mesne conveyances from W. A. Jones, there is still no allegation and nothing to show the nature of this patent from the State or the recitals therein, nor is there any allegation or evidence to show that the State was the owner of the land at the time it was conveyed to Jones. Defendants in their answer allege that these lands were entered by W. A. Jones about 1858, and that he received a certificate of purchase therefor from the State; that afterwards for a valuable consideration he transferred the certificate of purchase to W. C. Davie; that Davie conveyed the land to Rice Stewart, who paid taxes on the land continuously from 1858 down to the year 1892, when Stewart died. In 1893 the land was sold for the non-payment of the taxes for the year 1892, and purchased by C. E. McAuley, under whom defendants hold.

Taking these two opposing chains of title set up by plaintiff and defendants in connection with the agreement of counsel above referred to, we may assume that the State did own this land, and that W. A. Jones, under whom plaintiff claims, purchased it from the State sometime about 1858, and that afterwards in 1879 a patent was issued by the State to Jones conveying him the title. But the lands became subject to taxation so soon as they were purchased. The evidence shows that they were on the tax books in 1872, and that one Rice Stewart claimed these lands and paid taxes on them from that date down to 1892, when, as before stated, the lands were forfeited for taxes and purchased by C. E. McAuley. McAuley and those holding under him paid the taxes from the time of his purchase down to 1901. The facts in reference to the discharge of the taxes of 1901 is as follows. The father of defendants died some months after the taxes for that year became due, and on account of his sickness or for some other reason the taxes were not paid

before the day of the sale of land for non-payment of taxes. But Hale and Crenshaw, who, as shown hereafter, claimed under McAuley, held a vendor's lien on the land for half the purchase price which the ancestor of defendant agreed to pay them, and in order to protect their interests Mr. Hale of that firm requested Driver and Thomason, from whom they had purchased the land, and who held a vendor's lien on it for unpaid purchase money, to attend the sale, and, if the taxes were not paid, to pay them. There is record evidence tending to show that the lands were offered for sale, and were struck off to Driver and Thomason for the amount of the taxes, penalty and costs. The money to make this purchase was furnished by Hale and Crenshaw, Driver and Thomason only acting as their agents in the purchase. The testimony of both Driver and Hale shows that the intention was simply to pay the taxes to protect their interests and that of the defendants. Without deciding that this purchase of the land at tax sale was, under the circumstances, a payment of taxes within the meaning of the act of 1899, which declares that those who pay taxes on wild and unimproved land under color of title shall be deemed to be in possession of same, it was, as between the defendants and their vendors who made the purchase, nothing more than a payment of taxes. The defendants and those under whom they claim also paid the taxes for 1902. In July, 1903, the plaintiff made application to redeem these lands from the tax sale of 1902, and in 1904 it paid the taxes for 1903, and in August of that year commenced this action to cancel the title under which defendants claim.

The plaintiff does not claim title under Rice Stewart, and his payment of taxes for twenty years previous to 1892 was made under a claim of title adverse to its claim. From 1892 up to 1903, as we have shown, the taxes on these lands have been discharged by defendants and those under whom they hold. It thus appears that for thirty years previous to 1903 neither the plaintiff nor those under whom it holds paid any taxes on these lands. The lands remained wild, unimproved, remote from railway lines and of little value up to about 1896. After that date the evidence shows that there was a considerable rise in value. McAuley in 1893 purchased this land for the taxes of 1892, being less than one hundred dollars. In 1900 he sold it to John B.

Driver, and Driver sold a half interest to Thomason for $1.50 per acre, being nearly two thousand dollars. About a year later these parties sold the land to Hale and Crenshaw for several times that amount, and they in turn sold to the ancestor of defendants for a price amounting to several thousand dollars. At the time these sales were made neither the plaintiff nor those under whom it holds had paid any taxes on the land for over a quarter of a century, and apparently had abandoned all claim to the land, either because it doubted the justice of its claim, or, what is more probable, because it thought that the lands were not worth the taxes that were assessed against them.

But in recent years vast improvements have been made affecting the value of these lands. Levees have been built protecting them from overflow, railways constructed, making the timber upon them accessible to market, and plaintiff and those under whom it holds, after sleeping on their rights for a quarter of a century, have awakened to the fact that these lands are valuable. But the long and continued neglect of the plaintiff to pay taxes upon or assert any claim to the lands was calculated to make those parties who dealt with and purchased these lands from other claimants believe that if those under whom plaintiff claims ever had any title to the land, they had long since abandoned all claims thereto. Under this belief they invested considerable sums of money in purchasing these lands, and we are of the opinion that plaintiff is not in a position to ask a court of equity, which aids the vigilant but discourages the enforcement of stale claims, to aid it in cancelling the title of defendants.

This question was discussed in the case of *Turner* v. *Burke, ante* p. 352, where under somewhat similar circumstances this court held that the plaintiffs were barred by laches.

In discussing a question of this kind in a recent case the Supreme Court of the United States said: "One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an

abandoned right which no court will enforce. * * * There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity, and the present case fully illustrates that proposition." *Moran* v. *Horsky,* 178 U. S. 205. See also *Galliher* v. *Cadwell,* 145 U. S. 368; *Felix* v. *Patrick,* 145 U. S. 317; *Meyer* v. *Johnson,* 60 Ark. 50. It is true that mere delay does not, of itself, bar the plaintiff. "Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith become so changed that he can not be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. This disadvantage may come from loss of evidence, change of title, intervention of equities and other causes; for where the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." *Chase* v. *Chase,* 20 R. I. 202; 5 Pomeroy, Equity, § § 21-23.

It has become a maxim of the law that "equity aids the vigilant, not those who slumber on their rights." It was said by a distinguished judge in an old case that "a court of equity * * * has always refused its aid to stale demands, when the party has slept upon his rights and acquiesced for a great length of time." "Nothing," said he, "can call forth this court into activity but conscience, good faith and reasonable diligence." Lord Camden in *Smith* v. *Clay,* 3 Brown, Ch. 638.

There are other defenses set up by defendants, but it is unnecessary to consider them, for the reason that we are of the opinion that the plaintiff and those under whom it holds title have been guilty of such laches that the chancellor was, on that ground alone, justified in refusing the relief prayed and in dismissing the complaint for want of equity.

Judgment affirmed.

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RANKIN v. SCHOFIELD.

Opinion delivered December 2, 1905.

1. APPEAL—FORMER OPINION AS LAW OF CASE.—The opinion of this court on a former appeal herein is the law of the case, and can not be re-examined, modified or set aside. (Page 462.)
2. JURISDICTION—DEFINITION.—Jurisdiction may be defined as the right to adjudicate concerning the subject-matter in the given case, to constitute which there are three essentials: first, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be in substance and effect within the issue. (Page 462.)
3. DECREE—WHEN NOT RESPONSIVE TO ISSUES.—Where a complaint in a partition suit alleged, and the answer in effect admitted, that the lands were divisible, but the issue was as to who were the heirs of the decedent, a decree of the court directing that the property be sold for division, without hearing evidence to determine who were the heirs, and whether the lands were susceptible of division, was without the issue. (Page 462.)
4. INFANCY—COMPROMISE DECREE—VALIDITY.—A compromise decree entered with the consent of the guardian of an infant defendant, but without the concurring sanction of the court, was rendered without the infant's consent, and, where rendered without the issues in the case, was absolutely void. (Page 463.)
5. JUDICIAL SALE—VALIDITY.—A purchaser at a judicial sale under a void judgment acquires no title. (Page 463.)
6. INFANCY—RIGHT TO SHOW CAUSE AGAINST DECREE.—Under Kirby's Digest, § 6248, providing that an infant, within twelve months after arriving at the age of twenty-one years, may show cause against any order or judgment against him, a decree against an infant does not become absolute until expiration of the time allowed to show cause. (Page 463.)
7. SAME.—While mere irregularities or errors in the proceedings of the court will not invalidate a sale of an infant's land to a stranger, although the infant applies to set the decree aside within the time allowed by Kirby's Digest, § 6248, such sale will, on application in due time, be set aside upon a showing that the decree was void. (Page 464.)

Appeal from Woodruff Circuit Court; *Thomas B. Martin*, Special Judge; affirmed.

STATEMENT BY THE COURT.

In 1882 Betty Gibson obtained in the Woodruff Circuit Court

a decree of divorce from her husband, J. N. S. Gibson, known as "Spott" Gibson, on the ground that he was insane. The decree gave Mrs. Gibson the custody of their child, Sallie Spott Gibson. On the 5th day of April, 1884, Gibson died in Woodruff County, leaving an estate of personal and real property. On the 27th day of the same month L. D. Snapp was appointed administrator of the estate, and took charge of it. On the 2nd day of of July, 1886, Octavia Mitchell and others, sisters and nephews of Gibson, filed a complaint in equity in the Woodruff Circuit Court against Sallie Spott Gibson, her guardian, J. P. Fourshee, and her mother, Bettie Harwell, wife of W. A. Harwell, formerly wife of Gibson. Plaintiffs alleged that they were the heirs of Gibson, that Gibson at the time of his marriage was impotent, and so remained, and that the child, Sallie Gibson, was not Gibson's child, but was the natural child of some person unknown to plaintiffs, and that J. C. Fourshee had been appointed her guardian. They further alleged that Mrs. Harwell was not entitled to dower in Gibson's estate, that the personal estate of Gibson had been administered, that only $631 of debts of the estate remain unpaid, and that the administrator held possession of the lands of the estate. They prayed that the rights of the plaintiffs to the land be determined by the court, that a commissioner of the court state an account showing the amount of debts of the estate for which the lands of the estate are bound, and that, upon payment thereof by the plaintiffs or an extinguishment thereof by the rents of the lands, the lands be partitioned between plaintiffs according to their rights, and "for all other and proper relief."

Sallie Spott Gibson appeared by her guardian, J. P. Fourshee, and filed her answer, in which she denied the allegations of the complaint, and alleged that she was the legitimate child of Gibson and Bettie Harwell, and their only heir, and prayed that the complaint be dismissed, and "for such other relief as she may be entitled to."

Mrs. Bettie Harwell also filed an answer in which she denied that Gibson was impotent, and alleged that Sallie Spott Gibson was the legitimate child of herself and her former husband, Gibson, and entitled to estate, subject to dower and homestead rights. She admitted the decree of divorce, but alleged that it

was void, and did not affect her rights in the estate of Gibson. She asked that the complaint be dismissed for want of equity, and that "'commissioners be appointed to lay off the homestead, giving her 160 acres of the land and the mansion house and one-third of the remaining portion of the land during her natural life, and for such and further relief as she may be entitled to."

The depositions of many witnesses were taken, bearing on the question as to whether Gibson was impotent or not at the time of his marriage to Bettie Fourshee and afterwards, and whether or not he was the father of Sallie Spott Gibson. Some of the witnesses testified positively that Gibson had been castrated before his marriage and was impotent. Others testified positively to the contrary.

On hearing, the court, after counsel had argued the case, took the matter under consideration. Before he announced his decision the parties came to an agreement, and a decree was then entered by consent. The decree, after reciting the allegations of the complaint and denials of the defendants, proceeds as follows:

"And it appearing that numerous depositions have been taken, and the litigation herein is likely to be long and tedious of family matters; now, therefore, in order to put an end to litigation, and as an amicable adjustment and settlement of a family affair in regard to the descent, inheritance and settlement of the right of plaintiffs and defendants in regard to all the real and personal estate of the said J. N. S. Gibson in the hands of said administrator, it is hereby ordered, considered and decreed by the court, as well as by the consent and agreement of all parties hereto, both plaintiff and defendants, that said estate be equally divided, giving the plaintiffs one-half thereof, and the defendants, Sallie Spott Gibson and Bettie Harwell, as their rights may appear, the other half, and that the administrator file a settlement of said estate, including the rents of 1889, to be approved in the probate court of Woodruff County; that said lands be sold by W. E. Ferguson as special commissioner, etc."

This decree was rendered in February, 1889, and the land was sold by a commissioner appointed by the court at public sale in 1889 to L. B. McDonald. The sale was duly reported to the court and confirmed, and a deed conveying the lands to Mc-

Donald was executed by the commissioner and approved by the court in February, 1892.

When Sallie Spott Gibson came of age, she took an appeal from the decree under which the land was sold, and the decree was reversed, and the cause remanded for further proceedings. After the case was remanded Sallie Spott Gibson, who had married Rankin, filed a petition for restitution against Antoinette Bond and other heirs of L. B. McDonald, who was now dead. She alleged that the decree under which McDonald purchased and took possession of the lands owned by Gibson was void, and prayed that she have restitution of the lands owned by Gibson and for an account of all rents and profits received, and that she have judgment therefor.

Antoinette Bond and the other defendants appeared and filed an answer in which they denied that the decree under which McDonald purchased the land was void, but alleged that while it was in full force and effect the land was offered for sale under it by the commissioner of the court, and purchased by McDonald for the sum of $14,050, he paying one-third cash, and the balance in one and two years after the sale; that he was an innocent purchaser for value, that he took possession and made valuable improvements in good faith; and that by his purchase he obtained a good and valid title to the land. They also pleaded the statute of limitations both for seven and five years, and asked that the petition for restitution be denied.

The court found that Sallie S. Rankin was the legitimate daughter of Gibson and his wife, Bettie Gibson, that the decree under which the lands were sold, though erroneous, was not void, and that L. B. McDonald acquired a valid title to the land against all parties to that suit, and gave decree accordingly, from which judgment Mrs. Rankin appealed.

Gustave Jones and *Rose, Hemingway & Rose,* for appellant; *H. F. Roleson, P. R. Andrews* and *N. W. Norton,* of counsel.

1. The decision on the former appeal (71 Ark. 172) settled, first, that the decree under which the lands were sold was invalid as a consent decree; second, that it was invalid because it was not the emanation of a judicial mind. That decision is the

law of the case, even if wrongly decided. 63 Ark. 141; 10 *Id.* 186; 13 *Id.* 103; 16 *Id.* 168; 29 *Id.* 174. The lower court had no authority to review the judgment of this court. 1 Ark. 436; 18 *Id.* 292; 26 *Id.* 17; 5 *Id.* 200; 60 *Id.* 55. This court will review or correct its former decision on second appeal. 14 Ark. 427; 63 *Id.* 141; 67 Id. 483. Appellees are bound by admission of record as to appellant's legitimacy. 15 La. 363. Such admission may read in any other suit on any other issue. 68 Ga. 218; 74 Cal. 191; 55 Ark. 85; 54 Am. Dec. 628; 26 Ala. 363; 2 N. C. 420; 1 Green. Ev. § 195; 43 Am. Dec. 300; 11 Md. 396; 27 *Id.* 210; 33 *Id.* 157; 143 U. S. 28; 22 Wall. 32; 50 Ala. 63; 15 Atl. 433. If an offer to compromise contains an independent admission of a fact, because it is a fact, it will be received. 1 Green. Ev. § 192; 19 La. Am. 362; 43 *Id.* 1062; 13 S. & M. 443; 63 Pa. St. 24; 20 Am. Dig. column 1086. That the "family settlement" was void, does not affect the admission. 33 Ark. 593; 48 *Id.* 243; 77 N. W. 908; 44 Pac. 658; 1 Green. Ev. § 27. The judgment of the probate court granting letters of administration to Snapp, if not reversed or vacated, estops the McDonald from claiming any interest in the estate of Gibson. 13 Wall. 465. Plaintiffs will not be permitted to occupy inconsistent positions. 57 Ark. 632; 96 U. S. 267. Whatever was admitted on former appeal can not be denied on the present appeal. 9 Ark. 532.

A decree procured through fictitious or evasive proceedings is fraudulent and void. 126 Fed. 119; 54 Pac. 218; 129 U. S. 86. A judgment by confession, to be valid, must be entered in a court having jurisdiction over the parties and subject-matter. 2 Freeman on Judgments, 547. Consent can not confer jurisdictinn. 49 Ark. 443. Where the record discloses that the court had no jurisdiction of the proceedings, any judgment rendered in it is void. 9 Ark. 73; 29 Ark. 188; 38 *Id.* 159. A court of equity has no inherent power to direct the sale or mortgage of the real property of infants. 42 N. E. 11. Such sale is void, and passes no title. 6 Hill, 415; 75 S. W. 232; 29 S. E. 1014; 59 S. W. 862. The power to sell the lands of an infant depends upon the Constitution or on statutes. 47 N. Y. 27; 80 S. W. 797. The requirements of the statute providing the method by which an infant's lands may be sold must be strictly pursued to vali-

date such sale. 12 N. E. 592; 65 N. Y. 294; 75 Ga. 95; 39 Ark. 237. Equitable jurisdiction can be exercised only where the relief offered by the probate court is inadequate or imperfect, or where its proceedings have miscarried through fraud, accident or mistake. 49 Ark. 55. Constitution of 1874 fixed exclusive jurisdiction in probate courts. 51 Ark. 167. Chancery has no jurisdiction to convert the real estate of an infant into personalty, and a decree for that purpose is void on its face. 16 S. W. 1096; 16 S. W. 1096. So also a sale for any purpose is not authorized by statute. 117 Fed. 105; 19 Atl. 535; 34 Ark. 63; 50 Ark. 222; 92 Mo. 422. A decree which is not in response to the issues made or relief sought is void. 34 N. J. L. 418; Kirby's Digest, § 6249; 29 S. E. 1014; 29 Ark. 650; 43 *Id.* 467; 60 *Id.* 599; 62 Ark. 443; 93 U. S. 282; 55 Ark. 565; *Ib.* 205; 78 N. W. 485; 34 Atl. 68; 20 Cal. 352; 30 Mich. 336; 65 Pac. 465; 2 Dev. & B. Eq. 37; 2 Hill, S. C. 51; 73 Ill. 415; 65 Pac. 153; 43 Atl. 483; 82 Ill. Ap. 153; 92 Tex. 486; 40 Ark. 287. Judgments are conclusive only of matters that were directly in issue. 42 Me. 429; 26 Ind. 378; 4 Iowa, 199; 12 Conn. 365; 77 Iowa, 523. An infant cannot consent to a decree of partition. 30 So. 257. Where improved lands are held adversely, or where the title is in dispute, they are not subject to partition. 27 Ark. 92; 40 *Id.* 155; 70 *Id.* 432; 44 *Id.* 334; 47 *Id.* 238; 56 *Id.* 399. Where the lands are in possession of the administrator for the payment of debts, there can be no partition until administration is disclosed and debts are paid. 43 Conn. 556; 35 N. W. 693; 41 *Id.* 1065; 59 *Id.* 52; 33 N. J. Eq. 77; 11 S. E. 1068; 4 Tex. 285. Appellant, holding adversely to all plaintiffs, could not be made a party to suit for partition. 63 Miss. 99; 139 Fed. 481; 34 S. W. 525; 16 Ind. 479; 29 *Id.* 527; 82 Ky. 502; 30 La. Ann. 139. Averment of seizure and possession by plaintiffs is essential to maintain partition. 2 Edm. Sol. Cas. 385; 56 How. Pr. 193; 43 N. C. 25; 89 N. C. 151; 14 R. I. 9. Court can not decree a sale until after commissioner's report showing necessity therefor. Kirby's Digest, § 5785; 70 Ill. 309; 29 S. W. 495.

2. Everyone claiming under a decree is bound by notice of all facts shown by the record. 4 Sand. Ch. 1; 68 Fed. 48; 50 Ark. 327; 58 Ark. 267; 42 N. E. 6; 12 Ark. 286; 69 Ark. 448. A purchaser becomes a party to proceedings resulting in a judi-

cial sale. 103 Ind. 555; 84 *Id.* 585; 97 *Id.* 463; 36 *Id.* 592. Possession by the administrator was notice to L. B. McDonald and to the defendants in the petition for restitution. 14 Ark. 75; 2 Crawford's Digest, column 1339; 69 Ark. 167. The burden is on the purchaser to prove want of notice. 56 Ark. 537; 12 *Id.* 286. A purchaser at a sale under a void judgment acquires no title. 58 Ark. 186. The statute (Kirby's Digest, § 6248) is notice to the world in cases where it applies, and there can be no innocent purchaser in such cases. 70 Ark. 415. A purchase of land at a judicial sale by a party to the suit will be void if on appeal the decree under which it is made is vacated or set aside. 54 Ark. 239. The principal is charged with notice of his agent's knowledge. 21 Ark. 22; 29 *Id.* 99. One who has possession under a decree that has been reversed may be dispossessed by a writ of restitution, though he may claim under an independent title. 83 Cal. 384.

Otis W. Scarborough, J. M. Moore, and *W. B. Smith,* for appellees.

1. Refusal of the probate court to appoint E. S. McDonald administrator would estop him only, and not the collateral kindred of Gibson, who were not parties to the proceeding. 3 Wall. 175; *Id.* 190; 4 Strobh (S. C.), 352. Its effect would be to exclude him and let his co-claimants in for the entire estate if they maintained their claims. 152 U. S. 301 & 314; 47 Fed. 547-549; 11 Paige, Ch. 81. Co-heirs do not claim through one another, and there is no privity between them. 23 Ga. 309; *Ib.,* 332; 49 Tex. 444.

A purchaser at a judicial sale becomes a party to the proceeding for all orders necessary to compel the perfecting of his purchase, and to be heard on all questions arising thereafter affecting his bid. 136 U. S. 95; 26 C. C. A. 171; 152 U. S. 594. He is only a party for the purpose of protecting his rights under the decree. 15 C. C. A. 439, and cases cited; 36 Ark. 605.

The rule that the decision of an appellate court upon a question of law arising in a case becomes a part of the law of the case applies only to the questions that are before it for decision. 52 Ark. 473; 47 C. C. A. 637; 85 Am. Dec. 403; 87 Am. Dec. 518. A consent decree by way of compromise approved by the court

on investigation is binding upon an infant. 2 D. G. J. S. 373; 6 Beav. 363; 155 Mass. 363.

Heirs may have partition of lands in the hands of an administrator. 19 Mich. 121; 39 N. W. 297; 26 So. 936; 41 N. H. 501; 19 Atl. 668; 7 Paige, 551. Possession of the administrator is not adverse to his heirs. 18 Ark. 495; 28 *Id.* 20; 53 *Id.* 559. It was necessary to a settlement of the trust that the rights of all parties should be settled in that proceeding. 57 Ark 236. Where the court of law is incompetent to do full and complete justice, a court of equity may rightfully take jurisdiction, and especially so in cases of concurrent jurisdiction. 29 Ark. 619; 23 Ark. 339; 59 N. W. 54; 110 Mo. 575; I Story's Eq. § § 531, 532. Where, by reason of any equitable element, a court of equity acquires jurisdiction, it will retain it for the settlement of all rights between the parties, so as to do complete justice. 37 Ark. 292; 48 *Id.* 312; 46 *Id.* 96. Mere irregularities in statutory proceedings for the sale of land do not render the sale void, or subject to collateral attack. 19 Ark. 499; *Ib.* 515; 31 Ark. 74; 38 Ark. 78.

Compromises are favored, as tending to prevent litigation and quiet title. 2 White & Tudor, Leading Cases in Eq., Part 2, p. 1703 *et seq.* and notes. Such compromises are especially favored if in settlement of family disputes. 91 Am. Dec. 761; 42 *Id.* 447; 81 S. W. 633; 79 *Id.* 751; 100 N. W. 7; 3 Swanst. 339; *Ib.* 470; 1 Atk. 2.

Chancery has general jurisdiction over persons and property of minors. 33 Ark. 428; 44 Miss. 648; 53 Ark. 43; 45 *Id.* 46; 38 Ark. 410.

A minor becomes a ward of the court whenever brought before it for any purpose as a party to a suit or other proceeding. 3 Pomeroy, Eq. Jur. § 1305; L. R. 10 Eq. 530; 3 K. J. 213; 68 N. E. (Ill.) 451; 46 Ala. 418; 35 Ind. 474; Walker's Chancery, Mich. 314. Chancery has power to compromise litigation and order sale of infant's real estate, whenever in the judgment of the court it is beneficial to the infant. 44 N. Y. 249; 33 N. C. 616; 3 Dessaus. (S. C.) 18; 1 Rich. Eq. (S. C.) 401; 45 Ark. 41; 38 Ark. 406; 53 Ark. 37; 55 Ark. 485.

2. After confirmation the rights of a stranger purchasing at a judicial sale will be protected. 20 Ark. 583; 40 Ark. 46;

18 *Id.* 53; 49 *Id.* 397; 34 Ark. 579. If he purchase under a decree while in force, he will be protected, though the decree may afterwards in a direct proceeding be set aside. 40 Ark. 46; 1 Black on Judgments, § 265; *Id.* 193; 2 Freeman on Judgments, § 513; 90 N. C. 199. The purchaser is not bound to inquire whether irregularities or errors intervened in the action of the court. 16 Wall. 202. When the jurisdiction of the subject appears, the proceedings are presumed to have been regular. 26 Ark. 421; 42 Pac. 93; 95 U. S. 391; 145 Ill. 517. A consent decree by way of compromise is binding on an infant until reversed, though there may have been no previous inquiry to ascertain it was for the infant's interest. 2 De G. J. and S. 373; 1 Brown's Ch. Rep. (Eng.), 425; 52 Tex. 194; 155 Mass. 108; 3 A. K. Marsh. 253; 29 Mo. 315; 3 Dev. (N. C.), 214; 3 Johnson's Ch. 367; 101 Ill. 185; 57 Miss. 193; 3 Ohio St. 389; 61 Ala. 304; 68 N. E. 149, 451, 453.

L. B. McDonald alone was purchaser at the sale, and was not chargeable with the knowledge of E. S. McDonald. 1 Hill, 568. Had they been joint purchasers, notice to one would not be notice to the other. 65 Tex. 708; 92 Ill. 391; 86 Ill. 69; 2 Barbour, 281.

3. Appellant was barred by statute of limitations, which commenced to run from confirmation of sale. 22 Ark. 486; *Ib.* 178; 58 Miss. 514.

Gustave Jones, Rose, Hemingway & Rose, N. W. Norton, H. F. Roleson and *P. R. Andrews,* for appellant, in reply.

1. This court has decided that the decree was not valid (1) as a compromise, (2) as a decree, and (3) that the court below purposely avoided investigating the merits. 70 Ark. 83; 71 *Id.* 168. No court, either probate or chancery, has power to sell an infant's land for mere conversion into money. Kirby's Digest, § § 3794, 3801.

Judgments import absolute verity, and can not be varied by parol evidence. 11 Ark. 368; 14 *Id.* 9; 20 *Id.* 641; 11 *Id.* 578; 33 *Id.* 475; 43 *Id.* 320; 86 S. W. 672.

2. If the court has no jurisdiction, a sale under its decree is void, and can be attacked collaterally. 2 Heisk. 384; 20 D. C. 134; 14 Barb. 336; 24 La. Ann. 251; 4 So. (La.) 328. If

the decree is not based on one of the grounds mentioned in the statute, it is void. 117 Fed. 105; 46 S. E. 605; 83 Va. 232; 14 Mo. App. 592; 15 N. J. Eq. 239; 2 Brewster, 609; 14 Fla. 544.

In this State the chancery court has no general power to sell the lands of an infant. 3 Ark. 531; 48 *Id.* 544; 50 *Id.* 222; 67 Ark. 239; 34 *Id.* 71; 33 *Id.* 581; 49 *Id.* 55; 50 *Id.* 39; 36 *Id.* 390; 40 *Id.* 441. It is a power not inherent in the chancery court, but is derived solely from the statute. 65 S. W. 850; 5 Sneed, 665; 1 Head, 357; 4 Comst. 257; 55 Ala. 297.

3. That the purchaser paid a fair price for the land is of itself no defense. 23 Ark. 266; 32 *Id.* 255.

A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. 171 U. S. 629; 93 *Id.* 165; L. C. E., 2 Vol. 153; 4 R. I. 173; 82 Ill. 538. Whatever puts a purchaser on inquiry is equivalent to notice. 14 Ark. 69.

Even if L. B. McDonald purchased without notice, his defense has no standing. 136 Fed. 5; 6 Blackf. 197; 29 Ark. 94, and cases cited; 4 Dana, 98; 16 Ark. 168; 35 Conn. 250; 70 Ark. 416.

4. Neither the minor nor her guardian being present nor represented by counsel at time of confirmation, there was no confirmation, and therefore no sale. The five years statute could not apply. 69 Ark. 539. The decree being void and the sale a nullity, the statute does not apply. 85 Mo. 526; 6 Kan. 73; 8 *Id.* 677; 5 *Id.* 509; 46 Ark. 106; 61 *Id.* 41; 55 *Id.* 218; *Ib.* 198; *Ib.* 84; 50 *Id.* 126; 53 *Id.* 204; 54 *Id.* 667; 67 *Id.* 43; 32 *Id.* 132; 33 *Id.* 820; 35 *Id.* 508; 44 *Id.* 292; 51 *Id.* 397; 61 *Id.* 160; 34 Fed. 701; Cooley, Const. Lim. 474.

Where two or more disabilities exist at the time the right of action accrues, the limitation does not attach until all are removed. Kirby's Digest, 5089. Appellant was under disability of infancy and coverture, which latter continues. She is not barred. 51 Ark. 297; 62 Ark. 316; 3 Johns. Ch. 138; 42 Ark. 305; 47 *Id.* 558; 64 *Id.* 412; 67 *Id.* 322; *Ib.* 95; 54 *Id.* 236.

RIDDICK, J., (after stating the facts.) This is an appeal from a decree denying a petition for restitution of lands sold under a former decree, which the chancellor held to be erro-

neous but not void. It is well settled, when lands are sold under a valid decree and purchased by one not a party to the proceedings who pays the purchase price and receives a deed to the lands, that the purchaser will be protected in his purchase, even though the decree under which the lands were sold be reversed and set aside on appeal. The mere fact that there were errors in the proceedings leading up to the decree is a matter of no moment, so far as the purchase is concerned, if the court had jurisdiction of the parties and the subject-matter and power to make the decree. Nor would the case be different if the purchaser had notice of such errors, for otherwise it would not be safe for any one to purchase at a judicial sale that was liable to be reversed on apepal. For on a reversal it could always be said that by an examination of the record the purchaser could have ascertained the errors. Learned counsel for appellant have discussed the doctrine of innocent purchaser at some length and with much spirit and force, but that doctrine has very little application to this case, for this is not the case of one who purchases from a fraudulent grantor with notice of the fraud, or of one who buys land from one having the record title with notice of an outstanding title. Notice in such a case renders the position of the purchaser no better than that of the grantor. But the purchase here was made at a judicial sale where errors do not affect the validity of the sale, and where notice thereof does not affect the purchaser. It is sufficient for the purchaser at such a sale to know that the court had jurisdiction and power to order the sale. If the court has power under a decree to order the sale, and a purchaser buys at a sale made under the decree, then, if the sale is confirmed by the court, and the purchaser pays the price and receives a deed, it is immaterial, so far as he is concerned, whether there were errors or not, for his title will not be affected by them. *Moore* v. *Woodall,* 40 Ark. 42; *Boyd* v. *Roane,* 49 Ark. 397; *England* v. *Garner,* 90 N. C. 197; *Cocks* v. *Simmons,* 57 Miss. 193; *Marks* v. *Cowles,* 61 Ala. 304; 1 Black on Judgments, 265.

It follows that the main question to be determined in this case is whether or not the court had the power to make the sale at which McDonald purchased this land. The suit in equity in which the decree for the sale of the land was made was

brought by certain relatives of J. N. S. Gibson, who claimed to be his only heirs at law, against Sallie Spott Gibson, now Mrs. Rankin, who, then an infant of tender years, was supposed to be the daughter of Gibson, and against Bettie Harwell, who had been the wife of Gibson, but had secured a divorce and married Harwell. The complaint alleged that Sallie Spott Gibson was not the child of Gibson, but the natural child of some man unknown to the plaintiffs, and that neither she nor her mother had any interest in the lands left by Gibson. Plaintiffs prayed that their rights be determined, that the lands be partitioned among them according to their rights, and for all other proper relief. The defendants filed an answer, denying the allegation of the complaint, and asked that it be dismissed. Mrs. Harwell also asked that commissioners be appointed, and that her dower and homestead rights be assigned and set apart for her, and both defendants asked for all such other relief as they were entitled to.

In the first place, the fact that the administrator was in possession of the lands did not in our opinion affect the jurisdiction of the court to decree a partition of the lands of the estate among the heirs on payment of the debts of the estate by them. The administrator had been appointed over two years, the amount of the debts were known, and, upon the heirs paying or offering to pay the debts, the court had the right to partition the land among them, for the holding of the administrator was not adverse to the heirs, and the fact that no one was in possession of the lands holding adversely to the heirs made it necessary for these claimants to go into a court of equity to have their respective rights and interest determined. *Trapnall* v. *Hill,* 31 Ark. 345; *Davis* v. *Whittaker,* 38 Ark. 435. As the defendants were also claiming the land, and as neither the plaintiffs nor the defendants were in possession, a court of equity was the proper forum to determine their rights. And if it was found that the land was owned by both plaintiffs and defendants, then a court of equity, in order to do complete justice and settle all controversies between the parties arising out of the land, could order a partition thereof between them. The equity courts of this State have the power, independently of the statute, to make partition of lands, and incidentally to

order a sale thereof when a sale is necessary to do justice between the parties. *Patton* v. *Wagner,* 19 Ark. 233.

When it is alleged and proved that the best interests of both parties will be subserved by a sale of the land, the court may order a sale without first appointing commissioners to pass upon the necessity of a sale. The failure to appoint commissioners certainly does not affect the jurisdiction of the court or the validity of the sale. If that was an irregularity, it can not be urged against a judgment on collateral attack, which is the only matter of importance to be considered in this case. *Bell* v. *Green,* 38 Ark. 78.

The question as to whether a court of equity has power to order a sale of an infant's lands for investment or for other causes, when it clearly appears that such a sale would be to his benefit, has been much discussed by the courts. Such power was not exercised by the English courts of equity, and many American courts follow the English rule that a court of equity has no power, by ordering the sale of an infant's land, to convert it into personal property or to make any disposition of the inheritance that will bind the infant.

The English rule is said by some courts to be founded on the wide difference that existed "under the law of England between realty and personal property with respect to their enjoyment and devolution, passing as they did in different lines of succession, and being capable of disposition by will at different ages." The opinion of quite a number of American courts that these considerations should have little weight in the United States, where the differences between realty and personalty in these respects have been almost wholly obliterated, has led them to reject the English rule, and to hold that in this country courts of equity have the power to sell or mortgage the lands of infants for their benefit. This jurisdiction is exercised cautiously, and never unless it is clearly made to appear that a sale will be to the decided advantage of the infant.

The cases bearing on this question have been reviewed and the law clearly stated on this point by Mr. Stewart in an extended note to the recent case of *Richards* v. *Ry. Co.,* 6 Am. & Eng. Dec. in Eq. (1st series), 488. The question was considered by this court in *Shumard* v. *Phillips,* 53 Ark. 37, where

Chief Justice COCKRILL approved the statement of Chancellor Cooper in *Gray* v. *Barnard,* 1 Tenn. Ch. 298, to the effect that the rule was based mainly on the minor's want of power to convey, and the "fact that the court was unable to supply him with the power or to authorize another to do for him what he could not do for himself." But he said that "in this State the difficulty of divesting the title had been remedied by a statute—a vestige of the ancient practice remaining in allowing the infant one year after reaching majority to show cause against a judgment in certain cases." The reasoning of that case seems to support the contention that in this State the courts of equity have power to order the sale of an infant's land, though the court declined to state whether the Constitution of 1874 took away the jurisdiction of equity over the persons and estates of minors, and so left the question undecided.

But we regard it as unnecessary to determine that question in this case, for it has always been the rule, both in this country and in England, that courts of equity have the power, where the decree is by consent, to order the sale of an infant's real estate in proceedings for the partition of lands, or when necessary to secure or protect the rights of other parties. *Davis* v. *Turvey,* 32 Beav. 554; *Hubbard* v. *Hubbard,* 2 Hem. & M. 38; *Thorington* v. *Thorington,* 82 Ala. 489; *Bent* v. *Miranda,* 8 N. Mex. 78; *McGowan* v. *Lufborrow,* 82 Ga. 523; *Shaffner* v. *Briggs,* 36 Ind. 55; In re *Simmons,* 55 Ark. 485.

A judgment of that kind may be entered by the consent of the parties, even though an infant be a party to the proceedings; and where the infant is properly represented, he will be as much bound by such a decree as an adult. For an infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of a suit to the same extent as a person of full age is bound. As a matter of course, before pronouncing a decree by consent against an infant, the court should make inquiry and ascertain that the decree will be for the benefit of the infant. But the failure to make inquiry does not affect the jurisdiction or power of the court to render the decree, for it would never do to hold, when a court has jurisdiction of the parties and of the subject-matter, that the mere failure of the judge to properly consider the matter before rendering his judgment invalidated

his judgment and rendered it void. Such a rule would provide a new and effective means whereby judgments could be assaulted and overthrown on collateral attack, and finds little or no support in the adjudged cases. For this reason, while courts should, as before stated, always make inquiry before rendering decrees affecting the property of infants, yet, if the court having jurisdiction does without inquiry pronounce a judgment by consent in a case where an infant is a party, the infant is as much bound by the decree, until set aside by some direct proceeding authorized by law, as if there had been the fullest inquiry and an express determination that the decree was for his benefit. *Thompson* v. *Maxwell Land Grant Co.,* 168 U. S. 451; *Tripp* v. *Gifford,* 155 Mass. 108, s. c. 31 Am. St. Rep. 530; *Walsh* v. *Walsh,* 116 Mass. 377; *Cox* v. *Lynn,* 138 Ill. 195; *Gusdofer* v. *Gundy,* 72 Miss. 312; Fletcher, Eq. Plead. & Prac. § 711; 1 Black on Judg. (2 Ed.), 197.

But it is said that the decree is void in this case because the complaint did not allege that the sale of the land was necessary, and did not ask for a partition of the land against the defendant or for a sale of the land. The plaintiffs, it is true, alleged and contended that the defendant had no interest in the land. They alleged that the lands could be partitioned in kind between themselves, but they asked also for all other proper relief. The answer of Mrs. Harwell, one of the defendants, after alleging that the lands were owned by defendant, and that the plaintiffs had no interest therein, asked for an assignment of the homestead and dower; and, as before stated, both of the answers and cross-complaints concluded with a prayer for general relief. Now, we do not regard it as a jurisdictional defect that the complaint alleged that the defendant had no interest in the lands, and asked for no partition between them; for, under the prayer for general relief, when it was determined that the defendant had an interest in the lands, the court had the right to completely dispose of the controversy, and to order a partition of the lands between them. As an incident to that, it had the right to order a sale of the lands, if necessary to make the partition and to do complete justice between the parties. For, under the prayer for general relief, the parties may have special

relief other than that prayed for by the bill. Fletcher's Eq. Plead. & Prac. 734 & 735; 1 Black on Judg. § 197.

"The court," says Mr. Bliss, "may grant any relief consistent with the case made and embraced within the issue. If the facts put in issue and established by evidence entitled the party to any relief in the power of the court to give, although not that demanded, it is the duty of the court to give it, and its power to do so is not conditional upon the form of the prayer." Bliss on Code Pleading, § 161.

It is clear, we think, that the pleadings in this case were sufficient to authorize the judgment by consent, for that judgment was within the scope of the case made by the pleadings. The judgment being by consent, the pleadings must be treated as amended so as to sustain the judgment. In other words, as the parties could by consent have amended their pleadings, so as to ask for a sale of the land, and to show that it was necessary in order to make partition without prejudice to some of the parties, we must treat this as in effect done when they consented to a decree for partition and to a sale of the land for that purpose. In this collateral attack upon the decree and the sale thereunder we must assume that the parties representing the infant defendant honestly believed that it was to her interest that a decree of that kind should be made, and that the evidence justified this belief. As the court had power to order a sale of the land for partition, such a decree was binding on all parties before the court, infants as well as adults, until reversed or set aside on appeal or in some way provided by law.

We see nothing in this case that justifies the assertion that the parties to the suit in which the decree was rendered committed any fraud upon the court. It was in no sense a fictitious proceeding brought to impose upon the court and secure its judgment by fraudulent methods, but a *bona fide* suit between parties claiming interests in land adverse and hostile to each other. The parties were each represented by learned counsel. After the evidence had been taken and was before the court the parties compromised and agreed to a decree settling their rights because it was deemed the best thing to do under the circumstances. There is not, in our opinion, the slightest ground to hold that there was anything fraudulent or dishonest in the

matter, or that the judgment was void on that account. Nor do we think that the effect of the former decision of this court, when the consent decree was before the court on appeal, was to hold that such decree was void. On the contrary, the language of the court clearly indicates that the judgment of reversal was on the ground of error, and that the court did not intend to hold that the decree was void.

The testimony shows that when L. B. McDonald purchased the land at the sale under the decree he had an understanding with E. S. McDonald, one of the parties to the litigation, that he was to take a one-third interest therein. But E. S. McDonald afterwards declined to take the land, and L. B. McDonald kept the whole tract. We do not think that this agreement in any way affects the right of L. B. McDonald to be protected in his purchase. He was not a party to the suit, nor did he in any sense purchase from E. S. McDonald, but from the commissioner. He paid a fair price, and comes, as we think, fully within the rule which protects such purchasers against the effect of subsequent reversals.

Again, if this sale was void, still the action of plaintiff for restitution of the lands against the heirs of L. B. McDonald, the purchaser at the sale, seems to be barred by the five years statute of limitations applicable to judicial sales. This statute provides that actions for the "recovery of land sold at judicial sales shall be brought within five years after the date of sale and not thereafter, saving to minors and persons of unsound mind the period of three years after such disability shall have been removed." Kirby's Digest, § 5060. This statute, after the time for bringing the action has lapsed, protects the purchaser, even though the sale may have been void. *Cowling* v. *Nelson,* 76 Ark. 146.

In this case the sale was made in 1889, and confirmed in February, 1890. The statute commenced running in favor of the purchaser at that time, and the five years expired before plaintiff became of age in June, 1899. She had, under the statute, three years to bring the suit from that date, but she did not file the petition for restitution against the heirs of L. B. McDonald until December, 1902, more than twelve years after the confirmation decree and more than three years after she arrived at age. For this reason a majority of us think that she

is barred; but, as the case is decided by the other points noticed, we find it unnecessary to go into a full discussion of the question of limitations.

The case has been ably argued, and a large number of authorities have been presented for our consideration. The value of the property involved and the nature of the questions presented are such as to impress us with the importance of this controversy to the parties, but after due consideration thereof we are convinced that the judgment of the chancellor was in accordance with the law, and it is therefore affirmed.

ON REHEARING.

Opinion delivered July 2, 1906.

Gustave Jones, P. R. Andrews, H. F. Roleson, N. W. Norton and *U. M. Rose*, for appellant; *Rose, Hemingway & Rose*, of counsel.

1. The jurisdiction of each of our courts is derived from the Constitution alone. The Legislature can not change the jurisdiction of the court as prescribed by the Constitution. The jurisdiction of each court in its own peculiar sphere is original and exclusive. 5 Ark. 214; 14 Ark. 545; 3 Ark. 494; 45 Ark. 514; 1 Ark. 257; *Ib.* 275; 5 Ark. 37; 7 Ark. 75. The jurisdiction of the probate court in this class of cases is exclusive. Gantt's Digest, § § 1184, 1185; 44 Ark. 269. In American courts the preponderance of authority is against the exercise of this jurisdiction by chancery courts. 3 Pom. Eq. § 1309; Bispham's Eq. § 550; 6 Am. & Eng. Dec. in Eq. 488, note. The power to sell the lands of an infant is purely statutory, and such sales without strict compliance with the law are nullities. Woerner, Guardianship, § 70.

2. A purchaser under execution or at a judicial sale must take notice of all that appears on the face of the judgment or decree under which he buys. The decree or judgment is an indispensable link in his chain of title. 10 Ark. 181; 36 Am. Dec. 427; 2 Gilman, 151; 1 *Id.* 131; 2 Johns. 281; 13 N. Y. L. 271; 9 Am. Dec. 767; 11 *Id.* 704; 19 *Id.* 225; *Ib.* 535; 16 *Id.* 101; 22 *Id.* 486; 4 Wheat. 506; 23 Fed. Cas. 389; 2 Freeman, Judg. §

509; 30 Ind. 332; 95 Am. Dec. 699; 3 How. 342; 6 Pet. 729. See, also, 98 Am. Dec. 551; 12 *Id.* 225. Wherever a decree shows fraud on its face, a purchaser under it can not be an innocent purchaser. 1 Minn. 183; 3 *Id.* 277; 44 Tex. 517; 9 How. 1.

3. The former decisions of this court in this case are the law of the case, and can not now, after the lapse of the term in which they were rendered, be changed. 5 Ark. 576; 6 Ark. 102; 26 Ark. 214; 56 Ark. 171. In the opinion handed down the court, when, in effect, they hold that a guardian has the power to compromise all suits of whatever kind against his ward, and that the compromise in this case is valid, assert precisely the reverse of what has been twice previously asserted in this case. 71 Ark. 173; 70 Ark. 84. It is plain that no appeal will lie from a consent decree. 2 Enc. Pl. & Pr. 99; 32 Ark. 74.

And it is also plain from the judgment formerly rendered that this court held that the decree appealed from was not valid—was in fact no decree. A judgment rendered now, inconsistent with that heretofore rendered, can be set aside on motion, because void for want of jurisdiction. 14 Ark. 203.

The decree in this case was rendered in 1889. There is no change in its legal effect from what it was on former appeal. Had its recitals been incorrect, plaintiffs would have moved to amend; yet that could not have been allowed, for they were barred of that right by limitation. 4 Ark. 629; 20 Ark. 377; 19 Ark. 16. Such amendment could only be made on proper application and notice. 51 Ark. 323; 20 Ark. 635; 23 Ark. 18; 34 Ark. 300; 72 Ark. 185.

4. The "family settlement" decree was fraudulent. Whenever a judgment is obtained through a violation of duty by a guardian, it is fraudulent in law, may be impeached in chancery, and collaterally. 1 Big. Fraud, 90; Broom, Leg. Max. 341, 736; 93 U. S. 167; 16 Wall. 365; 2 Freeman, Judg. § § 486, 489; 129 U. S. 99; 111 U. S. 667; 17 Ark. 512; 65 Ark. 566; 73 Ark. 281; *Ib.* 444. Confirmation does not condone fraud. 10 W. Va. 143; 23 Gratt. 423. A fraudulent judgment is a nullity, and bars no one. 28 La. Ann. 333; 39 Tex. 168; 33 Ark. 429. A purchaser acquires a valid title under a judgment only when it

is valid on its face, and apparently free from fraud. 72 Ark. 304; 38 Ark. 196.

5. There can be no decree without judicial action. 1 Big. Fraud, 93; 2 Daniell, Ch. Pl. & Pr. 986; Black. L. D. 841. In this case a judicial investigation was purposely avoided, out of considerations of mere expediency, as was declared by this court. 71 Ark. 173.

The purchaser at a guardian's sale must make inquiry as to the title, and the guardian's authority to sell. 32 Ark. 324. Without the order of a court of competent jurisdiction, a guardian has no authority to compromise in behalf of his ward. Woerner, Guardianship, 184.

6. The guardian had no power to compromise. The rights of infants can in no case be affected except upon issues and proof. 39 Ark. 237; 43 Ark. 428; 47 Ark. 456; *Ib.* 300; 31 Ark. 233; 70 Ark. 84; 71 Ark. 173; 97 N. W. 863, and cases cited; 15 Am. & Eng. of L. 57; 47 Ark. 297; 53 Ark. 307; 10 Enc. Pl. & Pr. 589. The rights of infants can not be confiscated by consent decrees, even without a statute. 1 S. E. 605; 13 S. & M. 137; 9 Humph. 129; 102 U. S. 312; 158 U. S. 146. If a guardian exceeds his authority, even with the consent of the chancellor, the decree is void. 8 How. 669.

7. The decree is void because not based on the pleadings. 7 Ark. 516; 93 U. S. 282; 55 Ark. 205; *Ib.* 565; 30 Ark. 628; 13 Ark. 188; 11 Ark. 135; 46 Ark. 103; 41 Ark. 394; 12 Ark. 288; 9 Pet. 415; 24 Ark. 381; 29 Ark. 500; 12 Ark. 288; 24 Atl. 229. Such being the case, it is not material whether L. B. McDonald knew that it was void or not, for "in legal effect it is no judgment. By it no rights are divested. From it no rights can be obtained," etc. 58 Ark. 186. See, also, 62 Ark. 443.

A judgment of a court outside the issues presented is a nullity. 4 Coldw. 621; 93 U. S. 282; 55 Ark. 565; *Ib.* 205; 109 U. S. 267; 68 Fed. 44; 56 Ark. 422; 64 Ark. 301.

In partition proceedings, to give the court jurisdiction to order a sale, it is indispensable to allege that the lands in question can not be divided without loss or injury to the parties. 50 Md. 570; 3 Wend. 15; 55 Ark. 565; 13 Pet. 174; Kirby's Digest, § 3801. As to the partition proceeding, there was not only a failure to state a cause of action, but an affirmative show-

ing of no cause of action. Therefore the decree will be treated as void, whether atacked directly or in a collateral proceeding. 62 Ark. 443; 11 Wall. 350. Legal presumptions must be based upon facts, and it will not be presumed that the facts are otherwise than as shown by the record. 11 Ark. 236; 56 Ark. 17; 50 Ark. 390; 55 Ark. 216.

8. In the opinion handed down it is intimated that there is a doubt as to whether the rights of appellant are not barred by limitation. They are not barred. An infant may show cause against a decree within twelve months after arriving at the age of twenty-one years. Kirby's Digest, § 6248.

When the Civil Code, of which this section is a part, was adopted, a female attained her majority at the age of twenty-one. Though by the act of 1873 she attains majority at the age of eighteen, the Legislature has made no change in the above section, and the court can not change it. 42 Ark. 308. Nor can it supply any supposed defect in legislation. End. Stat. § § 18, 22. See, also, 49 Ark. 416; 70 Ark. 415. Compare Carroll, Ky. Codes, § 391. When a statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. 42 Me. 55; 1 Pick. 44; *Ib.* 155; 2 Crawford's Digest, Col. 1713; *Ib.* Col. 1700. Even if L. B. McDonald should be held as an innocent purchaser, it would be requisite to render a decree against the plaintiffs in the "family settlement" decree for the value of one half of the land confiscated under that decree as prayed in the petition for restitution. 65 Ark. 556. On such a demand the statute does not begin to run until after reversal of the decree. 2 Freeman, Judgts. § 482. The five years statute has no application. It was a part of the Revised Statutes of 1838, while the statute authorizing infants to show cause against judgments went into effect in 1869, and subsequent laws repeal those before enacted to the contrary. Broom, Leg. Max. 27.

J. M. Moore and *W. B. Smith,* for appellees.

Examination of our statute, Kirby's Digest, § 6248, and § 391, Ky. Code, cited by appellant, shows that ours is not a copy of the Kentucky statute, but it is a literal copy of section

386, Civil Code, Ohio. See Swan's Stat. Ohio, 671. The Supreme Court of that State has held that the title of a purchaser of real estate sold by an administrator to pay debts is not divested by a subsequent reversal of the order of sale. 3 O. St. 389. In a proceeding to set aside a sale of the lot of an infant by a guardian under an erroneous order of the probate court, *held* that error did not affect the jurisdiction of the court, nor render the sale void, nor affect the title of the purchaser. 26 O. St. 636; 42 Ohio, 259. It therefore appears that the court of that State did not construe the act of that State as affecting the rights of purchasers at judicial sales, and, unless given that effect, it would not in any way affect the operation of the statute of limitations. Since that statute was passed and the case first cited was decided long prior to the enactment of the statute of this State, this court should follow the Ohio rulings.

The statute has no application to a sale in partition. A judgment in partition is as effective against an infant as against an adult, the only difference being that the infant has a more extended right to set the decree aside upon a showing of merit; but if he succeeds, he can not take the land from an innocent purchaser at the judicial sale. 55 Ark. 492.

The only object of the statute was to extend the time within which an infant might have his remedy. It does not purport to enlarge his rights in other respects, neither was it the intention of the Legislature to impair the sanctity of judicial sales. It follows that the statute can have no application to the statute of limitations applicable to judicial sales.

BATTLE, J. We find, as the chancery court did, that Sallie Spott Rankin, born Gibson, was the legitimate child and sole heir of J. N. S. Gibson, deceased. The plaintiffs in this case, appellees, alleged in their complaint that they were the heirs of the deceased, and that Mrs. Rankin was not. During the pendency of this suit, and while Mrs. Rankin, then Sallie Spott Gibson, was under the age of eight years, the plaintiffs and defendants entered into a compromise, Sallie being represented by a guardian, by which it was agreed that the personal and real estate of Gibson should be divided equally between plaintiffs on one part and Sallie and her mother, on the other part, giving to plaintiffs one half and to Sallie and her mother the other

half. The decree in question was made in conformity with this compromise.

The compromise on the part of the infant, Sallie, was made without the order or sanction of any court, and without authority. The chancery court neither approved nor disapproved of it, made no investigation to determine whether it should have been made by the guardian, and did nothing to give it life, force or effect. Void in the beginning, the court did nothing to make it valid. According to the opinion of this court, delivered in the case when it was here on appeal the first time, it was void. *Rankin* v. *Schofield,* 71 Ark. 168. This is the settled law of this case, and can not be re-examined in this suit, modified or set aside: *Pulaski County* v. *Lincoln,* 13 Ark. 103; *Biscoe* v. *Tucker,* 14 Ark. 515; *Baxter* v. *Brooks,* 29 Ark. 173; *Perry* v. *Little Rock & Ft. S. R. Co.,* 44 Ark. 383; *Vogel* v. *Little Rock,* 55 Ark. 609; *Dyer* v. *Ambleton,* 56 Ark. 171.

The decree of the court was without jurisdiction.

As said in *Railway Company* v. *State,* 55 Ark. 205: "Jurisdiction is defined to be 'the right to adjudicate concerning the subject-matter in given cases.' To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And, third, the point decided must be, in substance and effect, within the issue." *Railway Company* v. *State,* 55 Ark. 205; *Windsor* v. *McVeigh,* 93 U. S. 274; *Falls* v. *Wright,* 55 Ark. 565; *Elsey* v. *Falconer,* 56 Ark. 422; *Hall* v. *Melvin,* 62 Ark. 439; *Cowling* v. *Nelson,* 76 Ark. 146; 1 Black on Judgments, 242; Bliss on Code Pleading, § 161.

The plaintiffs, appellees, alleged in their complaint that they were the only heirs of John N. S. Gibson, deceased, and that Sallie Spott Rankin was illegitimate, and was not an heir; that Gibson died seized and possessed of certain lands described in their complaint; and that they (lands) are susceptible of equitable division by metes and bounds among the parties entitled thereto; and asked that commissioners be appointed and directed to lay off to each of plaintiffs his or her proper share in said lands by metes and bounds.

Sallie Spott Rankin, then Gibson, answered and denied that

plaintiffs were the heirs of John N. S. Gibson, deceased, and entitled to the lands described in the complaint; and alleged that she was the only heir of the deceased. The allegation in the complaint that the lands were susceptible of division in kind was not denied.

The issue was, who were the heirs of John N. S. Gibson, deceased, the plaintiffs or Sallie Spott Rankin?

The chancery court, without hearing evidence or finding a single fact, without determining who the heirs are and that the lands were not susceptible of division, divested Sallie Spott Gibson of three-fourths interest in the lands, and created a tenancy in common between the parties, and, in violation of the statute and without authority, ordered the lands to be sold at public sale for division. The decree, in substance and effect, was without the issue. The compromise being void, it was without consent, and was not only erroneous, but void. About such a judgment or decree Mr. Freeman says: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all acts flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress." *Townsly-Myrick Dry Goods Co.* v. *Fuller,* 58 Ark. 186.

Mrs. Rankin, having appealed from said decree within the time prescribed by law, sought by an appropriate proceeding, within twelve months after she arrived at the age of twenty-one years, to show cause against it. Section 6248 of Kirby's Digest provides: "It shall not be necessary to reserve in a judgment or order the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such a reservation would have been proper, the infant, within twelve months after arriving at the age of twenty-one years, may show cause against such order or judgment." In *Blanton* v. *Rose,* 70 Ark. 417, this court held that this statute applies to cases "where the effect of the decree is to divest the infant of

an interest in land." The case before us comes clearly within the provision of this statute.

Under the statute she may, within the time designated, show cause against the decree. She has done so in this case and shown that it is void for want of jurisdiction in the court that rendered it. From this must necessarily follow the results or consequences of such judgment, among which sales made under it are void, and purchasers at such sales acquired no title to her property. As an incident to the right guarantied to her by the statute, she is entitled to recover her property; otherwise the proceeding authorized by the statute is an idle and meaningless ceremony. If this is not its effect, what is the time to show cause worth? This right was reserved by the statute at the time the decree was rendered, and parties purchasing at a sale under the decree took subject to the right and with notice thereof.

Section 6248 is a special or particular statute, providing a remedy in particular cases, and is not repealed or modified by any general affirmative statute, unless it contains negative words or is invincibly repugnant thereto. *Chamberlain* v. *State,* 50 Ark. 132. Under it judgments and decrees against infants do not become absolute until the expiration of the time allowed to show cause. 1 Daniell, Chancery Practice, 165, 175. By it all rights claimed under a void judgment or decree and sales thereunder are held in abeyance until the time to show cause has expired. *Stanley* v. *Brannon,* 6 Blackf. 193. They, of course, can not rise higher than their source. The statute, *ex proprio vigore,* stays statutes of limitations until that time. It wisely and beneficently provides for the protection of the infant. It may be well in this connection to say that "mere irregularities and errors in the proceedings of the court will not, under this statute invalidate a sale to a stranger, or prevent a good title from being made" to him. 1 Danl. Ch. Pr. 168.

Parties purchasing under the decree in question had notice that it was void, and that they acquired no title. It was a link in their chain of title, and they were bound to take notice of it, and that it was void. *Gaines* v. *Summers,* 50 Ark. 322; *Blanton* v. *Rose,* 70 Ark. 415. They are not innocent purchasers.

Reversed and remanded for decree and proceedings consistent with this opinion.

RIDDICK and MCCULLOCH, JJ., dissent.

ON SECOND REHEARING.

Opinion delivered December 10, 1906.

BATTLE, J. Appellees, in support of their motion, cite and rely on the following Arkansas cases: *Boyd* v. *Roane,* 49 Ark. 397; *Trapnall* v. *State Bank,* 18 Ark. 53; *Woodall* v. *Delatour,* 43 Ark. 521; In re *Simmons,* 55 Ark. 492.

In *Boyd* v. *Roane, supra,* it appears that "in 1868 suit was instituted in the circuit court of Jefferson County, in chancery, to foreclose a mortgage upon lands of John Selden Roane, deceased. The widow and heirs at law, and the administrator of the estate of Roane, were made parties defendant to the bill. The heirs were all minors. Process issued for all the defendants in February of the same year; a guardian *ad litem* was appointed by the court for the infant defendants; in January, 1869, a decree foreclosing the mortgage was rendered; a sale was made by the court's commissioner, and A. M. Boyd, the appellant's ancestor and one Walt, became the purchasers. Walt sold his interest in the lands to his co-purchaser, Boyd. * * * The widow's dower was afterwards assigned, and Boyd purchased her interest in the land. He entered into possession of the entire tract. * * * Afterwards he discovered that the description of the land in the comissioner's deed, as well as in the decree of foreclosure, was inaccurate, except as to about 300 acres of the tract; and in September, 1871, he filed a bill in the Jefferson Circuit Court, in chancery, to correct the error and quiet his title. The administrator of the estate and the heirs of Roane, who were still infants, were made defendant; process to bring them into court was regularly served, and a guardian *ad litem* was appointed for the infants, who appeared and answered." The court, after hearing the evidence adduced, corrected the description and quieted the plaintiff's title to the land. In both these suits the court had jurisdiction.

"In 1884, while the youngest heir was still a minor, but more than one year after the next youngest had attained the age of twenty-one years, the heirs joined in a complaint in the Jefferson Circuit Court, in chancery, against A. M. Boyd, to set aside

the two decrees above mentioned, to have an acount for the rents and to oust Boyd of the possession." This court held that this suit, "as far as the infant heirs are concerned, was a statutory proceeding to show cause, while as to the adults it was a bill of review resorted to for the purpose of vacating the decrees to enable them to redeem."

They sought to set aside the decree in the first suit, because they alleged that there was no service of process on any of the parties who were complainants in the last suit, but who were defandants in the suit to foreclose; that there was no defense made for the infants in that suit; that no proof was adduced at the hearing; that the second decree, being in aid of one that was void, could not rectify it. They allege that the second decree was void, because the answer of the guardian *ad litem* was not a proper denial of the allegations of the bill in that case, and because the only proof adduced upon the hearing was by *ex parte* affidavits.

In the first suit the record was silent as to the service of process upon the infant defendants. The court held that the presumption is that process was served upon them, and that it could not be contradicted by evidence *aliunde.*

As to other grounds of the attack upon the decree in the first suit the court said: "The court proceeded erroneously in that suit in pronouncing judgment without a defense from the guardian appointed for the purpose of protecting the interests of the infants, and without proof of the allegations of the bill. * * * But the misconstruction or even the disobedience of the plain provisions of the law in the exercise of jurisdiction once rightly acquired does not make a nullity of the judgment of the circuit court."

As to the second decree the court said: "The infant's only claim for vacating the second decree is for alleged errors in procedure. We are by no means sure that there is any reversible error in the proceedings. But, admitting that there is, the statute provides that the complaint in a proceeding by an infant to vacate a judgment shall "set forth the grounds to vacate or modify it, and the defense to the action, and enacts that "a judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action."

In *Trapnall* v. *State Bank,* 18 Ark. 52, a judgment *in personam* against an infant was attacked on the ground that it was rendered against him without first appointing a guardian to defend for him. The jurisdiction of the court was not questioned. The court held that the failure to appoint the guardian did not render the judgment void, but merely voidable; and that it can be avoided only by appeal, writ of error or some other proceeding to set aside.

Woodall v. *Delatour,* 43 Ark. 521, was a suit to enforce a lien for taxes advanced by plaintiff to defendants, three of whom were minors. It was alleged that the plaintiff, as agent for the defendants, paid the taxes on the land described, and a tax on personal property, and prayed that the same be charged as a lien on the land described in the complaint. No defense was interposed for the infants; a judgment by default was entered, charging the entire amount of the taxes, personal as well as real, as a lien on the land, and providing for a sale in default of payment. On appeal this court held that the allegations of the complaint were insufficient to establish a charge against the land; in other words that they did not state a cause of action against the infants, and that decree was erroneous on both the grounds mentioned; that is, by reason of their being no defense made for the infants and because the allegations of the complaint were insufficient to support the decree. But the court had jurisdiction. *Woodall* v. *Moore,* 40 Ark. 42. The allegations in the complaint were insufficient, because the plaintiff did not aver therein that he was seized of the lands or had the care of them.

In re *Simmons, supra,* it appears that two heirs brought suit against four heirs for partition of lands descended to them from their father. The defendants were minors. The lands were not susceptible of division, and were sold. Two of the defendants died during minority. The sole question in the case was, did their portion of the proceeds descend as personalty or realty? The decree or judgment in the case was not an attack for error or want of jurisdiction. In that case the court said: "The provisions of the statute regulating proceedings in partition are applicable to infants"; and that a "judgment in partition is as effective against an infant as against an adult, the only difference which the statute makes in

any case being that an infant has a more extended right to set the decree aside for error upon a showing of merits." But in what cases does the statute authorize a partition? Section 5770 of Kirby's Digest provides: "Where lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common, or in co-parenary, however derived or acquired, and whether in fee, for years or for life, any one or more of the persons interested may present to the circuit court a petition praying for a division and partition of such premises according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition can not be made without great prejudice to the owners." In such cases courts are vested only with jurisdiction to partition lands. They have no jurisdiction to partition the lands of an infant between him and persons who have no interest therein, and such power can not be conferred upon them. The Constitution prohibits it.

A comparison of the opinions in the foregoing cases with the last opinion in this case will show no conflict or inconsistency, The court in the last opinion do not undertake to say that sales to a stranger under an erroneous judgment are invalid. There is a difference between erroneous judgments and judgments or decrees which are void for want of jurisdiction. In the former case the erroneous judgment or decree is valid until it is set aside or reversed by a court of competent jurisdiction, and a sale to a stranger under it before that time is valid. *Boyd* v. *Roane,* 49 Ark. 416. But no rights can be acquired under a void judgment or decree. All acts performed under it and all acts flowing out of it are void. This distinction is plainly shown by the opinions in the foregoing cases and the last opinion in this case.

We have not undertaken to determine the rights of parties to a return of proceeds of sale of lands received by appellant, rents of lands and improvements thereon, or other incidents consequent on the recovery of the same. They were undetermined by the chancery court, and we are without sufficient information to do so. *Nunn* v. *Robertson;* 80 Ark. 351.

The motion for reconsideration is overruled. The decree of the chancery court is set aside, and the cause is remanded with directions to the court to enter a decree herein in accordance with the opinion of this court and for other proceedings.

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

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Opinion delivered January 21, 1907.

1. CARRIER—LIMITATION OF COMMON-LAW LIABILITY.—A carrier can not by special contract limit its common-law liability for losses not occasioned by its own negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction. (Page 472.)

2. SAME—WHEN RESTRICTION OF LIABILITY INVALID.—Where a shipper, on tendering livestock for shipment, is offered a bill of lading containing restrictions, it is immaterial that the carrier has another and unrestricted contract which the shipper might have used if the carrier's local agent refused to give him an unrestricted bill of lading. (Page 472.)

3. SAME—PRESUMPTION FROM LOSS OF LIVESTOCK.—The rule that where a shipper of livestock accompanies the car in which the stock is transported, and has charge thereof, there is no presumption of negligence against the carrier arising merely from the death of the animal, has not been altered by act of March 26, 1895, p. 64, requiring carriers to furnish shippers of livestock free transportation to and from the point of destination. (Page 475.)

4. SAME—LIABILITY FOR LOSS OF FREIGHT.—In the absence of special contract, a carrier of freight is responsible for all losses except those occasioned by the act of God or the public enemy. (Page 476.)

Appeal from Washington Circuit Court; *J. S. Maples*, Judge; affirmed.

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

1. There was not sufficient evidence of negligence to warrant a recovery, and the court's instruction upon the presumption of negligence from the fact of the animal's death was erroneous. 50 Ark. 397; 34 Ark. 383; 39 Ark. 523; 40 Ark. 375; 44 Ark. 208; 52 Ark. 26. The presumption is that the injury was from the viciousness of the stock. 5 Am. & Eng. Enc. of L. (2 Ed.) 471 and notes.

2. The shipment was made under a valid written contract limiting the liability of the carrier, and under this contract no recovery could be had. Kirby's Digest, § § 6802-4 and 6809. Plaintiff had no right, when the rates are fixed by the railroad commission and required to be posted, to accept the statement of the agent, if made. It was not within the apparent scope of the agent's authority, and was not binding on the company.

71 Ark. 552. If plaintiff accepted the lower rate and acted upon it when there were two rates, it would be binding, even if it had been signed without his knowing the contents. 50 Ark. 397; 71 Ark. 185. Under the agreement the recovery is limited to $100. It was a reasonable contract, and its terms are binding. 46 Ark. 236; 63 Ark. 331.

3. The stipulation in the contract limiting the time in which to bring suit to six months after the cause of action accrued is binding, and this action is thereby barred. 4 S. W. 571; 14 S. W. 913; 24 S. W. 918; 21 Wall. 264; 4 Elliott on Railroads, § 1512; 85 Fed. 986.

4. Appellee being limited by the contract to a recovery of $100, the court erred in its instruction to the jury fixing the damages at the market value of the jack in Monticello. 112 U. S. 331.

5. The court erred in giving contradictory instructions.

E. S. McDaniel, for appellee.

1. Appellee did not rely nor sue upon the live-stock contract, but upon appellant's common-law liability. Appellant set up this special contract, and the burden was upon it to show a valid contract, such as would relieve it from liability. 69 Ark. 256.

Since, as is shown by the evidence, appellant's agent was furnished by the company with but one form of contract to execute the shipment of live stock in carload lots at the time of receiving this live stock from Wells, the latter had no choice between this contract limiting the liability of the carrier and one such as it was the duty of appellant to furnish in the absence of a special agreement, and the case falls within the rule laid down in 57 Ark. 112; *Id.* 127.

2. The contention that no presumption of negligence arises against appellant because the jack was at the time in possession of appellee is not tenable under the law in force at the time of the injury. Kirby's Digest, § 6700. By the terms of that act appellee was entitled to passage as a shipper in consideration of the price paid for the car.

3. The contract being unfair and unreasonable, the measure of damages was the market value of the jack at Monticello. 63 Ark. 443; 74 Ark. 597.

McCULLOCH, J. This is an action against appellant railroad company to recover the value of a jack, alleged to be of the value of $240, shipped over defendant's line from Fayetteville to Van Buren, Arkansas, there to be delivered to a connecting carrier. It is alleged in the complaint that by reason of negligence of defendant's employee in the operation of the train the jack was killed while in transit and before arrival at Van Buren. The action was commenced more than a year after the shipment and death of the jack.

The defendant filed an answer denying that its servants were guilty of any negligence or that the jack was injured while in transit.

As a further defense the written contract for shipment entered into between plaintiff and defendant limiting the liability of the carrier in consideration of reduced rates for transportation was set forth and pleaded; and it was alleged that by the terms of said contract it was stipulated, among other things, that in the event the jack should be damaged or killed the liability of the carrier for the damage should not exceed the value stated in the contract, $100, and that no action against the defendant to recover damages should be maintained unless commenced within six months next before the cause of action should have accrued. The contract was introduced in evidence, and it contained the stipulations named above, as well as further recitals to the effect that the company offered the shipper two rates on shipments of live stock, and that the shipper elected to accept the reduced or lower rate under a contract limiting the liability of the carrier.

The plaintiff testified that before he signed or accepted the contract he asked the agent of the company if he had any other contract, and the latter replied in the negative, and that he accepted the contract because he could secure no other. This was contradicted by the agent, who testified that the higher rates on all shipments of live stock, according to value, under bills of lading or contracts containing no limitation of the carrier's liability, were allowed by the company; that he had no other printed form of contract prepared for shipments of live stock, but that he could by interlineation, etc., alter an ordinary bill of lading containing no limitations of liability so as to provide

another form of live-stock contract, whenever a shipper elected to accept a higher rate under such contract.

The jury returned a verdict in favor of the plaintiff, assessing the damage at the sum of $267.08, and the defendant appealed.

It is contended on behalf of appellant that appellee was bound by the contract limiting the liability of the carrier, even if he was denied the benefit of any other contract of rate, and that the recitals of the contract to the effect that he had elected to accept it in consideration of the reduced rate precluded him from proving that the company's agent had refused to give him any other contract or rate. This court held in *Railway Co.* v. *Cravens,* 57 Ark. 112, that (quoting the syllabus) "a carrier can not by special contract limit its common-law liability for losses not occasioned by its own negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction; and it is immaterial that the shipper knowingly accepted a bill of lading containing such restriction, without demanding a different contract, if he knew that the carrier's agent had no authority to make any other contract with him." In the case at bar the undisputed evidence is that the carrier had another rate to offer the shipper, and the contract recited that fact, but there is evidence tending to show that the local agent refused to give the shipper the opportunity to make any other contract than one restricting the liability of the carrier. Now, it matters not how many different rates or forms of contract the carrier is willing to give to the shipper; if the local agent with whom the latter deals denies him the opportunity to take advantage of the more favorable contract on a higher freight rate, or, what amounts to the same thing, informs him that there are no other terms or conditions upon which he can have his property transported, then there is in fact no opportunity afforded to contract for shipment on unrestricted terms, and the restrictions are void.

The contract for a limited liability of the carrier must be based upon the consent of the shipper upon a valid consideration, and, no matter what the contract contains by way of recitals or stipulations, if no opportunity for unrestricted service is afforded, then it is imposing the restricted contract upon the

shipper without his consent. If no opportunity for shipment on other terms was in fact given, then the recitals of the contract were false in stating that such opportunity had been given, and that the shipper had elected to accept a restrictive contract upon a lower rate. If the contract was in fact extorted from the shipper by a refusal to transport his property upon any other terms, he was not bound by false recitals which it may have contained. No rule of evidence was violated in permitting him to show the falsity of such recitals.

Mr. Justice HEMINGWAY, in delivering the opinion of the court in the Cravens case, said: "But it is said that if the party knowingly consents to a special contract, no one else can object, and that he can not be heard to say that it was unfair, or that an advantage was taken of him, since he acted freely and intelligently. This, as we have seen, is a mistake, for such contracts affect the interests of the public, and are subject to public regulation; and, besides, the circumstances do not warrant the assumption of fact that the party consented freely, but rather show that he submitted to terms that he was bound to accept, when the other party deprived him of the opportunity to choose between them and the contract which the law entitled him to demand. For he was, as we have seen, as much entitled to be indemnified against loss in transit as to the service demanded. The law imposes no necessity for an election between the two rights, and the carrier can impose none. But the carrier's refusal to perform the service without a release of his liability takes away the right to choose, which the law gives, and forces an election between rights which are not inconsistent."

It may be said that, inasmuch as a railway company can generally deal with the shipper only through its local agents, and when it has prescribed different rates for shipments upon different terms, the application of this rule would deprive the company of the power to enforce its contracts, and make the validity of its contracts for shipment depend upon oral proof in each case as to what transpired between the shipper and the local agent. So it may; but, on the contrary, any other rule would allow the company to extort from the shipper a contract without his consent, by reciting in the written instrument that he had been offered other terms, and had exercised his choice.

When the special contract was found to be invalid, all

question as to limitation as to value of the property and the time for bringing the action passed out of the case. *St. Louis, I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112; *St. Louis, I. M. & S. Ry. Co.* v. *Marshall,* 74 Ark. 597.

It is also contended that the evidence was insufficient to warrant the jury in finding that the plaintiff applied to the agent for the privilege of shipping upon different terms, and was denied the opportunity. The plaintiff testified that, to the best of his recollection, he asked the agent or employee with whom he dealt, and who prepared and signed the contract, for another contract, and that he received a negative reply—that he had no other alternative but to accept this contract. This was denied by the agent or employee in question, and, as already stated, it was conclusively shown that another rate had been prescribed for shipments on unrestricted terms, but that question was submitted to the jury, and we think there was sufficient evidence to sustain the finding.

The court, over the defendant's objection, gave the following instruction, which is assigned as error, viz:

"1. If the jury find that the defendant received the jack for shipment, and the same was killed while in the defendant's car, the presumption is that such killing resulted from the negligence of the defendant, or its servants, in the operation of its locomotive or cars."

This instruction was erroneous, for the reason that it left entirely out of consideration the contract between the parties for the shipment of the stock. By the terms of the contract, the shipper was required to accompany the shipment of live stock and be in sole charge of it for the purpose of attention and care to it. It further provided that the carrier should not be responsible for attention to and care of the stock, but should only be liable for actual negligence of its employees in the transportation of the freight. If the contract was in force, which was a disputed question, then the defendant was not liable unless its employees were guilty of negligence; and where the shipper accompanied the car and had charge of the live stock, there was no presumption of negligence arising merely from the death of the animal. *St. Louis, I. M. & S. Ry. Co.* v. *Weakly,* 50 Ark. 397. In that case the court said: "Having

the care of the stock, the liability of a common carrier, which makes it his duty to account for the loss of freight, did not devolve on appellant. Being in charge, they (the shippers) were presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause, before they can be entitled to recover."

Counsel for appellee contends that the rule announced in that case is changed by the act of March 26, 1895 (Kirby's Digest, § 6700) requiring railroad companies, when they receive shipments of poultry or live stock by the carload, to furnish to the shipper or his employee free transportation to and from the point of destination. We do not think that this statute changes the rule at all. It only makes it compulsory upon the carrier to furnish free transportation to the shipper for himself or employee when the shipment is in carload lots. The statute does not undertake to change the liability of the carrier in any other particular or to alter the rules of evidence respecting the establishment of its liability.

Whilst the instruction just quoted is an erroneous statement of the law, it was not prejudicial in this case. The jury, in arriving at a verdict in favor of the plaintiff for the sum named, necessarily found against the validity of the contract; for the court instructed them, at the request of the defendant, that, if they found the shipper had notice of the two rates fixed by the company and chose the lower rate, then the contract was binding on him, the cause of action was barred by limitation, and he could not recover. The jury could not, under the instructions given by the court, have found for the plaintiff for a sum in excess of $100, without first finding that the contract was not in force. So, treating this question as eliminated by the verdict of the jury, the instruction now under consideration was harmless. It told the jury, in substance, that if they found that the jack was killed in the car while being transported by defendant, a presumption of negligence on the part of the defendant arose. This is not a correct statement, as we have already seen. But, with the special contract out of consideration, the carrier was liable as an insurer of the safe transportation and delivery of the freight—it was responsible for all losses except those oc-

casioned by the act of God or the public enemy; and when it appeared that the animal was killed while in transit, it devolved upon the carrier, in order to exonerate itself from liability, to show that the loss resulted from one of those causes. *St. Louis, I. M. & S. Ry. Co.* v. *Weakly, supra.*

In the absence of a special contract limiting the liability of the carrier, it is responsible as an insurer, and the burden is not upon the plaintiff, in an action to recover for loss or damage, to show that the same did not result from the act of God or the public enemy.

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

BATTLE, J., dissenting.

HALL v. POTTER.

Opinion delivered January 28, 1907.

OVERDUE TAX SALE—REDEMPTION BY INSANE PERSON.—A person of unsound mind whose lands have been sold to the State under decree enforcing the payment of overdue taxes pursuant to the act of March 12, 1881, and which have been subsequently sold by the State to an individual, is entitled to redeem only within two years from the date of sale.

Appeal from Cleburne Chancery Court; *George T. Humphries,* Chancellor; affirmed.

Fraser & Fraser, for appellant.

If, as declared in 53 Ark. 430, the law then in force fixing the time for redemption allowed to persons under disability is a special and particular clause, even then it ought not to be held that the act of 1881 repealed it. Repeals by implication are not favored. 11 Ark. 103; *Id.* 496. A general statute will not repeal a prior particular act, unless the two acts are irreconcilably inconsistent. 29 Ark. 225. See, also, 34 Ark. 499; 48 Ark. 159; 56 Ark. 45; 50 Ark. 132; 51 Ark. 559. In this case the sale was never reported to nor confirmed by the court. There

is no judicial sale until confirmation. 4 Ark. 46; 14 Ark. 52; 33 Ark. 786; 38 Ark. 80; 47 Ark. 149; 50 Ark. 344; 53 Ark. 445.

George W. Reed, for appellee.

One who applies to redeem must admit the regularity of the forfeiture and tax sale. 71 Ark. 117.

This case is controlled and fully settled by the decision in *Railway* v. *Burke,* 53 Ark. 430. Confirmation of an overdue tax sale was not required by the act of 1881 to be made after the expiration of two years from date thereof—the period allowed for redemption. 55 Ark. 37. Moreover, appellant can not now for the first time urge a failure of confirmation. The act contained no exceptions in favor of those under disability. 51 Ark. 453; 53 Ark. 430.

McCULLOCH, J. The only question involved in this appeal is whether a person of unsound mind, whose lands have been sold to the State under decree enforcing the payment of overdue taxes pursuant to the act of March 12, 1881, and which have been subsequently sold by the State to an individual, can redeem said lands from sale.

It was decided by this court in *Railway* v. *Burke,* 53 Ark. 430, that the right of an infant, whose lands had been sold to an individual under such decree, was limited to two years from date of sale, the same period allowed to adults in making such redemption. Section 11 of the act of March 12, 1881, provided that lands sold under such decrees might be redeemed from the purchaser "at any time within the period fixed by law for the redemption of lands sold for taxes," and the court construed this provision, in connection with another section of the act directing the commissioner of the court to execute to the purchaser a deed "conveying the land bought by him in fee simple" as soon as the period of redemption prescribed in the act should expire, to limit the right of redemption of persons under disability to the same period.

Section 13 of the act provides that in case of a sale to the State the owner might redeem within the time prescribed in section 11 of the act, by making payment, etc., to the State Treasurer.

It follows that, so far as the act of March 12, 1881, is concerned, the time for redemption provided therein from sale to the State under decrees is the same as from sales to individuals, and that the right of redemption of persons under disability at the time of the sale is limited to two years, the time allowed to adults not under disability.

By the terms of another statute then in force persons under disability were allowed to redeem lands forfeited to the State for nonpayment of taxes, but the right expired by express language of the statute when the State disposed of the lands. Act March 14, 1879.

It is contended that the sale under the decree was never confirmed by the court, but this question was not raised by the pleadings, and can not be raised here for the first time. The complaint attacked the validity of the decree in the overdue tax suit on other grounds; but the attack was abandoned, and the plaintiff relied entirely on the right to redeem from the sale.

Affirmed.

BELOATE v. HENNESSEE.

Opinion delivered January 28, 1907.

RESULTING TRUST—WHEN CREATED.—Where land is purchased for A, who furnishes the purchase money, but the title is taken in the name of B, the latter will be held a trustee for the former.

Appeal from Lawrence Chancery Court; *George T. Humphries,* Chancellor; affirmed.

W. E. Beloate, pro se; J. N. Beakley, solicitor.

The statement of facts in the complaint, and not the prayer for relief, constitutes the cause of action. 93 S. W. 570. Fraud must be pleaded by showing the facts which constitute the fraud. In this case the facts, if properly pleaded, do not sustain the allegation, as the evidence must be full, clear and convincing. Title to real estate can not be overturned by a bare preponderance of oral testimony. 75 Ark. 448; 79 Ark. 418. There is

no allegation setting up facts constituting breach of trust. Fletcher, Eq. Pl. & Pr. 131 § 98; 34 Ark. 70. See, also, 24 Ark. 464.

A parol promise by a grantee, before or after the time of receiving the deed, to hold the land in trust for any one or for any purpose is void under the statute of frauds. 45 Ark. 481; 8 Ballard, Real Prop. § 771; 9 *Id.* § 743; 49 Atl. 103. As to appellee, the purchase by appellant was only a question of contract, which, being verbal, comes within the statute. 116 U. S. L. Ed. 703. See, also, 71 U. S. 513; 73 Ark. 310; 2 Pom. Eq. 1056; S. & H. Dig. § 3481; 50 Ark. 76; 1 Am. & Eng. Enc. of L. (2 Ed.), 757.

H. L. Ponder, for appellee.

The evidence of all the witnesses, save that of the appellant himself, shows that the land was sold to the appellant for the appellee; and, the money having been furnished to him for the appellee, the purchase by the appellant in his own name creates a constructive trust in favor of appellee. 39 Ark. 309; 73 Ark. 310.

It is admitted in appellant's answer that the appellee is in possession of the land. Delivery of possession under a parol contract for the sale of lands takes the case out of the statute of frauds. 42 Ark. 247. The statute is not inflexible, but has exceptions and modifications which equity will apply, when justice and the facts in evidence warrant it. 30 Ark. 262. It is fraud in a purchaser, who obtains property by verbal agreement at a price greatly below its value, to keep the property in violation of the agreement. 41 Ark. 270; 19 Ark. 39; 20 Ark. 272; *Id.* 663; 1 Ark. 417.

See, also, on the question of constructive trusts, Bispham on Eq. § 91; 15 Am. & Eng. Enc. of L. (2 Ed.), 1147; *Id.* 1184-5; 34 Ark. 503; 37 Ark. 195; 5 Ark. 321; 53 Ark. 195; 15 W. Va. 67; 70 Cal. 544; 69 Ga. 652; 5 Ia. 357; 24 S. W. 430.

BATTLE, J. I. J. Bagley, as administrator of M. B. Rhea, deceased, recovered a judgment against W. F. Hennessee, sued out an execution thereon, and caused the sheriff, to whom it was directed, to levy the same upon certain lands of the defendant. The lands were sold to satisfy the execution on the 12th day of

December, 1900. W. E. Beloate caused the sheriff to convey the lands to him. Mose Hennessee brought this suit against Beloate, alleging that he, plaintiff, purchased the lands at such sale, and that the defendant by false misrepresentations and statements caused the sheriff to convey the same to him, and asked that the defendant be declared holding the title to the lands in trust for the plaintiff, and for other proper relief.

The evidence adduced at the hearing of this cause shows that the defendant purchased the lands at the sale under execution for another. He does not claim to have purchased for himself, or to have paid the purchase price with his own money, but he says he purchased for Mrs. Hennessee, the wife of W. F. Hennessee, and paid for the same with money furnished by her husband. Other witnesses testify that he purchased for Mose Hennessee, the son of W. F. Hennessee. The court found from the evidence adduced at the hearing of the cause that he purchased for plaintiff pursuant to an agreement with him, and paid the amount bid with money furnished by Mose for that purpose, and decreed that Beloate, the defendant, be divested of the title to the lands, and that the same be vested in the plaintiff; and the defendant appealed.

The preponderance of the evidence heard by the court clearly and satisfactorily sustains its findings. The lands were purchased for the appellee; and he paid the purchase money; and upon every principle of equity governing such cases he is entitled to the lands. *Grayson* v. *Bowlin,* 70 Ark. 145; *Camden* v. *Bennett,* 64 Ark. 155; *Humphreys* v. *Butler,* 51 Ark. 351; *Ferguson* v. *Williamson,* 20 Ark. 272; *Underhill* v. *Howard,* 20 Ark. 663; *Watson* v. *Murray,* 54 Ark. 499.

Decree affirmed.

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BERNSTEIN v. BRAMBLE.

Opinion delivered January 28, 1907.

WILL—REPUGNANCY OF LIMITATION.—Where property is devised to the first taker in fee simple, with limitation over to another at the former's death, the limitation over is void for repugnancy.

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

Webber & Webber, for appellants.

Though the provision in the will that all the estate remaining at the death of the testator's wife, and not disposed of by her by will or other writing, should pass to the testator's brother and sister, or their heirs, would be void in a deed, it is good as an executory devise. As to the law of executory devises, see 3 Ark. 147. The rule in the construction of wills is to give effect to what appears to be the intent of the testator, in view of the provisions of the whole will. If this intention can be ascertained, it should be carried out, unless contrary to law or public policy. 13 Ark. 518; 73 Ark. 60; 3 Pet. 377; 6 Pet. 68; 6 S. W. 412; 89 Tex. 452; 37 S. W. 995; 65 S. W. 891; 102 Mo. 122; 45 L. R. A. 53. In the case of *Howard* v. *Carusi,* 109 U. S. 725, which is relied on by appellee, the first taker had devised, under the power given him, all the property to certain persons which had come to him from the original testator; hence there was no property to which the executory devise to the nieces could apply. But in this case the wife of the testator did not dispose of the property, but dealt with it as a life estate, and used it, as the testator intended, for her support during her life, and left it to be passed on to his brother and sister. 127 U. S. 300.

It is held that, notwithstanding a gift is absolute, where the testator gives the remainder of the estate over with as much clearness as the preceding words give the absolute estate, the intention of the testator is manifested as much by the last clause as by the first, both clauses are equally operative, and the last may no more be disregarded than the first. 68 Conn. 207; 107 Ill. 443; 28 Ind. App. 443; 102 Mich. 248; 75 N. Y. App. Div. 26; 9 Pac. 265; 18 N. W. 115.

W. H. Arnold, for appellees.

It is essential to the validity of an executory devise that it can not be defeated by the first taker. If the absolute right of property is given to the first taker, a limitation over is void.

The absolute right of ownership carries with it full power of disposition of the property. 3 Ark. 187.

In order to create a trust, it must appear that the words used were intended to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence. 73 Ark. 56. In this case the language of the will devising the property absolutely is clear and emphatic, and under it the wife took the property "in fee simple forever." At her death it must go to her heirs. See, also, 61 Ark. 366; 49 Md. 497; 109 U. S. 725; 4 Kent's Com. 271; 29 Am. Rep. 495; 50 Am. Rep. 703; 2 Redfield on Wills, (3 Ed.), 278; 59 Am. Rep. 748; 73 S. W. 664; 5 Mass. 500; 7 L. R. A. 517; 68 Ark. 409; 26 Am. Rep. 344; 38 S. W. 511; 51 Ark. 61; 52 Ark. 113; 126 Fed. 701; 8 L. R. A. 696; 13 L. R. A. 359.

BATTLE, J. Henrietta Bernstein and the heirs of Moritz Elle, deceased, brought suit in the Miller Chancery Court against Charles E. Bramble, as administrator of Minna Elle, deceased, and the heirs of Minna Elle, deceased, to secure construction of will and to recover certain real estate in Texarkana, in this State, and personal property, claiming the same under so much of the last will and testament of Gustav Elle, deceased, as is in the following words:

"All the rest, residue and remainder of my estate, real as well as personal, and wheresoever situated, I hereby devise, give and bequeath to my beloved wife, Minna Elle, to have and to hold the same in fee simple forever. But in the case of the death of my beloved wife it is my will that all the estate then remaining and not disposed of by her by a last will or other writing shall pass to my said brother, Moritz Elle, and my sister, Henrietta Bernstein, or their heirs in equal parts."

Plaintiffs allege that Henrietta Bernstein is the sister mentioned in the will, and the other plaintiffs are the heirs of Moritz Elle, the brother mentioned in the will, now deceased: that Minna Elle died without a will, leaving the property sued for undisposed of by will or otherwise, and without ancestors or descendants; and that the defendants are her heirs. They demurred to the complaint, and the court sustained the demurrer, and plaintiffs appealed.

Appellees insist that Gustav Elle devised the property sued for to his wife in fee simple, and that the following clause in

the will is void: "But in case of death of my beloved wife it is my will that all the estate then remaining and not disposed of by her by a last will or other writing shall pass to my brother, Moritz Elle, and my sister, Henrietta Bernstein, or their heirs in equal parts."

In *Moody* v. *Walker,* 3 Ark. 187, the court said:

"It is essential to the validity of an executory devise that it can not be defeated by the first taker. If the absolute right of property is given to the first taker, the limitation over is void. For if a legatee possesses the absolute right of property, he certainly has the power of disposing of it in any way he may think proper, and therefore he might defeat the devise or limitation over. If a testator gives property absolutely, in the first instance, to a legatee, he can not afterwards subject it to any limitation or provision whatever, as for example that he shall hold it for a life, or that he shall not spend it in a particular manner. The absolute right of ownership carries with it full power of disposing of the property."

In *Howard* v. *Carusi,* 109 U. S. 730, the court said: "This will gives, first, an estate in fee simple to Samuel Carusi; it contains, second, the expression of a hope and trust that he will not unnecessarily diminish the estate; and, third, it gives to the nieces of the testator so much of his estate as Samuel Carusi shall not at his death have disposed of by sale or devise. We have, then, devised to Samuel Carusi an estate in fee simple, with an absolute power of disposition either by sale or devise clearly and unmistakably implied. Therefore, according to the adjudged cases, the limitation over to the nieces of the testator is void."

In *Rona* v. *Meier,* 29 Am. Rep. (Ia.) 495, the court said:

"It is fully settled by authority that if the first taker has the power, by the terms of the will, to dispose of the property, he must be considered the absolute owner, and any limitation over is void for repugnancy."

In the case of *Stowell* v. *Hastings,* 59 Am. Rep. 748, 59 Vt. 494, it was held that: "Where a will gave to the testator's wife the residuum for her benefit and support, to use and dispose of as she may think proper, and then provided that if any of the

estate should be left in her possession at her death it should be equally divided between the brothers and sisters of the testator, the wife took an absolute estate, and that the remainder over was void for repugnancy."

In the case of *Roth* v. *Rauschenbusch,* (Mo.) 73 S. W. 664, it appeared that: "A testator by the second paragraph of his will, gave his whole estate to his wife 'absolutely and forever.' In the following paragraph he provided that it was his will that if any of the property remained undisposed of after her death, it should go to his blood relations. *Held,* that the wife took a fee simple, and that hence the attempted disposition over was void, and the blood relations took nothing thereby."

Chancellor Kent in his commentaries says: "If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same; in all such cases the remainder over is void because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate expressly given or necessarily implied by the will." 4 Kent's Com. (13 Ed.), marginal page 270.

In the 3d Edition of Redfield on the Law of Wills, Vol. 2, page 278, it is said: "It is a settled rule of American as well as English law that where the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes, any estate over is void, as being inconsistent with the first gift. Thus a devise to the testator's son P of certain real and personal estate, and to his heirs and assigns forever, adding, that if P should die, and leave no lawful heirs, what estate he should leave to be equally divided between another son and a grandson of the testator, naming them, it was held the devise over was void, as being inconsistent with the absolute interest in the first devise. This exclusion of the devise over depends upon whether the first taker has the absolute right to dispose of the property."

In the second volume of Underhill on the Law of Wills

it is said: "It is the rule that where property is given in clear language *sufficient to convey an absolute fee,* the interest thus given shall not be taken away, cut down or diminished by any subsequent vague and general expressions. This rule is applied where a fee is given either expressly by words of limitation, as to a person and his heirs, or by implication by a devise in general language through the operation of the modern statutes. If it is clearly the intention of the testator that the devisee *shall own the fee simple,* his subsequent language, directing that what remains of the property at the death of that devisee shall devolve upon a particular person or class of persons, will not cut down the fee to a life estate. The fee, being vested by express and appropriate words, will not be diminished by subsequent words of a vague and general character which are absolutely repugnant to the estate granted. Thus, a gift absolutely to A 'with all the power and rights that the testator enjoyed,' with a direction that he should make a will leaving what remains of the property at his death to certain persons named, or a direction that certain legacies are to be paid, after the death of the devisee, out of the proceeds of the land, which is devised absolutely; that certain property absolutely bequeathed should on the death of the devisee go to his children, or a gift to A with full power to alienate, convert or dispose of and upon his death as much of it as remains to his children, does not diminish the estate given to a life estate." Vol. 2, § 689.

In Page on Wills, § 684, it is said: "It not infrequently happens that a testator disposes of property in fee, and then attempts to provide for the disposition of the property after the death of the devisee in fee simple. A provision of this sort is to be carefully distinguished from the cases where a fee simple is cut down to a life estate by a devise over after the death of the first taker. The distinction between the two classs of cases, though not strongly marked, is well recognized by the courts. If the devise over upon the death of A is intended to pass the entire property, it is evident that the testator contemplated that A should take only a life estate, without any power of disposing of his property for a longer term than his own life. But where the devise over upon the death of A shows that A was vested with a fee simple estate, and that testator wishes him

to have such an estate, but to direct the course of its descent upon his death, the limitation over after the fee is repugnant to the nature of the estate and void. * * * A condition that if devisee does not dispose of his property in any way during his lifetime it shall pass to certain named persons is held to be void." See Gardner on Wills, 466.

The property in controversy was devised to Minna Elle in fee simple, "with an absolute power of disposition either by sale or devise clearly and unmistakably implied." According to the autorities cited, the limitation over to Moritz Elle and Henrietta Bernstein is void.

Judgment affirmed.

YANCEY v. BATESVILLE TELEPHONE COMPANY.

Opinion delivered January 21, 1907.

1. TELEPHONES—PENALTY FOR DISCRIMINATION.—Under Kirby's Digest, § 7948, regulating telephone companies, the statutory penalty is recoverable (1) wherever a telephone company refuses to supply applicants for telephone connection and facilities without discrimination or partiality; (2) wherever such company imposes any condition or restriction upon any applicant that is not imposed impartially upon all other persons or companies in like situations; or (3) wherever such company discriminates against any individual or company engaged in lawful business by requiring as a condition for furnishing telephone facilities that they shall not be used in the business of the applicant, or otherwise. (Page 494.)
2. SAME—RIGHT TO EXTEND CREDIT.—A telephone company may require its charges to be paid in advance, and may extend credit for such charges to such persons as it may deem deserving, without rendering itself liable to a charge of discrimination. (Page 494.)
3. SAME—DISCRIMINATION AMONG PATRONS.—A complaint against a telephone company which alleges that plaintiff has a telephone connection with defendant's exchange at his residence, and that defendant requires him to go to the central office of the exchange and pay cash in advance before it will permit him to communicate over its long distance lines, while no such requirement is made of other subscribers, states a cause of action. (Page 495.)

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

Action by J. C. Yancey against the Batesville Telephone Company and the Southwestern Telegraph & Telephone Company. A demurrer to the complaint was sustained. Plaintiff appealed. Reversed.

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

1. The question presented is the construction of § 7948, Kirby's Digest, being section 11 of the act approved March 31, 1885. Appellee's contention that the penalty of $100 only attaches to the violation of the latter part of the section is based partly upon the punctuation of the act as it appears, in the printed act and the Digest. This would be in any event a narrow construction of the act, but, by reading the original enrolled bill on file in the office of the Secretary of State, it is seen that following the words "partiality" in the third line, and "in like situations" in the sixth line of the section, commas are used, instead of semi-colons, making it clear that appellee's interpretation is untenable. The duty prescribed by the section is one which is already required by the common law; and if no penalty is attached for a violation of this duty, it furnishes no remedy which did not exist before. If appellee's construction is true, the first part of the section is a nullity—confers no rights and requires no duty not already fully protected under the common law. 50 Fed. 677; 23 Fed. 539; 10 Am. St. Rep. 114; 48 *Id.* 729; 47 *Id.* 798; 15 *Id.* 893; 46 *Id.* 769; 52 *Id.* 404; 59 *Id.* 167.

2. In this case the complaint alleges and shows that the defendant furnished facilities and telephone communication to other patrons, and refused to furnish the same to him under the same conditions and circumstances. This is a violation of the statute, and the demurrer was improperly sustained. 72 Ark. 478; 88 S. W. 834.

W. L. & D. D. Terry, for appellant; *Wright & Reeder, McLauren & Wozencraft* and *Walter J. Terry,* of counsel.

1. A limiting clause, or phrase, following several expressions to which it might apply, should be restricted to the last antecedent. Endlich's Interpretation of St. § 414.

It is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. 53 Fed. 912. But courts must interpret statutes according to the ordinary and plain language used. 2 Daly, N. Y. 67; Endlich's Int. St. 11, 17 *et seq.*

Mere discrimination or inequality of prices was not actionable at common law, but only unjust discrimination or excessive or unreasonable charges. 28 Am. St. Rep. 142; 18 L. R. A. 221; 26 Am. Rep. 731; 16 *Id.* 579; 24 Ill. App. 322; 64 Ark. 274. Likewise, at common law, it is the privilege of a public carrier to charge less than a fair compensation to one person, or class of persons, and another can not justly complain so long as the terms to him are reasonable. 40 Fed. 183; 27 Fed. 532. For the same reason the extension of the courtesy of credit to one, and requiring cash of another, is not, in itself, an unlawful discrimination.

Compare Indiana Acts, 1885, p. 150; and for a history of the litigation giving rise to and growing out of this character of legislation, see 10 Am. St. Rep. 121; *Id.* 132, note; 23 Fed. 540; 47 Fed. 672; 50 Fed. 677; 66 Md. 399. From which it is seen that such legislation grew out of the efforts of rival telegraph and telephone companies to prevent unjust discriminations on the part of the Bell Telephone Company and its licensees in favor of themselves and of the Western Union Telegraph Company as against these rival companies; but these companies, being interested in both telegraphing and telephoning business, were interested in not inflicting penalties themselves; hence the penalty is directly attached to that particular clause of the section 11 which says: "Nor shall such company discriminate against any individual or company * * * by requiring as a condition for furnishing such facilities that they should not be used in the business of the applicant." * * * Note also that the promoters of this legislation obtained the repeal of § 6419, Mansf. Digest, permitting individuals to recover penalties against telegraph companies for the negligent transmittal or delivery of messages; and likewise a similar repeal in Indiana. 108 Ind. 539. These are matters proper to be considered in the interpretation of statutes. 57 Fed. 429; Endlich, Int. St. § § 28, 29.

This is a penal statute, and both the statute and the complaint must be strictly construed. 72 Ill. App. 575; 76 Me. 412; 87

Mo. 280; 40 Mich. 288; 36 Conn. 78; 30 N. C. 188; 8 Tenn. 99; 53 Ark. 423; 50 Ark. 80; 56 Ark. 226; *Id.* 47; Black on Int. Laws, 282-3; 77 Cal. 404; 69 Ind. 298. To justify the court in awarding a penalty, appellant must bring his case within the strict letter of the law affixing the penalty. 64 Ark. 284. "A general averment of discrimination, but no statement of fact which shows any," is not sufficient. 40 Fed. 392.

The question as to what constitutes reasonable, proper and equal facilities necessary involves a consideration of the place, accommodations, terms and conditions at and under which facilities are sought, as compared with those where such interchange is conceded or afforded. 37 Fed. 623. The allegation that defendants "have discriminated and shown partiality against the plaintiff continuously each for the past twelve months," standing alone, is a mere conclusion of law on the part of the pleader. 38 Ark. 519; 64 Ark. 284.

2. Section 10 of the act, and not section 11, is the one that applies to long-distance messages. Under this section, discriminations would be the matter of price or promptness. 50 Ark. 78. As to meaning of "telephone exchange" see 105 Fed. 696.

3. The facts alleged in the complaint do not constitute the character of discrimination contemplated in either section 10 or 11 of the act. 139 U. S. 127; 48 Am. St. Rep. 738; 69 Ind. 199; 1 Blackford, 151; 72 Ill. App. 569; 30 N. C. 184; 45 Ark. 298; 76 Me. 412; 87 Mo. 280; 36 Conn. 78. A complainant, to recover for a penalty, must state the facts which show unlawful discrimination. "He must be held strictly to bring himself, by his pleadings, within the conditions of the statute. It must set forth every fact necessary to show that his case is within the statute." The special circumstances must be pleaded definitely. 7 Watts, 181; 28 N. C. 352; 40 Mich. 185; 38 Ark. 521; 68 Ark. 254.

4. The complaint does not state sufficient facts to constitute a cause of action for a penalty. Cases *supra.*

J. W. & M. House, for appellant in reply.

A penal statute must be construed as any other. The intent of the Legislture is the paramount question, and when that is ascertained it is the duty of the court to enforce it. "Penal

statutes are not to be construed so as to work absurdity or defeat their purpose." 45 Ark. 391; 6 Wall. 395.

2. When the language of a statute or the intent of the Legislature is uncertain, punctuation may afford some indication of it, and sometimes, in doubtful cases, even decide it. Sutherland on Stat. Const. 232; Endlich, Stat. Const. § 33; 1 Abb. (U. S.), 196; 23 Fed. Cas. No. 16, 513, p. 144; 46 Ia. 673. The settled rule is that the punctuation of the original act as passed by the Legislature governs, instead of the punctuation of the printed copy, and that the printed act may be corrected by the enrolled act. 55 Vt. 174; 70 Ind. 331; Sutherland, Stat. Con. § 40; McLean, U. S. 480; 54 Miss. 378.

3. There is no good reason why the penalty should attach to the third clause of the section, and not to the others, because, without the penalty, the applicant could, under either clause, enforce his rights to the extent of obtaining equal facilities. To confine the penalty to the last clause would be class legislation. It is not intended as a limiting phrase, as contended by appellees. Endlich on Stat. Const. § 414, p. 482; Id. § 81; 70 Pa. St. 311; 2 Daly (N. Y.), 66; 15 Abb. Pr. (N. Y.), 432; 1 Black (U. S.), 55; 65 Pa. St. 311; Sutherland, Stat. Const. § 259, p. 340; *Id.* § 267, p. 350; Endlich, Stat. Const. § 381, p. 533; 100 Pa. St. 63. If a statute is valid, it is to have effect according to the purpose and intent of the lawmaker. The intent is the vital part. Sutherland on Stat. Const. 234; *Id.* 237, *et seq.*

BATTLE, J. The following is the complaint in this action:

"On this day comes the plaintiff, J. C. Yancey, and states that he is a resident of the city of Batesville, Independence County, Arkansas; that the defendants, the Batesville Telephone Company and the Southwestern Telegraph & Telephone Company, are corporations, each organized and created under the laws of the State of Arkansas; that the Batesville Telephone Company is engaged in operating a telephone exchange in the said city of Batesville, in said State, and in furnishing the citizens thereof with telephone connections through the central office of the exchange maintained by said defendants, so as to give the citizens of said city, who are subscribers for telephone instruments connected with said exchange, facilities for communicating with all other parties who are subscribers to said telephone and

others; that they also maintain and operate a long-distance telephone exchange from said city of Batesville to divers points at a distance from said city of Batesville. This plaintiff further states that the defendant, the Southwestern Telegraph & Telephone Company, is engaged in operating a long-distance telephone exchange in the State of Arkansas, in Pulaski, Lonoke, White, Jackson, Independence and other counties in said State of Arkansas; that the defendants operated their respective telephone exchanges in connection with each other, that is to say, a long-distance telephone connection is made at divers points by and between said defendant companies, so that a telephone message and communication may be had from Batesville to divers other parts of the State, and that said defendant kept, maintained and operated an office in the city of Batesville, and had an agent at that place for the purpose of connecting and transmitting telephone messages and communications from the city of Batesville over said long-distance lines to divers other places in the State of Arkansas and other places, so as to give parties in Batesville who are subscribers, and others, telephone connections and exchange facilities for communicating with subscribers and others who desired to communicate with persons living in divers and distant parts of the State and other States, as contemplated by the telephone service. That the plaintiff is a subscriber, and has been a subscriber for more than twelve months, to said telephone at Batesville for one or more instruments connected with said exchange, and, as a subscriber to the said telephone and exchange operated by the said defendants, Batesville Telephone Company and Southwestern Telegraph & Telephone Company, he is entitled to the same service as any other subscriber to said exchange. That, by provisions of the statutes of this State, it is made the duty of every telephone company doing business in this State to supply all applicants for telephone connections and facilities with such telephone connections and facilities without discrimination or partiality, provided such applicants comply with the reasonable regulations of such telephone company, and upon failure to do so a penalty of $100 for each day of such discrimination and partiality is provided. That said defendants, through their agents and employees, have discriminated and shown partiality against this plaintiff continuously each day for the past

twelve months; that such discrimination and partiality consisted in this, towit: That other subscribers to said telephone exchange are permitted to be connected from their respective residences and places of business through said telephone exchange for the purpose of transmitting messages and communications to divers parts of the State and other places over the long-distance lines connecting in said exchange to divers parts of the State and other places, and for such service they are charged at the office of the said exchange, and the bills therefor presented at the end of each month, while with this plaintiff, although he is a subscriber, and has been such continuously for more than twelve months, for one or more telephones connecting his residence and place of business with said exchange, said defendants refused, and have continued to refuse, and still continue to refuse, to connect his residence or place of business with said telephone exchange for the purpose of transmitting or communicating messages over said long-distance lines to subscribers and others at divers parts of the State, or elsewhere, unless this plaintiff should first come to the central office of said exchange and pay cash in advance for such telephone messages, service and communication. But that with other subscribers to said telephone exchange, who reside in Batesville and bear the same relation to said telephone exchange as this plaintiff, such charges are made at the time the service is rendered, and presented to them respectively at the end of each month. That this plaintiff has complied with and offered to comply with every reasonable rule and regulation made by said defendant companies; that he is a subscriber, and has been continuously for more than twelve months, for two telephone instruments, one at his residence and one at his place of business in the city of Batesville; and for this service he is charged as other subscribers, and his bills are presented to him at the end of each month, as to other subscribers, and he always promptly pays the same in due course of business as other subscribers. That the discrimination above mentioned has continued each and every day for more than twelve months last past, and that such discrimination is illegal, unwarranted and unjust to this plaintiff; that, by reason of said illegal discrimination and partiality shown against this plaintiff, the defendants have subjected themselves to a penalty of $100 for each and every day

for the last twelve months, aggregating 365 days and amounting to $36,500.

"Wherefore he prays judgment for the said sum of $36,500, and for such other and further relief as he may be entitled to."

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

The action is based upon the following statute:

"Section 7948. Every telephone company doing business within this State, and engaged in a general telephone business, shall supply all applicants for telephone connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are [is] not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused." Kirby's Digest.

Appellees insist that the penalty of $100 is recoverable only on account of a discrimination by the telephone company "against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant;" while the appellant insists that it is recoverable on account of any discrimination forbidden by the statute.

The statute may be divided into three clauses as follows:

(1) Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, provided, etc.

(2) And no such company shall impose any condition or restriction upon any applicant that is not imposed impartially upon all persons or companies in like situations.

(3) Nor shall such company discriminate against any individual or company, engaged in lawful business, by requiring, as a condition for furnishing such facilities, that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed; to be recovered by the applicant whose application is so neglected or refused.

The penalty of $100 is not recoverable only on account of a discrimination "by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant," but as well on account of unlawful discriminations made otherwise. The statute indicates this by adding to the words quoted "or otherwise." The facilities mentioned in the third clause are evidently the facilities referred to in the first clause, and the penalty is "for each day such company continues such discrimination and refuses such facilities," etc., that is, the equal facilities required by the first clause to be furnished an applicant "without discrimination or partiality." The penalty is "to be recovered by the applicant whose application is so neglected or refused." This is the applicant "for telephone connection and facilities" mentioned in the first clause, and no other person, and the neglect or refusal referred to is the neglect to furnish such connection and facilities. All these clauses are connected and dependent on each other; and the penalty is recoverable on account of any discrimination forbidden by the statute.

Every company is entitled to compensation for telephone facilities furnished by it. It may require the charges for such services to be paid in advance. *Hewlett* v. *Western Union Tel. Co.*, 28 Fed. 181; Jones on Telegraph and Telephone Companies, § 431, and cases cited; and Creswell on "The Law Relating to Electricity," § 373, and cases cited. This power is given for its own protection. In the exercise of it, it may extend credit for such charges to persons it may deem deserving. This is a reasonable exercise of the power, and is essential to its success. No rule can be laid down by which the credit to which each person is entitled can be determined. This is dependent upon various circumstances, such as the amount of property he may have over

and above his exemptions and liabilities, his promptness in paying his debts, his being contentious, a wrangler, a fault-finder, his honesty, integrity, and other qualities. The credit due each individual depends upon himself. It can not be fixed by any rule, but must be and is left to the company to determine. The statute forbidding discriminations does not deny the right. It does not come within the evils the statute was intended to suppress. All are required to pay the same rates for the same service in like situations, but the time when it should be paid is within the peculiar province of the company to determine. This is a right of creditors, and there is no reason why it should be denied to telephone companies.

Appellant (plaintiff) alleged in his complaint that, "although he is a subscriber, and has been such continuously for more than twelve months for one or more telephones connecting his residence and place of business with said exchange (telephone exchange of defendants), said defendants refused, and have continued to refuse, and still continue to refuse, to connect his residence or place of business with said telephone exchange for the purpose of transmitting or communicating messages over said long-distance lines to subscribers and others at divers parts of the State, or elsewhere, unless this plaintiff should first come to the central office of said exchange and pay cash in advance for such telephone messages, service and communications; but that, with other subscribers to said telephone exchange, who reside in Batesville and bear the same relation to said telephone exchange as this plaintiff, such charges are made at the time the service is rendered, and presented to them respectively at the end of each month." The requirement that appellant should first go to the central office of the exchange and pay cash in advance for such telephone mesages, service and communication, when it was not required of other subscribers, was an unreasonable and unnecessary discrimination, and is forbidden by the statute. The payment of the charge is all that should concern them in that connection. All else is arbitrary and unnecessary.

Reverse and remand with directions to the court to overrule the demurrer.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* FURLOW.

Opinion delivered January 28, 1907.

1. CHANGE OF VENUE—CONTROVERTING GROUNDS OF PETITION.—Under Kirby's Digest, § 7998, the ground assigned in a petition for change of venue may be controverted in all cases except where a plaintiff has instituted suit in a county other than that of his residence, or than the county where the occurrence of which he complains took place, unless he was compelled to do so to get service on the defendant. (Page 498.)
2. CARRIER—RIGHT TO REJECT TICKET.—A railway conductor has no right to reject a passenger's ticket because it was presented at an intermediate point between the station where it was issued and the passenger's destination. (Page 500.)
3. SAME—EXPULSION OF PASSENGER—TIME LIMIT ON TICKET.—Where a ticket was sold to a passenger which was limited to the day of issuance, although there was no train thereafter on that day which the passenger could have taken, the carrier is liable for expelling the passenger from the first train which he could have taken on the following day. (Page 502.)
4. SAME—DAMAGES FOR EXPULSION OF PASSENGER.—Where the evidence tended to prove that a passenger, who was a child of thirteen years, was wrongfully ejected from a train, that the conductor talked roughly to him and pushed him rudely, whereby he was much humiliated, a verdict of $250 damages can not be said to be excessive. (Page 502.)

Appeal from Cleveland Circuit Court; *Zachariah T. Wood,* Judge; affirmed.

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

1. The petition for change of venue showed that the plaintiff was not then, nor at the time of filing the suit, a resident of the county in which this suit was brought; and, the petition being duly verified as required by the statute, the petition should have been granted as a matter of right. Kirby's Digest, § 7998, *proviso.*

2. If there was no agreement when appellee bought the ticket that he should walk to Rison and catch train number three that night, still, if the ticket was not used on that day, the conductor had the right, under the rules of the company, to reject the ticket and eject the appellee from the train at a station unless he paid his fare. Hutchinson on Carriers, § 580; 46 S. W. 209;

12 Am. & Eng. Ry. Cas. (N. S.), 104; 4 *Id.* 510; 2 *Id.* 112; 127 U. S. 390.

3. The verdict was excessive. The maximum limit of his recovery should have been $280, the amount paid for his ticket and nominal damages.

Taylor & Jones, for appellee.

1. Appellant's contention on the question of the change of venue is untenable. Having complied with the condition of the proviso, the right of defendant to a change of venue reverts to the original statute. 74 Ark. 172.

2. The jury's verdict settles the appellant's contention that appellee purchased the ticket with the understanding that he should walk to Rison and catch train number three. This was a question for the jury, and, having sufficient evidence to sustain it, their verdict will not be disturbed.

3. The rules of the company introduced in evidence provide: "Any transportation on which the limit has expired before presentation must not be honored, unless the circumstances are such that in the conductor's opinion the holder is entitled to use it; etc. This imposed upon the conductor the duty to investigate the circumstances of the case, and if he acted hastily, and without regard to the appellee's rights, the appellant is liable. 58 Ark. 136; 65 Ark. 177; 21 S. W. 951; 22 Am. St. Rep. 489; 11 *Id.* 434; 8 *Id.* 859; 36 S. W. 174; 33 S. W. 1028; 43 Ark. 529.

4. The verdict was not excessive. It is in testimony that the conductor and the porter took hold of the boy roughly, talked to him rudely, and *shoved* him off the train in such manner as to cause a witness to think that plaintiff was a "hobo," being put off for trying to "steal a ride." 58 Ark. 136, and cases cited.

McCULLOCH, J. The plaintiff is a boy about thirteen years of age, and sues the railway company for damages alleged to have been sustained on account of having been wrongfully ejected from the train. He boarded a southbound passenger train at Rison, Arkansas, a station on appellant's road in Cleveland County, on Sunday afternoon, July 31, 1904, and presented to the conductor a ticket reading from Clio, a station about four miles north of Rison, to Camden, Arkansas. The conductor refused

to honor the ticket, caused the tran to stop within about thirty yards below the station, and ejected the boy. The plaintiff alleged in his complaint that, "by reason of being ejected from said train, he was greatly distressed and humiliated, besides being prevented wrongfully by defendant from proceeding on his journey, causing plaintiff, in addition to being humiliated and wounded, the actual loss of the money paid for said ticket, to his damage in the sum of one thousand dollars." The jury returned verdict in his favor, and assessed the damage at the sum of two hundred and fifty dollars. The first question for our consideration is the decision of the trial court in denying the defendant's petition for a change of venue. The petition of defendant, in addition to the statutory grounds for change of venue, alleged that the plaintiff did not reside in the county where the action was instituted; and it is insisted by learned counsel for appellant that because of that allegation the prayer of the petition should have been granted as of course. The court heard testimony as to the existence of the statutory grounds for change of venue, and denied the prayer.

The statute regulating the practice upon petitions for change of venue in civil cases is as follows:

"Upon presenting the petition, which may be resisted, and notice to such judge, he may make an order for the change of the venue in such action, if in his judgment it be necessary to a fair and impartial trial, to a county to which there is no valid objection which he concludes is most convenient to the parties and their witnesses; provided, that in case where the plaintiff shall have instituted suit in a county other than that of his residence, or of the county where the occurrence of which he complains took place, unless compelled to do so in order to get service on the defendant, the defendant shall have the right to a change of venue upon presentation of his petition duly verified." Act April 13, 1899; Kirby's Digest, § 7998.

Prior to the passage of that statute the order for change of venue was granted as a matter of course upon the filing of a petition duly verified and supported by the affidavit of two credible persons. There was no authority for an issue to be made be granted as a matter of course upon presentation of the petition, upon the truth of the allegations of the petition or for the court

to inquire into the truth thereof. The power of the court was limited to an ascertainment whether or not the petition was in proper form, contained the necessary averments, and was supported by the affidavit of two credible persons. The first paragraph of the statute just quoted worked a material change in that respect. It plainly authorized the court to inquire into the truth of the alleged grounds for change of venue, and to ascertain, before granting the prayer of the petition, whether or not the alleged grounds therefor exist.

The contention of appellant's counsel is that where the plaintiff shall have instituted an action in a county other than that of his residence, unless compelled to do so in order to get service on the defendant, the order for change of venue should be granted as a matter of course upon presentation of the petition, and that, if the plaintiff instituted an action in a county other than that where the occurrence of which he complains took place, it forms a distinct ground for change of venue. We do not agree with them.

The statute plainly means that if the plaintiff commences an action in a county other than that of his residence, or other than that of the county in which this occurrence of which he complains took place, unless he is compelled to do so in order to get service on the defendant, the latter shall have the right to a change of venue upon presentation of his petition in proper form, duly verified, containing allegations of the statutory grounds of prejudice or undue influence and supported by the affidavits of two credible witnesses. Upon the presentation of such a petition, the sole issue of fact for the determination of the court is whether or not the action has been instituted in the county where the plaintiff resides or in the county where the occurrence of which he complains took place, and, if not, whether the plaintiff was compelled to institute the action in some other county in order to get service on the defendant. But if the action is commenced either in the county of the plaintiff's residence, or where the injury complained of occurred, or if necessarily brought in some other county in order to get service on the defendant, then the change of venue is not ordered as a matter of course on presentation of the petition, and the court, before granting the prayer, where the petition is resisted, should first ascertain whether or not the alle-

gations of undue influence or local prejudice are true.

There was no error in overruling appellant's petition for change of venue.

At the time of the occurrence complained of the plaintiff and his father lived at Clio. There were two passenger trains per day going south at that time, train number one passing Clio about 3:30 P. M. and train number three passing that place about 3:20 A. M. A new time card went into effect at midnight on June 30, and according to it train number three did not stop at Clio, though it had been stopping at that place under the schedule in force up to that time. Plaintiff's father on July 30, about nightfall, and after train number one had passed, purchased a ticket for plaintiff from Clio to Camden and return, and the ticket was stamped of that date, and bore the usual stipulation thereon to the effect that it was good for passage on the date of sale. Plaintiff and his father both testified that the ticket was bought expecting that he would take train number three at Clio, and that the agent did not inform them that it would not stop there, but the agent testified that he did tell them that that train would not stop at Clio, and that they would have to walk to Rison to catch the train. The testimony is conflicting on this point, and must be treated as settled by the jury in favor of plaintiff's contention. It is undisputed, however, that the agent did sell a ticket for plaintiff's use at an hour when the only train which he could have taken on that day at that place or at Rison had passed. In other words, the ticket, according to the stipulations on its face, was void when the agent sold it, because there was not another train on that day which stopped there. The next train was due at 3:20 the next morning, and did not stop there. The plaintiff did not go to Rison that night to take the early morning train, number three, but waited for it at Clio, and it did not stop there. He walked to Rison the next day, Sunday July 31, and boarded train number one at 3:30 in the afternoon. When he boarded the train, the limit of his ticket had, according to the letter of its stipulation, expired, but under the rules of the company the conductor was not bound to reject it. One of the rules read in evidence from the book of instructions provides that "any transportation on which the limit has expired before presentation must not be honored unless the circumstances are such that in the conductor's opinion the holder

is entitled to use it, in which case he may accept it." This rule gave the conductor discretion to inquire into the facts and to honor a ticket apparently out of date if the circumstances warranted it. Moreover, the conductor testified that if he had been on train number three he would have honored the ticket, notwithstanding that train passed after midnight and the limit of the ticket had then expired. Now, the conductor knew that train number three did not stop at Clio, and as the ticket was, according to his own statement, good from Clio on train number one, he had no right to reject it because the plaintiff boarded the train at Rison. If it was valid from Clio, it was valid from Rison, an intermediate point, as the plaintiff did not forfeit his right to use the ticket because he walked down to Rison and boarded the train there, instead of embarking at Clio. Nor could the conductor rightfully assume that, because plaintiff boarded the train at Rison, he was at that place when train number three passed, so as to have had an opportunity to take passage on it. The fact that the ticket read from Clio, and was sold at that place, notified the conductor that plaintiff was seeking passage from Clio to Camden. Neither the plaintiff nor his father give any explanation why they walked down to Rison, instead of boarding train number one at Clio; but it is not necessary to sustain the cause of action that this circumstance should be explained. They were ignorant negroes, and the fact that the change in the time card which prevented plaintiff from getting on the early morning train at Clio, as he expected to do, may have brought about a confusion which induced them to go on to Rison on Sunday, where both trains were known to stop.

In *Little Rock & Ft. S. Ry. Co.* v. *Dean,* 43 Ark. 529, a case involving a similar point, Chief Justice COCKRILL, after holding that a passenger was bound by the time limit fixed in the contract, said: "The obligation bears upon the carrier with equal force. He must afford the purchaser of such ticket the necessary facilities for accomplishing his journey within the stipulated time, and upon his failure to do so he is not in position to treat the contract of carriage as forfeited, and demand a re-payment of fare for the same passage at least if the ticket holder avail himself, as in this instance, of the first opportunity to complete his journey after the expiration of the time limited."

Now, to sustain the contention of appellant in this case would be to do violence to the just rule expressed in the above quotation. The plaintiff took passage on the first train he could get after the ticket was purchased, and to refuse transportation on that train was to deny him the privilege of using the ticket at all. When the company through its agent did this, it violated its contract, and the expulsion from the train was wrongful.

Our attention is directed by learned counsel to authorities holding that the ticket presented by the passenger must, so far as the duty of the conductor is concerned, be treated as exclusive evidence of the right to passage, and that the passenger can not insist on riding on a ticket which is invalid on its face by reason of some mistake or omission of the selling agent. There seems to be conflict in the authorities on this question; but if it be conceded that the weight is with appellant's contention, yet that principle does not apply to the facts of this case where it is shown that the conductor had authority, under the rules prescribed by the company for his guidance to accept after the expiration of the time limit a ticket that the company was bound to honor. Besides, this court has decided that even where the conductor has acted strictly within his prescribed duties in rejecting a ticket apparently invalid, yet the company is liable for the expulsion on account of the mistake of the selling agent in making out the ticket. *Hot Springs R. Co.* v. *Deloney,* 65 Ark. 177.

It is next insisted that the verdict for $250 was excessive. The plaintiff, as we have already pointed out, was a boy thirteen years of age, and was put on board the train to go to Camden. He was carried only about thirty yards from the station, and was there put off the train. He testified that the conductor, after refusing to accept his ticket, took hold of him with the train porter and put him off; that his feelings were hurt; and that he walked back to his father crying. He said that the conductor took hold of him roughly, and talked roughly to him. Other witnesses testified that the boy was crying when he was put off, and another witness of acknowledged truthfulness testified that he was standing near by and saw one of the trainmen push the boy off the train, and that the boy was crying, and seemed to be distressed. The boy and his father had to walk back to Clio, and the agent refused to refund the price of the ticket.

While the verdict is in excess of what, it appears to us, the jury should have allowed, still we do not feel that it is so unjust or unreasonable that we should disturb it.

In the Dean case *supra,* where the injury seems to have been less than in this case, the court sustained a verdict for two hundred dollars. The court said concerning the amount of damages: "No harsh or unnecessary means appear to have been resorted to in this instance to expel the appellee from the train, though he, himself, testified that the conductor threatened to throw him off. The elements of damage the jury were directed to consider in case they found for appellee were the extra fare paid by him, the humiliation of being put off the train, and the inconvenience of being compelled to reach his destination by other means. The jury might well consider all of this, and we can not say that the amount was excessive."

The amount of damages for an injury involving humiliation and distress of mind resulting from a wrongful expulsion from a train, accompanied by harsh treatment, is indeterminate, and must be left, to some extent, to the sound discretion of the jury; and unless the assessment is palpably excessive, or so flagrantly unjust as to indicate passion, prejudice or a failure to appreciate the law and facts presented, this court will not disturb it. *Fordyce* v. *Nix,* 58 Ark. 136; *Railway Company* v. *Maddry,* 57 Ark. 306; *Railway Company* v. *Robbins,* 57 Ark. 384. There was no element of contumacy in the plaintiff's conduct after his ticket was rejected. He had no money to pay his fare with, so as to prevent his ejection from the train, nor did he augment his damage by refusing to get off after his ticket was rejected. The evidence shows that when the ticket was rejected, and the plaintiff stated that he had no money to pay his fare, he was roughly and rudely expelled from the train—pushed off, as one of the witnesses expressed it.

The jury had the witnesses before them and exercised their discretion, from all the facts adduced in evidence, in determining what would be fair compensation for the injury inflicted. We see no reason for disturbing the verdict.

Judgment affirmed.

Ex parte CAPLE.

81 504
84 202

Opinion delivered January 14, 1907.

DIVORCE—REQUIRING BOND FOR ALIMONY.—One held under order of the chancery court in a divorce suit which directs that he be detained in custody until he executes a bond for performance of the court's orders in regard to payment of alimony and suit money will not be released on habeas corpus in the circuit court, at least if there was no showing that he was unable to perform the judgment of the chancery court.

Certiorari to Sebastian Circuit Court; *Daniel Hon,* Judge; affirmed.

C. T. Wetherby, for petitioner.

The chancery court was without power to order the petitioner into custody until after there had been an adjudication that he had wilfully disobeyed the valid orders of the court. While the court had the jurisdiction to make the order requiring the payment of the sums of money named in the order, and to require of petitioner the execution of a bond to that end, yet he was entitled to a reasonable time in which to make the bond, and, upon failure therein, should have had an opportunity to show cause why he had not obeyed the order. The court ought not to anticipate a contempt and place the petitioner in custody before he had violated its order. Kirby's Dig. § § 2679, 719-730; 4 Wis. 522; 11 S. W. 669.

T. B. Pryor, for respondent.

1. In the absence of a bill of exceptions, all presumptions are in favor of the action of the court, and that the chancery court had jurisdiction to make the order.

2. Of the remedies provided in the statute, Kirby's Dig. § § 2679 to 2682, that of execution and also of sequestration of defendant's property and of property of securities were impracticable, because defendant had no leviable property, nor any securities. Hence, the court could only exact a bond, which was fixed at a reasonable sum, and require security, in order to compel obedience to its order. And, in view of defendant's declarations that he would not obey the order of the court to pay alimony, it would have been idle to trust him to furnish security

voluntarily, and it was necessary to hold him in custody until the bond was furnished.

RIDDICK, J. The facts in this case are that Pearl Caple brought an action for divorce against her husband, John Caple, and afterwards filed a petition for maintenance, temporary alimony and allowance of attorney's fees.

On the hearing of this petition the following order was made: "Come the parties, and, the petition for temporary alimony being heard upon evidence, the court orders the defendant to pay to the clerk for the benefit of the plaintiff $20 per month, beginning with the 15th day of December, 1906, and to pay $25, her attorney's fee, within 60 days, and $5 for her cost, and the defendant is required to give bond in the sum of $250, with security to the approval of the sheriff, conditioned to pay said sum, and the sheriff is ordered to take into custody the said defendant, and, in default of his making said bond, commit to jail until the further orders of the court."

The defendant failed to give bond, and was committed to jail. He afterwards filed a petition, and obtained a writ of habeas corpus from the judge of the circuit court. The sheriff who had custody of the defendant made a response to the writ by bringing the defendant before the circuit judge, and by stating in writing that he held the defendant in obedience to the order of the chancery court above referred to, that "upon the rendering of said decree or order he immediately took petitioner into custody, and still detains him, and his sole authority for so doing is the said decree or order. That petitioner has so far been unable to furnish said bond, although he has been given all opportunity requested by petitioner, and has allowed him to go in custody to see friends and relatives in different parts of this county." After hearing the matter the judge held that the petition for a discharge should be denied, and he remanded the prisoner. This judgment of the circuit court is brought before us by writ of certiorari for review.

We have before us in this case nothing but the petition for the writ of habeas corpus, the judgment of the chancery court ordering the defendant in the custody of the sheriff, with leave to give bond in the sum of $250 conditioned to perform the judgment of the court, and the return of the sheriff to the writ

of habeas corpus stating that defendant has been allowed every opportunity to give bond, but has failed to do so, and that he holds him in custody by virtue of the order of the chancery court.

As neither the complaint in the action for divorce, nor the petition of Mrs. Caple for temporary maintenance and attorney's fees, nor the evidence produced before the court on the hearing of the petition, are before us, we must presume that the pleadings and the evidence were sufficient to sustain the judgment rendered by the chancery court, if it can be sustained on that theory. Now, when this order was made, the action for divorce had been commenced, and the defendant had been summoned. He had notice of the petition for temporary alimony, and appeared and was present in court when the case was heard. The court had jurisdiction to try the case, and to make such orders as were authorized by the pleadings and evidence.

The petition for temporary alimony may have alleged that the defendant was able to pay the sums demanded, but had declared his intention not to do so, and that, unless he was compelled to give some security for the payments of the sums ordered to be paid by the court, he would at once leave the State and refuse to perform the judgment of the court. The evidence may have shown that these allegations of the petition were true, and that the only way to protect the rights of the plaintiff was to order the defendant into the custody of the sheriff until he had given bond for the performance of the judgment. In a case of the kind supposed we are of the opinion that the court would have the power to protect the rights of the plaintiff and to make the order it made. *Potts* v. *Potts*, 68 Mich. 492; *Davis* v. *Davis*, 83 Hun (N. Y.), 500; Ex parte *Robinson*, 71 Cal. 608; *Harper* v. *Rooker*, 52 Ill. 370.

It was formerly the common practice in cases of that kind for the courts of chancery to issue writs of *ne exeat* in order to protect the wife's interest and to secure the payment of alimony. When the writ was issued, the practice was to fix the amount of security which the husband must give, and upon failure to give it the husband was held in custody subject to the orders of the court. Nelson on Divorce, § 940.

These writs have been abolished by statute in this State

(Kirby's Digest, § 5970), and have fallen into disuse in other States for the reason that in most of the States the courts may on a proper showing require the husband to give security for the payment of the alimony. Bishop on Marriage, Divorce and Separation, § 1102.

Our statute expressly provides that the court in actions for divorce "may allow the wife maintenance and a reasonable fee for her attorneys, and enforce the payment of the same by orders and executions and in proceedings as in cases for contempt." Kirby's Digest, § 2679. It further provides in another section that such orders may be enforced by sequestration and such other lawful ways and means as are in accordance to the rules and practice of the court. Kirby's Digest, § 2682. Imprisonment in such a case is only justified on the ground of wilful disobedience to the orders of the court; and, so soon as it is made to appear that the defendant is unable to comply with the orders of the court, he should be discharged. The proper practice would be to make application to the chancellor for a modification of his order, but, conceding that the matter may be inquired into on a writ of habeas corpus issued by the circuit judge, there is nothing here to show that the petitioner was unable to perform the judgment of the chancery court. For, though that was alleged in the petition for the writ of habeas corpus, no evidence was introduced to support the allegation, and the circuit judge was justified in refusing to act on the allegations in the petition alone.

Counsel who oppose the discharge of the petitioner assert in their brief that petitioner on his examination before the chancery court stated that he earned four dollars a day at work as a miner, but that he did not intend to pay anything towards the support of his wife and infant child. We have no means of knowing whether this is so or not from the record, for the evidence is not in the record. But the presumptions are all in favor of the validity of this judgment, and from the record before us we are not able to say that it is void. We are therefore of the opinion that the circuit judge was right in refusing to discharge, and in remanding the prisoner to the custody of the sheriff. The writ of certiorari will therefore be quashed, and the judgment affirmed.

CAPITAL FIRE INSURANCE COMPANY *v.* MONTGOMERY.

Opinion delivered January 28, 1907.

1. INSURANCE—WAIVER OF BREACH OF WARRANTY—PAROL EVIDENCE.—Where a fire insurance company relies upon a breach of the warranty therein against incumbrances, the insured may by parol evidence show that when he applied for the policy he informed the insurance company's agent that the property was mortgaged. (Page 510.)
2. SAME—WHEN WARRANTY WAIVED.—A warranty in a fire insurance policy that the property insured is unincumbered is waived where the insurer's agent was notified when application was made for the policy that the property was incumbered. (Page 510.)
3. SAME—AUTHORITY OF AGENT.—The authority of one to receive and forward applications for fire insurance is sufficient to bind the insurance company with regard to any information imparted to him in the course of his employment. (Page 510.)
4. SAME—STIPULATION AGAINST WAIVER.—An insurance company can not, by stipulation in the application or in the policy, escape responsibility for the act of its agent in waiving the falsity of the answer to a question in the application. (Page 511.)
5. SAME—RELEASE OBTAINED BY DURESS.—Evidence that, after destruction of insured property, the adjuster and another agent of the insurance company went to the assured, who was an ignorant man, and told him that he was "in United States trouble" and had better settle, and that they kept him over night and induced him to surrender his policy and execute a release of liabilities thereunder, was sufficient to sustain a finding that the surrender and release were obtained by duress. (Page 511.)
6. SAME—AMOUNT PAID FOR RELEASE AS CREDIT.—Where an insurance company paid a sum of money to obtain a release of liability, and the jury finds that the release was obtained by duress, the insurance company is entitled to credit on the amount of its liability for the sum so paid. (Page 511.)

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

C. S. Collins, for appellant.

1. The incumbrance on the property was specially pleaded in the answer. This was a breach of contract, to which appellee made no plea of waiver. Waiver must be both pleaded and proved, and the burden of proof is on the plaintiff. 3 Cooley, Briefs on Ins. 2768; *id.* 2773; 23 Ind. App. 121; 53 N. E. 787; 77 Am. St. Rep. 414; 7 B. Mon. (Ky.) 470; 72 Ark. 52.

And where waiver by an agent is alleged, the burden of proving the agency is also on the plaintiff. 3 Cooley, Briefs on Ins. 2774; 26 So. 655; 66 Ia. 466; 122 N. Y. 578; 24 O. St. 67. Though it is primarily for the jury to determine whether there has been a waiver, it is a question for the court whether there has been sufficient evidence to take the case to the jury, or to support a finding of either party. 3 Cooley, Briefs, 277; 124 Cal. 164; 127 Ill. 599; 94 N. W. 274; 98 Am. St. Rep. 349.

2. The burden of proving the agency of Woods was on the plaintiff. No effort was made to prove the character and scope of his agency—nothing to show whether he was a mere soliciting agent with authority limited to taking applications to be submitted to the company, or a recording agent with authority to bind the company at the time by issuing a policy. The court therefore erred in overruling appellant's exceptions to this testimony of appellee: "I held a policy in the Capital Fire Insurance Company, which I got through the agent of the company, Zol. J. Woods, at Beebe. I told Woods that there was a mortgage on the place. I told him he ought to see it." 62 Ark. 47.

McCULLOCH, J. The plaintiff, J. N. Montgomery, instituted this action to recover of the defendant, the Capital Fire Insurance Company, the sum of $575 and interest thereon upon a fire insurance policy issued to him by the defendant on his dwelling house and furniture. The complaint contained the necessary averments as to ownership of the property and its destruction by fire, the issuance of the policy and the furnishing of the proof of loss, and contained the further allegation that the defendant's agent had, by fraud, deceit and duress practiced upon him, obtained from him the policy after the fire and kept it.

The defendant in its answer pleaded breach of warranty by plaintiff against incumbrances on the property insured; and also pleaded a written release of liability alleged to have been executed by the plaintiff in consideration of the sum of twenty-five dollars paid to him as a compromise and the further sum of $11.15, unearned premium paid to him. The answer also contained a denial of the plaintiff's allegations of fraud and duress in obtaining possession of the policy.

A trial before a jury resulted in a verdict in favor of the plaintiff for $575, and the defendant appealed.

The defendant asked the court for a peremptory instruction in its favor, which was refused, and exceptions were saved. There were no other requests for instructions, and the instructions given by the court have not been preserved in the record. We must therefore indulge the presumption that the jury was properly instructed.

The only errors assigned in the motion for new trial are that the court permitted the plaintiff to testify concerning his oral statements to defendant's agent who prepared and forwarded the application for insurance about a mortgage on the property, and the refusal of the court to give the peremptory instruction asked.

The plaintiff was an illiterate man, and testified that when the application was written by the agent through whom he obtained the policy he informed said agent of the mortgage on the property. This testimony was admissible, and it was not disputed. It operated as a waiver of the warranty that the title to the property insured was unincumbered. *Insurance Co.* v. *Brodie,* 52 Ark. 15; *State Mutual Ins. Co.* v. *Latourette,* 71 Ark. 242; *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295; *German-American Ins. Co.* v. *Harper,* 75 Ark. 98; *People's Fire Ins. Assoc.* v. *Goyne,* 79 Ark. 315; *Security Mutual Ins. Co.* v. *Woodson,* 79 Ark. 266.

Counsel argues that the evidence is insufficient to establish the agency of Woods, the person to whom the information was given. We cannot agree with him in this contention. Woods wrote the application, and appellee stated in his testimony that Woods was the agent of the company, and that he obtained the policy through him. Another witness, Hatch, who was present when the application was prepared, testified that Woods prepared it, and that he was the agent of the company. Neither of these witnesses were asked as to their means of knowledge concerning the agency of Woods, nor did appellant offer any evidence controverting these statements or showing the limits of Woods's authority as agent. We think there was sufficient to warrant the jury in finding that Woods was the agent of the company with authority to bind it. His authority to receive and forward the application was sufficient to bind the company to any information imparted to him in the course of the employ-

ment. *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 395; *People's Fire Ins. Co.* v. *Goyne, supra; Mutual Reserve Fund Life Assn.* v. *Cotter, ante* p. 205.

Nor could the company, by stipulation in the application or policy, escape responsibility for the act of its agent in waiving the falsity of the answer to questions in the applicaton. *People's Fire Ins. Co.* v. *Goyne, supra.*

The testimony of the plaintiff shows that he is not only illiterate, but that he is a very ignorant man. He states that, after the destruction of the property by fire, the adjuster of the company and another agent came to his home in the country, and told him that he "was in United States trouble and had better settle;" that they induced him to go with them to the town of Beebe, led him to the hotel, one of them on each side of him holding him by the arm, and then kept him over night in a room with Woods, the agent, and that they induced him to surrender the policy. It is true that he does not testify as to any positive threat or act of violence offered; but, according to the undisputed evidence, the company was liable to him for the loss, and we cannot say that the jury was without warrant in finding that the surrender of the policy and the release of liability thereunder was not fairly obtained from him. As already stated, we must presume that the jury were properly instructed as to the law on this point, and there was sufficient evidence to support the finding.

Appellant was entitled to credit on the amount of liability under the policy for the sum paid to him. We assume that the court instructed the jury to that effect. The jury returned a verdict for the amount of the loss, without interest. The interest up to the date of the verdict was sufficient to cover the amount of the payments, and we assume that the jury allowed the credits in that way.

There is no error in the proceedings, and the judgment must be affirmed. It is so ordered.

SUPREME LODGE KNIGHTS AND LADIES OF HONOR v. JOHNSON.

Opinion delivered February 4, 1907.

1. INSURANCE—LIABILITY OF FRATERNAL ASSOCIATION.—The constitution and by-laws of a fraternal insurance association form a part of the contract, and must be complied with before the association becomes liable for a death loss. (Page 514.)

2. SAME—WAIVER OF REQUIREMENT OF MEMBER.—If a requirement in the by-laws of a fraternal insurance company that an applicant for membership shall be initiated before any liability for his death accrues may be waived by the action of a subordinate lodge, the mere election to office in such lodge of an applicant for membership will not operate as a waiver of such requirement if the applicant was never installed and never attended any meeting of the lodge. (Page 514.)

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

F. A. Youmans and *W. H. Dunblazier*, for appellant.

Sam R. Chew, for appellee.

McCULLOCH, J. The plaintiff, Nannie E. Johnson, instituted this action against the Supreme Lodge Knights and Ladies of Honor, a fraternal society organized as a corporation under the laws of the States of Kentucky, Missouri and Indiana, to recover the amount of a relief fund certificate or policy therein on the life of her son, Charles Johnson, who is alleged to have been a member of said society at the time of his death. The defendant denied that said Charles Johnson was a member of said order, and upon this issue the jury returned a verdict in favor of the plaintiff. It appears from the evidence that in the month of January, 1904, E. R. Settle, deputy grand protector of this order, solicited and procured applications from various persons at Fort Smith, Arkansas, for membership, preparatory to the organization of a subordinate lodge at that place. He secured the application, dated January 15, 1904, of Charles Johnson, and the medical examination of said applicant was approved on January 23, 1904, by the supreme medical examiner.

The provision of the constitution and laws of the society, with reference to the institution of subordinate lodges is as follows:

"New lodges, consisting of not less than twenty applicants for relief fund membership, may be instituted and the degree conferred after the examination of the applicants by the subordinate medical examiner, and his recommendation to the supreme medical examiner for his approval of the same; but no relief fund certificate shall be issued, nor shall any liability be incurred by the supreme lodge, nor shall the membership be complete, until the medical examinations of at least twenty of the said applicants shall have been submitted to and approved by the supreme medical examiner and said applicants shall have been duly obligated in lodge session.

"The initial assessment required by relief fund law 1 to be paid by charter members of lodges instituted on or after the 22nd day of a month shall be accounted for and forwarded as the assessment for the month next following."

On February 5, the first meeting was held for the purpose of instituting the lodge, and at this meeting, as shown by the minutes, the deputy grand protector presided and a representative of the supreme lodge was present and assisted in the organization. At this meeting the applications of 49 (including Charles Johnson) were read, and they were all balloted upon and elected to membership; and nineteen of them were obligated according to the laws of the order. Johnson was not of the number, and was not present at the meeting. Several other persons were elected to membership on cards from other lodges. The election of officers was postponed until a subsequent meeting to be held on February 10; and on that date another meeting was held at which the officers of the lodge were elected and installed, and other business was transacted, including the reception of other applications and election of the applicants to membership. Another meeting was held on February 20, at which business was transacted, including initiation of applicants.

The charter of the lodge was issued dated March 5, 1904, and recited that the lodge had been instituted on February 15, 1904, the law concerning issuance of charters being as follows:

"Charters shall be issued to grand lodges and subordinate lodges by the supreme secretary within sixty days after satisfactory evidence of their organization has been furnished."

Charles Johnson died April 24, 1904. He never attended

any meeting of the lodge, nor was he ever obligated or initiated. On February 23, he paid the amount of one assessment in the relief fund to Settle, the deputy grand protector, but made no other payment, and was reported to the supreme lodge as suspended for non-payment of assessment, and for failure to take the obligation.

The supreme secretary issued a relief fund certificate for him dated February 15, 1904, and same was forwarded to the secretary of the subordinate lodge, but was never delivered to him.

It is conclusively shown that, for at least two reasons, Charles Johnson was not a member of the order, and that the plaintiff can not recover.

In the first place, he was never obligated or initiated as a member of the order. The law of the order hereinbefore quoted, as well as other sections of the constitution and laws, provide that the membership shall not be complete until the applicant shall have been obligated or initiated. The constitution and laws of the society formed a part of the contract, and must have been complied with before there could be any liability. 1 Bacon on Benefit Societies, § 81; *Woodmen of the World* v. *Jackson*, 80 Ark. 419.

It is contended on behalf of appellee that the failure of the applicant to be obligated or initiated was waived by the action of the subordinate lodge in electing him to an office in the lodge. The minutes of the meeting held on February 10, 1904, show that Johnson was elected to the office of sentinel, but he was never installed and never attended a meeting. If it be conceded that the subordinate lodge had the power, by any action of that body, to waive this positive requirement of the constitution and laws of the supreme lodge, the mere election to office in the lodge of an applicant for membership, where he was never admitted and never attended meetings or performed any of the duties of the office, could not operate as a waiver of any prerequisites to completed membership in the order. Certainly, it could not be considered a waiver until there was an acceptance of the office and an installation therein.

The laws of the order provide that "in all acts performed in complying with the relief fund laws of the order the subordinate lodge and its officers are the agents of the members, and

not the agents of the supreme lodge." It may well be doubted whether the subordinate lodge could waive the provision with reference to obligation or initiation at all, but this we deem it unnecessary to decide now. We do hold, however, that it was not waived in this instance.

In the next place, if Johnson ever became a member, he was suspended from membership on account of his failure to pay the assessment for the month of March. The lodge was instituted prior to February 22, and the assessment paid on February 23 must have been applied on the February assessment. It is not contended that he ever paid another assessment, and, under the law, he stood suspended at the end of the month of March for the non-payment of the assessment due for that month. It is argued that, because the money of some of the members paid at or about the same time was applied on the March assessment, the payment made by Johnson should have been so applied; but it is shown that the examinations of those persons were not approved by the supreme medical examiner until March 10, 1904, and that, for this reason, their initial assessments were not due until March. Johnson's examination was approved in January, and his assessment was due within thirty days from the date of such approval.

The instructions of the court were in conflict with the law as herein announced, and were therefore erroneous; and the evidence was not sufficient to sustain a verdict in favor of the plaintiff.

Inasmuch as the case has been fully developed, and it is obvious that the plaintiff cannot recover, it is useless to remand the case for a new trial.

Reversed and dismissed.

BEARD v. STATE.

Opinion delivered February 4, 1907.

ERROR CORAM NOBIS—NEWLY DISCOVERED EVIDENCE.—The writ of error coram nobis does not lie to review a judgment of conviction of rape rendered by the court at a former term, upon allegations that the

prosecuting witness since that trial has admitted that she committed perjury in testifying that defendant ravished her.

Appeal from Phillips Circuit Court; *H. N. Hutton,* Judge; affirmed.

Baldy Vinson and *June P. Wooten,* for appellant.

1. The right to bring proceedings in the nature of coram nobis exists, even though one has prior thereto pursued his other remedies. 11 Mo. 661; 61 Pac. 690; 57 Kan. 398; 60 Kan. 51. A motion for the writ will lie to revoke the judgment at any time the matter is presented to the court by such motion, supported by affidavits or evidence. 44 Mo. App. 506. See also 34 Am. Dec. 395; 19 Wend. 620; 8 East, 414; 20 Wend. 626; 1 Swan. 341.

2. The circuit court has power to issue and determine necessary writs to carry into effect its general and specific powers. Kirby's Digest, § 1310. In the exercise of its common-law power, it has authority to issue the writ in this State. Kirby's Digest, § 623; 35 Ark. 517; 58 Ark. 229. The writ is available as a common-law remedy, notwithstanding an additional remedy may be provided by statute. 46 Am. Dec. 257; 46 Conn. 604.

3. Sufficient facts having been set up in his petition, the court should have sustained the petition and placed the petitioner back on trial, in view of the constitutional guaranty allowing him "to have compulsory process for obtaining witnesses in his favor." Art. 2, § 10, Const. See also 35 Tenn. 341; 18 L. R. A. 838; 62 Kan. 109; 66 Kan. 202; 19 L. R. A. 762; 52 *Id.* 512; 48 L. R. A. 839.

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

At the common law, at the conclusion of the former trial, appellant had the right to file his petition, either for writ of error to correct an error of law or for coram nobis to correct an error of fact; but he had no right to file both, or one and then the other. Appellant took a writ of error, and this court affirmed the judgment of the lower court. 79 Ark. 292. He is now precluded from employing the writ of *coram nobis.* 1 Stra. 696; 2 *Id.* 975.

RIDDICK, J. The defendant, Govan Beard, a negro, was indicted in the Phillips Circuit Court for the crime of rape committed upon the person of one Annie McAbles, a white woman. The defendant entered a plea of not guilty, but on the trial he was convicted and sentenced to be hung. The conviction rested almost entirely upon the testimony of the prosecuting witness, Annie McAbles. The case was afterwards brought to this court by writ of error, and the judgment affirmed.

After the judgment had been affirmed the defendant by his counsel presented a petition to the circuit court where the conviction was obtained, asking for a writ of error *coram nobis.* He alleged that the prosecuting witness, Annie McAbles, had committed perjury on the trial, and further showed that since the trial in the circuit court she had admitted that her testimony on the trial that the defendant had ravished her was false, and in her desire to repair the wrong that she had committed she had voluntarily made affidavit to that fact, and confessed her wrong in the presence of a number of reputable citizens. He further alleged that at the time of the trial the community where the trial was had was in a state of frenzy in ignorance of the true facts, and under the belief that he, a negro, had committed rape on a white woman; that he was tried at a special term of the court called for that purpose, and because of the threats of the mob against him and through fear of violence he was afraid to apply for a continuance of the trial; that he on that account was compelled to submit to a trial without the opportunity of summoning witnesses and presenting evidence that would have contradicted the prosecuting witness and exonerated him. He therefore asked for a writ of error coram nobis to try whether the petitioner was denied a legal trial by reason of mob violence being threatened at the time, and whether the prosecuting witness committed perjury in testifying that she was ravished by defendant, and whether the other facts alleged in the petition are true or not.

Affidavits were attached to the petition, tending to show that the facts alleged therein were true.

After hearing the petition, the circuit court overruled the petition and refused to issue the writ, and the defendant appealed.

The only question in this case is whether the facts stated

in the petition were sufficient to justify the circuit court in issuing the writ of error coram nobis to review a judgment rendered by that court at a former term.

In the case of *Bronson* v. *Schulten*, the Supreme Court of the United States discussed the question as to the proper functions of the writ of *coram nobis*. After stating that the writ was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceedings, and that these were generally limited to the facts that one of the parties to the judgment had died before it was rendered, or was an infant, and that no guardian had appeared, or been appointed, or was a *feme covert*, and the like, or error in the process through default of the clerk, the court said further: "It is quite clear, upon the examination of many cases of the exercise of this writ of error coram nobis found in the reported cases in this country and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case." *Bronson* v. *Schulten*, 104 U. S. 410.

In a case involving this question decided by this court it was said that the writ "will not lie to contradict or put in issue any fact that has been already adjudicated in the action. An issue of fact wrongly decided is not error in that technical sense to which the writ refers. If the error lie in the judgment itself, it must be corrected by appeal or writ to a superior court." *Howard* v. *State*, 58 Ark. 229.

Now the defendant in this case was not, under fear of violence from a mob, compelled to enter a plea of guilty, as was the case in the case of *State* v. *Calhoun*, 50 Kan. 523, where judgment was rendered against the defendant on his plea of guilty without the formality of a trial. In this case he entered a plea of not guilty, and he was tried on that plea and convicted. The defendant now says that he is innocent, that the prosecuting witness committed perjury on the trial, and that he through fear of mob violence was prevented from producing evidence to contradict her. But the question of whether the prosecuting witness told the truth on the trial, and whether the defendant was guilty or innocent, has already been submitted to a jury and

decided in that trial. As we have shown by the decisions both of this and the Supreme Court of the United States, the writ of *coram nobis* will not lie to review a fact already submitted to and determined by the court or jury.

The fact that the defendant was prevented from obtaining his witnesses does not in our opinion alter the case, for that is a matter that should have been set up by a motion for new trial at the term at which he was convicted.

We have come to this conclusion with some reluctance, for the affidavit of the prosecuting witness filed with the petition of defendant and the other evidence convince us that the testimony of this witness is utterly unreliable, and that there are grave doubts of the guilt of the defendant. But our statute does not provide for new trials in criminal cases on the ground of newly discovered evidence, and for the reasons stated above we are of the opinion that the writ of error coram nobis does not lie in this case. The case has therefore passed beyond the jurisdiction of this court, and we are powerless to modify the judgment. The judgment of the circuit court refusing the writ must be affirmed, and it is so ordered.

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HAMMOND PACKING COMPANY v. STATE.

Opinion delivered January 14, 1907.

1. ANTI-TRUST ACT—NATURE OF PROCEEDING TO RECOVER PENALTY.—The penalty denounced by the anti-trust act of 1905 against those who violate its provisions is recoverable in a civil action, and not in a criminal proceeding within article 2, section 8 of the Constitution, providing, with certain exceptions, that "no person shall be held to answer a criminal charge unless on presentment or indictment of a grand jury." (Page 536.)
2. SUBPOENA DUCES TECUM—VALIDITY.—Where an order for *subpoena duces tecum* practically calls for all books, papers and documents of a large business, and in addition requires the production of certain witnesses for oral examination, the validity of the order as to production of the books and papers, if it be invalid as being un-

reasonable, will not justify disobedience of the writ as to the appearance of the witnesses for the purpose of testifying. (Page 538.)

3. ANTI-TRUST ACT—POWER OF STATE OVER CORPORATIONS.—The State, in a proper action, may require of either a foreign or domestic corporation doing business under authority of its laws the production of books, papers and documents, in order that it may be determined whether such corporation is violating the anti-trust act, provided the order for their production is reasonable in its terms. (Page 540.)

4. SAME—REQUIREMENT AS TO PRODUCTION OF TESTIMONY.—The provisions of the anti-trust act (sections 8 and 9) that the State's attorneys may in a proceeding under the act apply for an order to take the testimony of persons, and that the defendant's attorneys, officers or employees may be notified to request the officers, agents or employees of defendant to appear and testify, do not contemplate anything more than that the defendant shall make an honest effort to produce the testimony called for. (Page 540.)

5. SAME—PRODUCTION OF TESTIMONY—DUE PROCESS.—Section 9 of the anti-trust act, providing that when a defendant, proceeded against under its terms, is notified to produce certain witnesses to testify as required by section 8, and such witnesses fail to appear and testify, the defendant's answer or other pleading shall be stricken out, and judgment by default entered against defendant, relates to a matter of procedure and practice in procuring testimony in trials, and does not deprive the defendant of due process within the Fourteenth Amendment. (Page 541.)

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

This was an action instituted in the name of the State of Arkansas upon the relation of the Attorney General against the Hammond Packing Company under the anti-trust act, charging the defendant with being a member of a pool, trust, combination or conspiracy to fix and maintain prices in violation of the terms of the act, and seeking to recover a money penalty and to forfeit the right of the defendant to do business in the State.

The complaint alleged that defendant is a foreign corporation, and that on certain dates mentioned, while engaged in business in Arkansas, it created, entered into and became, and was then, a member of and a party to a pool, trust, agreement, combination, confederation and understanding, with certain other corporations, partnerships, individuals, persons and associations of persons, engaged in lines of

business similar in most respects and objects to that conducted by the said defendant, amongst whom were Swift & Co., the Cudahy Packing Company, the Armour Packing Company, Nelson Morris & Co. and Armour & Co., to regulate and fix the selling price of certain articles of manufacture, merchandise, commodity and convenience, towit, the commercial products of slaughtered live stock, and to maintain such price when so regulated and fixed, contrary to the form of the statute in such cases made and provided, and in violation thereof.

* * * * * * * * *

"Wherefore plaintiff alleges that said defendant, by transacting and conducting in this State the business of selling the products, articles and commodities aforementioned in this State, while a member of and a party to such pool, trust, combination, and understanding, as aforesaid, and by being a member of and a party to such pool, trust, combination and understanding as aforesaid, while transacting such business in this State, as aforesaid, violated the provisions of said act, and thereby forfeited its right and privilege thereafter to do business in this State; and that by committing such prohibited acts upon the 26th, 27th, 28th, 29th, 30th and 31st days of March, 1905, the said defendant became liable to the plaintiff in the sum of thirty thousand dollars, and an action accrued to the plaintiff to recover said sum according to the provisions of said act.

"The premises considered, plaintiff prays judgment that the right and privilege of said defendant to do business in this State be declared forfeited, and that plaintiff have and recover of said defendant the sum of thirty thousand dollars, and all her costs in this suit expended, together with all the expenses of the Attorney General in prosecuting same, as provided in said act, and for all other and proper relief."

The defendant interposed a demurrer on the following grounds:

"1. Because the allegations of the said paragraph do not constitute a cause of action against the defendant.

"2. Because it does not appear from the allegations of the said paragraph that the defendant had created, entered into, or become a member of, or a party to, any pool, trust, agreement, combination, confederation, or understanding with any corpora-

tion, partnership, individual, or association of persons in the State of Arkansas, or to regulate or fix the price at which any article of manufacture, merchandise, commodity, or convenience should be sold within the State of Arkansas.

"3. Because the statute upon which the action is brought attempts to impose a penalty for acts done outside the State of Arkansas, and is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, and under section 21, article 2, of the Constitution of Arkansas."

With its demurrer the defendant filed an answer specifically denying the allegations of the complaint.

The court overruled a motion by defendant to make the allegations of the complaint more definite and certain so as to show when the pool, trust, agreement, confederation, combination or understanding charged in the complaint was made, where it was made, what its terms and conditions were, and in what respect it constituted a pool, trust, agreement, combination, confederation or understanding in violation of the statute, and to show the article or articles embraced within the terms of the pool, trust, combination or confederation.

On September 5, 1906, plaintiff filed its motion for the appointment of a commissioner to take depositions in Chicago, and for an order upon the defendant to produce before him S. A. McLain, Jr., and fifteen other designated persons alleged to be officers and employees of the defendant residing in Chicago, Illinois, and all books, papers and documents in the possession or under the control of said persons, or any of them, relating to the issues in the case.

Defendant filed its motion for a rule on plaintiff to set out specifically what it expected to prove by each witness whose production was asked for, and also to set out specifically the particular description of any books it desired to be produced, with the name of the witness who was expected to produce it, and that it be required specifically to state wherein any of said books were material to the issues in this case. The Attorney General, on behalf of the plaintiff, filed an affidavit stating that he did not know just what could be proved by any one of the witnesses asked for, nor exactly what information was contained in any book or paper which was material in

the case. The court overruled this motion, and to its action in so doing the defendant excepted.

On September 10 the court entered an order appointing Lyle D. Taylor commissioner to take the depositions of the witnesses named in the motion of plaintiff in Chicago. The order directed the production of any books, papers, and documents in the possession or under the control of either of said persons relating to the merits of said cause, or to any defense therein, and directing and impowering said commissioner to examine orally under oath each and all of said persons or such thereof as may be brought before him for examination. Provided, that at such examination the witnesses and books aforesaid shall not be required to be produced at any one time in such numbers as to interfere with the operation of the defendant's business. It is further ordered that said commissioner shall, immediately upon the receipt of his commission above granted, issue a notice in writing, directed to the president or some officer or agent of the defendant corporation, notifying such president, officer or agent that the testimony of the person above named is desired, and requesting such president, officer or agent to have such persons, together with such books, papers and documents as above referred to, at the office of the said Lyle D. Taylor, 1301 Ashland Block, 59 Clark Street, in the city of Chicago, Illinois, on the 20th day of September, 1906, at 10 o'clock, A. M., then and there to testify, and to have such persons to attend at such place from day to day or from time to time, if adjournment be had, until the taking of their testimony herein be completed, and at such times to produce said books, papers and documents whenever demanded. And it is further ordered that counsel for the respective parties, or either of them, be, and they are, hereby authorized and allowed to attend before said commissioner upon the execution of the commission hereinbefore granted, and to orally examine and cross-examine said witnesses, or either of them; such oral examination and cross-examination to be reduced to writing by type by the commissioner, signed by said witnesses, attested in due form of law, and annexed to and returned with the commission hereinbefore ordered to the clerk of the Pulaski Circuit Court."

On October 8, the plaintiff filed its motion, reciting its motion for the appointment of a commissioner, the order appointing the commissioner, the service of notice by the commissioner for the production of the witnesses, and the books, papers and documents called for in the order appointing him, and the fact that at the time and place fixed the defendant refused to produce the witnesses called for, or any of the books, papers or documents, and thereupon asked the court to strike out all answers, demurrers, motions, replies or other pleadings filed in the cause, and to render a judgment in favor of the plaintiff by default.

The plaintiff, in support of its motion to strike the pleadings of the defendant, offered in evidence its motion to appoint a commissioner, the affidavit of the Attorney Gereral in support thereof, the order of the court appointing the commissioner, and the commission issued, with the return of the commissioner thereon.

The defendant, in support of its response, offered in evidence its motion to make the complaint more definite and certain, and the order of the court thereon, and its motion to require the depositions taken out of Pulaski County to be taken upon interrogatories and the order of the court overruling said motion, and its motion to require the plaintiff to make its motion for the appointment of a commissioner more definite and certain, so as to show the names of the persons to be examined, what the plaintiff expected to prove by each of them, the books, papers and documents that it desired produced, and what they contained that was material to the issues of the case, with the court's order overruling the same.

In the return of Lyle D. Taylor, commissioner, which was introduced in evidence by plaintiff upon the hearing of the motion to strike the pleadings and render judgment by default, is a letter of the defendant stating its reasons for its failure to comply with the order, which is as follows:

"*Lyle D. Taylor, Commissioner, Ashland Block, City:*

"DEAR SIR—Your request upon this company to produce certain of its officers and employees, with books, papers and documents, before you, to be used as evidence on the part of the plaintiff in the case of the State of Arkansas against this company, has received the most respectful consideration. The company cannot concede the right of the honorable court whose com-

mission you bear, to make the order under which you act, or your right to make the request referred to. On the contrary, it is of opinion that the request calls upon it to surrender rights in which it is protected by the Constitution of the United States and of the State of Arkansas, that are too valuable to be surrendered.

"With all respect for yourself and the honorable court, the company must decline to comply with the request.

"Very respectfully, etc.,

"Chicago, October 2, 1906."

Defendant filed a response to the motion, setting up that the statute was in various respects unconstitutional.

The following stipulation was filed:

"It is stipulated by and between the parties to this suit, the State of Arkansas represented by her Attorney General, and the defendant by its attorneys, Rose Hemingway, Cantrell & Loughborough, that if the defendant fails to produce the witnesses, and books, papers and documents called for in the order heretofore made by the honorable Pulaski Circuit Court, and if the plaintiff shall file a motion in pursuance of the statute of the State of Arkansas to strike the answer and other pleadings of the defendant from the files and for a judgment by default, and if said motion is sustained and a judgment by default rendered for a money penalty in favor of the plaintiff against the defendant, in such event the judgment shall be entered on the first count of the complaint and for the sum of ten thousand dollars ($10,000.00); that the defendant may prosecute an appeal to the Supreme Court of Arkansas, which is to be done with all reasonable speed and expedition, and in case of an adverse decision by the Supreme Court of Arkansas it may further prosecute with all reasonable speed and expedition its writ of error to the Supreme Court of the United States; and that the enforcement of the judgment shall be suspended until the final decision of the cause in the court of last resort."

The motion to strike out the pleadings of defendant, and the response thereto by defendant, were heard, the motion was sustained, the pleadings were stricken from the files, and a judgment by default was rendered for the sum of ten thousand dollars.

Thereupon the defendant filed its motion to set aside the judgment by default, and for a new trial, which motions raised various objections to the legality of the court's action in striking out its answer, and in entering judgment against it by default.

The court overruled the motions, to which action the defendant at the time saved its exceptions, and it filed its bill of exceptions and appealed.

Sections eight and nine of the Anti-trust Act (Acts 1905, p. 1.) are as follows:

"Section 8. Whenever any proceeding shall be commenced in any court of competent jurisdiction in this State by the Attorney General and Prosecuting Attorney against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this State, or to recover the penalties in this act provided, then and in such case, if the Attorney General or Prosecuting Attorney desires to take the testimony of any officer, director, agent, or employee of any corporation, or joint stock association proceeded against, or, in case of copartnership, any of the members of said partnership, or any employee thereof, in any court in which said action may be pending, and the individual or individuals whose testimony is desired are without the jurisdiction of this State, or reside without the State of Arkansas, then in such case the Attorney General or Prosecuting Attorney may file in said court in term time, or with the judge thereof in vacation, a statement in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place where he desires said persons to appear; and thereupon the court or judge thereof shall make an order for the taking of said testimony of such person or persons and for the production of any books, papers and documents in his possession or under his control relating to the merits of any suit, or to any evidence therein, shall appoint a commissioner for that purpose, who shall be an officer authorized by law to take depositions in this State,

and said commissioner shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said case, or agent, or officer, or other employee, that the testimony of the person named in the application of the Attorney General or the Prosecuting Attorney is desired, and requesting said attorney, or attorneys of record, or said officer, agent or employee to whom said notice is delivered, and upon whom the same is served, to have said officer, agent, employee, representative of said copartnership, or agent thereof, whose evidence it is desired to take, together with such books, papers and documents, at the place named in the application of the Attorney General, or the Prosecuting Attorney, and at the time fixed in the application, then and there to testify; Provided, however, That such application shall always allow in affixing said time the same number of days travel to reach the designated place in Arkansas that would now be allowed by law in case of taking depositions: Provided, also, In addition to the above named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employee on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice as returned in writing may be made by any one authorized by law to serve a subpoena.

"Section 9. Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director or employee to attend before any court, or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce any books, papers and documents they may be ordered to produce by the court, or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the Attorney General or Prosecuting Attorney, to strike out the answer, motion, reply, demurrer or other pleading then or thereafter filed in said action or proceeding by the said corporation, joint stock association or copartnership, whose officer, agent, director or employee has neglected or failed to attend and testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, and said court shall pro-

ceed to render judgment by default against said corporation, joint stock association or copartnership. And it is further provided that in case any officer, agent, employee, director or representative of any corporation, joint stock association or copartnership in such proceeding, as hereinbefore mentioned, who shall reside or be found in this State, shall be subpoenaed to appear and testify or to produce books, papers and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or copartnership in any such proceeding, shall, on motion of the Attorney General or Prosecuting Attorney, be stricken out and judgment in said cause rendered against said corporation, joint stock association or copartnership."

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The provision of the statute authorizing the court to make an order for the production of books and papers is unconstitutional: (1) Because it deprives defendant of the right to have the witnesses against it produced in person and to be confronted by them in the trial. Art. 2, § 10, Const. Ark.; 5 Amendment U. S. Const.; art. 2, § 14, Const. (Ark.), 1836; Rev. Stat. 246; 6 Ark. 187; Cooley's Const. Lim. 374. (2) It subjects the defendant to unreasonable search and seizure of its books, papers and documents. 4th and 14th Amendments Const. U. S.; art. 2, § 15, Const. Ark. The statute, being penal, should be strictly construed, and the full protection of the Constitution extended to the defendant. 116 U. S. 617; 148 U. S. 325; 154 U. S. 479; 201 U. S. 43, 76; 132 Pa. St. 403; Cooley's Const. Lim. 370, n. 2; *Id.* 372; 109 Fed. 549; 3 Cranch, C. C. 646; 4 Mo. App. 494; 72 Mo. 97; 75 S. W. 737; 71 Pac. 602; 5 Cush. 369; 39 Ind. 519; 2 Elliott on Ev. § § 1391, 1396, 1412; 150 Ill. 408; 93 Fed. 36; 20 Hun, 517; 50 N. E. 1032; 11 Exch. 543; 20 Atl. 977; 1 Pom. Eq. Jur. § 201; Story, Eq. Jur. § § 1490, 1495; 2 Daniell, Ch. Pr. § 1557; Story's Eq. Pl. § § 521, 575, 576; 1 Greenleaf, Ev. 451; 5 Best & S. 873; 2 Gray, 558; 64 N. Y. 120; 5 Ark. 70; 15 Ark. 29. Every order for the production of papers should rest upon the judgment of a court that the papers called for are material to the issues; and every such order calling

for the production of private papers and their exposure to strangers, without a preliminary showing of materiality and without a specific description which shall identify the material and leave untouched the immaterial, is a violation of the principles of civil liberty. 72 Mo. 83; Kirby's Digest, § 3111; 66 Ark. 229; 73 Vt. 212; 40 Ill. App. 428; 146 Pa. St. 255; Cooley's Const. Lim. 368; 150 Ill. 408; 50 N. E. 132. The act places a harsh and unreasonable burden upon the defendant as a condition to making its defense, placing a price upon the administration of justice, in violation of the Constitution. Art. 2, § 13. (3) The section of the act authorizing the court to compel a production of witnesses and papers requires the defendant, in a penal or criminal action, to give evidence against itself, and the order based upon it violates the 5th and 14th amendments to the United States Constitution and the State Constitution, art. 2, § 8. Cooley's Const. Lim. 364, and authorities *supra;* 3 Wigmore on Ev. § 2259; 18 S. W. 1125. (4) It denies to the defendant the equal protection of the laws. 165 U. S. 150; 127 U. S. 209; 52 Ark. 150; 10 Pet. 596; 7 Wall. 159; 17 Fed. 41. (5) It deprives the defendant of its property without due process of law. *Supra.*

2. The statute which provides that the court shall strike the defendant's pleadings from the files and render judgment against it by default is unconstitutional, and a judgment so rendered constitutes a taking of property without due process of law, and a denial to it of the equal protection of the law. Art. 2, § § 3, 8 and 21, State Const.; 14th Amendment; 30 S. E. (Ga.) 878; 125 Fed. 468; 172 U. S. 557; 155 U. S. 689; 167 U. S. 444; 3 Sumn. 601; 93 U. S. 274; 18 Wall. 330; 17 Wall. 437; 182 U. S. 427; Cooley's Const. Lim. (6 Ed.), 452; 61 Fed. 718; 53 Fed. 901; 58 Ala. 594; 55 Minn. 473; 11 Wall. 259; 52 Pac. 122; 51 Pac. 696; 55 Pac. 163; 61 Pac. 987; 71 Pac. 407; 37 S. E. 678; 23 Gratt. 409; 28 Gratt. 16; 42 La. Ann. 92; 94 Fed. 1017; 55 Cal. 633; 88 Fed. 713; 186 U. S. 365; 62 N. E. 488; 85 N. Y. 437; 21 W. Va. 347; 122 Mo. 161; 45 S. C. 464.

3. The allegations of the complaint do not disclose a cause of action against the defendant. (1) The anti-trust act is essentially a criminal statute. § § 1, 2, art.; art. 2, § 8, Const. 1874; Kirby's Digest, § 1546, *et seq.;* 70 Md. 191; 146 U. S.

657; 47 Ark. 243; 6 Ark. 187; 41 Ark. 403; 11 Ark. 500; 43 N. W. 845; 2 Doug. (Mich.) 334; 38 Ind. 60. The anti-trust acts of Missouri and Texas allowing proceedings for their violation upon information of the Attorney General or Prosecuting Attorney are based upon constitutional provisions different from ours. Compare art. 2, § 12, Const. Mo., 1875; art. 1, § 10, Const. Tex., 1876. And the anti-trust acts of those States do not make the violation of their terms an offense, or constitute them crimes, as does ours. 2 Rev. Stat. Mo., § § 8968-8975; Sayle's Texas Civ. Stat. Tit. 108, pp. 1878, 1879; Kirby's Digest, § § 1976-1982. The first section of the act provides that persons violating its terms "shall be deemed and adjudged guilty of a conspiracy to defraud." Every combination, either to injure individuals or to do acts prejudicial to the community, was indictable at common law. 2 Bishop, Crim. Law, § § 174-5-6; 2 Eddy on Combinations, § § 43-4-5; 2 Wharton, Crim. Law, (10 Ed.), § § 1369, 1371, 1851; 20 Ark. 216; 68 Pa. St. 173; 2 Whart. Cr. Law, § 178; 9 Am. Dec. 534; 1 Devereux (N. C.) 357; 4 Met. 111; 84 Va. 927; 3 Whart. Cr. Law, (6 Ed.), § 2322; 12 Minn. 164; 23 N. J. Law, 33; 15 N. H. 396; 156 U. S. 1; 175 U. S. 211; 196 U. S. 375. Therefore, when the act forbade combinations to fix or maintain prices, and declared its violation to be a conspiracy to defraud, it but defined a common law offense, and persons violating it can only be proceeded against by indictment. 6 Ark. 190, and authorities *supra;* 26 U. S. 216; 2 Eddy on Combinations, 914 *et seq.* (2) If the act alleged in the complaint constitutes a violation of the statute, the statute is nevertheless unconstitutional because it provides penalties for acts and transactions occuring without the State, and discriminates between persons in its treatment of acts done by them in the State. This question was not urged in the Hartford case, 76 Ark. 303, and the decision of the majority of the court was directed to the power of the State to oust a foreign corporation for violating the act.

The gist of the offense defined by the act is an unlawful confederation, and not doing business in this State. At the common law the unlawful confederation or agreement was the gist of the offense of conspiracy, and such is the common law as it has been adopted by the various States of the Union. 1 Leach,

274; 17 Fed. 145; 44 Fed. 898; 3 Am. Dec. 58; 51 *Id.* 75, note; 12 Minn. 164; 15 N. H. 396; 9 Am. Dec. 556; 152 U. S. 539; 108 U. S. 204; 10 Cent. Dig. 1130.

The act does not prescribe the terms upon which foreign corporations may do business in the State, nor the punishment of such corporations for doing business without authority.

The offense defined by the act is in fact, as well as in name, "a conspiracy to defraud;" and, when considered in connection with the common law with respect to conspiracies in restraint of trade and the Federal statutes upon the same subject, the conclusion must be reached that it was intended to punish confederations, and not acts prejudicial to trade.

The offense is complete when the confederation has been formed. The only effect of acts done to accomplish its purpose is to aggravate, or renew, the offense. 4 Wend. 229; 21 Am. Dec. 122; 85 Pa. St. 482; 152 U. S. 539; Arch. Crim. Pr. 6; 4 East, 164; 6 Biss. 259; 52 Fed. 275; 27 Fed. Cas. No. 15,896. If the act can not be so construed as to make the offense the same whether committed by a foreign or a domestic corporation, or by an individual residing and doing business within the State, or residing or doing business without the State, then it it unequal in its application, deprives the appellant of the equal protection of the law, and therefore is unconstitutional. Cases *supra.*

A corporation is a person within the meaning of the State and Federal constitutions, and a foreign corporation, when it has complied with the terms of the statute prescribing the terms upon which it may do business in this State, is entitled to demand the equal protection of the laws. Kirby's Digest, § 828; 118 U. S. 394; 142 U. S. 386; 164 U. S. 578; 127 U. S. 209; 199 U. S. 409; Cooley's Const. Lim. 209-14.

The punishment under the act can not exceed forfeiture of license to do business within the State. Conceding to the State that, through comity, it may authorize a foreign corporation to transact business within its borders, and may thereafter at will withdraw that right, and exclude the corporation, yet, undoubtedly, it is without authority to inflict a money penalty for acts done without its jurisdiction. 177 U. S. 28; 197 U. S. 115. See, also, 182 U. S. 452; 199 U. S. 409; 200 U. S. 48.

Robert L. Rogers, Attorney General, *Lewis Rhoton,* Prosecuting Attorney, *James H. Stevenson, F. Guy Fulk, W. M. Lewis* and *W. L. Terry,* for appellee.

1. A corporation is subject to regulation by the alteration, amendment or repeal of its charter, under the power reserved to itself by the State. Art. 12, § 6, Const.; 58 Ark. 407, 427, 435. Having no absolute rights outside the State of their creation, foreign corporations accept license to transact business within this State subject to such burdens, restrictions and limitations as the State may see fit by law to impose upon them. Art. 12, § 11, Const. And, whether the conditions imposed are reasonable or not. so long as they are within constitutional limitations, they are absolutely within the discretion of the Legislature. 19 Cyc. 1251-2; 54 Ark. 101; 69 Ark. 521.

Whatever restrictions, conditions and burdens the Legislature might lawfully have laid upon a corporation in the original grant of power to it may be imposed upon it by way of amendment; provided such restrictions, conditions and burdens be prospective in their operation, and provided further that they do not impair the contracts of the company already made or rights which have become vested under authority, and in the valid exercise, of its charter. 99 U. S. 700 and cases cited; 110 U. S. 347.

Appellant by coming into this State agreed to abide by the laws of the State, including such statutes restricting its powers as the Legislature might from time to time enact; and by continuing in the State after the act of 1905 was passed it agreed to conform thereto. 54 Ark. 101; 125 Fed. 502; 124 Fed. 262; 138 Cal. 738; 106 U. S. 350; 177 U. S. 29. Compliance with all the requirements of the act of 1905 is required of foreign corporations as a condition of doing business in this State. 76 Ark. 403, 412. See, also, 208 Ill. 562.

Statutes are sustained as valid which:

(1) Require foreign corporations to submit to examination under the Anti-Trust Law. 125 Fed. 502; 199 U. S. 401.

(2) Deny to foreign corporations, not complying with certain requirements, the right to use the courts of the State. 138 Cal. 738.

If appellant's propositions were true (which appellee does not concede) that (1) this is a criminal charge and appellant can

only be proceeded against by indictment or presentment, (2) that it can not be compelled to produce evidence against itself therein, and (3) that it has been deprived of its property without due process of law, still appellant does not come within the class of parties who are made the beneficiaries of the guaranties of the Bill of Rights which appellant seeks to invoke. The words "people," "men," "person," "people of this State," "citizen or class of citizens" as used in art. 2, § § 1, 2, 8, 13, 15, 16, 18 and 21, Const. 1874, occurring in close juxtaposition and in reference to the same general purposes, when given the ordinary and usual meaning, must necessarily be taken to refer to natural persons and citizens, and not to corporations. A review of the Federal Constitution shows that its guaranties are intended primarily for the individual. Art. 4, § 2; amendments Nos. 2, 4 and 5; amendment No. 14, § 1. Although the United States Supreme Court has held that corporations are persons within the meaning of the provisions guarantying due process of law and equal protection of the law, there is authority sustaining appellee's contention here. 17 L. R. A. 856. And it has been held that a corporation is not included in the term "the people," as used in the 4th Amendment relating to searches and seizures. 201 U. S. 43, 73, 78. See, also, 8 Wall, 168; 19 Cyc. 1226; 125 U. S. 181; 5 Current Law, 1471; 74 N. E. 467; *Id.* 809.

2. The act is not unconstitutional as providing for an unlawful search and seizure; moreover the record discloses no facts upon which to base the contention that the order of examination subjected appellant to such unlawful search and seizure.

The order of examination, wherein Lyle D. Taylor was commissioned to act for the court for the purpose of securing the testimony of the witnesses named therein, was necessarily general in its terms; but he was given discretion to continue the taking of depositions from time to time, as might be neccessary, and to order the production of books, papers and documents "whenever demanded," and it was further provided in the order that the witnesses and books should not be required to be produced at any one time in such numbers as to interfere with the operation of defendant's business. At the first attempt of the commissioner to enter upon the execution of the commission, when he called upon appellant to produce witnesses, naming one speci-

fically, for examination, and without requesting that he produce any books, papers or documents, appellant refused to produce the witness, and, further, refused to yield obedience to any part of the order of examination. If the commissioner had made an order which was too broad, the proper time to object was when appellant appeared in circuit court and made response to the attorney general's motion for default judgment.

Where one conceives that he is not compelled to submit to questions and demands which he has reason to believe will be asked or made, it is his duty to wait until such improper questions or demands are asked or made, and then assert his rights by refusing to answer or comply. 4 Abb. (N. C.) 241; *Id.* 252; 14 Daly, 308. The act does not deprive the circuit court of its discretion to grant or refuse the Attorney General's motion for an order for examination, nor with reference to entering a default judgment. 66 N. Y. Supp. 129. As opposed to the contention that the act is unconstitutional in providing for an unlawful search and seizure, see 142 Fed. 808; 201 U. S. 652, 664; 106 Mo. 670; 108 Mo. 666; 18 S. W. 894; 91 S. W. 1062; 17 L. R. A. 859; 66 Ark. 229; 13 Ark. 307; 161 U. S. 591; 199 U. S. 370.

3. The provisions of the act authorizing a judgment by default are not inimical to the "due process of law" provisions of the Constitution, and are valid. 2 N. Y. Civ. Proc. Rep. 72; 91 S. W. 1070; 96 U. S. 97; 94 U. S. 113; 97 U. S. 108; 18 How. 272; 111 U. S. 701; 4 Wheat. 244; 95 U. S. 714; 92 U. S. 480; *Id.* 90; *Id.* 280; 182 U. S. 436; 37 S. W. 513; 110 U. S. 516; 160 U. S. 389; 177 U. S. 230; 169 U. S. 586; 166 U. S. 138. It has been held: (*a*) That the proceedings under which property is subjected need not be strictly a judicial proceeding. 18 How. 272; 107 U. S. 265; 115 U. S. 330; 47 Ark. 296, 301. (*b*) That due process of law does not necessarily imply a proceeding according to the course of the common law. Cases *supra;* 110 U. S. 516. (*c*) That due process of law does not necessarily imply a trial by jury. 92 U. S. 90, *et seq.* See, also, 182 U. S. 186; 177 U. S. 238. The State has full control over the procedure in its own courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions

of the Federal Constitution. 9 Fed. Stat. Ann. 431; 175 U. S. 175; 137 U. S. 20; 166 U. S. 138; 194 U. S. 263; 8 Cyc. 823. In the exercise of its inherent power, the court, in this State, if an answer does not meet the requirements of the statute, may render judgment by default, treating the case as if the defendant had not appeared, though served. Kirby's Digest, § § 6098, 6197. See, also, *Id.* § § 6240-1; *Id.* 6154-6166. For further authorities supporting the validity of the provisions for entering judgment by default, see 75 Miss. 862. The judgment by "default" provided for in the act is not to be understood as meaning "default" in its technical sense, but in the broader sense intended in code provisions. 1 Black on Judgments, § 15; *Id.* § 80; 6 Col. 483; 6 Enc. Pl. & Pr. 59. The provision for striking out the answer and giving judgment by default upon failure to comply with the order of examination is proper practice. 6 Enc. Pl. & Pr. 83; *Id.* 91-2; 5 Am. & Eng. of L. (1 Ed.), 496*a*; 20 Col. 628. Such statutes are highly remedial, and should be liberally construed. 55 N. Y. App. Div. 245. See, also, 3 Fed. Stat. Ann. 2, 3; 8 *Id.* 264-5; 2 Rev. Stat. (Mo.), 1855 p. 1577, § 3; *Id.* § 4; 31 Mo. 435; 40 Mo. 166; 46 Mo. App. 351; 48 Mo. App. 510; 81 Mo. App. 380; 114 Mo. App. 446; 14 How. 453; 15 Hun, 110; 15 Abb. Pr. (U. S.), 184; 34 N. H. 215; 5 Ind. 291; 80 Ind. 371; 111 Ind. 403; 88 Ind. 305; 26 Wis. 500; 105 N. W. 1067; 3 Ala. 295; 6 Ala. 438; 56 Ind. 394; 139 Mass. 98; 125 Mass. 572; 136 Mass. 291; 44 Ia. 394; 13 Tex. 394; 86 Pac. 1120; 93 Fed. 31; 24 Fed. 738; 109 Fed. 547; 10 Fed. 529; 1 Curt. 401; 30 S. E. 878; 26 S. E. 473; 174 Pa. So. 349; 80 Ill. 489; *Id.* 435; 78 Ill. 605; 71 Ill. 44; 99 Mass. 404; 1 Miles (Pa.), 256; 10 Phila. 609.

4. The procedure in this case did not deny the appellant the right to confront the witnesses against it, even if it was entitled to such right, nor was it a violation of that right as secured by art. 1, § 10, State Const.; and the 5th amendment to the Federal Constitution does not apply. 29 Ark. 17; 33 Ark. 539; 40 Ark. 454; 37 Ark. 324; 60 Ark. 400; 47 Ark. 180; 9 Fed. Stat. Ann. 256. The order of examination does not constitute an unreasonable search and seizure. Cases *supra*. The statute is not invalid as compelling a party to be a witness against himself in a criminal case. It does not deny to appellant the equal protection of the law. There is no classification provided in the act, but it

applies to all corporations, partnerships, individuals or other associations or persons. 165 U. S. 150; 2 N. Y. Civ. Proc. 72; 14 Abb Pr. 443. The order of examination does not deprive appellant of its property without due process of law.

5. The act is not a criminal statute, and this is not a criminal proceeding. 56 Ark. 166; Mansfield's Digest, § 5478; Kirby's Digest, § 6595; 63 Ark. 134; 55 Ark. 201; 58 Ark. 39; 69 Ark. 363; 32 Wis. 663; 28 Conn. 169; 16 Enc. Pl. & Pr. 231; *Id.* 235; *Id.* 237; 52 N. Y. Supp. 9; 4 Lans. 136; 14 Tel. 365; 12 Neb. 538; 85 Ky. 586; 84 N. C. 681; 2 Paine, 300; Fed. Cas. No. 13,341; 197 U. S. 115; 44 S. W. 936; 67 S. W. 1057.

6. The act defining the violations of the law which are charged in the complaint is constitutional. 76 Ark. 303. Contrary to appellant's contention, the judgment in this case not only shows that no judgment for ouster was entered, but it also shows that the lower court specially refrained from entering such a judgment, and held the question open until this court could pass upon the constitutionality of the act and the power of the circuit court to enforce its judgment for a money penalty. See, also, 46 Am. Dec. 100; 125 Fed. 502.

HILL, C. J. This is an action brought by the State of Arkansas on the relation of the Attorney General against the Hammond Packing Company, alleging that it was doing business in the State contrary to the Anti-trust Act of 1905. After answer a commission was issued to a commissioner in Chicago to take testimony. Upon a refusal to comply with the order of court requiring production of witnesses and documents, after notice, the answer was stricken out, and judgment rendered against the appellant as by default, and it appealed.

1. The nature of the "conspiracy to defraud" denounced by section one of the act of January 23, 1905, the "Anti-trust Act," is the first subject requiring attention. Appellant contends that the complaint, framed in the language of that section, does not constitute a cause of action because the acts therein complained of constitute a crime, and under art. 2, § 8, of the Constitution of Arkansas, "no person shall be held to answer a criminal charge unless on presentment or indictment of a grand jury" (with certain exceptions not pertinent to this issue).

The same contention was made in regard to the offense

described in the 1st section of the Anti-trust Act of 1899. Acts 1899, p. 50. The difference between section 1 of the act of 1899 and section 1 of this act is immaterial on this issue. The court, in construing the act of 1899 in *State* v. *Lancashire Fire Ins. Co.* 66. Ark. 466, ruled this point, it is true, *sub silentio,* against the contention of the appellant. That an attempted monopoly, an agreement to restrain the freedom of trade, was a criminal conspiracy at common law is undoubtedly true. This subject is fully discussed. and also the applicability of the law of criminal conspiracy to modern combinations in restraint of trade, in Eddy on Combinations, § § 335-336, and Beach on Monopolies, § § 77-78.

When the ingredients constituting the criminal conspiracy at common law and the ingredients constituting the "conspiracy to defraud" under anti-trust acts are examined, it is apparent that the offenses are not identical. The latter is doing business while a member of an illegal combination, while the former is a conspiracy to do an unlawful act or a conspiracy to do a lawful act in an unlawful manner. The remedies against the common-law conspiracy were indictment for the criminal conspiracy and an action on the case for damages by an aggrieved party or *quo warranto* by the State against an offending corporation. Eddy on Combinations, § § 338, 371. This action is entirely different, and is purely a statutory action to recover the penalties of the statute for doing business in the State contrary to its terms. These penalties are two-fold: one a money judgment for each day the offense continues, and the other as to corporations a forfeiture of charter if a domestic corporation and forfeiture of right in the State if a foreign corporation. Anti-trust Act, 1905, § § 2 and 3,

Railway Company v. *State,* 56 Ark. 166, is applicable here. It was therein demonstrated that a statutory penalty for a matter not a crime at common law and not made a crime by the statute was recoverable in a civil action, and was not a "criminal charge," within the meaning of sec. 8, art. 2, of the Constitution. The fact that there is a further penalty in case the offender is a corporation—that penalty being the civil death of the corporation if it is created by this State and its exile if created by another State—can not change the effect of the money penalty. It is just an added penalty where the offender is an artificial person, and falls

equally, to the extent of the State's power, on foreign and domestic corporations.

It is sought to distinguish the Hartford case (*Hartford Fire Insurance Co.* v. *State,* 76 Ark. 303), from this one on the ground that in the Hartford case only the ouster of a foreign insurance corporation was considered, while this case presents an appeal from a money judgment only. The matter of money judgment in the Hartford case was covered by an agreement of parties (see page 305), and the decision was limited to the facts presented, but it was expressly held that the corporation had subjected itself to the penalty of the act. That this judgment is not of ouster as well as for the money penalty is not a cause of complaint by appellant, for it is liable to that penalty likewise if liable for the money penalty. Therefore the court treats the action as purely a statutory one for the recovery of a penalty named in the statute.

2. It is contended that sections 8 and 9 of the anti-trust act of 1905 subject defendants proceeded against under them to unreasonable search and seizure of papers, books and documents, contrary to the 4th amendment of the Constitution of the United States, and contrary to a similar provision in section 15, art. 2, Constitution of Arkansas.

The first ten amendments of the Constitution of the United States operate on the Federal Government only, and can not be invoked against State legislation. *Jack* v. *Kansas,* 199 U. S. 372; *Brown* v. *New Jersey,* 175 U. S. 172. Where, however, the provisions of a State constitution are identical with provisions in these amendments, the courts of the State should, and do, regard as controlling decisions of the Supreme Court of the United States upon them.

Appellant relies upon *Boyd* v. *United States,* 116 U. S. 616, as establishing the principles that the "search and seizure" clause reaches to an order of court under a statute providing for a production of books and papers under penalty that the complaint be confessed in an action to recover a penalty; and if such order effects an unreasonable search, it is contrary to such provision; and actions seeking penalties should in this respect be treated as criminal cases.

The scope of *Boyd* v. *United States* is narrowed when ap-

plied to corporations by the recent decision in *Hale* v. *Henkel,* 201 U. S. 43, and the case at bar must be determined in these respects by the last enunciation of that court on this subject. It is established in *Hale* v. *Henkel* that the interdiction of the 5th amendment to the Federal Constitution that "no person * * * shall be compelled in any criminal case to be a witness against himself" does not apply to corporations but to natural persons. The exact language above quoted is also found in section 8, art. 2, Constitution of Arkansas. It is further settled by *Hale* v. *Henkel* that a corporation is entitled to immunity by reason of the 4th Amendment from *unreasonable* search.

As to whether the order in question was an unreasonable search of appellant's books is not properly before the court under the facts. The order for the production of the books was coupled with an order to produce named witnesses for oral examination, and J. Ogden Armour, one of those named in the order, was the first witness called for oral examination. Instead of producing him or showing inability to do so, the appellant declined *in toto* to obey the order.

If appellant had obeyed so much of the order as required the production of witnesses for oral examination, or showed its inability to do so, and showed an attempt to comply with the order to that extent, and had refused to obey the order as to the production of books and papers, then the question would be squarely for determination whether the order in question amounted to an unreasonable search of books and papers. It is pointed out in *Hale* v. *Henkel* that a *subpoena duces tecum* which practically called for all the books, papers and documents of a large business to be brought into court under a sweeping clause was unreasonable and void, but the fact that it was void as to the production of the books and papers did not justify its disobedience as to appearing to testify. In this case the order is very broad, but its harshness is somewhat ameliorated by a proviso that at the examination the witnesses and books should not be required to be produced at any one time in such numbers as to interfere with the business of the defendant. But, as indicated, it would be *obiter dictum* to determine the reasonableness of the order in question in so far as production of books and papers is concerned. Sufficient to say that the statute is valid under the decision in *Hale* v.

Henkel, in so far as it authorizes a reasonable order for the production of books, papers and documents of a corporation over which the State has control, and what may be a reasonable order must be determined in each case as it arises.

Foreign corporations doing business in this State under laws permitting them to do so would in this respect be subject to like State control as domestic corporations. *Woodson* v. *State,* 69 Ark. 521; *Railway Company* v. *Gill,* 54 Ark. 101; *St. Louis & San Francisco Railway Company* v. *Gill,* 156 U. S. 649. The control of the Government over State corporations engaged in interstate commerce surely can not be as far reaching as the control of a State over a foreign corporation within its borders by its permission and corporations created by it; and as *Hale* v. *Henkel* sustains the right of the Government to require a production of books, papers and documents in order for the Government to ascertain in a proper action whether a corporation engaged in interstate commerce is proceeding in its business along legal lines, provided such order is reasonable in its terms, it follows, *a fortiori,* that a State may do so over foreign and domestic corporations doing business under authority of its laws.

The question narrows to whether the statute, in so far as it authorizes the order to produce witnesses, is constitutional. The provisions of sections 8 and 9 are attacked as unreasonable, in derogation of natural rights and various clauses of the State and Federal constitutions. These sections, with a few differences immaterial to this issue, are copied from the Missouri anti-trust act, and the clauses under fire here were recently sustained as constitutional by the Supreme Court of Missouri in *State* v. *Standard Oil Co.,* 91 S. W. Rep. 1062.

It is insisted here, as it was in Missouri, that this statute lays a duty on a corporation to produce its officers and employees, or be defaulted for a failure to do so.

If these provisions mean that the corporation must be a policeman, and bring into court on demand its president, bookkeeper or doorkeeper *vi et armis,* certainly it would be an unreasonable imposition. An analysis of the provisions, however, will not justify such construction. These sections evidently mean this, and nothing more: that the corporation shall on demand request any given officer, agent or employee to be present at the time

named for examination as a witness (and in case of production of books and papers that the given officer or agent produce the given books or papers), and on a failure to comply with these requirements that it be defaulted. Of course, this necessarily contemplates an honest effort to produce the testimony called for. When that is made, then the statute is complied with; when it is not, as in this case where the defendant corporation refused to obey any part of the order, then the statute is not complied with, and that brings up the gravest question of the case.

3. Is section 9 authorizing the answer to be stricken out and default judgment rendered when the defendant refuses to obey the order made pursuant to section 8 due process of law? The case most strongly pressed upon the court to sustain the contention that such action is not due process is *Hovey* v. *Elliott,* 167 U. S. 409.

The Supreme Court of the District of Columbia, sitting as a chancery court, made an order on defendants to pay over certain funds which had been paid them by a receiver of the court. This order was disobeyed, and, after citation to show cause against it, the answer of defendants was stricken from the files, and thereafter the bill was taken *pro confesso,* and judgment rendered accordingly. Subsequently suit was brought on the judgment in New York, and the case reached the Supreme Court of the United States on the question whether this was due process of law. Mr. Justice White for the court learnedly and exhaustively reviewed the authorities as to the power of a chancery court to punish for contempt by striking out the answer and proceeding on the bill as confessed, and demonstrated that such power did not exist. He says that in England no single case is found sustaining it, and in America only two, *Walker* v. *Walker,* 82 N. Y. 260, and *Pickett* v. *Ferguson,* 45 Ark. 177. These two cases are condemned as unsound. It is interesting to note that the court in *Pickett* v. *Ferguson* simply followed the New York case of *Walker* v. *Walker,* but Mr. Justice EAKIN filed a dissenting opinion, and reviewed the authorities on the subject, and stated the law as it was done subsequently by Mr. Justice White in this case. The court, after reaching the conclusion that the chancery court did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and ignore the

proof taken in support of it, then passed to the question whether a judgment thus rendered contrary to law was void for want of jurisdiction and subject to collateral attack. It was determined that the judgment was one substantially without hearing, and analogous to a judgment determined upon issues not raised in the pleadings and in the absence of the party. The decision was expressly rested "on the want of power in the courts of the District of Columbia to suppress an answer of parties defendant, and after so doing to render a decree *pro confesso* as in case of default for the want of an answer." In the case at bar the court did not lack power to strike out the answer and proceed as in case of default if it was competent for the State to confer that power on the court. Hence the question here is, not the power or want of power in the court, but the power or want of power in the State to enact the statute under review. If the court in *Hovey* v. *Elliott* had held, as did this court in *Pickett* v. *Ferguson,* that the power to strike out the answer and proceed as in case of default was an inherent power of the court, and still a judgment rendered under it was taking property without due process of law, then *Hovey* v. *Elliott* would be conclusive of this issue. But the decision was predicated upon the premise that the power exercised was contrary to the law of the land, and the sequence followed that property was taken without due process.

In the first judiciary act passed by Congress, in 1789, a statute was enacted giving United States courts in the trial of actions at law the power to require the parties to produce books and writings in their possession or control which contain evidence pertinent to the issue, in cases and under circumstances where the same might be compelled in chancery, and this was the penalty named for a violation of such order:

"If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." Rev. Stat. § 724.

An examination of the 3 Federal Statutes Annotated, pp. 2-5, show this statute has been constantly applied by many of the ablest jurists who have adorned the Federal bench for the past 118 years, and in none of the many decisions applying it and defin-

ing its scope has it been held contrary to due process of law.

The Revised Statutes of Arkansas, adopted in 1837, gave the power to any court of record to compel a party to a suit pending therein to produce any books, papers and documents in his possession or under his control relating to the merits of such suit or to any defense therein. It was provided, as a penalty for failure to obey such order, that the court may nonsuit him, or strike out any pleas or notice of setoff or debar him from any particular defense in relation to such books, papers and documents. Rev. Stat., ch. 116, § 88-92, now found in Kirby's Digest, § § 3074-3078. There were similar provisions enacted for courts of chancery to proceed as on confession against a party failing to obey an order to produce books, papers and documents. Kirby's Digest, § § 3079, 3080.

These statutes have been constantly invoked in the courts of this State almost since its admission into the Union, and their enforcement not opposed as depriving the recalcitrant party of his property without due process. The section under inquiry does not differ in principle or much in detail from section 724 of the Federal statutes nor these statutes so long upon the statute book of this State, in so far as striking out the answer is concerned.

The industry of counsel for appellee develops the fact that such statutes are common in other States. They may be found referred to in the brief. These considerations are important only as indicating that such statutes have long been accepted by bench and bar, State and Federal, as being part of the law of the land. This question was before the Supreme Court of Mississippi under a statute authorizing a default for a failure to answer interrogations; and the statute was attacked as unconstitutional on the strength of the opinion in *Hovey* v. *Elliott*. The court said: "It was a declaration of the Magna Charta that no one should be deprived of a right without being heard in his defense; and this principle is embodied in section 14 of our State Constitution, which provides that 'no person shall be deprived of life, liberty or property, except by due process of law.' However wholesome this doctrine is when applied to courts and to persons exercising judicial or quasi-judicial functions, it has never been supposed that it deprived the Legislature of the power of changing the rules

of evidence, or of modifying or abrogating altogether the presumptions indulged by the principles of the common law. If the Legislature may provide for a discovery of evidence in the hands of the adversary, it must be competent for it to impose upon such party the conditions of a failure to make such discovery; for when the Legislature requires the discovery to be made, and imposed the conditions of a refusal, such conditions must become the law of the land, and to pursue the statute is due process of law. (Bagg's case, cited in *Hovey* v. *Elliott,* 167 U. S. 416.)" *Illinois Cent. Railroad* v. *Standford,* 75 Miss. 862.

This case is criticised as reasoning in a circle, but the criticism is not just if the statute is valid. Of course, an invalid statute gives no force, and is not the law of the land, and proceedings under it are not pursuant to due process; but where the statute is valid, then its provisions become as much the law of the land as any common law inherited from England. The question then passes to whether the State has power to enact a statute visiting the penalty of a default judgment upon a party required to produce evidence in court who fails and refuses to do so. The power of the State in such matters is thus stated by Mr. Justice Brewer, speaking for the Federal Supreme Court: "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not make a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. * * * The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary." *Brown* v. *New Jersey,* 175 U. S. 172. See, also, *Wilson* v. *N. C.,* 169 U. S. 586: *Hurtado* v. *California,* 110 U. S. 516.

In *Louisville & Nashville Ry. Co.* v. *Schmidt,* 177 U. S. 230, Mr. Justice White for the court said, at page 236: "It is no longer open to contention that the due process clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in the State courts or regulate practice therein. All its requirements are complied with, in the proceedings which are claimed not to have been due process of

law, provided the person condemned has had sufficient notice and an adequate opportunity afforded him to defend." See also *Simon* v. *Craft,* 182 U. S. 436.

Applying these principles, it can not be doubted that the statute in question, like section 724 of the Rev. Stat. of the United States and sections 3079, 3080 of Kirby's Digest, is a matter of procedure and practice in procuring testimony in trials and enforcing orders for production of material and relevant evidence, and in the proceeding leading up to its enforcement it requires sufficient notice and an adequate opportunity to defend, first against the order, secondly it provides for an opportunity, after notice, to obey it, before any default can be taken; and these provisions meet the requirements of the 14th Amendment.

4. Appellant presents arguments against the construction placed on section one of this act in *Hartford Ins. Co.* v. *State,* 76 Ark. 303, but the rule of *stare decisis* forbids a re-examination of these questions.

Other matters have been presented and considered, but the views expressed heretofore are fatal to appellant's contentions.

Judgment affirmed.

BATTLE, J., dissents.

WOOD, J., (concurring). The construction given the first section of the anti-trust law of 1905 in *Hartford Insurance Co.* v. *State,* 76 Ark. 303, in my opinion renders the whole act unconstitutional. The offense, or act interdicted by the law, is the "being," "creating," "entering into," "becoming a member of," a trust to regulate or fix prices. That is the "conspiracy to defraud" of which the parties are adjudged guilty. That is the unlawful act which subjects the parties named in the act to a penalty. If the act thus made unlawful is not committed in this State, if the trust has no reference whatever to prices in this State, and does not in any manner affect persons or property in this State, then the Legislature has no power to prohibit, or prescribe money penalties for the commission of, such acts. I care not how altruistic or philanthropic such legislation may be from the viewpoint of political doctrinaires, it is unconstitutional and void. I repeat now, I hope for the last time, what

I have said twice before, that our Legislature in the anti-trust law of 1899 and 1905, never intended their enactment to have any such extra-territorial effect, and this court in my opinion, with all due respect, has not correctly construed it. See my concurring opinion in *Lancashire Insurance Co.* v. *State,* 66 Ark. 466, and my dissenting opinion in *Hartford Insurance Co.* v. *State,* 76 Ark. 303. The first sections of the anti-trust acts of March 6, 1899, and of Jan. 23, 1905, are in language almost identical and in legal effect precisely the same. We gave the correct construction and reached the correct conclusion in construing the first section of this law in *Lancashire Ins. Company* v. *State,* 66 Ark., *supra.*

The words "whether made in this State or elsewhere" were added to the first section of the Act of 1905 to make the language of that act conform to the decision of the court in *Lancashire Insurance Co.* v. *State,* 66 Ark. *supra.* The effect of these added words was to make any act done, no matter where, in furtherance of the conspiracy to defraud the people of Arkansas by entering into a trust to control prices in this State a violation of the law.

If the act had been framed as an exclusion statute for foreign corporations doing business in this State, or as prescribing the terms upon which foreign corporations might be admitted to do business in the State, the lawmakers would never have embraced private individuals and domestic corporations within the provisions of the law, as framed, creating the offense, and prescribing the pecuniary punishment thereof. We must presume that the Legislature knew that private individuals could not be punished for entering a trust beyond the limits of the State that did not affect prices in the State, and that domestic corporations could not have penalties adjudged against them for doing some act out of the jurisdiction of the State that did not affect prices in the State. Would one of our merchants in Little Rock who entered a confederation in London, England, to control the price of an article that was sold and used only in London be subject to the penalties of this law for entering such confederation? Could one of our citizens be deprived of his livelihood and of his property by execution to satisfy a judgment that might be rendered against him as a penalty for an act committed in London? Could domestic corporations be held liable, under similar circumstances,

and mulcted in fines, and have their charters forfeited and their property confiscated, simply because they are creatures of the State? In my opinion, such procedure would be in derogation of charter rights, and could not be justified by any power reserved in the Legislature to "alter, revoke, or amend" the charter of domestic corporations, for charters can not only be altered, revoked, or annulled "in such a manner that no injustice shall be done to the corporators." (Art. 12, § 6, Const. Ark. 1874.) Such procedure would be most unreasonable and unjust to the corporators who may have invested millions in our State, and who at the time of the passage of the act were engaged in a perfectly legitimate business. If they are in a trust of any kind anywhere at the time of the passage of the act, although not to affect prices in this State, they are penalized under this statute, and the statute is *ex post facto* in that respect. It may be impossible for them, within sixty days, to arrange their affairs so as to come within the provisions of the act, without an absolute sacrifice or confiscation of their property, still, if they do not, they are subject to the heavy pecuniary penalties of this law. Well, if individuals and domestic corporations cannot be penalized in heavy money judgments for acts done beyond the jurisdiction of the State, under this law, neither can foreign corporations. The act should be so construed as to make the law equal and uniform in the money penalty to be adjudged against those who come within its inhibition. I have no doubt that such was the intention of the Legislature.

It must be kept in mind that in this, as well as in *Hartford Insurance Co.* v. *State,* the only judgment sought is a pecuniary penalty. It is not a proceeding to forfeit a charter, but to punish for acts done out of the State under a charter that was good when issued and that has never been forfeited or called in question. The appeal only calls in question the validity of the pecuniary judgment. When a foreign corporation has been licensed to do business in the State, it must have the equal protection of the laws. The State can keep it out, but it cannot admit it, and permit it to remain, and at the same time subject it to money penalties that could not be imposed upon domestic corporations or individuals for the same offense. "Such (foreign) corporation shall be entitled to all rights and privileges and subject to all the penalties conferred and imposed by the laws

of this State upon similar corporations formed and existing under the laws of this State." Kirby's Digest, § 828.

These are a few of the numerous considerations which, it seems to me, demonstrate the error in the construction given the law, and show its unconstitutionality as construed.

The provisions of the first section of the act as applicable to the classes named therein cannot be separated. This court can not enter upon the work of legislation. The provisions of the act are so interdependent that this court can not enter upon the work of classification and segregation. The first section cannot be held constitutional as applied to individuals and domestic corporations, and therefore it cannot be held constitutional when applied to foreign corporations. See *American Smelting & Refining Co.* v. *Colorado,* 204 U. S. 103.

The law, to be constitutional, must be confined in its operation to trusts that are formed in this State or elsewhere to affect prices in this State. It must be presumed that the Legislature intended to act within its jurisdiction, that it intended to benefit the people of the State by laws that would protect them from dishonest, unjust and oppressive combinations in restraint of trade, and confederations and monoplies designed to fix, control, and regulate the price of some commodities essential to the life, comfort and happiness of the people.

The language of the law, in my opinion, does not warrant a construction that puts the Arkansas Legislature in the unenviable attitude of driving from our State those individuals and corporations who would come here and, by engaging in competitive business, lower the price of the various articles enumerated in the statute. I am unwilling to convict the Legislature of the unwisdom involved in a policy that can but bring dire disaster to the business interests of the State, and ruin to the people whom the Legislature must be presumed to have intended to benefit and protect.

The law, as construed, does not relieve the people of the necessity of buying trust-made articles, and at trust-fixed prices, but it only compels them to go into other States for them and to pay the increased cost. For there is no law in Arkansas that can prevent the merchants of New York, St. Louis, and Memphis, from selling our merchants and people their goods, wares and

merchandise at trust-fixed prices, and there is no law, and can be none, that will prevent the insurance companies of foreign states and countries from entering into trusts and combinations to fix the rates of insurance for property elsewhere. There can be no law to prevent our people, when the exigencies of their business require, from insuring their property in old-line insurance companies that have been driven from the State. But all this adds to the burden of the people, instead of making it lighter. Hence, I still contend that this court made a great mistake in looking to executive messages, political platforms of the dominant party, and other so-called contemporaneous "history of the times," to aid in the construction of language which in my opinion really needs no construction, but which plainly limits the operation and effect of the law to territory within the jurisdiction of the Legislature—to Arkansas. But I am powerless as an individual judge to overrule *Hartford Fire Ins. Co.* v. *State;* and, as I see nothing in sections eight and nine to render the act unconstitutional, for reasons stated by the Chief Justice, under the rule of *stare decisis,* I concur in the judgment only.

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WARD FURNITURE MANUFACTURING COMPANY *v.* ISBELL.

Opinion delivered February 4, 1907.

1. CONTRACT—ENTIRETY.—Though a contract is entire in form, its entirety may be broken by the concurring acts of the parties. (Page 559.)

2. SALE—EFFECT OF PARTIAL ACCEPTANCE.—Where there was evidence that the parties to a contract for sale of lumber elected to treat it as divisible, it was error to instruct that acceptance of a material part of the lumber would be an acceptance of the whole. (Page 560.)

3. SAME—VENDEE'S DUTY TO INSPECT.—Under an executory contract for the sale of a quantity of lumber, of a certain kind and quality, it is the vendee's duty to make proper inspection of the lumber within

a reasonable time after same was received; and if he fails to make reasonable inspection and report same, he will be deemed in law to have accepted the lumber. (Page 560.)

4. SAME—VENDEE'S DUTY AS TO ACCEPTANCE.—If a sale of a quantity of lumber by description was entire, the vendee should have accepted all or none; if several, he might accept such as conforms to the contract, and reject the remainder. (Page 560.)

5. SAME—WARRANTY—REMEDIES OF VENDEE.—Where a contract for the sale of lumber specified that the lumber should be of certain age and grade, the vendee, in case the lumber fails to come up to specifications, had three remedies, viz., (1) he might reject the lumber; (2) he might accept same and bring a cross action for breach of warranty, when sued for the purchase price; or (3) he might use the breach of warranty by way of recoupment in an action by the vendor for the price. (Page 560.)

6. TRIAL—DUTY TO ASK FOR INSTRUCTION.—Appellant can not complain that the trial court failed to give an instruction that was not asked by appellant. (Page 561.)

7. CUSTOM—ESTABLISHMENT.—It was not error for the trial court to refuse to instruct the jury as to the existence of an alleged custom if there was no evidence that such custom had existed a sufficient length of time to have become generally known. (Page 561.)

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

STATEMENT BY THE COURT.

This suit was brought by appellees against appellant to recover a balance of $686.48 alleged to be due appellees on lumber sold and delivered to appellant. The appellant answered denying any indebtedness to appellees, and by way of cross-complaint alleged:

"That it entered into a contract with plaintiffs to buy between 60,000 and 100,000 feet of lumber from them, to be of what is termed No. 1 and No. 2 common grade, and to be air-dried from 60 days to 6 months; that certain lumber was shipped to it by plaintiffs, but that it was not the grade nor character of lumber it bought from plaintiffs, and that defendant promptly notified plaintiffs of this fact, and refused to accept the lumber that did not come up to contract specifications; that 28,116 feet of lumber so shipped was according to contract, and was accepted by defendant, and that plaintiff's account with it was credited with

the contract price of 28,116 feet of lumber, amounting to $337.39 and the freight thereon, amounting to $65.79, and that, after giving said credit on plaintiff's account, plaintiffs are indebted to defendant in the sum of $209.36 balance due it on account. Appellant alleged that an item of $212.13 for freight was paid by it for appellees on lumber shipped to appellant and rejected. Appellant prayed judgment on its cross-complaint for $209.36 with interest thereon from 16th day of December, 1904.

Appellee's reply to the answer and cross-complaint admits the execution of the contract set up, but denies all the other allegations of the answer and cross-complaint, and alleges that the lumber was sold appellant upon the understanding that no claims were to be allowed against it unless reported at once, and alleges further a custom in Ft. Smith that lumber sold as this was should be inspected at once and report made of same to the seller, and that appellant failed to conform to this custom.

The contract out of which the litigation arose is as follows:

"Sold to Ward Furniture Manufacturing Company 60,000 to 100,000 ft. oak lumber 1 to 2 in. thick from 6 to 20 ft. long at $12.00 per m., f. o. b. mills, 60 days to 6 months old, No. 1 and 2 com., car furniture.

"J. B. Isbell & Co., per Isbell."

The $686.48 sued for represents the purchase price of six carloads of lumber sold by appellees to appellant under the contract. The lumber was shipped from appellees' mill in Sevier County to appellant at Fort Smith, Arkansas. The first carload was shipped November 15, and the last December 7, 1904. With the invoice and the first carload was a letter from appellees saying: "We find that the boys loaded small amount of 2½ in. and 3 in., which was an error in the shipping clerk." On November 30, December 1, December 2 and December 6, appellant wrote appellees expressing dissatisfaction with the lumber that had been shipped as to its age, complained that the lumber was too green, that the railroad had charged extra freight on that account, and asking appellee not to ship any more, etc. The letter of December 6 from appellant to appellees is as follows: "The lumber shipped us has now all come in, and we are unable to find a carload of lumber in the whole lot that will come within the terms of our contract with

you. There is a small portion of lumber in the last car that may be over 60 days cut, but it is mixed up with green lumber. In the first car there was some No. 2 mill culls that appeared to be dry, but nothing that would do us any good. We have instructed our lumberman to unload and pile this lumber, but we can not receive it until it is all sixty days old. Our contract with you called for lumber from sixty days to six months old, and you remember that you informed me, when making the sale, that there would be very little of this lumber but what would be four months old. We are very much disappointed with it, as we wished to use some of it at once, and have not the time to take care of green lumber, as you will remember that I told you that we did not under any circumstances buy green lumber."

To this letter appellees replied (December 8, 1904) "that all the lumber shipped was from sixty days to six months old except a small amount that was about forty days old." Appellee Isbell testified that this letter of December 8 contained all the complaint, so far as he knew, that appellees had to make about what appellant had written as to the condition of the lumber and the disposition appellant proposed to make of it. There was no further written correspondence until February 1, 1905, when appellant wrote appellees as follows:

"We have your statement, which we return. We will render you an account of the green lumber shipped to us on November and December as soon as we have checked it up, which we have now ordered to be done. We wrote you at the time that, inasmuch as the lumber was most all green, we would pile it up and check it out when it had been on sticks 60 days. It is a very tough lot of lumber, and a good deal of it is worthless for our use. However, all of it that is rejected on account of being mill culls will be carefully stacked up, so that you may have it inspected. If we throw out any that can be used in manufacture, or that would not be graded as a mill cull, we shall be pleased to receive it as lumber. There will be some extra freight on account of the lumber shipped to us green."

To this appellees replied February 21, 1905, as follows:

"This is in reply to yours of 2-1 in reference to your lumber account. The cause of delay in replying was the serious illness of Mr. Isbell. You seem to take a very decided stand in

this matter. The lumber was shipped to you just as it was sold to you. You are claiming green lumber was shipped. This is positively not the case, as we had no oak lumber under forty days old, and were not making any oak at the time your shipments were made. There were ten, or possibly twelve, thousand feet of this lumber at the first shipments that were only forty days on sticks, but had positively been on sticks that length of time. The balance of the lumber shipped you was from sixty days to six months old when shipped. Now, we know this to be a fact. Now, what we want you to do is to make settlement on this as invoice, unless you have some lumber that is worthless to you. Let us hear from you along this line with settlement. Unless it is settled within a very few days, we will put it in the hands of an attorney for collection and his fees added. * * * Trusting you will make prompt settlement of this matter, we are," etc.

Witness Isbell was asked this question: "Q. Now, in this letter you told him that you wanted him to pay for the lumber, unless there was some which was worthless to him, and you stated this in answer to a letter written February 1?" And he answered: "Yes, sir; that is right. We don't want anybody to pay for anything that is worthless. If it had been properly inspected when it first arrived, it would have graded up to our contract."

In a letter of February 22, 1905, appellant, writing in reply to appellee's letter of 21st, among other things said: "We intended to inspect this lumber some three weeks ago, but the weather would not permit it," and in a letter of February 27, 1905, appellant said: "As we stated in our former letter, we are now engaged in inspecting the lumber. It is a very poor lot of lumber; will probably be through in about four days," etc. On March 6, 1905, appellant wrote as follows: "We have been over the entire amount of oak lumber shipped to us by you, and find that there are 62,460 feet of mill culls. This lumber is not merchantable, and is worthless for making furniture. This lumber is here for your inspection, and we wish to have some kind of settlement of it at once, as we have quite a little money in it. It is possible that the lumber men would make some kind of an offer for sheeting and dimension stock. The balance of the

lumber, 26,295 feet, we have placed to your credit, although even this is mostly shipping culls, there not being 5,000 feet of No. 1 common in the whole lot. As we said before, the lumber has been a great dissappointment and source of damage to us, and we feel sure that Mr. Isbell did not know the quality of the stuff when he guarantied to us that it was a better lot of lumber than that shipped to us before."

Other correspondence passed, looking to a settlement, but it is unnecessary to set it out.

Appellee Isbell stated that he notified appellant that there were some ten or twelve thousand feet that did not come up to the contract, and that he would have had no objection to appellant's rejection of that if it had settled for the other. There were also some nineteen or twenty other pieces that did not come up to the contract; that the appellees had no objection to appellant's rejection of same. It was testified by appellee Isbell that it was three months and a half from the time shipment began until appellees received a report showing that the lumber had been inspected, and that appellant had other objection to the lumber besides that pertaining to its age. Appellees contend that this report was contained in the letter of appellant to appellees of March 6, 1905.

J. B. Ward of appellant company testified that when the shipments of lumber arrived his inspector made examination of it, and reported to him of its character and condition, and that be notified appellees that, on account of the green condition of the lumber, it would have to be put on sticks to dry, and that he directed that it be put on sticks, and kept for sixty days; that it would have been about the latter part of January or 10th of February before it should have been inspected; that they had it inspected as soon as it was possible to do so on account of weather conditions. They commenced inspecting the latter part of February, 1905, and made the report March 6. It was shown by appellant that on the inspection, which was begun in the latter part of February, and concluded on the 6th of March, 63,755 feet were turned over to one Elliott, an expert inspector, for inspection. He followed the rules for grading and inspecting lumber. He found of mill culls 45,193 feet, and 1,539 feet of No. 1 common and 17,023 feet of No. 2 common, or a total of 18,562 feet of

No. 1 and No. 2 common. But the witness Elliott further testified that it was not possible, if an honest inspection was made of 63,755 feet of lumber represented to be No. 1 and No. 2 common, that there could be as much as 45,000 feet of mill culls in it. Elliott's inspection, in connection with the amount that appellant had placed to the credit of appellees, towit, 28,116 feet, showed that the total amount shipped appellant was 91,935 feet. Some of the 28,116 feet that had been taken out of the 91,935 feet had been used. J. B. Ward for appellant testified that if settlement was made for the lumber under the contract according to the inspection of Elliott, there would be a balance due appellant from appellees of $9.85. Appellees over the objection of appellant were allowed to show that it was the general custom for those who bought lumber in Ft. Smith by the carload to have the same inspected and to make report in about ten days after the shipment, showing the different grades of lumber. There was testimony that no such report was made by appellant to appellees; that appellant only notified appellees that there were some 62,000 feet of mill culls. The following instructions were given by the court:

"The court instructs the jury that, under the evidence in this case, it was the duty of the defendant upon the arrival of the lumber at its yards, or within a reasonable time thereafter, to have the same inspected and notify the plaintiffs of the result of such inspection; and if the defendant failed to do so, and accepted and used a material part of said lumber, it is held to have accepted all of said lumber, and is bound to the plaintiffs for the contract price thereof.

"3. If the defendant, after said lumber had been received by it, complained to plaintiffs that the same was not as old as the contract required and made no other objections, but, notwithstanding the fact, proceeded to use a material part of said lumber, then the court instructs you that that was an acceptance of all of said lumber, measured by the contract price.

"The court instructs you that the lumber in controversy was sold f. o. b. cars at the mill, and that defendant had no right to charge plaintiff with any freight paid by it on said lumber—provided you believe that the defendant accepted all or a material part of the lumber shipped.

"Now, it appears from the contract entered into between the parties to this suit, that the plaintiff sold and agreed to deliver to the defendant from sixty to one hundred thousand feet of oak lumber to be from six to twenty feet long, from one to two inches thick, and to be of the grade known as No. 1 and No. 2 common. Now, the court instructs you that the defendant would be compelled to pay the plaintiffs for all lumber delivered to it, that is oak lumber, which you may find from the testimony in this case, graded No. 1 and No. 2 common and was from one to two inches thick and from six to twenty feet long, and for no other lumber shipped it by plaintiffs, unless you find from the evidence in this case that the defendant has accepted all the lumber shipped to it by plaintiff, or a material part of it. In that event the defendant would have to pay plaintiffs for all the lumber shipped; but, unless you find that the defendant has accepted all the lumber shipped it by plaintiffs, or a material part of it, it would have to pay for only such lumber as it did accept under the terms of the contract, or, rather, only such lumber as came within the terms and conditions of the contract, as I have already stated to you; unless you find that the defendant accepted all the lumber or a material part of it."

Other instructions were given, but the above show the theory upon which the cause was presented.

The verdict and judgment were for $615.48 in favor of appellees. A motion for new trial, reserving exceptions to the ruling of the court in giving, refusing and modifying instructions and in the admission of the testimony as to the custom of inspection, was overruled. This appeal was taken.

Winchester & Martin, for appellant.

1. In contracts of this kind, conditions and warranties are held to be the same, and it is immaterial in this case whether the condition in the contract as to grade and the time the lumber was to be air-dried was a condition precedent to appellant's liability, or a warranty; neither is it material whether the contract is executed or executory. 13 L. R. A. 224; 115 U. S. 29 L. Ed. 368; *Id.* 398; 43 Me. 226; 149 Mass. 570, and authorities *postea.*

2. Upon a breach of a contract for the sale of a specific

article of designated quality, by the vendor, the vendee at his election may (1) refuse to receive the article at all, or (2) may receive it and bring a cross action for the breach, or (3) may avail himself of the breach of warranty to reduce the damages in an action brought by the vendor for the price. 48 Wis. 338; 53 Ark. 155; 22 Ark. 454; 45 Cal. 573; 3 Col. 207, 298, 302; 67 Ill. 366; 2 Benjamin on Sales, 6 Amer. Ed. 1155, and notes; 99 N. Y. 517; 9 How. 213; 13 Hun, 514; 15 Penn. 118; 2 Mechem on Sales, § 1398; 118 N. Y. 260; 52 N. Y. 416; 54 N. Y. 587; Story on Sales, § 405; 21 Fed. 164; 36 Ore. 105; 113 Mass. 352; 61 U. S. 15 L. Ed. 850.

3. The court erred in admitting in evidence testimony to the effect that there was a custom amongst Ft. Smith lumber dealers to inspect immediately and report on each car of lumber received, showing the grades and what amount came within the contract and what did not. 27 Am. & Eng. Enc. Law, 719, *et seq.*; 62 Ark. 41.

Read & McDonough, for appellees.

1. The contract was executory. On receipt of the lumber, appellant had the right, if it did not possess the qualities stipulated in the contract, to reject it and rescind the sale; but, in order to rescind, it must be done in a reasonable time, and the purchaser must act fairly. Mechem on Sales, §§ 1802, 1377-1380, 1398; 21 Misc. (N. Y.) Rep. 35; *Id.* 465; 29 N. Y. 263; 84 Wis. 53.

2. "There is a difference between a contract for the sale of articles to answer to certain description and a sale of certain specified articles then in the hands of the seller, and described to be of certain grade and quality. In the former case there is, until acceptance by the purchaser, a warranty that the articles shall answer the description, whilst in the latter case no warranty is implied unless an intention to warrant appears." 76 Ark. 177. In this case the material was on hand at the time the contract was made.

If there was a warranty, then, under the pleadings and testimony, appellant had no right of rescission after the lumber had been delivered. Mechem on Sales, § 1805; 104 N. W. 513. The answer does not plead a breach of the warranty, nor ask for

damages by reason thereof, nor does appellant in its testimony attempt to show what its damages have been. 28 Am. & Eng. Enc. of L. 827, note 2; 48 Wis. 338; 4 N. Y. 470; Schouler on Pers. Prop. 610, 611; 23 Pick. 284; 34 Am. Dec. 56; 95 N. W. 862. The burden is on the appellant to show the extent of the damage, and the measure of damages would be the difference between the value of the article warranted and the value of the article actually delivered. Mechem on Sales, § 817.

3. Appellees have not by their conduct waived appellant's acceptance of part of their lumber. Mere silence is not a waiver, nor leniency on the part of him to whom the act is due. Mechem on Sales, § § 1072-3, 1074. Appellant's claim of waiver was not raised in the court below, and can not be raised here for the first time. 49 Ark. 253; 54 Ark. 216; 59 Ark. 312; 60 Ark. 613; 76 Ark. 66; 74 Ark. 252.

4. Evidence as to the custom, if incompetent, was immaterial, and could not have affected the issue, because appellant has not shown where it should recover in any event in this case, and because the court instructed the jury that it was defendant's duty upon the arrival of the lumber at its yards, or within a reasonable time thereafter, to have the same inspected, and to notify the appellant, etc., thereby leaving it to the jury to determine what was a reasonable time.

A judgment that is right on the whole record will not be reversed. 75 Ark. 328; 44 Ark. 556; 19 Ark. 677; 43 Ark. 296; 46 Ark. 542.

WOOD, J., (after stating the facts.) The correspondence shows that appellant notified appellees promptly on receipt of the first carload of lumber that it did not comply with the contract as to age of lumber. Also, as the other cars were received, and after the last car was received, appellant notified appellees that it was "unable to find a car in the whole lot that came within the terms of the contract," and that it "would not receive it until it was all sixty days old." In answer to this letter appellees claimed that the lumber was according to contract except "a small amount." Before the expiration of sixty days appellant wrote appellees letter of February 1, 1905, calling the attention of appellees to the fact that it was a "very tough lot of lumber" and "a good deal of it worthless," and that "all of it that was rejected

on account of mill culls" would be carefully stacked, so that appellees might have it inspected. This letter stated: "If we throw out any that can be used in manufacture, or that would not be graded as a mill cull, we shall be pleased to receive it as lumber." In answer to this, appellees, after again conceding that ten or twelve thousand feet of the first shipments did not comply with the contract as to age and after declaring again that the balance of the lumber shipped was from sixty days to six months old, continued as follows: "Now, what we want you to do is to make settlement on this as per invoice, *unless you have some lumber that is worthless to you.* Let us hear from you along this line with settlement," etc. Isbell, appellee's manager, when questioned in regard to this statement, replied: "That is right; we don't want anybody to pay for anything that is worthless. If it had been properly inspected when it first arrived, it would have graded up to contract." Concerning the ten or twelve thousand feet that did not comply with the contract as to age, Isbell said appellees had no objection to appellant's rejection of it if it was not wanted. If appellant had thrown this out and made settlement for the other, it would have been satisfactory to appellees.

1. In view of the above and other evidence set forth in the statement of facts, the court erred in declaring appellant liable for all the lumber shipped if it accepted a material part thereof. This declaration was doubtless grounded upon the idea that the contract was entire, and that appellant, by accepting a part of the lumber, in law accepted all. But this proposition ignored all the evidence which tended to show that the lumber which appellant did accept was after notification to the appellees, and upon the understanding with them that it might accept the portion which conformed to the contract, without making itself liable for that which was not according to the contract, or that which was *"worthless"* to appellants. The court erred in declaring in effect that under the evidence this was to be treated as an entire contract, when there was evidence from which the jury might have found that the parties to it regarded and treated it as severable. Ordinarily, the contract under consideration would be construed as an entire contract. But, "even if the contract would not ordinarily be deemed severable, the parties may by

their conduct so treat it as to show that they regarded it as severable in fact." 2 Mechem on Sales, § 1398. The intention of the parties to the contract is paramount; and, even where the contract according to its language is entire in form, its entirety may be broken by the concurrent acts of both parties. 3 Page, Cont., § 1484; *Russell* v. *Lilienthal,* 36 Oregon, 105. If the contract was entire, and the parties to it by acts done under it did not elect to treat it as divisible in fact, then the acceptance of a material part of the lumber would be an acceptance of the whole. We are of the opinion that it was a question for the jury under the evidence to determine whether or not the acceptance of a material portion of the lumber was the acceptance of the whole, so as to render appellant liable for the whole in a sum measured by the contract price.

2. The contract under consideration was an executory contract for the sale of lumber of specified age and grades. What were the duties and rights of the appellant under it? It was the duty of appellant to make proper inspection of the lumber within a reasonable time after same was received. In the absence of contract stipulations, the rules and customs peculiar to the trade in such cases, if shown, would furnish the proper measure of appellant's duty in the premises. If the contract was entire as to the quantity of lumber designated, it would be the duty of appellant, if all the lumber was according to the contract, to accept and pay for same. But, if the whole or a material portion was not according to the contract, if the contract was entire, appellants should have rejected all or none, and promptly notified appellees of the result of the inspection and the action taken. If the contract was severable as to the quantity of lumber, appellant should have accepted such portion of the lumber as was according to the contract, rejecting any that did not conform thereto. If the appellant failed to make seasonable inspection of the lumber received and to report the result thereof to appellees, it would be deemed in law to have accepted same. The contract specifications as to age and grades of lumber were not merely warranties, but conditions precedent, which gave appellant these rights: (1) if the lumber was not according to contract in these respects, to reject the same, or (2), to accept same and bring cross action for breach of warranty, when sued for

the purchase price, or (3), without bringing cross action for breach of warranty, to use the breach by way of reduction or recoupment in the action by the vendor for the price. *Plant* v. *Condit,* 22 Ark. 454; *Weed* v. *Dyer,* 53 Ark. 155; *Pope* v. *Allis,* 115 U. S. 363; *Morse* v. *Moore,* 13 L. R. A. 224.

The requests of appellant for instructions, however, embodied the idea that, in case the jury should find that appellant accepted all the lumber, in that event appellant would have to pay for all the lumber shipped. It is apparent, therefore, that appellant is not in an attitude to complain, because the court did not present the theory that, in case of an acceptance of all the lumber, if there was a breach of warranty or failure to comply with conditions precedent in the contract, on the part of appellees, appellant might recover in a cross action, or by way of recoupment when sued by appellees for the price of the lumber. If appellant desired the benefit of this theory which it has so ably presented here, it should have asked it in the trial court.

3. In the matter of a particular custom or usage of trade, "all that is required is to show that it is established; that is, that it has existed a sufficient length of time to have become generally known." 12 Cyc. 1034, cases cited in note. There was nothing in the record to show how long the alleged custom had been in vogue. The proof was hardly sufficient to establish a usage among lumber dealers as to the inspection of lumber. The evidence, however, could not have been prejudicial, since the court charged the jury that appellant was required to inspect the lumber within a reasonable time, leaving the jury to say what was a reasonable time under the evidence. The court left the matter of inspection to be determined by the law without reference to the custom, as if no custom had been established. This was correct.

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

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. BOARD OF DIRECTORS OF RED RIVER LEVEE DISTRICT NO. 1.

Opinion delivered February 4, 1907.

1. LEVEE—ASSESSMENT OF RAILROAD TRACK.—Where there is evidence sufficient to sustain a finding that a railroad track was benefited by the building of a certain levee, a legislative determination that the railroad should be assessed for the purpose of building such levee is conclusive upon the courts, whether the track was benefited as much as other property in the district or not. (Page 563.)

2. SAME—MODE OF ASSESSMENT.—It is within the discretion of the Legislature to require that assessments for levee purposes should be made according to the whole value of the land in the levee district, or according to the value of the benefit added by the improvement. (Page 565.)

3. SAME.—The act creating Red River Levee District No. 1, (Acts 1905, p. 231 *et seq.*) is not unconstitutional in providing, in section four, that a levee tax shall be assessed on the real estate in the district according to the valuation of lands on the tax books for State and county purposes. (Page 567.)

Appeal from Lafayette Chancery Court; *Emon O. Mahoney,* Chancellor; affirmed.

S. H. West and *Gaughan & Sifford,* for appellant.

1. Appellant ought not to be compelled to pay this tax regardless of benefit. The courts have the power in every case to determine whether there is any benefit which is direct and certain to the property of the complainant embraced in the improvement district, and, if it is found that no direct or certain benefit will result, to refuse their aid. 69 Ark. 68, 76.

2. In raising revenue in the district there is no burden of taxes placed upon the personal property of any one in the district except that of appellant. As to whether or not a railroad right of way can be assessed for local improvements, see Elliott on Railroads, § 786, and authorities cited in notes.

Henry Moore, Jr., for appellee.

The power of the Legislature to create improvement districts, and to declare what property is benefited, has been settled by this court. 72 Ark. 119. "A tract within the district may be above overflow without the levee and yet in various ways greatly bene-

fited by the levee." 59 Ark. 537. Special assessments are made upon the assumption that a portion of the community is to be especially benefited in the enhancement of the value of property peculiarly situated as regards the contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. Cooley on Taxation, 416. The method of levying the local assessments is a legislative question. *Id.* 447; 2 Dill. Mun. Corp. (4 Ed.), 752; 164 U. S. 174; 125 U. S. 345; 181 U. S. 338. On the question of the right in this State to tax the track and right of way of a railroad for local improvements, see 68 Ark. 380. "It is within the power of the Legislature of a State to create special taxing districts and to charge the cost of local improvements in whole or in part upon the property in said district either according to valuation of superficial area or frontage, and it was not the intention in *Norwood* v. *Baker,* 172 U. S. 269, to hold otherwise." 181 U. S. 394. See, also, 69 Ark. 76; 77 Ark. 383.

Appellant's contention that the burden of taxation upon personal property within the district is placed upon it alone is without merit. Its ties, spikes, angle bars and steel rails, when attached to the soil in the form of a railroad, become real estate for the purposes of taxation. Kirby's Digest, § 6945; 67 Ark. 501.

MCCULLOCH, J. The General Assembly, at the session of 1905, created a levee district covering certain teritory in Lafayette County through which the railroad of appellant runs, and this is a suit instituted in the chancery court by the board of directors of said district to enforce the payment of levee taxes assessed against the railroad. Acts 1905, pp. 231-255.

Appellant makes an attack upon the validity of the statute, in so far as it attempts to authorize a tax on the railroad, on two grounds, viz: First, that it is an attempt to impose a tax regardless of any benefit derived from the improvement, and, second, that the method authorized by the statute of assessing railroad property is invalid. We will dispose of these two questions in the order in which they are presented by appellant's counsel.

We are not confronted now by the question whether the Legislature can authorize an arbitrary assessment upon a class

of property for local improvement regardless of benefit, or where it is shown that no benefit can possibly accrue from the improvement to the property sought to be taxed. We are not prepared to say that the Legislature may, without judicial hindrance, authorize the taxation of property for local improvement where no benefit can possibly accrue to the property taxed.

In *Norwood* v. *Baker,* 172 U. S. 269, Mr Justice Harlan, speaking for the court, after having quoted from a former decision of the court to the effect that the law-making body may generally determine what territory shall belong in a district formed for local improvement and what property shall be considered as benefited by a proposed improvement, said:

"But the power of the Legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvement is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established, as a rule of constitutional law, that the imposition by the Legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

The doctrine of *Norwood* v. *Baker* has been modified to some extent by later decisions of the Supreme Court of the United States, but the soundness of the principle announced in the quotation just made from the opinion in that case has not been questioned.

This court announced substantially the same principle in the case of *State* v. *Moore,* 76 Ark. 197, where, in discussing the power of the Legislature to determine what are necessary expenses of government, it was said: "The court in the Sloan case (66 Ark. 575) did not mean to lay down the doctrine, nor do we now, that the power of the Legislature to determine what is a necessary expense of government is arbitrary, bounded by no

limitations, and absolutely beyond control by the judicial department. We can readily call to mind subjects for appropriation so obviously beyond the scope of what may be deemed necessary expenses of government that the courts could, and in duty should, ignore a legislative determination, and declare as a matter of law that the same do not fall within that class."

But, as already stated, that is not the question which we have before us now. Appellant proved that it had already constructed its railroad through the territory above ordinary overflow before the creation of the levee district and also introduced evidence tending to show that no benefit would accrue to its property from the building of the levee. This, however, was contradicted by evidence introduced by the plaintiff to the effect that the property was greatly benefited by the improvement. It was shown by the testimony of witnesses who professed to know, and who apparently were well informed on the subject, that, notwithstanding the railroad was on a high dump constructed above overflow before the building of the levee, yet the dump was liable to injury from overflow, and the protection afforded by the levee was a considerable benefit to the railroad. It is well established by the evidence, we think, that the building of the levee was calculated to result and did result in benefit to the property of appellant which was taxed. It is not necessary that it should receive absolute protection from overflow, or that it should have been entirely without protection and subject to inundation before the levee was built. *Carson* v. *Levee District,* 59 Ark. 513. Whether it was benefited to an extent equal to that of other property in the district, we do not consider it necessary to determine. That was a matter largely for legislative determination in fixing the boundaries of the district and providing for the method of assessment of taxes. That it was a matter for legislative inquiry and determination, and that the courts must respect such determination, is settled, so far it can be done by a decision of this court, by the case of *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 119, and that decision is in accord with the authorities generally. *Matthews* v. *Kimball,* 70 Ark. 451, is substantially to the same effect. *Spencer* v. *Merchant,* 125 U. S. 345; *Paulsen* v. *Portland,* 149 U. S. 30; *Parsons* v. *District of*

Columbia, 170 U. S. 45; *French* v. *Barber Asphalt Co.,* 181 U. S. 324.

If the opinion in *Norwood* v. *Baker* can be construed to be in conflict with this rule, it has to that extent been modified or overruled by *French* v. *Barber Asphalt Paving Co., supra.* In the last-named case the court in the opinion quoted with approval the following from the opinion of Mr. Justice Peckham in *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112:

"The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of the benefits to the land included in the district, and the citizen has no constitutional right to any or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.,* the amount of the tax which he is to pay. * * * Unless the Legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken."

This court has said in *St. Louis S. W. Ry. Co.* v. *Grayson, supra,* that the railway company had its opportunity to be heard upon the ascertainment of the amount it should pay when the assessment for State and county taxes was made by the State board of railroad commissioners. And the court quoted with approval the following statement of the law from Judge Cooley in his work on taxation: "The whole subject of taxing districts belongs to the Legislature. So much is unquestionable. * * * If the Legislature has fixed the district, and levied the tax, for the reason that in the opinion of the legislative body such district is plenteously benefited, its action must, in general, be deemed conclusive."

Nor can we see any conflict between the case last cited, as counsel seem to think there is, and *Ahern* v. *Board of Improvement,* 69 Ark. 68. On the contrary, that case sustains the method of assessment according to the value of the property as provided in this instance.

Mr. Justice RIDDICK, speaking for the majority of the court in that case, said: "I am therefore of the opinion that, under our Constitution, it is within the discretion of the Legislature to require that these assessments be made according to the whole

value of the land in the improvement district, or according to the value of the benefit added by the improvement. For practical purposes, one of these methods of assessment may be as good as the other, and it is for the Legislature to determine which shall be applied."

This brings us to a consideration of the other question, whether the method of assessment is valid. The act provides that the board of directors shall annually assess and levy a tax not to exceed four per cent. on the real estate in the district, according to the valuation of lands on the tax books for State and county purposes and upon railroad track of all railroad companies as appraised by the State Board of Railroad Commissioners. In other words, that the assessment shall be according to value as appraised for State and county taxation. This is the method of assessment for local improvement which was approved by this court in *Ahern* v. *Board of Improvement, supra,* and *Porter* v. *Waterman,* 77 Ark. 383. In the Grayson case *supra,* it was also applied especially to railroads. This method was also approved by the court in *Kansas City, P. & G. Ry. Co.* v. *Waterworks Improvement Dist.,* 68 Ark. 376. We can see no reason why it should not apply to railroad tracks as well as to the other property. Nor is it in conflict with any of the decisions of the Supreme Court of the United States. *Webster* v. *Fargo,* 181 U. S. 394. The fact that the assessment is made upon the whole value of the property does not imply that it is not also according to the benefits to accrue from the improvement, for it is not an arbitrary or unreasonable method of ascertaining the amount of the benefits to assume that they will accrue in proportion to the actual value of the whole property. The Legislature acted upon this assumption in providing that the assessments should be fixed according to value, and we can not say it is arbitrary or unreasonable.

But it is contended that, in accepting the assessment of railroad track made by the State Board of Railroad Commissioners, it included the ties, angle bars and rails which are personal property, so it is claimed, and should not be assessed for local improvement. The statutes of this State expressly declare that the right of way of a railroad and all tracks, side tracks, turn-outs and other things situated on and appurtenant thereto shall be

included within the meaning of the term "railroad track," and that the same shall be held to be real estate for the purposes of taxation. Kirby's Digest, § § 6940-6944. This does not include rolling stock and other movable property, which are separately provided for under the scheme of assessments of railroad property for taxation. Kirby's Digest, § 6946. This court held that stockyards on the right of way of a railroad must, under the statute, be considered a part of the right of way and assessed as a part of the real estate. *St. Louis, I. M. & So. Ry. Co.* v. *Miller Co.*, 67 Ark. 498.

We find nothing in the statute creating the levee district, nor in the method of assessing the property liable for the cost of the levee, which renders them invalid.

The decree against appellant for the taxes, penalty and costs, and declaring the same to be a lien on the road, is therefore affirmed.

CONTINENTAL CASUALTY COMPANY *v.* BRITTNER.

Opinion delivered February 4, 1907.

ACCIDENT INSURANCE—DEATH FROM UNNECESSARY EXPOSURE.—Where a policy of accident insurance provided that "in any case where the accidental injury results from unnecessary exposure to danger or obvious risk of injury the sum payable shall be one-tenth of the amount which would otherwise be payable under said policy," it was error not to direct a verdict for the insurance company, where it made a tender of one-tenth of the amount payable under the policy, if the undisputed evidence showed that the death of plaintiff's assured resulted from an unnecessary exposure to danger or from an obvious risk of injury, as where the evidence showed that, while stealing a ride on a dark and rainy night upon a moving freight train, without a lantern, assured fell between two cars and was killed.

Appeal from Pulaski Circuit Court; *Robert J. Lea,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action by appellee, the beneficiary in an accident policy issued by appellant, insuring the life of Herman E. Brittner against death by accident, in the sum of $1,500.

The complaint alleged the issuance of the policy, and that the assured had been run over and accidentally killed by a railroad train. Notice of the death and other facts necessary to state a proper cause of action were properly set forth in the complaint, and judgment was asked for the amount of the policy.

In its answer appellant admits that assured was run over by a railroad train, and that he died from the effects thereof, but denies that he was accidentally run over within the meaning of the policy. Appellant then set up the following: "Defendant states that it is provided in said policy that in any case of death, where the accidental injury results from unnecessary exposure to danger or obvious risk of injury, the sum payable shall be one-tenth of the amount which would otherwise be payable under said policy. Defendant states that said Brittner climbed on top of a freight train of the St. Louis, Iron Mountain & Southern Railway Company for the purpose of riding thereon, that he was not an employee of said company, and had no right to ride on said train and on the top thereof, and that while said train was moving fast in the night time, and while it was dark and raining, the said Brittner was walking on said train without a light or lantern, and suddenly disappeared from the top of said train and under the wheels thereof, where he was mangled and killed." Defendant states that said exposure was an unnecessary exposure to danger and to an obvious risk of injury, and for which there could be due in any event only the sum of $150 under said policy. Defendant states that said Brittner owes the sum of $20.30 on his premium, and that there could not be due the plaintiff more than the sum of $129.70; that said amount has heretofore been tendered to plaintiff and by her refused. Wherefore defendant prays to be discharged with its costs and for all other proper relief.

The facts are as follows: On the night of March 5, 1904, between nine and ten o'clock, just before the extra west-bound freight train pulled out for Ft. Smith from the Ft. Smith cross-

ing, a young man approached the engineer and exhibited a fireman's brotherhood card, asking to be permitted to ride. The brotherhood cards were usually recognized as passes, but they were not always so recognized, and those desiring to use them ascertained beforehand whether they would be accepted. Hence Brittner's inquiry about his card on this occasion. The engineer told him that the card was not good with him, but to see the fireman, who probably belonged to his order, and who had gone to the restaurant. The engineer did not know the young man, and could not describe his appearance. The fireman, who had gone to the restaurant about two blocks south of where the engine was standing in the Iron Mountain yard while waiting to start, on his return to his engine met Herman Brittner, the assured. He says that Brittner spoke to him, stated that he wanted a free ride to Van Buren, and told him that he had just been down to the engine to see him, and that the engineer had referred him to the fireman. The fireman says he knew Brittner well, and described him. He says he told Brittner to go to see the conductor, who was at the depot; that they were about ready to start out for Ft. Smith. He says Brittner walked with him a short distance toward the depot, left him and went over to the depot to see the conductor. While with him, he showed his brotherhood card. The fireman did not know whether Brittner saw the conductor. His train left in a few minutes after he left Brittner. He was keeping a lookout as best he could between firing. He did not feel his engine run over anything, could have felt it very easily had it done so. The conductor testified that Brittner did not find him. The brakeman who was on the train with the engineer who had seen the young man whom the fireman identified as Brittner testified that as they were coming out of a switch right around the "Y" a short distance north of the Ft. Smith crossing, he saw a man on top of the train coming towards him. He could see him while the fireman was opening his box to fire the engine. The reflection from the fire box was like a headlight or electric light, and he plainly saw a man on top of the train approaching him or going in the direction of the caboose. The man was six or eight cars ahead of the brakeman, who was on the fourth of fifth car from the caboose. The brakeman saw the man disappear, and thought he had fallen off. When he saw the

man disappear, he went to the place where he saw him and found no one. Their first stop was at Conway. The brakeman went over the train there and found blood, bones and brains on the brake beam, the brake shoes and on the wheel of about the twelfth car from the caboose. That car was about the place he last saw the man coming out of the crossing. The conductor testified that at Conway they received information which led them to make a close investigation of the cars with the result that they found blood and brains on the wheels of the twelfth car from the caboose, but nowhere else on the train. They also found the pin-lifter that lifts the pin and the coupler torn loose.

There were 31 cars in the train. The train when it passed the "Y" out of the switch at the crossing, was traveling about seven or eight miles an hour, not too fast for a man who had been in the railroad service and accustomed to boarding moving trains to get on. It was in evidence by the undertaker that Brittner's body was found about 150 feet north of the viaduct. The body was lying sort of diagonally between the rails with head mangled and feet pointing toward the north. The head was severed from the body and lying outside of the left, or west, rail, and about eight feet from the body. Several persons had preceded the undertaker to the place, and he did not know whether the body had been disturbed. The undertaker was at the place about twelve at night, and it was raining and dark. He was not very familiar with the locality, and might have been mistaken as to distances. A policeman who was familiar with tracks, having run on the road for five years, and who was at the body about a half hour before the undertaker was there, testified that he found the spot where he first saw the body without difficulty, and measured the distance from where Brittner was killed to the viaduct. It was thirty-six rails of about thirty feet to the rail. The distance from where the switch goes on to the main line, called the "Y," to the viaduct is 31 rails, and from the Ft. Smith crossing to the switch is about ten rails, making 41 rails from the viaduct to the crossing. These distances were measured, and a memorandum taken of them by one who went there for the purpose of getting accurate measurements.

At the time Brittner was killed there were two passenger trains a day to Van Buren, one left about 8:30 o'clock at night,

and one about the same hour in the morning. The passenger train that left at night had gone before the train on which Brittner was seeking passage, and the next passenger train did not leave till next morning, arriving at Van Buren about 3 o'clock in the afternoon. The only way a man could get to Van Buren after ten o'clock at night would be either to take a freight or wait until next morning and go on the passenger. There was testimony showing that the riding on top of freight trains on a dark night, without a lantern, passing from one car to another, was such an exceedingly hazardous undertaking that no sane man, in the opinion of the conductor, would undertake it, not even an experienced railroad man. It was a dark and rainy night, the cars were wet and slippery. The distance between freight cars was nearly two feet on top. To pass from one to the other over this space on a dark night without a lantern when the train was running and the distance varying as the cars moved, was regarded by the conductor as a foolhardy undertaking. The conductor said that a locomotive fireman, as Brittner had been, would understand the danger. He further said that he would not say the man was crazy who would take such desperate chances, because some people naturally take more chances than others, but he would say that he did not know whether a man that would take such desperate chances was crazy or not. Some sane men he had known to do some very foolish things and to take very desperate chances. The width between the rails was four feet eight and one-half inches. The brake rods and other attachments between freight cars, when coupled, obstruct between thirteen and fifteen inches of that space. The brake beams average from six to eight inches clear of the top of the rail. There was proof to the effect that a brakeman was once run over by an engine without being hurt, but the engine was higher than the ordinary engine, and the brakeman regarded his escape as miraculous. Other instances were in evidence showing that an engine one time had passed over a man doing no other damage than cutting off his foot, and, in another case, a brakeman had fallen down under the cars, and was run over by three or four cars without being hurt. But all the witnesses testifying to the subject concurred in the opinion that it would not be probable for an engine to knock a man down and for it and seventeen cars

to pass over him without touching him. It would be improbable for the engine and so many cars to knock a man down and pass over him without killing and mangling him, say some of the witnesses. The appellee read in evidence an affidavit made by Michael Brittner, the father of Herman Brittner, the assured, in making the proofs of death required under the policy. In that affidavit he states "that he had personally investigated the cause of the accident, and had made personal inquiry from all persons whom he could learn could give him any information with reference to the accident, that the last seen of his son, the insured, was by the brakeman, and that they saw him last making his way back over the tops of the freight cars on his way to the caboose;" and that "he believes that said Herman E. Brittner came to his death by falling from the said train of cars and being run over by part of the train."

The court refused the following request: "You are directed that you can not find for the plaintiff in excess of the sum of $129.70." To which ruling the appellant objected and excepted.

The verdict and judgment were for $1,479.70 with interest.

A motion for new trial, reserving the exceptions and containing an assignment that the verdict was contrary to the evidence, was overruled, and this appeal taken.

Ashley Cockrill, for appellant.

1. The court erred in instructing the jury, in effect, that proof that the body of deceased was found on the railroad track between the rails, etc., with his head severed from the body, made a *prima facie* case that he came to his death by violent and accidental means, whereas they should have been instructed that such proof alone does not raise a presumption of death by external violent and accidental causes, and further that the burden was on plaintiff to prove the death from such causes by a preponderance of the evidence. 106 Ia. 281; 69 S. W. 469. In stock-killing cases no presumption of negligence arises merely from the fact of finding the stock killed or injured near the railroad. It devolves on the plaintiff to prove that the killing or injury was done by the railroad. 80 Ark. 72; 42 Ark. 126; 60 Ark. 189; 56 Ark. 549. Neither does such presumption arise in this case merely because the dead body was found on the track.

2. The jury should have been instructed to return a verdict for the plaintiff for the sum of $129.70, being one-tenth the face of the policy less the premium due.

Where a *prima facie* case is clearly overcome by testimony which is reasonable and consistent, and which is not contradicted by other evidence, a verdict for the plaintiff will be set aside. 67 Ark. 514; 80 Ark. 396; 79 Ark. 608.

A. N. DeMers and *Bradshaw, Rhoton & Helm,* for appellant.

1. Having in its answer admitted the accidental death, appellant can not complain because the court stated to the jury what made out a *prima facie* case. 129 Mo. 76; 60 N. Y. Supp. 188. Where a company seeks to excuse itself because of some breach of the provisions of the contract, the burden rests upon the company. 13 L. R. A. 263; 26 *Id.* 406; 61 N. W. 485; 144 Mass. 572; 54 N. W. 453; 50 Am. St. Rep. 427, and notes; 60 *Id.* 154. Where the plaintiff has made out a *prima facie* case of accidental death (admitted in this case), the burden is on the defendant to show death from a cause which excepted it from liability. 174 Mo. 256; 1 Cyc. 290; *Id.* 300. See, also, *Id.* 248; 8 Am. St. Rep. 758.

2. The verdict is sustained by the evidence. 109 Fed. 847; 87 S. W. 812; 58 Pac. 390; 97 N. W. 862; 59 Atl. 262; 80 Ark. 190.

Ashley Cockrill, for appellant in reply.

There is no admission in the answer of accidental death, but on the contrary an express denial of it. The effect of the answer is this: Defendant denied accidental death, but alleged that, if the assured died an accidental death, it was by falling from the top of a train, in which event he could recover only a reduced amount. This is legitimate pleading. Bliss on Code Pl. § 344; 35 Ark. 555; 7 Ark. 378.

WOOD, J., (after stating the facts.) The court's fourth instruction was as follows:

"If therefore you believe from the evidence that the assured was killed by falling from the top of a moving freight train upon which he had been riding in a standing position, without light or lantern on a dark and rainy night, and that he was not there

as an employee of the railroad company in the discharge of his duty, you are instructed as a matter of law that assured was guilty of negligence and of unnecessarily exposing himself to danger, and that plaintiff can recover only the sum of $129.70."

Under this instruction the verdict should have been for $129.70. The court erred in not declaring as matter of law that appellee upon the undisputed facts could not recover in excess of $129.70, as requested in appellant's first prayer for instruction. The facts, as established by the uncontroverted evidence, show that Herman E. Brittner was killed by the freight train which left Ft. Smith crossing bound west at about 9:30 o'clock March 5, 1904. Brittner was on the ground about the time for the departure of that train, asking its engineer and fireman for permission to go on that train by exhibiting his brotherhood pass. He was referred by the fireman, who positively identified him, to the conductor of the train, who was supposed to be at the depot. Brittner was last seen alive by the fireman going towards the depot. This was a few minutes before the train pulled out. The direction Brittner took after leaving the fireman was in the course the train would take as it moved out for Ft. Smith. A man was seen by the brakeman, after the train started, on top of the cars, and was seen to disappear therefrom at about the place where Brittner's dead body was found that night. When the train reached Conway, the first stop, the train crew received information which led them to examine the train to see if they had run over some one. Blood and brains were discovered on the brake shoes, brake beams and on the wheels of the twelfth car from the caboose, but nowhere else on the train. There was no blood on the wheels of the engine or any other car of the train. It would have been impossible for Brittner to have reached the place where his body was found, during the interval between the time when he was last seen by the fireman and the time his train reached the place where his body was found, except by going upon the train. He could not therefore have been in front of the engine upon the tracks, or walking beside it, and have been killed and found lying between the tracks as he was. The train was moving slowly enough for Brittner to have climbed upon the top of it as it passed out of the "Y" or left the switch. The twelfth car on which the blood and brains were found occupied the posi-

tion in the train about where the brakeman said he saw the man when he disappeared from the top, and this car was about at the place where Brittner's dead body was afterwards found. Brittner could not have been in front of this train. The time was too short for him to have reached there walking. The engine could not have knocked him down and it and seventeen cars have passed over him without mangling him. That "would have been a miracle," as one of the witnesses expressed it, and the days of miracles have passed. Yet it is reasonably certain that Brittner was killed by this train. Then how was it done? The only explanation compatible with the physical and other facts is that it was done by Brittner's climbing upon the train as it started out from the yards, and by falling from the twelfth car, as indicated by the brakeman, between the cars, and by having his head severed by the wheels of that car. Appellant thus sustained the burden of proving that Brittner was killed in the manner set up in its answer. There was no rebuttal of this. It was not shown that any other train killed him, or could have done so. The place where Brittner's body was found, the manner in which he was killed, the blood and brains on the wheels of the twelfth car, and not on the wheels of the engine and others cars, the fact that he wanted to go on this train, and that a man was seen to disappear from the top of a car about where the twelfth car would have been in the train and about where Brittner's dead body was found as shown by actual measurements—these facts should cause unbiased minds to come to the conclusion that Brittner was killed in the manner indicated, and no other conclusion can reasonably be reached. It is not a question of disputed evidence, the weight of evidence, or the credibility of witnesses. But the question is, the facts being undisputed, what should be the conclusion? There is no room for a difference of opinion, and the court should have declared it as asked in appellant's first prayer, and the jury should have found it under the court's fourth declaration. The judgment is reversed, and the cause is remanded for new trial.

SCAGGS *v.* STATE.

Opinion delivered February 11, 1907.

APPEAL—WHEN ERRORS WAIVED.—The admission of erroneous evidence, to which appellant objected, will not be considered on appeal if appellant saved no exception to the court's ruling, and did not refer to the matter in his motion for new trial, nor in his brief filed on appeal.

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

G. W. Barham, for appellant.

William F. Kirby, Attorney General, and *Dan Taylor,* assistant for appellee.

1. The charge of the court as to the corroboration of the testimony of an accomplice was correct. 64 Ark., 247.

2. Continuances are matters within the discretion of the trial court, and unless this discretion is abused a refusal to continue is not ground for new trial. 26 Ark. 322; 41 *Id.* 153; 54 *Id.* 243; 57 *Id.* 165; 71 *Id.* 63.

3. The remark of the court to the jury was not prejudicial, and no exceptions were saved except in the motion for new trial. 7 La. Ann. 518; 89 N. C. 115; 108 *Id.* 65; 90 Wisc. 258.

RIDDICK, J. This is an appeal by the defendant, John Scaggs, from a judgment of the Logan Circuit Court for the Northern District convicting him of burglary and sentencing him to confinement in the State penitentiary for a term of three years.

We have examined the assignment of errors set out in the brief of counsel for appellant, and in our opinion none of them can be sustained. The instructions given by the court fairly and clearly presented the law of the case to the jury. The evidence is not set out in full in the bill of exceptions, only the substance thereof being stated, but so far as set out it shows that it was sufficient to sustain the judgment. There is only one ruling of the court that seems open to doubt, and this was made in reference to certain testimony of Dr. J. C. Harrod. This witness, who was called by defendant, related the circumstances under which the prosecuting witness, Attwood, had made the confession implicating himself and defendant in the crime. Dr. Harrod

said that after Attwood was arrested he was induced to make a confession by the officers and himself, who told Attwood that he had as well confess, for Scaggs had already told all about the matter." Scaggs, the defendant, had in fact told nothing, but Attwood, supposing from the statement of the officers that he had confessed, made a confession himself. Thereupon one of the jurors asked Harrod what caused him to suspect Scaggs? The defendant by his counsel objected to this question, but the court overruled the objection, and permitted the witness to answer. Witness then said that he believed that the defendant was guilty for the reason that defendant had said that Attwood had the McNabb pistol, and that they afterwards found the pistol in defendant's possession; that from this fact and the statement of Attwood he had drawn his conclusion of the guilt of defendant. Testimony had been introduced tending to show that the parties who committed the burglary had previously on the same night stolen McNabb's pistol, and had it with them at the time of the burglary. The pistol was fired while they were in the act of committing the burglary, and the hole made by the bullet in the floor and the bullet itself indicated that it came from a large pistol of the same caliber as the McNabb pistol. The fact that the defendant denied having this pistol, and that subsequently it was found in his trunk, tended to connect him with the burglary; but it was improper to permit this witness to give to the jury his opinion that the defendant was guilty, even though he accompanied the opinion with a statement of the facts on which the opinion was based. But, although defendant objected to this evidence, the transcript does not show that he saved any exceptions to this ruling of the court, nor is the matter referred to in his motion for a new trial or his brief filed in this court. We take it therefore that no importance was attached to this evidence in the trial court; that it was admitted through inadvertence, and would have been excluded, had the attention of the court been directly called to it by an exception or motion to exclude.

On the whole case we see nothing that would justify a reversal. The judgment is therefore affirmed.

81	579
f85	251
81	579
f87	311
f88	175

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY v. HICKEY.

Opinion delivered February 4, 1907.

1. ACTIONS—JOINDER OF CAUSES.—An action on behalf of the estate of a deceased person to recover damages for his negligent killing may, under Kirby's Digest, § 6079, be united with a similar action arising out of the same injury, brought on behalf of his widow and next of kin. (Page 587.)

2. AMENDMENT—WAIVER OF OBJECTION BY PLEADING OVER.—Objection to an amendment to a complaint that it sets up a separate cause of action is waived by filing an answer to it. (Page 587.)

3. APPEAL—INVITED ERROR.—Appellant can not complain of an instruction given at appellee's instance if appellant asked substantially the same instruction. (Page 588.)

4. CARRIER—STARTING TRAIN PREMATURELY—INSTRUCTIONS.—Where defendant railroad company, in a suit for negligently injuring a passenger by prematurely starting its train, asked an instruction that if defendant's conductor announced the departure of the train a sufficient length of time for the passenger to get aboard, and, not "knowing" that such passenger was in the act of boarding the train, caused it to start, then defendant would not be liable, it was not error to insert after the word "knowing" the words "or having no reasonable grounds to suspect," as the phrases are equivalent. (Page 588.)

5. SAME—REFUSAL OF INSTRUCTIONS.—In an action against a railroad company for injuries to a passenger caused by defendant's negligence in starting its train prematurely, causing the passenger to be thrown down and injured, it was not error to refuse to instruct that plaintiff was not entitled to recover if he stopped for certain purposes when by going directly to the train he could have got aboard before it started, notwithstanding the jury might have found that the train did not remain still a reasonable time, after the passengers were notified to get aboard, for all of them to do so, and notwithstanding there was evidence tending to prove that he was thrown to the ground by the train starting suddenly with a jerk while he was on the first or second step of the coach. (Page 589.)

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

E. B. Pierce and *Buzbee & Hicks,* for appellant.

1. The court erred in overruling appellant's motion to strike out the amendment to the complaint because (1) it set up a new and distinct cause of action which (2) did not exist at the time the original complaint was filed; (3) the facts stated

in the amendment were not material to the case set up in the original complaint; (4) the additional cause of action cannot be joined with that in the original complaint because (a) each kind of action does not affect all the parties to the action, and (b) both causes of action do not belong to one of the classes allowed to be joined. Kirby's Dig. § 6081; *Id.* § § 6285, 6289; *Id.* § 6079; 96 S. W. 143; 53 Ark. 117; 1 Enc. Pl. & Pr. 547; *Id.* 209; 23 Ark. 474; 34 Ark. 144; 61 Ark. 253; 59 Ark. 441; 36 Ark. 465; 75 Ark. 465; 7 S. E. 58; 10 S. E. 923; 114 Fed. 116; 1 L. R. A. 777; 49 L. R. A. 285; 52 *Id.* 414; 87 N. W. 743; 73 N. W. 1077; 13 Ky. 228; 48 N. W. 44; 19 So. 209.

2. A railroad company discharges its duty toward its passengers when it announces the departure of its train a sufficient length of time before starting it to enable the passengers by the use of reasonable diligence to get aboard, and the conductor has the right, when that time has elapsed, to presume without further inquiry that all who desired to take passage are aboard, and to start the train. 54 Ark. 28; 73 Ark. 548; 3 Thompson's Com-on Law of Negligence § 2855; 24 Am. & Eng. R. R. Cas. (N. S.) 922 note; 47 *Id.* 533; 50 S. W. 580; 48 *Id.* 58; 8 So. 711; 7 S. W. 3; 33 Am. & Eng. R. R. Cas. 520; 21 *Id.* 374; 26 Id. 162; 15 S. E. 534; 50 Mo. App. 561; 18 Wis. 185; 20 Wis. 362; 71 Ga. 710; 8 So. 86.

An instruction telling the jury that it was the duty of the employees of defendant to exercise reasonable care in holding said train a reasonable time for Hickey to board, etc., imposed too great a duty on appellant.

Instruction numbered 7, given for appellee, imposed a duty on appellant not required by law, and left the jury to find facts not supported by the evidence. 74 Ark. 19; 79 Ark. 225. If the conductor had known of Hickey's lameness, he also had the right to presume that he would so time his movements as to get aboard within the time allowed for the stop, and appellant's employees were under no obligation to act as nurses or attendants upon him. 42 Miss. 607.

Conceding that the eighth instruction given for appellee is the law, still the issue was not fairly submitted to the jury because the court refused to give instructions as to what was or was not negligence in the movement or handling of appellant's

trains, or to tell them the effect of evidence showing a proper handling of its trains. 69 Ark. 137; 90 S. W. 999; 96 S. W. 116.

3. The verdict is not supported by the evidence; or, if it can be said that there is evidence to support the verdict, it is so inconsistent, and unreasonable, and so completely contradicted both by testimony and physical facts as to make the verdict clearly contrary to the weight of the evidence and to shock the sense of justice. 26 Ark. 310; 34 Ark. 632; 70 Ark. 385; 79 Ark. 608.

Wood & Henderson, for appellee.

1. There was no error in refusing to strike out the amendment to the complaint. 23 La. Ann. 612; 36 Ark. 17; 11 Ark. 720; 26 Ark. 336; *Id.* 408; 42 Ark. 57; Kirby's Dig. § § 6145, 6148; 1 Enc. Pl. & Pr. 464; 60 Ark. 526; 58 Ark. 504; 90 Ala. 470; 120 Ind. 40; 13 Tex. 464; 21 S. W. 1011; 24 S. W. 533; 18 S. W. 734; 13 S. W. 34; 34 Tex. 478; 31 N. W. 656; 1 Enc. Pl. & Pr. *et seq.; Id.* 552.

If it should be held that the amendment was not proper, appellant waived its objection by answering instead of standing on its motion to strike. 30 Ark. 684; 65 Ark. 495; 44 Ark. 205; 43 Ark. 230; 1 Enc. Pl. & Pr. 573; 21 S. W. 851; 15 S. W. 981; 64 N. W. 673; 51 N. W. 10; 29 Atl. 462; 9 How. Pr. 193; 82 Cal. 604.

2. If a railroad company knows, or by the exercise of reasonable care ought to know, that a passenger is in the act of getting on or leaving a train, and in such position as to be liable to suffer injury from the moving of the train, it is guilty of contributory negligence in causing the train to move. 6 N. W. 486; 8 So. 86; 6 N. E. 577; 46 Pac. 768; 29 Am. St. Rep. 719; 6 Cyc. 613; 5 Am. & Eng. Enc. of L. (2 Ed.), 577, 578; 73 Ark. 548; 75 Ark. 211.

There is sufficient evidence to support the verdict.

BATTLE, J. On the 23rd day of May, 1902, L. H. Hickey, in his lifetime, commenced an action against the Choctaw, Oklahoma and Gulf Railroad Company, in the Garland Circuit Court. Plaintiff stated his cause of action as follows:

"On the 9th day of January, 1902, plaintiff was on one of defendant's trains on a through ticket from Memphis, in the

State of Tennessee, to the city of Hot Springs, in Arkansas, and while such a passenger the train upon which he was traveling stopped at Little Rock, Arkansas, for the purpose of allowing the passengers on the train to procure dinner.

"That plaintiff left said train for the purpose of procuring dinner, and upon his return to said train, and while in the act of boarding the same, while upon the first step leading into the coach on said train, the agents, employees and servants of defendants in charge of and operating said train, wrongfully, negligently, unlawfully and carelessly caused said train to move by a sudden jerk, which caused paintiff to fall from said step violently to the ground and underneath said train; that plaintiff at the time was in the exercise of due care, and he was thrown or caused to fall from said step, before he was able to get upon said car in the manner and form as aforesaid, by the wrongful, careless, and negligent acts of the agents and employees of defendant in starting said train; that by said fall the plaintiff sustained severe personal injuries to his back and other portions of his body; that in falling he in some way rolled under the edge of the train as it was moving along, in such position that he could not get out from under said car while the same was in motion; that some bystander halloed at him to lie down close to the ground if he wished to save his life, which injunction he obeyed, and the entire train passed over him in that position; that plaintiff's position was such that, if he had moved in an effort to get out, some portion of the car would have caught his clothing, which would have evidently dragged him to death; that plaintiff realized this fact and remained in that position under the edge of the cars until the entire train passed over him; that plaintiff, during the time that said train was thus passing over him, expected every minute to be caught by some portion of the car and to be killed, and during such time he suffered untold mental agony and pain; that, by reason of the wrongful, careless and negligent acts of the defendant as aforesaid, plaintiff has been damaged in the sum of ten thousand dollars."

The defendant answered and denied the allegations of the complaint. On the 20th day of November, 1903, the issues in the case were tried in the Garland Circuit Court, and a verdict was rendered in favor of the plaintiff, which was set aside on a mo-

tion for a new trial. Subsequently the plaintiff died, and the action was revived in the name of D. H. Hickey, as administrator of L. H. Hickey, deceased, and he filed an amendment to the complaint as follows:

"That the said L. H. Hickey died in the city of Lexington, and county of Fayette, in the State of Kentucky, on the 7th day of December, 1903, and that this plaintiff, D. H. Hickey, was duly appointed administrator of the estate of the said L. H. Hickey by the county court of said Fayette County, in the State of Kentucky, on the 21st day of December, 1903, a day of the December term, 1903, of said county court, and that he is now the duly appointed, qualified and acting administrator of the estate of the said L. H. Hickey, deceased; that the said L. H. Hickey left surviving him at his death, Ada Hickey, as a widow, and ——— Hickey, his son and only heir; that the said ——— Hickey at the time of the death of the said L. H. Hickey, was five years old; that the death of the said L. H. Hickey resulted from and was caused by the injuries received by him in falling from the train on the 9th day of January, 1902, in the manner as set out and stated in the complaint herein, and resulted by reason of the wrongful and negligent acts and conduct of the defendant and its employees, as stated in said complaint; that the death of the said L. H. Hickey was produced and brought about by the negligent acts and conduct of the defendant and its employees as set out in said complaint; that after receiving said injuries, the said L. H. Hickey continued to suffer excruciating pain, both of body and mind, as stated in said complaint, and the amendment thereto filed on November 19, 1903, until the 7th day of December, 1903, when he died.

"That in the month of May, 1902, soon after said injuries were received by the said L. H. Hickey, he became paralyzed therefrom and totally blind, as stated in his said amended complaint filed November 19, 1903, and remained in that helpless condition, suffering and languishing, until the time of his death; that during the lifetime of the said L. H. Hickey, and prior to the receipt of said injuries, he was an active, industrious man, a devoted father and husband; that he provided for his family a comfortable home and furnished them with all things necessary for their pleasure and happiness in life; that he was a man of

good moral habits, and devoted all of his earnings to the benefit of his said wife and child; that by the death of said L. H. Hickey the said widow and child have been damaged in the sum of ten thousand dollars.

"Wherefore plaintiff prays judgment against the defendant herein in the sum of ten thousand dollars as damages resulting to the estate of the said L. H. Hickey, and the further sum of ten thousand dollars as damages for the benefit of the said widow and child."

The defendant moved to strike the amendment from the files of the court, because it sets up a cause of action which cannot be joined with that in the original complaint. On the 19th day of June, 1905, this action was taken by change of venue, on motion of the defendant, to Saline County. On the 12th of September, 1905, the motion to strike amended complaint from the files was overruled by the Saline Circuit Court, and the defendant saved exceptions. An answer to the amendment to the complaint was thereupon filed by the defendant, specifically denying each allegation thereof.

Evidence was adduced by the plaintiff in the trial in the action, which tended to prove, substantially, the allegations in his complaint; and the defendant adduced evidence to prove the contrary.

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

"6. If you find from the evidence that the deceased, Hickey, was a passenger on defendant's train from Memphis to Hot Springs, and while such passenger he left the train at Little Rock for the purpose of getting dinner at the place provided for passengers to get meals, and for changing cars for Hot Springs, then it was the duty of the employees of defendant in charge of its Hot Springs train to exercise reasonable care in holding said train a reasonable time for said Hickey to board said train after announcing that the train was ready to depart; and if you find from the evidence that said employees failed to hold said train a reasonable time for said Hickey to board it after announcing 'All aboard,' but negligently started said train while said Hickey was in the act of boarding the same, and was on the first or second step leading to the platform of one of the passenger

coaches and in a position likely to be injured, and that he was thrown or caused to fall from said train by such starting, and was injured thereby, you will find for the plaintiff.

"7. Whether or not the servants of defendant in charge of its train used reasonable care toward the deceased, Hickey, depends on all the circumstances surrounding the parties at the time of the accident. If said Hickey was lame, and his motion was retarded on that account, and his condition was known to the servants of the defendant in charge of the train, then that fact should be considered by the jury in determining whether or not they exercised reasonable care towards him.

"8. If you find from the evidence that the deceased, Hickey, fell from defendant's train by reason of the moving or running of said train, and was injured thereby, then the presumption is that said Hickey received said injury on account of the negligence of defendant."

And gave the following at the instance of the defendant:

"2. You are instructed that it was the duty of the defendant to announce the departure of its trains a sufficient length of time to enable the deceased in the exercise of reasonable diligence to get aboard same before it started, and it was the duty of the deceased, upon hearing such announcement, to use reasonable diligence to get aboard said train before it started.

"7. If you find from the evidence that deceased was thrown to the ground by the movement of the train, and that defendant was not negligent in starting the train at the time defendant did, then you cannot find for the plaintiff unless you find that said movement by which deceased was thrown to the ground was negligent and unnecessary in the handling of said train.

"10. If you find from the evidence that defendant's conductor announced that defendant's train was ready to depart by calling 'All aboard,' or in any other manner, and that plaintiff, after hearing said announcement, failed to use ordinary diligence to get aboard said train, and was injured by attempting to get on said train after it had started, then he was guilty of contributory negligence, and cannot recover..

"13. If you find from the evidence that deceased was guilty of negligence or want of ordinary care which contributed in any manner to produce his injury, then he cannot recover in this

case; and in determining this question you may take into consideration deceased's physical condition at the time.

"15. Before the plaintiff can recover, he must show by a preponderance of the testimony that the condition and death of deceased, which he alleges was the result of said accident, was caused thereby; and if he failed to establish this fact by a preponderance of the evidence, he cannot recover.

"17. If you find that Hickey failed to use due diligence to get aboard the train after the announcement of 'All aboard' was given, but after the train started attempted to board same, and was injured thereby, then he was guilty of contributory negligence, and plaintiff cannot recover."

And gave instructions asked for by defendant, after modifying them by interlining them with the words in brackets, as follows:

"4. If defendant's conductor announced the departure of its train a sufficient length of time before starting for deceased to conveniently get aboard the same, and without any fault of defendant's servants he failed to do so, and the conductor, not knowing [or having no reasonable grounds to suspect] that he was in the act of boarding the train, caused the train to start while he was so attempting to board it, then the defendant would not be liable.

"5. If the defendant's conductor announced the intended departure of defendant's train a sufficient length of time before starting for deceased by the use of ordinary diligence to have got aboard, then it was not incumbent upon him to make separate inquiry of persons about the depot as to whether or not they intended to take passage on the train, but he had the right to start said train unless he knew [or had reasonable grounds to suspect] that the deceased was endeavoring to board same.

"6. If you find that, before the train started on which deceased intended to take passage, defendant's agents gave him notice that the train was about to depart and in time for him to have got on it by the exercise of reasonable diligence, and those in charge of the train did not know [or had no reasonable grounds to suspect] that he had not yet got aboard, then they had a right to presume that he was on the train."

And refused to give the following instructions which were requested by the defendant:

"9. If you find that defendant's train was started in a careful and cautious manner, and without any jerk or jar other than that incident to the proper handling of trains, then the defendant will not be liable to plaintiff for injuries caused thereby.

"12. You are instructed that defendant was under no obligation to hold its train for deceased to purchase cigars and attend to other private matters; and if he stopped for such purposes, when by going direct to the train he could have got aboard the same before it started, then he was guilty of negligence, and plaintiff can not recover.

"14. If you believe from the evidence that deceased had got on the first or second step of defendant's train, and was injured by the starting thereof, this would not entitle him to recover, if it also appears that the train was started in a careful and prudent manner, and that the injury was caused by the motion usually and ordinarily incident to the movement of passenger trains."

The jury returned a verdict for plaintiff for the estate for $2,000, and for the widow and next of kin for $3,000; and the defendant appealed.

There was no misjoinder of causes of action in the complaint and amendment. The statute provides: "Several causes of action may be united in the same complaint where each affects all the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes:

* * * * * * * *

"Sixth. Claims arising from injuries to person and property." Kirby's Digest, § 6079. The causes of action in this case affect all the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and are claims arising from injuries to the same person; and come within the letter and spirit of the statute.

While the second cause of action could not have been brought into this action by an amendment without the consent of the defendant, it (defendant) waived all objections to the same by answering. *Thompson* v. *Brazile,* 65 Ark. 495; *Holt*

County v. *Cannon,* 114 Mo. 514; *Witkowski* v. *Hern,* 82 Cal. 604; 1 Enc. Pl. & Pr. 573, and cases cited. "The filing of the amendment setting up an entirely separate and distinct cause of action, and the answer to it of appellant, were equivalent to, and not distinguishable from, the bringing of a new action." "In answering" the appellant "entered his appearance, and waived summons. The same result was reached as would have been accomplished had a new and original complaint been filed. In that case the appellant could have entered its appearance, as it did, and waived summons, "and the same end would have been obtained as was reached by the filing of the amendment. The legal effect of the two proceedings is the same." *Wood* v. *Wood,* 59 Ark. 446.

Appellant objects to the instruction given at the request of appellee numbered 6 because it "told the jury that it was the duty of the employees of defendant in charge of its train to exercise reasonable care in holding said train a reasonable time for said Hickey to board," etc. Instruction numbered 2, given at the request of appellant, told the jury substantially the same thing. It cannot complain on this account.

Appellant's objection to the instruction numbered 7 given at the request of plaintiff is the last sentence. The court did not tell the jury what effect to give to the facts mentioned therein, but that they should consider them in determining whether or not defendant's servants exercised reasonable care towards Hickey. Their effect was necessarily controlled and determined by other instructions. The instruction numbered 7 given at the request of the defendant obviates any valid objection to instruction numbered 8 given at the request of the plaintiff.

The modifications of instructions numbered 4, 5 and 6, given at the request of defendant, did not affect their legal effect. "Not knowing," "or having no reasonable grounds to suspect," "knew," or "know," "or had reasonable grounds to suspect," are legal equivalents.

The requests of the defendant for instructions numbered 9 and 14 were properly refused by the court. They deny to plaintiff the right to recover under any circumstances, even though the train was started before a reasonable or sufficient time had been allowed to get aboard; and so far as correct or applicable they are covered by other instructions.

The request of the defendant numbered 12 was properly refused. It denied to plaintiff the right to recover if he stopped for certain purposes when by going directly to the train he could have got aboard of it before it started, notwithstanding the jury might have found that the train did not remain still a reasonable time, after the passengers were notified to get aboard, for all of them to do so, and notwithstanding there was evidence tending to prove that he was thrown to the ground by the train starting suddenly with a jerk while he was on the first or second step leading to the platform of one of the passenger coaches. It makes the right of plaintiff to recover to depend entirely and exclusively upon two facts specified therein.

The evidence, though unsatisfactory, was sufficient to sustain the verdict.

Judgment affirmed.

CARR v. STATE.

Opinion delivered February 4, 1907.

1. JURY—CHALLENGE AFTER ACCEPTANCE.—It is within the court's discretion to permit the State to challenge jurors peremptorily after they have been examined and accepted as jurors in the case. (Page 590.)
2. EVIDENCE—CONFESSION.—Testimony that defendant, accused of murder, at the time of his arrest said that he expected to be arrested, and that if he killed deceased he was drunk, was admissible as tending to show a confession. (Page 590.)
3. WITNESS—CROSS-EXAMINATION OF ACCUSED.—It was not improper, on cross-examination of one accused of murder, to ask him if he had not been criminally intimate with a certain female, and if he had not threatened to kill any man in that community that ever went to see her or had anything to say to her. (Page 590.)
4. BURDEN OF PROOF—CIRCUMSTANTIAL EVIDENCE.—It is not necessary that each circumstance in a chain of circumstances relied upon to convict should be established beyond a reasonable doubt; it is sufficient if all the circumstances, taken together, convince the jury beyond a reasonable doubt of defendant's guilt. (Page 591.)

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

R. J. Williams, for appellant.

1. The court erred in permitting the prosecuting attorney to challenge two jurors peremptorily after they had been accepted as jurors. Kirby's Digest, § § 2356-7, 2347.

2. It was error to permit the prosecuting attorney to ask defendant if he had not been criminally intimate with a certain woman, and if he had not threatened to kill any man in the community that went to see her or had anything to do with her.

3. It was also error to refuse the 3rd and 4th instructions asked for by defendant.

Wm. F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

1. There was no error in permitting the challenges of the jurors. 70 Ark. 337.

2. The question with reference to appellant's intimacy with the woman, etc., was on cross-examination, and was admissible as affecting the credibility of the witness. 16 Ark. 534.

3. The third and fourth instructions asked by defendant were properly refused. 67 Ark. 417; Hughes, Instructions to Juries, § § 310-11.

BATTLE, J. Alfred Carr was indicted for murder in the first degree committed by killing Bill Civil, and was tried and convicted of that offense; and he appealed to this court.

Appellant says that the trial court erred in permitting the State to peremptorily challenge two jurors after they had been examined and accepted as jurors in the case. But this was not error. It was lawful to do so. *Allen* v. *State,* 70 Ark. 337.

He next complains of the court for admitting the testimony of a witness named Jim Wallace, in which he testified that appellant, at the time he was arrested, said that he expected to be arrested, and that if he killed Bill Civil he was drunk, and that one Cook advised him to submit to arrest and go with the sheriff, and assured him that he would be protected. The testimony was admissible as tending to show a confession.

Appellant testified in his own behalf. He says that the court erred in permitting the prosecuting attorney to ask him "if he had not been criminally intimate with one Emma Simms, and if he had not threatened to kill any man in that community that ever

went to see her or had anything to say to her." He answered in the negative. The question was proper on cross-examination, and if it was not it was not prejudicial.

He insists that the court erred in refusing to instruct the jury as follows:

"3. The jury is instructed that in cases depending on circumstantial evidence every circumstance in the chain of circumstances, necessary to convict the defendant, must be established beyond a reasonable doubt and to a moral certainty, and each circumstance must be consistent with all the other facts and circumstances proved, and all, when taken together, must be consistent with the guilt of the defendant, and inconsistent with any other reasonable hypothesis; and unless you so find, you should acquit the defendant.

"4. The jury is instructed that in cases depending on circumstantial evidence each circumstance in the inculpatory evidence must be consistent with the truth of the fact to be proved—that is, the guilt of the defendant—and consistent with the truth and human probability; and unless you so find you should acquit the defendant."

In this there was no error. The court properly instructed the jury in that respect, as follows: "The jury are instructed that in cases depending on circumstantial evidence it is necessary that all the circumstances taken together must convince the jury beyond a reasonable doubt of the defendant's guilt; and if after a mature consideration of all the circumstances the jury has a reasonable doubt, they should acquit." *Lackey* v. *State*, 67 Ark. 416.

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

Judgment affirmed.

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

81 591
87 324

Opinion delivered February 4, 1907.

1. NEGLIGENCE—EVIDENCE.—In an action against a railroad company for the negligent death of an employee, where it was a question whether

the employee was guilty of contributory negligence, it was error to permit plaintiff to prove that deceased was a cautious, careful and prudent man who avoided taking danger. (Page 597.)

2. MASTER AND SERVANT—DUTY OF MASTER.—As a general rule, it is the duty of the master to provide the servant with suitable instruments and means with which to do his work, and to provide a suitable place in which such person, when exercising due care himself, can perform his duty safely or without exposure to dangers that do not come within the obvious scope of his employment. (Page 598.)

3. SAME—DUTY TO CAUTION SERVANT.—Where a servant, by reason of youth or inexperience, does not appreciate the danger incident to the work which he is employed to do, it is the master's duty to give him such instructions as would, in the judgment of men of ordinary prudence, be sufficient to enable him to appreciate the danger and to do the work safely. (Page 598.)

4. SAME—DUTY TO FURNISH SAFE PLACE.—Where a servant is working in a place of danger, it is the master's duty to adopt such reasonable precautions to provide for his safety as a reasonably prudent man would have considered sufficient for his own safety under the same circumstances. (Page 598.)

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

B. S. Johnson and *S. D. Campbell,* for appellant.

1. Under the circumstances of this case, and because of the nature of the work in which deceased was engaged, there was no duty resting on appellant to provide him with a safe place to work, but deceased assumed all the risks and hazards of the employment. Appellee is aided by no presumption of negligence on the part of appellant. 79 Ark. 76; 179 U. S. 658; 76 Ark. 69; 58 Ark. 217; 73 Ark. 55; 65 Fed. 48; 67 Fed. 507; 144 Fed. 605. See, also, on the question of assumed risk, 46 Ark. 569; 54 Ark. 389; 61 Ark. 549; 63 Ark. 427; 64 Ark. 367.

Even though there may be evidence of witnesses which alone would sustain the verdict, yet, if the physical facts disclosed in the record show that such evidence is unreasonable and contrary to human experience and common observation, the court will reverse. 79 Ark. 608.

Uncontradicted facts show that neither Inman nor Marrs had any control or superintendence the one over the other, nor was either invested with such authority by appellant, and that, although belonging to different gangs, all, in this emergency,

were working together for a common purpose, all in the same grade under the common direction and supervision of Busby. Such being the case, the fellow-servants' law applies, and precludes recovery. Kirby's Digest, § § 6658, 6659; 63 Ark. 477 and authorities *supra.*

2. The court erred in admitting incompetent testimony as to statements made and language used by persons at the wrecked bridge, the same not being a part of the *res gestae,* being mere hearsay, and throwing no light on any element of liability as to the proximate cause of the injury. 76 Ark. 430.

3. Testimony of witnesses to the effect that deceased was a cautious, prudent or careful man was improperly admitted. 76 Ark. 302; 58 Ark. 454; 115 Fed. 268; 83 Am. Dec. 592; 25 Am. Rep. 172; 52 *Id.* 744; 48 S. W. 568; *Id.* 608; 6 Thompson on Neg. (2 Ed.), § 7883.

4. It was error to admit testimony as to lack of warning at the time of the accident. 58 Ark. 227 and authorities *supra.*

5. The court erred in reading to the jury the sections of the digest upon the law of fellow servants and vice principals without explanation. 63 Ark. 477.

6. At the conclusion of the argument of appellee's attorney, the audience applauded, whereupon the court, on objection of appellant, reprimanded the audience, but gave no cautionary admonition to the jury. The jury were thereby prejudiced, and the proceedings at the time were prejudicial even if the court had admonished the jury. 65 Ark. 627.

S. Brundidge, Jr., and *J. W. & M. House,* for appellee.

1. While it is true the burden of proving negligence is on appellee, yet when positive acts of negligence, or even acts from which negligence may be inferred, are shown, that burden is discharged. 57 Ark. 383.

While an employee assumes all the risks incident to the service he enters, he does not assume a risk created by the negligent act of the master. 67 Ark. 217. He neither waives nor assumes the negligent act of the master or vice principal. 16 Am. & Eng. Ry. Cas. (U. S.) 324; 12 *Id.* 492; *Id.* 636; *Id.* 517.

Marrs was at the time a vice principal, acting for the appellant, and knew that when the rivets were cut the wreckage

would fall. It was his duty to see that no one was near it at the time, if by timely warning it could have been done. 45 Ark. 318; 46 Ark. 388. And the fact that the work was of a dangerous character shoud have caused a higher degree of care on the part of those in charge of the work. 14 Am. & Eng. Ry. Cas. (N. S.) 657.

The physical facts in no wise contradict the evidence in the record, and the cases cited by appellant on this point have no bearing upon any question arising in this case.

2. It is in proof that Inman belonged to the bridge building crew, with Woodall as his foreman, and that Marrs was foreman of the wrecking crew, who had no connection whatever with the work in which Inman was engaged. Marrs's crew were engaged simply in clearing away the wreckage, and he had authority to direct the work and give orders to his men. It is further proved that Busby at the time was three hundred yards away and not giving orders. Deceased and Marrs were not fellow servants. Kirby's Digest, § § 6658, 6659; 65 Ark. 138; 70 Ark. 411.

3. Declarations made by the servant are admissible against the master, when they are made in the transaction of his business, and coincident with the events to which they relate. 28 Am. & Eng. Ry. Cas. (O. S.) 524; *Id.* 467; 16 *Id.* 580; 34 *Id.* 127; 10 *Id.* (N. S.) 368.

4. Evidence to the effect that deceased was a careful and cautious man was competent; but, if not, appellant can not complain, because it invited such testimony by introducing in evidence the application made by Inman for employment. Moreover, if incompetent, it was harmless, because it only proved that which the law presumes to be true until the contrary is shown. 20 Am. & Eng. Ry. Cas. (O. S.) 422; 35 Pac. 269; 45 Pac. 581; 100 Am. Dec. 69; 63 N. Y. 643; 52 Am. Rep. 468; 18 Am. Rep. 407; 163 U. S. 353; 72 Ia. 371. But the issue was raised as to contributory negligence of deceased, hence his habits as to care and caution were admissible. 44 Atl. 388; 114 Ia. 257; 99 Ill. App. 143; 1 *Id.* 439; 20 Col. 107; 61 N. H. 416. Such evidence is especially admissible where the party dies, and can not be before the court to testify. *Ubi supra.*

5. If it was error to read the statute relating to fellow ser-

vants, etc., without explanation to the jury, it is cured by other instructions given at the instance of appellant.

BATTLE, J. Matilda Inman, as administratrix of L. H. Inman, deceased, brought this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages occasioned by the death of her intestate. She alleged in her complaint that L. H. Inman was, on the 12th day of September, 1904, a bridge carpenter, and was in the employment of the defendant, and that one J. A. Woodall was the foreman of a gang of men with which he was working at that time, and on that day, while working under such foreman on a bridge of the defendant across the Ouachita River, near Arkadelphia, another gang, of which Frank Marrs was foreman, wilfully and negligently cut the bolts and supports of an iron beam in the bridge, and thereby caused the same to fall upon and kill Inman; that deceased left plaintiff, Matilda Inman, his widow, and two children, Fred Inman, aged twenty years, and Anna Inman, aged thirteen years, him surviving.

The defendant answered and denied the allegations in the complaint, and alleged that the death of Inman was caused by his own contributory negligence, and was the result of and incident to his employment, and within the risks and hazards assumed by him.

The following facts were shown by the evidence adduced in the trial before a jury in this action: On the 11th of September 1904, a freight train of the defendant broke through and wrecked a span of the bridge across the Ouachita River, near Arkadelphia. Immediately all available gangs of workmen in the employment of the defendant, and they were many, were called to remove the wreckage and repair the broken span, each gang having a foreman. But the superintendence of this work was under S. H. Busby, and all worked as one gang under him. On the 12th day of September, 1904, "while Inman, who was a bridge carpenter and a member of one of the gangs, was engaged in this work, and while he was taking measurements for the purpose of repairing the bridge, other men were cutting rivets and taking away parts of the wreckage of the span as fast as possible. This span, before the wreck, was supported by two large rock piers some distance apart, and when the freight train broke through

the span there were portions of the broken span left, so that, while parts of the freight train and of the wrecked span rested against one corner of the pier, there was, as to that part of the pier opposite, a distance in the clear, between the wreckage and the north side of the south rock pier, of from two to five feet—at least such clear space sufficient for a man to ascend or descend a rope between the wreckage and the pier. This pier was about twenty feet high, about eighteen feet wide at the top, about five or six feet thick at the top, and all dimensions increasing towards the base (or "flaring" as termed by the witnesses.) There was a rope fastened to one of the ties at top of the pier and hanging down to the base, so that it could be turned in any manner as to the pier—on the north side between the pier and the wreckage or alongside the shortest diameter of the pier on either side, or on the north side of the pier (its longest diameter), being the opposite side from the wreckage. This rope for a part of the time was suspended on one side, and a part of the time on the other. When Inman descended it the last time, it was hanging between the wreckage and the north side of the south pier. It had been used indiscriminately by persons ascending and descending. Who changed it from one side of the pier to the other, or why the change was made, the evidence does not show. But it does show that it was used by different people, and that some, in descending, came down until the wreckage was reached, and then got on that to work or to go down to the bottom; while others would continue on the rope to the end. The wreckage stood with the distance from two to five feet between it and the pier, as before stated, from some time early in the night of the 11th of September, 1904, until about two o'clock in the afternoon of the next day, when the wreckage gave way while Inman was descending the rope between it and the pier, about half way down, and fell against him. The cause of the fall was the cutting of the rivets or bolts which held the wreckage together by the men engaged in that work. A severe injury was inflicted upon Inman by the fall, from which he died in a few hours.

In the trial plaintiff was allowed to adduce evidence, over the objection of the defendant, tending to prove that the deceased,

Inman, was "a cautious, careful and prudent man, who avoided taking danger."

The jury returned a verdict in favor of the plaintiff for $5000, and the defendant appealed.

The evidence admitted by the court over the objection of the defendant was incompetent. It did not tend to show that the deceased pursued any particular course of conduct at the time he was killed, or that he did or did not any act shown by the evidence. It does not tend to show such invariable regularity of action or conduct by him in the past as to make it probable that he did or failed to do any act at the time he was killed. Unless it had that effect, how could it enable the jury to determine whether he was or was not guilty of contributory negligence at the time he was killed? The statement that he was careful and cautious was merely an expression of an opinion of a witness, and threw no light upon any issue in the case. From the admission of it as evidence the jury might have inferred it was for the purpose and sufficient to show that deceased was not guilty of negligence. It was misleading and prejudicial, and the court erred in admitting it. *Hot Springs Street Railway Company* v. *Bodeman,* 76 Ark. 302; *Railway Company* v. *Harrell,* 58 Ark. 454; *Chase* v. *Maine Central Railroad Company,* 52 Am. Rep. 744; 6 Thompson on Negligence (2 Ed.), § 7883; 1 Wigmore on Evidence, § 92; *Louisville & N. R. Co.* v. *McClish,* 115 Fed. Rep. 268, 277.

Inasmuch as the judgment in this case will be reversed and the cause remanded for a new trial, we deem it necessary to consider what was the duty of the appellant to provide for the protection of Inman and other persons in its employment and engaged in moving the wreck of the bridge, at the time of the accident which caused the death of Inman, and to make suggestions as to the law regulating the rights of the parties to this action in a case wherein the pleadings are properly drawn, to the end the parties may take advantage of them if they see fit.

There was a large force of men engaged in removing the wreck and repairing the bridge at the time the accident occurred. They were exposed to great danger and injury, as shown by the evidence in this case. What was the duty of appellant to them as to such danger?

As a general rule, it is the duty of the master to provide the servant with suitable instruments and means with which to do his work, and to provide a suitable place in which such person, when exercising due care himself, can perform his duty safely or without exposure to dangers that do not come within the obvious scope of his employment. It would be a breach of his duty to expose a servant, who, by reason of his youth or inexperience, is not aware of or does not appreciate the danger incident to the work he is employed to do or the place he is engaged to occupy, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding and prudence, be sufficient to enable him to appreciate the dangers and the necessity for the exercise of due care and caution, and to do the work safely, with proper care on his part. *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 232.

In *Railway Company* v. *Triplett,* 54 Ark. 289, where a car repairer was engaged in work under a car upon a railroad track, and so situated that he could not protect himself and that a jar from an approaching car would cause it to fall and crush him, it was held that it was the duty of the railway company, "by the exercise of ordinary care, to provide the car repairer with a safe place in which to work, and that it might do so by adopting such rules and regulations as would be sufficient for that purpose, when faithfully observed by its employees, and when the circumstances were such that a reasonably prudent person might have relied upon rules and regulations to afford protection; and that, if he saw proper to rely upon such methods of protection, and the occasion demanded it, he should also have adopted such measures as would have reasonably been necessary to secure the observance of such rules." *Fordyce* v. *Briney,* 58 Ark. 206; *Kenefick-Hammond Company* v. *Rohr,* 77 Ark. 290.

In *Kenefick-Hammond Co.* v. *Rohr,* 77 Ark., 290, the defendant was engaged in constructing a railway. Plaintiff was in its employment. At the particular time and place when and where the plaintiff was injured construction work was being done on the line of the road, which ran along the side of a mountain, about 250 yards from the valley below. Laborers in the employment of the defendant were engaged in making a cut. Two sets of men were drilling holes in the earth and rock for the re-

ception of powder for blasting. A portable boiler was used to furnish steam to operate the drills; and plaintiff and an assistant operated the same. On account of the character of the ground, trees and underbrush intervening, plaintiff at the boiler and the men at the drills could not see each other. When a hole was finished, it was charged with powder, and the same was discharged. This court held that it was the duty of the defendant to provide reasonable means and precautions for the protection of plaintiff against the blasts.

It follows, then, that it was the duty of appellant to have adopted and used reasonable means and precautions to provide for the safety of Inman at the time of the accident, which were such as a reasonable and prudent man would have considered sufficient for his own safety under the same circumstances. 1 Labatt on Master and Servant, § § 14-17.

For the error indicated the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

PEOPLE'S SAVINGS BANK v. BIG ROCK STONE & CONSTRUCTION COMPANY.

Opinion delivered February 4, 1907.

CONTRACT—PUBLIC POLICY.—It is against public policy to permit a bank of which the mayor of a city is a stockholder and president to take an assignment of the claim of a contractor against the city for the price of work which he has performed for the city, and which work must be inspected and accepted for the city by a board of which the mayor is chairman.

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

STATEMENT BY THE COURT.

On the 18th of March, 1904, W. E. Lenon was mayor of the city of Little Rock. As mayor he was president of the board of public affairs of the city, which board was composed of himself, Herman Kahn and J. L. Reid. This board was intrusted with

the letting of paving and other contracts for the performance of work for the city and with the inspection and acceptance of such work. This board on the 18th day of March after due advertisement let a contract for the grading and paving of Shell Alley in that city to one Chas. T. Torbert, he being the lowest bidder for the work, for which work the board agreed to pay him the sum of $667.50. The contract was signed by W. E. Lenon as president of the board.

Lenon at this time was a stockholder in the People's Bank and president thereof. To enable Torbert to complete his contract with the city, the bank advanced him $147.43, and took an assignment of his claim against the city.

Torbert became indebted to the Big Rock Stone & Construction Company in the sum of $223.61 for crushed rock, and to the Arkansas Brick & Manufacturing Company in the sum of $82 for cement, this crushed rock and cement being used by Torbert in paving the alley. Afterwards these companies brought an action in equity to subject the money due from the city to Torbert for paving the alley to the payment of their debts against him. The People's Bank filed an intervening petition, claiming the fund by virtue of its loan to Torbert and his assignment to the bank of his claim against the city.

The plaintiffs filed an answer, in which they alleged that, at the time the bank made the contract with Torbert, Lenon was mayor of the city and president of the board of public affairs and president and stockholder in the bank, and that as such he acted for the bank in securing the contract with Torbert set up in the intervening petition of the bank. The answer further alleged that by this transaction Lenon became a beneficiary of and party to the contract, and placed himself in a position where he could not properly represent the city in the final inspection and acceptance of the work done by defendant; that, notwithstanding this dual interest, Lenon acted as president of the board of public affairs, and as such accepted the work of defendant; that it would therefore be against the policy of the law to permit the intervener to inforce its alleged contract with defendant.

On the hearing the chancellor sustained the answer of the plaintiffs, and found in their favor, and gave judgment accordingly, and, the money due from the city to Torbert having been

paid into the registry of the court, the court made an order that such money be paid to plaintiffs to be applied on their claims. The bank appealed.

Bradshaw, Rhoton & Helm, for appellant.

1. If an ordinance is passed by the council authorizing the expenditure, and bids are advertised for, any person can make a contract with the Board of Public Affairs, provided his is the lowest bid, notwithstanding he may be related to a member of the board, or associated with him in business. Kirby's Digest, § § 5643, 5644. There is no allegation in the complaint that would entitle appellees to conventional subrogation; but the allegations of the intervention, and the proof, show an assignment of Torbert's claim to appellant whereby conventional subrogation is established. 56 Ark. 480. The legal right to the fund is in appellant, because it furnished the money which was used to pay laborers and to pay for material, and which could not have been obtained except upon assignment of the amount due from the city. 58 Ark. 348; 33 Mich. 61; 47 Mich. 236. A contract is not absolutely void between two corporations because some of the directors of the two are common to both. 33 L. R. A. 788; 92 Ind. 518.

2. The contract is not void as against public policy, but in any case appellees can not complain. Only parties to a contract void or voidable as against public policy can be heard to complain. The presumption of law is in favor of the legality of a contract as against its illegality, and the general rule is to give a contract that interpretation which will give it validity. 117 U. S. 567; 15 Am. & Eng. Enc. of L. 3; 80 Ind. 245. See, also, 11 Ark. 475. When a contract based upon a lawful consideration is for the performance of an act capable of being performed in a legal manner, the contract is valid, even though one of the contracting parties violates the law. 15 Am. & Eng. Enc. of L. 937.

Murphy, Coleman & Lewis, for appellees.

The appellant's contract with Torbert can not be enforced because its enforcement would be against public policy.

As to whether or not a contract is against public policy, the test is the evil tendency of the contract, and not the actual results;

and if its tendency is opposed to the interests of the public, it is invalid, even though the intent of the parties was good, and no injury to the public would result in the particular case. 9 Cyc. 481; 63 Ark. 320-21; 15 Am. & Eng. Enc. of L. (2 Ed.), 934; 49 Am. Rep. 746; 43 N. Y. 147; 137 Ind. 655; 80 Am. Dec. 677. See, also, 103 U. S. 658; *Id.* 261; 135 U. S. 507; 27 Wash. 543; 70 N. C. 393; 80 Ky. 681; 136 Mass. 265; 30 Tex. Civ. App. 561; 39 Am. Rep. 17. It is immaterial whether or not it is a party to the contract who brings to the notice of the court the fact of its being against public policy. "It is for the protection of public interests that the courts take notice of the immorality of such contracts whenever by any means made aware of it." 3 Fed. 10. The bank can not enforce a contract which its president has made in violation of public duty. Cook on Stock & Stockholders, § 663*a*; *Id.* § 6; Spelling on Priv. Corp. § § 829, 831; 31 Mich. 490; 85 Tenn. 572; 23 Atl. 802; 87 Ala. 211; 20 Fed. 700.

RIDDICK, J., (after stating the facts.) The only question in this case is whether it is against public policy to permit a bank of which the mayor of a city is a stockholder and president to take an assignment of the claim of a contractor against the city for the price of work which he has performed for the city, and which work must be inspected and accepted for the city by a board of which the mayor is chairman? The bank, acting through its president and other officers, in good faith advanced the contractor certain sums of money to enable him to carry out his contract with the city, and to secure the loan took from him an assignment of his claim against the city. At the time this was done the work had not been completed, and therefore had not been inspected or accepted by the city. It would certainly be against public policy to permit the mayor of a city to take an assignment of such a claim to himself and to become personally interested in this way in a contract against the city of which he was the chief officer and a member of a board whose duty it was to inspect the work and pass upon the question as to whether it had been performed in accordance with the contract. In such a case the law will not permit him to put himself in a position where his own interests may conflict with those of the city which it is his duty to guard and protect. But the same rule which prevents him from doing that as an individual will prevent him

from doing so as the president of a corporation in which he is also a stockholder. His interests as a stockholder and president of the corporation might conflict with the interests of the city of which he is mayor and chairman of the board of public affairs charged with the duty of inspecting the work in question. If a question should arise before the board of public affairs as to whether or not the contractor had properly performed his work and was entitled to be paid the contract price, the duty of the mayor, as an officer representing the city, might require the rejection of the work, which would be opposed to his interests as president and stockholder in the bank. The law aims to shield officers against such temptations by forbidding them from entering into contracts which might bring their private interests into antagonism with those of the city and by declaring that all such contracts are void. *West* v. *Camden,* 135 U. S. 507; *Holcomb* v. *Weaver,* 136 Mass. 265; *Edwards* v. *Randle,* 63 Ark. 320; 9 Cyc. 481; 15 Am. & Eng. Enc. Law (2 Ed.), 934-976.

There is nothing in our statute that changes this rule of law. On the contrary, it goes further, and forbids the board of public affairs to make any contract with any person associated in business with or related within the sixth degree of consanguinity or affinity under the civil law to any member of the board or member of the city council except upon advertisement and to the lowest bidder. It provides that "every contract in which any such forbidden person shall have an interest, direct or indirect, shall be utterly null and void." And requires that an affidavit be filed before payment showing that no person forbidden by the act has an interest in the contract. Kirby's Digest, § § 5644, 5647.

There is nothing in this language to justify a member of the board in becoming interested in a contract, even after it has been made to the lowest bidder, when his duty requires that he shall inspect and determine whether the work due under the contract shall be accepted by the city or not. In this case the original contract with Torbert was valid, for no member of the board or council was interested therein, but the subsequent contract by which Torbert, before his work had been completed and accepted, assigned his claim against the city under the contract to the bank of which the mayor was president and stockholder came

within the rule that contracts which place the individual interests of public officers in conflict with their duty to the public and put them under an inducement to act in violation of such duty are illegal. By this assignment the mayor, as president and stockholder of the bank, became interested in a contract, the work done under which he, as member of the board of public affairs, had to approve and accept for the city. The statute declares that all such contracts "shall be utterly null and void," and this is only a restatement of the rule of the common law. Such contracts being illegal, no court can enforce them, for to do so would be for "the law to aid in its own undoing." *Berka* v. *Woodward,* 125 Cal. 119, 45 L. R. A. 420; *Melliss* v. *Shirley Local Board,* 16 Q. B. Div. 446; *Brown* v. *Tarkington,* 3 Wall. (U. S.), 377; *Oscanyan* v. *Winchester Arms Co.,* 103 U. S. 261; 15 Am. & Eng. Enc. Law (2 Ed.), 971.

While we are well satisfied that in this particular instance both the mayor and the bank officials acted in entire good faith, and really intended what they did for the benefit of the city and its contractor, yet the law looks not alone at this particular instance, but to what a rule that recognized the validity of such contracts would lead. And, while these men acted from honest motives, yet, when they contracted for the assignment of this claim against the city, they entered into a contract which the law as a matter of public policy will not enforce. The judgment of the chancellor was therefore in our opinion right, and his decree is affirmed.

McCULLOCH, J., dissenting.

ARKANSAS & LOUISIANA RAILWAY COMPANY *v.* SANDERS.

81 604
190 437

Opinion delivered February 11, 1907.

1. STOCK KILLING—NEGLIGENCE.—Proof of the killing of an animal by a railroad train makes a *prima facie* case of negligence against the company, and casts upon it the burden of proving that its servants were not guilty of negligence. (Page 606.)

2. SAME.—Although the engineer in charge of the engine which killed an animal testified that in his judgment the chances of avoiding the injury were bettered by omitting to ring the bell or sound the whistle, the jury were not bound to accept his opinion, and might

have found that he failed to exercise ordinary care to avoid injuring the animal. (Page 606.)

3. SAME—TEST OF NEGLIGENCE.—An instruction which made the question of negligence to depend upon whether or not the person did the best he could under the circumstances was properly refused; the test of negligence being whether such person omitted to do something which a reasonably prudent person would, or did something which a reasonable prudent person would not, do under like circumstances. (Page 607.)

4. EVIDENCE—HEARSAY.—It was not error to permit witnesses to testify, from having the plaintiff point out the place where the animal in question was killed by a train, as to the distance the engineer and fireman could have seen the animal after the engine passed out of a certain cut, where the plaintiff also testified that he went with these witnesses and assisted them in measuring the distance. (Page 607.)

5. RAILROAD—DUTY TO KEEP LOOKOUT.—Where the evidence showed that an animal on a railroad track could have been seen by the trainmen about 156 yards ahead of the engine, and the engineer testified that he did not see it until he got within a distance of 100 yards, the jury were warranted in finding that no lookout was kept. (Page 607.)

Appeal from Howard Circuit Court; *James S. Steel,* Judge; affirmed.

W. C. Rodgers and *B. S. Johnson,* for appellant.

1. The peremptory instruction for defendant should have been given. The issues are matters of law, as there is no conflict in the evidence, and no liability. The *prima facie* case resulting from the injury was clearly overcome by the evidence, and the jury could not disregard it. 67 Ark. 514, 516; 53 *Id.* 96, 97; 62 *Id.* 182, 185; 66 Id. 439, 441; 81 Ga. 202; 83 *Id.* 393; 70 Miss. 348.

2. It was error to permit plaintiff to prove the location of the accident by witnesses from his own statements as to where the horse was when struck. 23 Ark. 282-6; 28 Col. 502; 106 Cal. 220; 41 W. Va. 332; 21 Ark. 349, 356; 109 Mich. 546; 64 S. W. Rep. 863; 65 Oh. St. 403; 64 S. W. Rep. 630; 91 S. W. Rep. 30, 31; 92 *Id.* 251; 91 S. W. Rep. 8.

3. The ninth instruction asked by defendant correctly stated the law, and should have been given. The first, second, third and fourth instructions for plaintiff should not have been given. The first is vicious; the second is wrong; the third is

objectionable as it gives the jury no guide as to what is due care; the fourth is abstract. Abstract instructions serve no good purpose, and giving them is error. 14 Ark. 537; 36 Id. 646; 37 *Id.* 591; 54 *Id.* 339; 56 *Id.* 461; 61 *Id.* 560; 91 S. W. Rep. 187; 92 *Id.* 788.

W. P. Feazel and *Sain & Sain,* for appellee.

It was the duty of the employees, after discovering the horse, to do all in their power to avoid the killing. They did nothing, and can not excuse their negligence by stating their experience. Whether it was safer not to sound the alarm was for the jury. 68 Ark. 32; 57 Id. 192. See, also, 81 Ark. 35. These authorities show that there is no error in the instructions given and none in refusing these asked by defendant. If the engineer saw the horse so near as to indicate danger, he was negligent in not sounding the alarm, slowing up, etc. If he could have seen the horse in time and by exercise of ordinary care avoided the injury, and failed to do so, he was guilty of negligence; or, if no proper lookout was kept, it was negligence.

McCULLOCH, J. This is an action against the railway company by the owner of a horse to recover damages for its alleged negligent killing by servants of the company in the operation of a train, and it is the second appearance here of the case. *Arkansas & Louisana Ry. Co.* v. *Sanders,* 69 Ark. 619. The facts are stated in the former opinion. The second trial resulted in a verdict in favor of the plaintiff for the value of the horse, and the defendant again appealed. It is contended that the evidence does not sustain the verdict.

Proof of the killing of the animal made a *prima facie* case of negligence against the company, and cast upon it the burden of proving that its servants were not guilty of negligence. It was admitted by the engineer that no alarm was given, either by ringing the bell or sounding the whistle. He stated, however, that in his judgment the chances of avoiding the injury were, under the circumstances, better by omitting these alarms. This left a question for the jury to determine whether he exercised ordinary care to avoid injuring the animal. The jury were not bound to accept his opinion as to the best means of avoiding the injury. They had the right to exercise their own judgment in determin-

ing that question, as it was not a question calling for especial knowledge or experience on the subject. The evidence shows that the horse was running toward the track in front of the approaching engine, and it is very probable that an unusual alarm, such as a blast of the whistle, would have frightened the animal and diverted its course from the direction of the danger. *Fordyce* v. *Edwards*, 65 Ark. 98.

Appellant complains of the court's refusal to give the following instruction: "No. 9. If the jury find from the evidence that the engineer and fireman did all they reasonably could have done to avert an injury to the animal in controversy, and in good faith exercised the best judgment they could under the circumstances and in the time they had to consider, they will find for the defendant, though they further find that, had they acted otherwise, the accident would not or might not have happened." The instruction was properly refused. It made the question of negligence or due care depend upon whether or not the engineer and fireman "in good faith exercised the best judgment they could under the circumstances." This is not the correct test of negligence, which is the omission to do something which a reasonably prudent and careful person would, or the doing something which such a person would not, do under like circumstances. 1 Thompson on Negligence, § § 1, 2; *Hot Springs Railway Co.* v. *Newman,* 76 Ark. 607. The engineer and fireman may have in perfect good faith done what they honestly believed to be the best in order to avoid the injury, and yet have been guilty of negligence.

No error was committed by the court in permitting witnesses to testify, from having the plaintiff point out the place where the animal was killed, as to the distance the engineer and fireman could have seen it after the engine passed out of the cut. Their testimony was, of course, founded upon the truth of plaintiff's statement pointing out the place to them, and the jury considered this in testing the weight of their testimony. It was not hearsay, because the plaintiff testified that he went with them and assisted in measuring the distance.

Nor was there any error in instructing the jury upon the duty of defendant's servants to keep a lookout. There was evidence to base the instruction upon, as the engineer testified that he saw the horse only 70 or 100 yards in front of the engine,

and the testimony of the other witnesses tended to show that the horse could have been seen about 156 yards. If it could have been seen that distance, and the engineer did not see it until he got within a distance of 100 yards, the jury were warranted in finding that no lookout was kept.

Judgment affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

Grayson-McLeod Lumber Company *v.* Carter; appeal from Clark Circuit Court; Joel D. Conway, judge; affirmed December 10, 1906; by Hill, C. J.

Ferguson Lumber Company *v.* Little Rock Well & Pump Company; appeal from Pulaski Circuit Court; Edward W. Winfield, judge; affirmed December 17, 1906; by Riddick, J.

Bryant Lumber Company *v.* Carl-Gadd Mercantile Co.; appeal from Perry Circuit Court; Edward W. Winfield, judge; affirmed December 17, 1906; by Battle, J.

Cogburn *v.* State; appeal from Pike Circuit Court; James S. Steel, judge; affirmed January 7, 1907; by McCulloch, J.

Muldrow *v.* State; appeal from Howard Circuit Court; James S. Steel, judge; affirmed January 7, 1907; by Hill, C. J.

Chambers *v.* Thompson; appeal from Prairie Chancery Court; John M. Elliott, chancellor; affirmed January 21, 1907; by Battle, J.

Watkins *v.* Parker; appeal from Ashley Chancery Court; Marcus L. Hawkins, chancellor; affirmed February 11, 1907; by McCulloch, J.

Weaver *v.* Parlin & Orendorff Company; appeal from Lonoke Chancery Court; Jesse C. Hart, chancellor; affirmed February 11, 1907; by McCulloch, J.

Stark Grain Company *v.* Automatic Weighing Machine Company; appeal from Miller Circuit Court; Joel D. Conway, judge; affirmed February 11, 1907; by Riddick, J.

II.

CASES DISPOSED OF ORALLY.

Arkansas Central Railroad Company, *et al. v.* Mary Howard Brown, *et al.;* Sebastian Circuit Court; Styles T. Howe, judge; affirmed for non-compliance with rule nine, December 3, 1906; *per curiam.*

Charles C. Rose *v.* St. Louis, Iron Mountain & Southern Railway Company; Pope Circuit Court; Wm. L. Moose, judge; settled, and appeal dismissed, December 10, 1906; *per curiam.*

The Gunther Coal Company *v.* John E. Weaver; Sebastian Circuit Court; Styles T. Rowe, judge; settled and appeal dismissed, December 10, 1906; *per curiam.*

The Gunther Coal Company *v.* William C. Orme; Sebastian Circuit Court; Styles T. Rowe, judge; settled and appeal dismissed December 10, 1906; *per curiam.*

St. Louis Southwestern Railway Company *v.* Jas. F. Bennett and P. C. Dooley; Arkansas Circuit Court; Geo. M. Chapline, judge; settled and appeal dismissed, December 10, 1906; *per curiam.*

W. W. Adams *v.* The Incorporated Town of Ozark; Franklin Chancery Court; Jeremiah G. Wallace, chancellor, on exchange; appeal dismissed on motion of appellant, December 10, 1906; *per curiam.*

John Q. Johnson *v.* The State of Arkansas; Howard Circuit Court; James S. Steel, judge; affirmed on motion of Attorney General, December 10, 1906; *per curiam.*

Dave Henry *v.* The State of Arkansas; Howard Circuit Court; James S. Steel, judge; affirmed on motion of Attorney General, December 10, 1906; *per curiam.*

T. W. Drain *v.* Jesse Bird; Madison Circuit Court; J. S. Maples, judge; affirmed as a delay case, with penalty, December 24, 1906; *per curiam.*

M. W. Dillard *et al. v.* Mrs. B. C. Pope; Hempstead Chancery Court; James D. Shaver, chancellor; appeal dismissed on motion, December 24, 1906; *per curiam.*

Westinghouse, Church, Kerr & Company *v.* Will Ferrill; Pulaski Circuit Court; Edward D. Winfield, judge; settled and appeal dismissed, January 7, 1907; *per curiam.*

Andrew and Ada Cooper *v.* Little Bay Lumber Company; Calhoun Chancery Court; E. O. Mahoney, chancellor; appeal dismissed for non-compliance with rule nine, January 7, 1907; *per curiam.*

D. J. Young, *et al.* v. Tillman Shaw; Sebastian Circuit Court; Styles T. Rowe, judge; affirmed by consent, January 14, 1907; *per curiam.*

Klondike Lumber Company *v.* Bender Wagon Company, *et al.;* Little River Chancery Court; James D. Shaver, chancellor; settled and appeal dismissed, January 14, 1907; *per curiam.*

Capital Fire Insurance Company *v.* M. C. Wallace; Pulaski Circuit Court; Robert J. Lea, judge; settled and appeal dismissed, January 14 1907; *per curiam.*

T. M. Atkins *v.* Sallie M. Rooker *et al.;* Pulaski Circuit Court; Edward W. Winfield, judge; appeal dismissed for non-compliance with rule nine, January 21, 1907; *per curiam.*

First National Bank of Corning *v. J. M. Mardis et al.;* Clay Circuit Court; Allen Hughes, judge; appeal dismissed for non-compliance with rule nine, January 28, 1907; *per curiam.*

Carroll Dismukes *et al. v.* W. P. Fletcher *et al.;* Lonoke Chancery Court; Jesse C. Hart, chancellor; appeal dismissed for non-compliance with rule nine, January 28, 1907; *per curiam.*

C. C. Henderson *v.* G. C. and Lelia L. Jones; Clark Chancery Court; James D. Shaver, chancellor; settled and appeal dismissed by consent, January 28, 1907; *per curiam.*

E. J. French *v.* Stanton B. Cole; Fulton Chancery Court; George T. Humphries, chancellor; settled and appeal dismissed, January 28, 1907; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Baldy Vinson; Chicot Circuit Court; Zachariah T. Wood, judge; settled and appeal dismissed by consent, January 28, 1907; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* Ed. Robinson, administrator of the estate of Eugene Robinson, deceased; Pulaski Circuit Court; Edward W. Winfield, judge; settled and appeal dismissed by consent, January 28, 1907; *per curiam.*

Hot Springs Street Railroad Company *v.* Monroe Clardy; Garland Circuit Court; A. M. Duffie, judge; settled and appeal dismissed, February 4, 1907; *per curiam.*

Dyke Brothers *v.* C. W. Knight and Hal L. Norwood; Polk Circuit Court; James S. Steel, judge; advanced and affirmed for failure to file bill of exceptions within the time allowed by the lower court, February 11, 1907; *per curiam.*

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