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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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ERRATA

In 77 Ark. p. 89, third line, 1st headnote, for "will" read *which.*

In 78 Ark. p. 391, 4th line from bottom, for "75 Ark. 507" read *76 Ark. 423.*

In 78 Ark. p. 614, lines 2-8 at top of page should have been inserted on p. 616 just before the title, MASTER AND SERVANT.

In 80 Ark. 636, 8th line from bottom, for "on appropriation" read *an appropriation.*

In 81 Ark. 63, erase 19th line from top.

In 81 Ark. 63, line 20 from top, after the word "emoluments" insert the word *property.*

In 82 Ark. 11, 3d headnote, after 3d line insert the following line: *the jury the question of negligence in failing to block*

In 82 Ark. 335, 2d line of 2d head note, for "May 2, 1890" read *February 28, 1893.*

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

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84 1
f87 363
f87 492
e87 493

84 1
89 143

OSCEOLA LAND COMPANY *v.* CHICAGO MILL & LUMBER COMPANY.

Opinion delivered May 13, 1907.

1. TAX TITLE—WHO MAY QUESTION.—Under Kirby's Digest, § 7105, one who seeks to question the validity of a tax title must show that he or those under whom he holds had title at the time of the sale. (Page 8.)

2. SAME—EFFECT OF TAX DEED.—Under Kirby's Digest, § 7104, providing that a tax deed "shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed and also the right, title and claim of the State and county thereto, and shall be *prima facie* evidence that all the prerequisites of the law were complied with, * * * and that all things whatsoever required by law to make it a good and valid sale and to vest the title in the purchaser were done," a valid tax sale transfers, not only the title of the person in whose name the land was assessed for taxes, but the interests of all others therein, (Page 8.)

3. SAME—NOTICE OF SALE—CERTIFICATE OF PUBLICATION.— A tax title is void where the county clerk failed to certify on the record the publication of notice of sale of delinquent land, as required by Kirby's Digest, § 7086. (Page 8.)

4. SAME—EFFECT OF CONFIRMATION.—Though a tax sale was void for failure of the clerk to make a certificate showing publication of notice of sale of delinquent land, this irregularity was cured by a decree confirming such tax sale. (Page 8.)

5. SAME.—Where a tax title, though void for irregularity, has been confirmed in an adversary suit, the effect of the tax sale and decree of confirmation is merely to vest whatever title the defendants possessed in the plaintiff, but such decree does not conclude any one not a party to the suit. (Page 8.)

6. AFTER-ACQUIRED TITLE—EFFECT.—Under Kirby's Digest, § 734, providing that if any person shall convey real estate by deed purporting to convey same in fee simple, and shall not at the time of such con-

veyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall pass to the grantee, *held* that where one executed a conveyance in fee simple with warranty to certain land owned by the State and subsequently acquired the equitable title thereto from the State, such after-acquired title passed to the grantee. (Page 9.)

7. SALE OF LAND—BONA FIDE PURCHASER—BURDEN OF PROOF.—Where a plaintiff sets up that he or his predecessors in title were *bona fide* purchasers, and shows that he or they paid a valuable consideration, the burden of showing that he or they purchased with notice is on the defendant. (Page 10.)

8. DEED—RECORD AS NOTICE.—The record of a deed of land owned by the State, the title to which the grantor subsequently acquired from the State, is constructive notice to all persons buying the land from the heirs of the grantor. (Page 11.)

9. TRUST—ENFORCEMENT—LACHES.—A trust will not be enforced against the patentee of State land and his privies where the alleged *cestuis que trust* for more than thirty years have done nothing to enforce the trust, and have paid no taxes and exercised no acts of ownership over the land. (Page 13.)

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

STATEMENT BY THE COURT.

In February, 1855, Jeptha Fowlkes and wife conveyed by warranty deed section 14, township 15 north, range 8 east, in Mississippi County, Arkansas, to Ashley B. Rozell. At the time of this conveyance the land belonged to the State. Afterwards in 1856 Fowlkes entered the land and paid the consideration therefor and received a certificate of entry from the State. The evidence does not show what became of this original certificate, but Fowlkes died, and in 1870 his wife, who was the executrix of his estate, filed an affidavit that the certificate was lost, and the Commissioner of State Lands of this State issued a duplicate certificate, which was delivered to her.

In 1873 Mrs. Fowlkes and the heirs of Jeptha Fowlkes sold and conveyed the land to the Memphis & St. Louis Railroad Company.

In May, 1883, the railroad company sold and conveyed the land to W. H. Chatfield, and in September of the same year the

widow and heirs of Jeptha Fowlkes transferred the duplicate certificate of entry to Chatfield, and Chatfield obtained on this certificate a patent from the State conveying the land to him.

Chatfield died, leaving, as his heirs, A. H. Chatfield and May Chatfield Gilbert. Mrs. Gilbert in 1890 sold and conveyed her interest in the land to her brother, A. H. Chatfield.

In 1892 the land was sold for non-payment of taxes, and purchased by R. O. Culbertson, to whom a tax deed was executed in 1894.

In 1896 R. O. Culbertson sold and conveyed the land to one Boynton. Boynton brought an action in the Mississippi Chancery Court against L. D. Rozell and other heirs of A. B. Rozell to confirm the tax title under which he held and to confirm his title to the land. On the hearing the plaintiffs and defendants appeared by attorneys, and the court rendered a decree confirming the tax sale and quieting the title of the plaintiff as against the defendants. Boynton died, and his widow and heirs in 1902 conveyed the land to the Chicago Mill & Lumber Company.

A. B. Chatfield, who also claimed the land, was not a party to the action in which the confirmation decree above referred to was rendered. He sold and conveyed the land in 1904 to the Osceola Land Company, and this Company brought an action against the Chicago Mill & Lumber Company to cancel the tax title under which the Chicago Mill & Lumber Company claimed the land and to quiet the title of the plaintiff to the land.

The Chicago Mill & Lumber Company appeared and answered. On the hearing there was a decree in favor of the defendant, quieting its title to the land and dismissing the complaint of the Osceola Land Company for want of equity.

The defendant appealed.

Chas. T. Coleman and *J. T. Coston*, for appellant.

1. The proposition that the title of the Rozell heirs passed from them to Boynton by virtue of the decree against them in the case of Boynton *v.* Rozell's heirs is true as to the parties to that suit, but not as to third parties. The decree does not purport to establish title in the Rozells and pass it to Boynton. A decree can do no more than it purports to do. 88 S. W. 567. Judgments and decrees are binding between parties and privies

only, and a stranger cannot rely upon such judgment or decree as an estoppel, nor be estopped thereby. 84 Am. Dec. 485; 50 Am. Dec. 691; 29 Ala. 236; 22 Ala. 821; 52 Ark. 173; 4 Hun, 164; 27 Ore. 181; 40 Minn. 283.

If Chatfield had been made a party to that suit, he could have introduced the record of the tax sale which shows on its face that the sale was void. He was deprived of opportunity to be heard, to cross-examine witnesses, or to introduce evidence. 15 Grat. 204.

2. Appellee acquires no title by reason of payment of taxes for seven years consecutively, the first payment having been made January 6, 1898, and this suit commenced August 4, 1904. Seven full years must have elapsed after first payment before title is perfected. Compare Arkansas and Illinois statutes on this subject. Kirby's Digest, § 5057; 1 Wall. 638; 42 Ark. 93; 12 Ia. 186; 22 N. W. 844; 46 Ill. 521; 45 Ill. 391; 77 Ill. 269; 87 Ill. 259; 46 N. E. 748; 1 Wall. 643.

3. The record of Rozell's deed from Fowlkes was no notice. 89 S. W. 470. If the Memphis & St. Louis Railroad Company bought without notice, appellant stands in its position and succeeds to all its equities, and the burden is on appellee to show that the railroad company had notice of the deed from Fowlkes to Rozell. 35 Ark. 102; 31 Ark. 88; 113 Fed. 390; 82 Fed. 386; 102 Ill. 340; 31 Am. Rep. 723; 25 S. W. 829; 66 Me. 539. If the burden were on appellant to show that the railroad company was a *bona fide* purchaser for value without notice, that burden was discharged by the introduction of the deed from the Fowlkes heirs reciting a consideration of two dollars per acre and acknowledging receipt thereof. 66 Miss. 636; 11 So. 688; 12 Atl. 908. See also on the contention that appellant succeeds to the rights and equities of the railroad company, 2 Pomeroy, § 754, p. 1345; 49 Ark. 216; 25 S. W. 829; 73 Hun, 552; 82 N. Y. 477; 67 Am. Dec. 70.

3. The presumption is that the Chatfield patent was issued to the party entitled to it. 39 Am. Dec. 678; 2 Head, 697; 120 U. S. 548; 88 S. W. 566. Defendant is barred by laches. 12 Peters, 255; 12 Cranch, 513; 58 Fed. 990; 18 Wall. 508; 120 Fed. 830.

W. J. Driver and *W. J. Lamb,* for appellee.

1. The decree, taken in connection with the tax sale, even though void as alleged, constitutes a link in appellee's claim of title, and has the same force and effect as a conveyance by the heirs of Rozell. Kirby's Digest, § § 6521, 7104; 4 Wheat. 213; 106 Ga. 33; 31 S. E. 787. It was admissible in evidence to supply a link in the chain of title, though appellant's predecessor was not a party to the suit. 29 N. E. 896; 141 Ill. 215; 30 N. E. 320; 8 Ga. 354; 6 Har. & J. 182; 145 N. Y. 607; 2 Black on Judg. (2nd Ed.), § 607.

2. Chatfield had knowledge of facts sufficient to excite inquiry, regardless of the record of the deed, by virtue of the frequent conveyances by the Fowlkes heirs, and the record of the deed was in itself constructive notice. 21 Am. & Eng. Enc. of L., 584; 101 U. S. 141; 15 Pet. 93; 101 U. S. 260; 50 Ark. 327. It is a general rule that if a purchaser has not obtained the legal title before notice of the prior equity, even though by contract and patent without notice he has acquired an equitable title, he can not, after notice, acquire the legal title and thereby defeat or postpone the prior equity unless his own equity is of superior merit, but, in order to produce such a result, he must acquire not only the equitable, but also the legal, title, without notice. 23 Am. & Eng. Enc. of L., 519 and cases cited; 17 S. D. 637; 98 N. W. 166; 106 Am. St. Rep. 791. If Fowlkes had any interest at all, he was not only entitled to convey that interest, but whatever interest he afterwards acquired would also pass. Kirby's Digest, § § 731, 734; 4 Ark. 285; 15 Ark. 313; 16 Ark. 340. These statutes were in force prior to the entry by Rozell, while the act authorizing the assignment of the certificate of purchase, *Ib.* § 4749, was not passed until after the date of the conveyance from Fowlkes to Rozell. Hence an assignment of the original certificate to him would have been void; but, if it had been assigned, the assignee would have taken subject to any rights which had been conveyed to other persons under the law previously in force. 15 Pet. 93; 54 Ark. 148; 101 U. S. 260. If a patent is issued to one person when another has acquired the ownership of the land by purchase or otherwise, the person to whom the patent is issued becomes the trustee for the person entitled. 26 Am. & Eng. Enc. of L., 279, and note 9;

Id. 397, note 7; *Id.* 399, note 1; 75 Ark. 415. See also 16 Ark. 440; 20 How. (U. S.), 6. In this case the *ex parte* affidavit of Mrs. Fowlkes and the imperfect assignment and acknowledgment of the certificate constituted an imposition upon the State Land Commissioner, and Chatfield should be held to be the trustee for the Rozell title. 2 Black, 554; 128 U. S. 456; 1 Black, 132; 2 How. 284; 17 Ark. 701; 80 Ark. 391. Until the act of February 16, 1893, an attorney in fact could not convey the interest of a married woman. 39 Ark. 120. A patent issued by a ministerial officer is only *prima facie* evidence of title, and, such being the case, the certificate and assignment can both be inquired into. 27 Ark. 125; 40 Ark. 328; 39 Am. Dec. 512; 80 Am. Dec. 410.

3. The seven payments of taxes by appellee perfected its title. The words of the statute, "shall have paid taxes for at least seven years in succession," mean seven annual payments of taxes, and time is not the criterion. Compare § § 5057 and 665, Kirby's Digest; 68 Ark. 211; 74 Ark. 302.

4. As to the equities in the case, the patent to Chatfield had never been recorded, there is nothing in the record to show that Rozell or his heirs had any knowledge of the issuance of a patent to Chatfield, or that he claimed any interest in the land, which was wild and unimproved, and which the testimony shows he abandoned about 1896. Those claiming under the Rozell title have paid the taxes about sixteen years, while the Chatfield interest has paid them one year. Chatfield never recorded his patent until after this suit was institued. The property rapidly enhanced in value—2,000 per cent. in seven or eight years. Appellee and those under whom it claims asserted title affirmatively and defensively before appellant purchased. 18 Am. & Eng. Enc. Law, 102; 57 Am. St. Rep. 911; 91 U. S. 593; 96 U. S. 618.

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

1. The answer alleges fraud, but the only fraud suggested is an alleged presumption based solely upon the existence of the deed from Fowlkes to Rozell. This is not sufficient. 75 Ark. 420; 52 Ark. 156; 120 Fed. 819; 133 Fed. 826; 76 Ark. 525; 73 Ark. 30.

2. Appellee's argument on the question of laches is based entirely on matters outside the record.

RIDDICK, J., (after stating the facts.) This is an appeal from a decree of the Mississippi Chancery Court dismissing the complaint of the Osceola Land Company and quieting the title of the defendant, the Chicago Mill & Lumber Company, to a section of land in Mississippi County. A history of the different titles under which this land is claimed by the two parties to this action is fully set out in the statement of facts, but it will be necessary to briefly restate it here. In 1855 this land was owned by the State of Arkansas. In that year Jeptha Fowlkes sold it to A. B. Rozell. It does not appear that Fowlkes at that time had any interest in the land, though, judging from the fact that he sold it to Rozell and gave him a warranty deed for it, we think it is probable that he had made an application to purchase it from the State or intended to do so. Rozell shortly afterwards recorded the deed from Fowlkes, and, the record having afterwards been destroyed, he had it recorded again, and it is still of record in Mississippi County. About a year after Fowlkes conveyed to Rozell, Fowlkes entered the land from the State, paid for it and received a certificate of entry therefor. Some years after this Fowlkes died, and his wife was appointed executrix of his estate. In 1870 she made an affidavit that the original certificate of entry to the land was lost, and the State Land Commissioner issued and delivered to her a duplicate certificate. She and the heirs of Fowlkes afterwards sold and conveyed the land to the Memphis & Little Rock Railroad Company. This company sold and conveyed the land to W. H. Chatfield. Mrs. Fowlkes and the heirs of Fowlkes assigned the duplicate certificate of purchase to Chatfield, and he in that way obtained a patent from the State. The Osceola Land Company, the plaintiff in this action, holds under the Chatfield title.

The defendant, Chicago Mill & Lumber Company, holds under a tax title based on a sale of the land for non-payment of taxes in 1892. This title was confirmed in an action brought by one Boynton against L. D. Rozell and other heirs of A. B. Rozell. The decree was not appealed from, and was a final adjudication that the tax title was valid as against the Rozell heirs.

But A. B. Chatfield, under whom the plaintiff claims title, was not a party to this confirmation suit and decree; and, if he had any title to this land, it was not affected by this decree. The plaintiff, which holds under Chatfield, brings this action to set aside and cancel the tax sale under which defendant holds.

In order to question the validity of the tax title, the plaintiff must show that those under whom it holds were the owners of the land or had some interest in it at the time it was sold for taxes. Kirby's Digest, § 7105. *Rhea* v. *McWilliams,* 73 Ark. 557. The defendant, which holds under the tax title, denies that it was void, but contends that, if it is void, the Rozell heirs, and not Chatfield, were the owners of the land, and that by virtue of the tax sale and confirmation decree the interests of the Rozell heirs was vested in the grantor of the defendant. Our statute under which this tax sale was made provides that a tax deed duly executed by the clerk of the county court "shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed and also the right, title and claim of the State and county thereto, and shall be *prima facie* evidence that all of the prerequisites of the law were complied with, * * * and that all things whatsoever required by law to make a good and valid sale and to vest the title in the purchaser were done." Kirby's Digest, § 7104.

A valid tax sale under this statute transferred not only the title of the Rozells, in whose name the land was assessed for taxes, but the interests of all others in the land, so as to give the purchaser a complete title. *Hefner* v. *Northwestern Life Ins. Company,* 123 U. S. 751.

After considering the objections urged against the tax title by plaintiff, we are of the opinion that the sale on which the tax title rests was void for the reason that the clerk of the county court did not make on the record a certificate showing publication of notice of sale of delinquent land as required by the statute. Kirby's Digest, § 7086.

But, though the tax sale may be void for the reasons stated, it has been confirmed, so far as the Rozell heirs are concerned, by a valid decree of a court having jurisdiction of the matter, and, so far as the interests held by these heirs, it must in this action be treated as a valid tax sale, for the defendant holds

under the party who obtained this decree. This is not in conflict with the decision in the case of *Updegraff* v. *Marked Tree Lumber Company,* 83 Ark. 154, for this confirmation decree confirmed the tax sale, and not the title of the defendant. Treating the tax sale as valid as to the Rozell heirs, then under the statute it vested the title of these heirs, whatever it was, in the purchaser at the tax sale. We do not mean by this that the purchaser at the tax sale holds under the Rozell heirs, or that he occupies the same position as if he had purchased from them. A purchaser of land from another may acquire the right to sue for breach of warranty or to bring an action for specific performance, or become vested with other legal or equitable rights foreign to the position of a purchaser at a tax sale. What we do say is that if the Rozells were the owners of this land, either in law or equity, the title that they held was, by virtue of the tax sale and confirmation decree, vested in the purchaser at the tax sale or his grantee. Plaintiff contends that this can not be so for the reason that the tax sale was void and could not affect the title, and the decree does not purport to divest the title. What it does purport to do is to confirm the tax sale, and the tax sale and deed purport to divest the title. The decree confirming this tax sale made it as to the Rozells a valid tax sale. It being as to them a valid sale, it transferred their title, if they owned the land, to the purchaser, and, without going into any further discussion as to the nature of a title acquired by a purchaser at a tax sale, we may say that, so far as this case is concerned, we can assume that the defendants own the Rozell title. This is true for the further reason that on the plaintiff rests the burden of proof, and, if it does not claim under the Rozells, to succeed it must show a title superior both to the title of the defendant and to that owned by the Rozells. Again, if the Rozells, and not Chatfield, were the owners of this land at the time it was assessed and sold for non-payment of taxes, then neither Chatfield nor the plaintiff was injured by that sale, and they have, under our statute, no standing in court to attack it. Kirby's Digest, § 7105. It will therefore be necessary to consider whether the Rozells or the Chatfields were the owners of the land at that time.

As Fowlkes conveyed this land to A. B. Rozell by warranty

deed, and afterwards purchased it from the State, paid for it and obtained a certificate of entry, the statute vested this after-acquired title in Rozell, who thus became in equity the owner of this land, the State holding the legal title as trustee for him. Kirby's Digest, § 734. While the title was in this condition, Fowlkes died, and his widow, who was the executor of his estate, obtained a duplicate certificate. She and the heirs then sold and conveyed the land to a railroad company, this company conveyed to Chatfield, and Chatfield obtained from the widow and heirs of Fowlkes an assignment of the duplicate certificate of entry, and with it procured a patent from the State.

The plaintiff contends that the railroad company and Chatfield were both *bona fide* purchasers for value without notice of the Rozell title, and the question is presented whether the burden to show notice was on the defendant or not. In the recent case of *Steele* v. *Robertson,* 75 Ark. 228, where parties came in as interveners and in order to obtain protection alleged affirmatively that they were *bona fide* purchasers for value without notice, we said that the burden was on them to make out their case, and to show, not only that they had paid for the land, but that they did so without notice of plaintiffs' right. When in such a case there are circumstances that tend to show notice, or tend to raise an inference of notice, and the party who claims to be a *bona fide* purchaser fails in his testimony to deny notice, this may be, as we held in that case, a controlling circumstance against him, without regard to who has the burden of proof. This was probably as far as we should have gone in that case, although the law as there stated is supported by a number of cases. *Bell* v. *Pleasants,* 145 Cal. 410; *Beattie* v. *Crewdson,* 124 Cal. 577; *Wilhoit* v. *Lyons,* 98 Cal. 409; *Farley* v. *Bateman,* 40 W. Va. 542; *Connecticut Mut. Life Ins. Co.* v. *Smith,* 117 Mo. 261. But a further consideration of the case has convinced us that the statement that the burden is on the party claiming to be a *bona fide* purchaser to show want of notice is not correct as a general rule; for, when the party relies on the defense of being a *bona fide* purchaser, and shows that he has paid a valuable consideration, the burden of showing that he purchased with notice is on the party alleging it or who relies

on the notice to defeat the claim of *bona fide* purchaser. *Pearce* v. *Foreman,* 29 Ark. 563; *Walter* v. *Brown,* 115 Iowa, 360; *Hodges* v. *Winston,* 94 Ala. 576; *Barton* v. *Barton,* 75 Ala. 400; *Anthony* v. *Wheeler,* 17 Am. St. Rep. 281, and note; 2 Pomeroy's Equity (3 Ed.), § 759, and note, where the cases are collated. So in this case we think that the burden to show that the railroad company and Chatfield had notice of the conveyance from Fowlkes to A. B. Rozell is on the defendant, for it alleges that fact in order to defeat the title acquired through the purchase of the railroad company and Chatfield. This case is very different from the case of *Steele* v. *Robertson,* above referred to. In that case the party who alleged that he purchased without notice was a party to the action. His failure to testify that he did not have notice was a circumstance against him. But in this case one of the parties charged with notice has been dead for years, and the other is a corporation, and neither of them are parties to the suit, and whether they had notice or not is probably as well known to defendant as to plaintiff.

But was notice to these parties not shown by the fact that the deed from Fowlkes to Rozell was of record at the time that the railroad company bought from the Fowlkes heirs, and when Chatfield bought from the railroad company? In the case of *Rozell* v. *Chicago Mill & Lumber Company,* 76 Ark. 528, in speaking of the title to land affected by the same conveyances, we said that the record of the deed from Fowlkes to Rozell was not notice to the defendants who purchased from Chatfield, for the reason that such deed was not in the line of their title. Chatfield held under a patent from the State, and those who purchased from him could, in the absence of actual notice, rest upon the presumption that the officers of the State had done their duty and issued the patent to the person entitled to receive it, and for this reason such purchasers were not required to search the records for conveyances not only before the issuance of the patent, but before the State had made any sale of the land, or any contract affecting its title thereto.

Under this decision the record of the deed from Fowlkes to Rozell was not constructive notice to the Osceola Land Company, for it purchased from Chatfield. But that is of no importance now, for it was admitted that this company had actual

notice of the deed from Fowlkes to Rozell before it bought from Chatfield. The question here is whether the record of this deed was notice to the railroad company and to Chatfield at the time of their purchases. In *Rozell* v. *Chicago Mill & Lumber Company,* just referred to, we said that "probably" it was not notice to these parties. But it is was unnecessary to decide the question in that case, and the language used indicates that the court did not wish to express a decided opinion as to whether the record of the deed was notice to those parties or not. But the question is brought squarely before us in this case, and after further consideration we think that the position of the railroad company and Chatfield are not the same as those who purchased from Chatfield after he acquired the patent from the State. The railroad company purchased from the Fowlkes heirs, and Chatfield purchased from it before the patent had been issued. At the time they purchased, the deed from Fowlkes to Rozell was of record, showing that neither Fowlkes nor his heirs had any interest in the land. It is true that the deed from Fowlkes had been executed before he purchased the land from the State, but, so soon as he purchased and paid for the land, the equitable title thus obtained passed at once by virtue of the statute from him to Rozell the grantee in his deed. Kirby's Digest, § 734. A purchaser from Fowlkes or from his heirs should have taken notice of this statute and the fact that he might have conveyed the land before he obtained his certificate of entry from the State, and should have searched the records for such conveyances. As this deed was of record at that time, we are of the opinion that both the railroad company and Chatfield must in this case be treated as purchasers with notice. *Bernardy* v. *Colonial Mortgage Company,* 17 S. Dak. 637, 98 N. W. 166, 106 Am. St. Rep. 791; *Tefft* v. *Munson,* 57 N. Y. 97; *Warburton* v. *Mattox,* Morris (Iowa), 367.

This brings us to a consideration of the effect of the patent issued by the State to Chatfield. There is a presumption that the State officers examined the facts and issued the patent to the proper person, and the only question here is whether the facts and circumstances in proof are sufficient to overturn that presumption. I was inclined to the opinion that those facts do show that this patent was issued to Chatfield through mistake,

and that he should be treated as a trustee for the Rozell heirs; but it is unnecessary to state the reasons for this opinion, for the majority of the court have come to a different conclusion. They are sustained by the fact that, though this duplicate certificate was issued to the Fowlkes heirs in 1870, and though the heirs of Fowlkes and those holding under them have claimed the land since, there is nothing in the record to show that the Rozell heirs have ever asserted any acts of ownership over this land from that day to this, except that they resisted the action of Boynton to confirm a tax title he had acquired to the land. But their conduct in this respect was not antagonistic to the title asserted by those who claim under Chatfield, for, if valid, the tax title would have cut off both the Rozell and the Chatfield title. Although the duplicate certificate was issued in 1870, and the patent to Chatfield in 1883, and though defendant claims that the Rozells were the owners of the land prior to 1870, and from that time to the tax sale in 1902, yet it does not appear that during all that time they ever paid the taxes on it even for a single year, or exercised over it any acts of ownership whatever. This conduct on their part tends to show that they had abandoned the land, or disposed of it in some way, and the majority of the court are of the opinion that these circumstances tend to support the presumption in favor of the regularity of the patent issued by the State officials. They think that, after this long delay, when W. H. Chatfield, A. B. Rozell and most of the other parties connected with the earlier history of the title to this land are dead, the presumption which attaches to the regularity of the issuance of this patent has become conclusive, and under the facts as shown in the record the court must assume that Chatfield, by the purchase from the railroad company, the transfer of the duplicate certificate by the Fowlkes heirs, and the issuance of the patent from the State to him, acquired not only the legal but the equitable title to the land in controversy.

As Chatfield was the owner of the land at the time of the tax sale and confirmation decree, his title was not affected by either, for he was not a party to the confirmation suit, and was not affected by the decree against the Rozells, and as we have said the tax title was void. But the tax deed, though based on a void sale, was color of title under which the holder might

acquire title by adverse possession for the statutory period, either by actual possession or by the constructive possession which the statute gives to those paying taxes under color of title on wild and unimproved lands. But, though the land was wild and unimproved, yet defendant and those under whom it holds had not paid taxes continuously for seven years before this action was commenced, and the action is not barred. *Updegraff* v. *Marked Tree Lumber Company,* 83 Ark. 154.

The tax sale and deed was a cloud on the title of the plaintiff in this case. The majority of the court are therefore of the opinion that the Osceola Land Company was entitled to the relief asked, and that the chancellor erred in dismissing its complaint for want of equity.

Judgment reversed and cause remanded, with an order that a decree be entered cancelling the tax deed under which the defendant holds and quieting the title of plaintiff.

BATTLE and MCCULLOCH, JJ., dissent.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* ADAMS.

Opinion delivered July 15, 1907.

RAILROAD—SUFFICIENCY OF NOTICE TO REPAIR STOCKGUARD.—Under Kirby's Digest, § 6644, providing that it shall be the duty of railroads, upon receiving ten days' notice in writing from the *owner* of inclosed lands, to construct stockguards and to keep same in good repair, notice from a *tenant* to repair a stockguard is insufficient to require a railroad company to repair the stockguard.

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

Buzbee & Hicks, for appellant.

No foundation being laid for its intorduction, the letter of plaintiff's attorney was erroneously admitted. But if it were properly admitted, and if it could be construed as a notice, it was as such insufficient. The statute only authorizes the giving of notice by the *owner.* Kirby's Digest, § 6644. Being penal in its nature, the statute must be strictly construed. 67 Ark. 357.

W. S. McCain, for appellee.

That part of the statute requiring notice relates exclusively to the company's duty to construct or put in the stock guard. It does not apply to that part of the statute requiring it "to keep the same in good repair."

BATTLE, J. Dean Adams alleged in his complaint that during the year 1905, and for about one month thereafter, "he was the owner and occupant as a tenant of an inclosed parcel of land in the county of Pulaski, in this State; that the roadbed of the defendant, the Chicago, Rock Island & Pacific Railway Company, ran through the inclosure, and that the defendant allowed a stockguard on the land to get out of repair, and failed to keep it in repair during the latter part of the year 1905, and the month of January, 1906, and that he gave the defendant notice to repair the guard, which it failed to do."

Defendant answered and specifically denied each allegation of the complaint.

The jury returned a verdict in favor of plaintiff for $75, and the defendant appealed.

The statute upon which this action was based (Kirby's Digest, § 6644) makes it the duty of railroad companies to construct stockguards and to keep the same in good repair, upon receiving ten days' notice in writing from the owner of the lands to do so. They are required to construct such guard upon notice given only by the owner of the land. It is evident that notice given by a tenant would not be sufficient. In all cases where there is a tenant there is an owner, and the statute requires the owner to give the notice, and there can be no doubt as to which of the two is the owner. The owner can authorize the tenant to give the notice in his (owner's) name.

Appellee argues that, there being a stockguard already constructed, it is the duty of the railroad company to keep it in repair, and there was no necessity for a notice to do so in order to recover the penalty. Why is notice to construct necessary? For the purpose of indicating the wishes of the owner in that respect and to enable the railroad company to protect itself against penalties in an unguarded moment. For the same rea-

son notice to repair is equally necessary and useful, and must be given.

Notice in this case was given by the tenant, and is insufficient.

Judgment reversed, action dismissed, and judgment rendered in favor of the defendant.

RENFROE v. STATE.

Opinion delivered July 8, 1907.

1. INDICTMENT—VALIDITY.—Where the grand jury on a certain day presented an indictment against defendant, and subsequently on the same day withdrew such indictment and filed a second indictment for the same offense, there being no change in the personnel of the grand jury since the finding of the first indictment, a motion to quash the second indictment because no witnesses were re-introduced before the grand jury to prove its allegations was properly overruled. (Page 19.)
2. CONTINUANCE—ABSENCE OF WITNESS.—A continuance on account of the absence of nonresident witnesses who would, if present, testify as to the age of the prosecutrix in a prosecution for carnal abuse was properly denied where the prosecutrix resided in the county, and there was no showing why her age could not be shown by resident witnesses. (Page 20.)
3. CARNAL ABUSE—DEFENSE.—In a prosecution for carnally knowing a female under age evidence that other persons had sexual intercourse with her is inadmissible. (Page 20.)
4. APPEAL—HARMLESS ERROR.—If it was error to admit the baptismal register to prove the age of the prosecutrix, such error was not prejudicial where her age was proved by other competent evidence beyond a reasonable doubt. (Page 20.)
5. EVIDENCE—OTHER CRIMES.—It was not improper in a prosecution for carnal abuse alleged to have been committed in a certain judicial district, to permit the prosecutrix to testify that on the same night on which the alleged offense was committed and while she was out driving with defendant, he, as part of the same transaction, committed the same offense with her in an adjoining judicial district. (Page 20.)
6. TRIAL—IMPROPER ARGUMENT.—Where improper remarks made by the prosecuting attorney in a criminal case were withdrawn by him on objection being made, and the court instructed the jury not to

consider them, and no prejudice appears to have resulted, a conviction will not on that account be set aside. (Page 20.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; affirmed.

Edwin Hiner and *Ben Cravens,* for appellant.

1. The motion to quash the indictment should have been sustained. Kirby's Digest, § 2203; 67 Ark. 256.

2. The court's refusal to grant a continuance was, under the circumstances in this case such an abuse of discretion as to warrant a reversal. 71 Ark. 180.

3. The testimony of the prosecuting witness as to an assault committed in the Greenwood District was improperly admitted. 73 Ark. 262; 67 Ark. 112.

4. The baptismal record and the card of St. John's Episcopal Church were inadmissible as evidence of the age of Bertha Huber, and should have been excluded. Likewise, it was erroneous to admit the ledger of Dr. Stevenson. 65 Ark. 65.

Wm. F. Kirby, Attorney General, and *Daniel Taylor,* Assistant, for appellee.

1. Finding a second indictment on testimony on which the first was based is an irregularity merely, and no ground for reversal. 67 Ark. 266; 82 Ark. 321.

2. None of the testimony for the production of which the continuance was sought was material and relevant, except as to the age of the prosecuting witness; and the record shows that she was born and reared in Fort Smith. Why was it necessary to send to the Indian Territory for witnesses to prove her age? 77 Ark. 146.

3. The documentary evidence submitted was admissible, except possibly the baptismal card; but if it was erroneously admitted it was harmless error, since her age was clearly proved by other competent evidence. 2 Greenleaf, Ev. § 363; 1 Enc. Ev. 732; Wigmore, Ev. § § 1482-1495.

BATTLE, J. "At the March, 1907, term of the Sebastian Circuit Court, Fort Smith District, the grand jury returned an indictment against Tom Renfroe, accusing him of the crime of carnal knowledge of a female under the age of 16 years, com-

mitted as follows, towit: The said defendant, in the county and district aforesaid, on the 17th day of February, 1907, unlawfully and feloniously did carnally know and abuse Bertha Huber, a female person under the age of 16 years, against the peace and dignity of the State of Arkansas."

The defendant moved the court to "quash the indictment against him in this case for the reason that the same was found and returned by the grand jury without the production before them of any legal testimony or testimony of any kind. And to sustain the said motion introduced the following evidence: That an indictment had been returned charging the defendant with this said crime on the.....day of....., 1907, and that said indictment had been, upon motion of district attorney, quashed and case remanded to the grand jury for further action; and that on the same day, and within a short time after said indictment was quashed, the grand jury returned into court this indictment; and that between the time of quashing the first indictment and returning this one no witness had been called, but the testimony upon which the former indictment was returned was re-read by the grand jury, and upon that this indictment was found and returned; and that there had been no change in the personnel of the grand jury since the finding of the first indictment."

This motion was overruled by the court.

And on the same day he moved for a continuance on account of absent witnesses, and stated in his motion what he expects to prove by them, in part as follows:

"The defendant expects to prove by William Taylor that he, said William Taylor, was a citizen and resident of the city of Ft. Smith in the latter part of March, 1895, at which time he removed to the Indian Territory, and at that time was acquainted with the prosecuting witness in this case, Bertha Huber: that she was apparently at that time six or seven years of age, and was actually attending the public schools in the city of Ft. Smith. The defendant expects to prove by Ed Taylor that the said Ed Taylor is of the age of 21 years; and that prior to the latter part of March, 1895, he was living in the city of Ft. Smith and attending the public schools, and at that time was acquainted with the prosecuting witness, Bertha Huber, and knows

she was at that time at least six years of age and attending the public schools in the city of Ft. Smith.

"The defendant expects to prove by Will Allen that the said Will Allen had been acquainted with the prosecuting witness for some time, and that she had represented her age to him as being over sixteen years of age, and that at different times and places in the city of Ft. Smith or vicinity this witness has had carnal knowledge of and sexual intercourse with the said Bertha Huber with her full consent."

The motion for continuance was overruled.

In the progress of the trial the baptismal record of Bertha Huber was read as evidence over the objections of the defendant. It is stated in this record that Bertha was baptized on the 16th of April, 1892, and the date of her birth was given as February 24, 1891.

Bertha Huber was allowed to testify, over the objection of the defendant, that the defendant assaulted and carnally knew her on Sunday night, February 17, 1907, in the Greenwood District, in Sebastian County, Arkansas.

Many instructions were asked by the defendant and refused by the court. So far as correct and applicable, they were included in instructions given by the court.

"The defendant did not take the stand as a witness, and the prosecuting attorney in his closing argument to the jury made use of the following language: 'At that time they did not know whether they would put the defendant on the stand or not.' To which statement the defendant at the time excepted. Upon the defendant objecting to the statement the attorney for the State at once withdrew the same, and the court then and there instructed the jury not to consider the statement so made by the attorney for the State or permit the same to influence their verdict."

The jury found the defendant guilty, and assessed his punishment at three years' imprisonment in the penitentiary, and the court rendered judgment accordingly. The defendant appealed.

The motion to quash the indictment was properly overruled. *Worthem* v. *State,* 82 Ark. 182.

The appellant asked for a continuance on account of the absence of witnesses, by whom he expected to prove that they knew Bertha Huber about the latter part of March, 1895, when she was attending public school in Ft. Smith, Arkansas, and her age at that time. These witnesses are temporarily in the Indian Territory. There does not appear to be any good reason why the appellant should send to the Indian Territory for witnesses to prove the age of a girl born and reared in Ft. Smith, in a trial in that city. If there was any, it should have been stated in the motion for continuance. *Hust* v. *State,* 77 Ark. 146. Other facts stated in the motion to be known by absent witnesses were incompetent and inadmissible. There was no abuse of discretion in the overruling of the motion for continuance.

Assuming that the baptismal register was inadmissible as evidence, it was not prejudicial. The age of the abused girl was proved beyond a reasonable doubt. Against absolute proof stood the doubtful testimony of witnesses as to the admission of the girl who could have known nothing about it except from information. There was only one rational conclusion upon the subject.

Appellant committed the offense for which he was indicted on the same night he committed the offense in the Greenwood District, about which Bertha Huber was allowed to testify. Both were committed while she and appellant were driving and on the same drive, and while she was in the power and at the mercy of the appellant, and were a part of one unbroken transaction, and evidence of the Greenwood offense was admissible to explain the acts of the appellant on that occasion and to put the jury in the full possession of the whole transaction, and to enable them to act more advisedly in the premises.

The improper remarks of the prosecuting attorney were promptly withdrawn by him on objection, and the court instructed the jury not to consider or permit them to influence their verdict. Ordinarily, this is sufficient to cure the prejudice of such remarks, and we do not see that this case is an exception to the rule, and we do not see how it could have been more effectually done by a confession of the wrong and the instruction

of the court. No prejudice is indicated by the verdict. See *Little Rock & Ft. Smith Ry. Co.* v. *Cavenesse,* 48 Ark. 106.

Judgment affirmed.

LAKE *v.* COMBS.

Opinion delivered July 15, 1907.

1. ACTION—MISJOINDER OF CAUSES—WAIVER.—A misjoinder of causes of action is waived by failure to move to strike out the causes improperly joined. (Page 26.)
2. SALE—TRANSFER OF TITLE.—Where a lease of land to be used for a ferry stipulated that at the expiration of the lease the ferryboat and appliances should belong to the lessor, and before the lease expired the lessees sold the boat and appliances to another, the title passed to the purchaser, the lessor having merely an executory contract for delivery which passed no title until executed. (Page 26.)
3. FERRIES—RIGHT TO ATTACH CABLE TO ANOTHER'S LAND.—Kirby's Digest, § 3556, providing that if a person own the land on one side only of a ferry, or have possession thereof, "he shall have the privilege of a public ferry from his own shore, with the privilege of landing his boat and passengers on the opposite shore, and making the landing and road up said opposite bank, and keeping the same at all times in good repair and condition for ascending and descending," does not authorize such person to attach the ends of his ferry cable to another's land on the side of the river opposite to his land. (Page 27.)

Appeal from Marion Circuit Court; *E. G. Mitchell,* Judge; reversed in part.

W. S. Chastain, for appellants.

1. Since Combs is attempting to hold appellant's land without right or title, he should be ejected. Upon being ejected, can he take with him the ferry outfit as an innocent purchaser? If it is a part of the realty to which it was attached, he could not be an innocent purchaser, because he had full knowledge that the land belonged to the Lakes.

On the theory that it is personalty, which is not admitted, then, while possession of a chattel is *prima facie* evidence of title in the holder, yet, if the vendee has actual or constructive notice

that it is not the property of the holder, he can not invoke the protection of innocent purchaser. 24 Am. & Eng. Enc. of L. (2 Ed.), 1040-1, 1169.

If the transfer to Cornell and sale by him to Combs were good, still the latter acquired no greater interest than Cornell had, which was an interest terminating with the lease on June 30, 1905. 13 Am. & Eng. Enc. of L. (2 Ed.), 653.

2. When the ferry was attached to the lands, it became a permanent fixture—a part of the realty. 26 Ark. 464; 41 Ark. 209; Kirby's Digest, § 3556; Tiedeman, Real Prop. § 3; 12 Am. & Eng. Enc. of L. (2 Ed.), 1088, 1099; 13 *Id.* 665, note 1, 597.

Horton & South and *Bradshaw, Rhoton & Helm,* for appellee.

1. Neither forcible entry and detainer nor ejectment will lie for a ferry. 12 Am. Dec. 295; 55 How, Pr. 138.

There is no agreement by the parties that the ferry outfit shall become realty, but only that it shall become the property of Lake. Being personalty to begin with, it devolved upon appellant to show that it had become a fixture.

In order to make a fixture of a chattel, its annexation must be for the permanent use and improvement of the land—accessory thereto, and not merely to the particular business being carried on upon it at the moment. 13 Am. & Eng. Enc. of Law, 613.

2. In order to recover for infringement of one's right to a ferry, he must allege and show a license in himself. 52 Ark. 61; 51 Ark. 235. If it is held that appellee is in possession of any part of the bank of the river by reason of having tied his cable to the bank on appellant's land, then appellee had the right to maintain possession of enough of the Lake land to carry on ferry operations. At most, appellant could only recover the real value of the land so taken; he could not recover the land itself, 69 Ark. 104. Moreover, the granting of a ferry privilege is not taking private property for public use without compensation. 20 Ark. 561. See also Kirby's Digest, § 3556.

HILL, C. J. A. C. Lake, as guardian of Ernest B. Lake and Louise Bradford, minor heirs of D. W. Lake, deceased, filed a complaint in the Marion Circuit Court against Thomas Combs,

in which he sought to recover for his wards certain real estate held by Combs, and also a ferry boat and outfit.

The case was tried before the circuit judge sitting as a jury. He gave judgment for the defendant, and the plaintiffs have appealed; the minors in the meantime having reached majority.

The record is peculiarly constructed. There are depositions and oral testimony copied in the transcript, without any authentication, and following these depositions and testimony is the bill of exceptions, which contains in a concise form the evidence of witnesses. Only the testimony authenticated is considered.

The testimony on behalf of the plaintiffs (appellants here) is substantially as follows:

Wilber testified that he made a contract with A. C. Lake, guardian of these minors, which was introduced. By it he leased a tract of land for a ferry privilege on White River at Lake's Ferry; and he was to put in a ferry boat at a cost of not less than $50, the boat to be large enough to carry a wagon and team hitched to it, and to expend not less than $50 on repairing the road leading to the ferry, and to run a ferry regularly for a period of two years from July 1, 1903; and at the end of that time to return the land, together with the ferry outfit, to the Lake heirs; and other details not necessary to notice.

About the time he made this contract with Lake, or shortly before it, Keener, Cowdrey and Jones built a ferry boat, and began operating a ferry at this point. Their ferry boat was run by means of poles and oars, and landed at the public road on each side of the river. The land on the Baxter side of the river, opposite the Lake tract, belonged to Combs. When Wilber got this contract with Lake, he formed a partnership with Keener, Cowdrey and Jones; and Gray, Keener's partner, was also taken into the company, making it consist of five. They then bought a wire cable with which to operate the ferry, and attached it to the Lake land 40 or 50 feet outside of the public road, and stretched it across the river, and fastened it at the other end to a tree in the public road. They did not touch on Combs's land on the Baxter side of the river. A windlass was placed on the Lake land, and by it the cable controlling the ferry was operated.

Wilber said that Keener, Cowdrey, Gray and Jones knew

of said contract, and operated the ferry under it. They, his partners, claimed that they could operate a ferry at that point without a lease from Lake or anyone else, there being a public road on each side of the river; but they did not claim that they could attach their wire cable to the Lake land without a contract, and they did attach their cable to the Lake land and operated their ferry from it under and by virtue of his contract with the Lakes. That the partners were cognizant of the fact that under the contract the ferry outfit was to be the property of the Lakes at the termination of the contract as part of the consideration for the use of the land, and that they were willing to this, as they anticipated that by that time the railroad would be built across the river near there, rendering the ferry of little value. He and his co-owners performed the $50 worth of road work required by the Lake lease. He said he never sold his interest to Cornell, or to anyone else; that Cornell simply operated the ferry for the co-partnership.

When the ferry license was first issued, it was in the name of Jones; but Combs, who owned a ferry a short distance up the river, brought a suit in Baxter County to enjoin Jones from running the ferry; and in order to defeat this injunction the license was shifted from Jones to Cornell and run in his name, so that the ferry would not be stopped. Wilbur said that he did not know of this at the time it was done, and did not consent to it, and that he afterwards learned that Cornell did not pay anything for the ferry, and that no sale was made to him. Cornell was a clerk in the employ of Gray and Keener.

D. T. Jones, another member of the partnership, testified to substantially the same effect as Wilber, and stated that he transferred the license to Cornell in order to defeat the suit of Combs against them, and that there was no sale to Cornell. He says that Cornell did not buy the ferry, and never did own any part of it. He further says that Combs saw the lease from Lake to Wilber prior to the time he claims to have bought, when it was used in the trial of the injunction suit.

Jones says that he and Cowdrey, Keener and Gray contended that they had a right to operate the ferry by means of poles and oars without a lease from the Lakes, but they did not consider that they had a right to attach the ferry to the Lake

land without a contract from them permitting it. That the firm put the ferry in with the intention of operating it until the expiration of the lease of Wilber, and then the railroad would be built, and the ferry business would not amount to much, and that they were willing for the ferry outfit to go to the Lakes at the end of the lease, and knew that was the effect of using the Wilber lease of the Lake land.

A. C. Lake testified to the execution of the contract and the operation of the ferry under it. He said that Combs, after he got possession of the ferry outfit, moved the wire cable further back on the Lake land and fastened it to an iron bar driven in a permanent rock on said land. He testified as to the amount of damages he thought that his wards had suffered by reason of the action of Combs, and of his efforts to have Combs vacate the lands and ferry at the expiration of the lease.

The evidence on behalf of the defendant was as follows: Combs testified that he claims he bought the ferry from Cornell, the party whom he found in possession of it, and claims that he paid $250 in cash for it. That he thought the ferry belonged to Cornell, as Keener told him it belonged to Cornell and for him to buy it. He admits that he saw the lease which Lake gave to Wilber before he bought the ferry from Cornell. He says he let Keener have a lot in Cotter which went in payment for the ferry in controversy. He does not claim that he bought the ferry from Wilber or anyone except from Cornell, as the license was in the name of Cornell. That when he bought the ferry oufit he went to where Wilber, Cowdrey, Keener, Gray and Jones had attached the end of the wire cable to a tree on the Lake land, and moved it further back upon the bluff on the Lake land, and there fastened it to an iron bar in a rock. He also took the opposite end of the wire cable from the public road, and moved it on his own land on the Baxter side of the river, thus making the ferry run from the Lake land to his land, and so operated it from said points.

Keener testified for Combs that he and his partners did not consider the lease which Wilber made with the Lakes as necessary. That they thought they had a right to put in a public ferry there and run it because of the public road which they used on either side of the river. That he declined at all times

to recognize Wilber's lease from the Lakes because he thought it was unnecessary. But he admits that his firm fastened the wire cable to a tree on the Lake land, and operated it from there. He says that they sold the ferry to Cornell, and that "D. T. Jones made the sale to Cornell for our Company;" and Cornell afterwards sold it to Combs. That he told Combs that Cornell was the owner of the ferry.

Gray, another one of the partners, testified that he did not consider the Lake lease necessary in order to operate the ferry. He likewise admits that the ferry was fastened to a tree on the Lake land. He says the license was taken out in the name of Cornell by the company, but did not know who paid for it.

This is the substance of all the testimony in the bill of exceptions. The court found from these facts that there was a *bona fide* sale from Cowdrey, Keener, Gray, Jones and Wilber to Cornell, and by Cornell to Combs, and gave judgment for the defendant, and the Lakes have appealed.

Giving the finding of facts by the judge the same effect given to the finding of a jury, yet this judgment can not be sustained in its entirety. If it be conceded that there was a *bona fide* sale by Cornell to Combs, and a majority of the court do not think that the evidence establishes a sale without notice, yet there was no authority, other than the Wilber lease, for Combs to take and hold possession of the Lake land and operate the ferry upon it. This lease only gave Wilber and those claiming under him the right to occupy the land upon the terms therein stated until July 1, 1905. He further knew that at the end of that time the lessees were to surrender the ferry outfit to the Lakes as part payment for the use of the land during the period of the lease. Combs denies holding under the Lake lease, but it is the only shadow of right he had to possession of the land.

There was likely a misjoinder of actions in joining an action for the recovery of the real estate and of the ferry boat and appliances; but there was no objection to such misjoinder, and under section 6082 of Kirby's Digest such error was waived.

A majority of the court decides that there can be no recovery of the ferry boat or other ferry outfit because there was never a delivery of it, but only a contract to deliver it. They hold that the agreement in the lease for the delivery of the ferry

outfit at the expiration of the term was executory, and the title did not pass until it became executed, which they hold did not occur, but that on the contrary the title passed to appellee Combs under his purchase before the time of delivery fixed by the contract.

Mr. Justice BATTLE and the writer do not agree with that view, as they think that when the partnership took possession of the land under the Wilber lease they attached the boat and other appliances to the land with the understanding that they were to remain there, and Combs stepped into their shoes by his purchase. In other words, that he could not accept the benefits of the Lake lease without being subjected to the burden of it, and the delivery and title of the personal property passed when attached to the Lake land with intention of remaining there.

Therefore, under the views of the majority, the judgment, so far as the personal property is concerned, is affirmed; but, as indicated, no title whatsoever has passed to the land to Combs, and he is shown by his own testimony to be in possession of it, having the wire cable attached to the land, and operating the ferry with a windlass from it. He has refused to give up this land, and demand has been made upon him. The judgment is reversed, and the cause remanded, with instructions to proceed with the suit for the recovery of the land and the usable value thereof from the date Combs took possession of it.

Reversed and remanded.

Justices WOOD and RIDDICK are of opinion that the judgment in whole case should be affirmed, and dissent from so much of the judgment as is reversed.

ON REHEARING.

Opinion delivered October 7, 1907.

HILL, C. J. Appellee Combs insists that he had a right to tie the end of his ferry cable to any land on the opposite bank of the river from his own land, under section 3556 of Kirby's Digest. This could only give him a right to land on the opposite shore where the public had a right to land, that is, a

public road or other highway. Certainly, it could not give him the right to forcibly take the property of another man for the other end of his ferry landing.

It is further insisted that there is no testimony that shows that Combs had possession of the Lake land, except that he fastened the cable to a rock on the Lake land, and that the statement in the opinion that Combs is shown to have operated the ferry by means of a windlass from the Lake land is error. Wilber, Lake and other witnesses state that when the partnership was operating the ferry they attached one end of the cable to the Lake land and operated the ferry with a windlass therefrom; and Combs testifies: "When I bought the ferry outfit, I went to where Wilber, Cowdrey, Keener, Gray and Jones had attached the wire cable to a tree on the Lake land, and took the said cable loose from said tree and moved it further back upon the bluff on Lake land, and there fastened it to an iron bar in the rock, and have ever since held possession of it."

The court found as a fact that Cowdrey & Company placed Cornell in possession of the ferry, and Cornell placed Combs in possession of it. There is no evidence whatsoever in the bill of exceptions that Combs took the windlass from the Lake land when he took possession. In fact, the appellee seeks to show the incorrectness of the statement in the opinion by some of the unauthenticated evidence, which is improperly copied into this transcript. But the court can not, and does not, notice that. Even if the windlass was moved to the other side of the river, it would not change the fact of possession, only the extent of it.

Motion for rehearing is denied.

DAVIS v. HOWELL.

Opinion delivered July 22, 1907. 84 29 86 533

ROADS—DRAINS—DISCRETION OF LOCAL AUTHORITIES.—The matter of draining public roads is within the discretion of the local authorities, including road commissioners and overseers; and, even if there should be some incidental damages to abutting owners thereform, it does not fall within the province of the courts to control this discretion.

Appeal from Lafayette Chancery Court; *Emon O. Mahoney,* Chancellor; reversed.

Warren & Hamiter, for appellants.

R. L. Montgomery and *D. L. King,* for appellees.

Land is burdened with its own surface water and watercourses, and the owner can not by artificial means gather the water upon his own property and throw it upon the property of his neighbor. 3 Farnham, Water and Water Rights. 2553; *Id.* 2619; *Id.* 2616, 2617; 66 Ark. 271.

MCCULLOCH, J. This is a suit in equity by Mrs. S. R. Howell and B. A. Moore to restrain G. W. Jackson from obstructing a drainway, and also to restrain J. F. Davis, road commissioner of Lafayette County, and N. G. Lewis and T. V. Cabiness, road overseers, from cutting a ditch along the side of a public road in front of property owned by the plaintiffs. The facts are as follows:

The plaintiffs and Jackson severally own land situated in Lafayette County on the west side of the public road running south from the court house in the old town of Lewisville. Jackson's property lies about three hundred yards north of Mrs. Howell's land, and the land of plaintiff Moore lies further south. There is a slight fall from the court house down to a point between Jackson's property and Mrs. Howell's property, and thence a gradual rise on south to a point below Mrs. Howell's property. The surface water has, for the past thirty or forty years, flowed down the road from the court house as far south as Jackson's property, and drains through a natural depression, forming a ditch, along an alley between the Jackson property and

a lot known as the "Butler lot." This caused the flooding of Jackson's land, and he has from time to time stopped up the drain way through the alley, so as to prevent the flow of water across his property. This was done with the permission of the county judge.

The plaintiffs in this case sought to enjoin him from maintaining the obstruction, and a temporary restraining order was issued at the commencement of the action, but upon final hearing the chancellor dissolved it. No appeal has been taken from that part of the decree.

The appellants here, who are the road commissioner and the road overseers, attempted to cut a ditch down the east side of the public road from a point opposite Jackson's property, so as to carry off the water diverted by the obstruction maintained by Jackson, and to conduct it to a watercourse known as Wilson's branch. The plaintiffs sought to restrain them from cutting and maintaining this ditch, and the chancellor granted that relief, and the road officials appealed.

Mrs. Howell claims that the obstruction maintained by Jackson to the drain-way between his property and the Butler lot, preventing the flow of water, causes the surplus water to flood her land, thereby causing great injury to it. She also contends that the construction of the ditch along the public roadway will damage her property by reason of the fact that the ditch will wash out and become deeper and wider year by year in front of her property. The evidence shows that in front of her property the road is higher than in front of the Jackson property, and on account of this elevation the ditch will have to be cut that much deeper.

The testimony is conflicting as to whether or not any damage will result from the cutting of this ditch; but we are of the opinion that, according to the preponderance of the evidence, the damage will be very slight. The question of Jackson's right to obstruct the drainway across his property is not before us, inasmuch as no appeal has been taken from that part of the decree. We are confronted with the sole question whether or not the road officers have the right to cut the ditch along the public road, and we are clearly of the opinion that they have the power to do so, and that their power in this respect has not

been abused. Since the drainway across the Jackson property has been obstructed, it appears to be absolutely necessary to drain in some direction the water which flows down the public road. Otherwise the road would be obstructed thereby. And it appears necessary to do this in order to prevent the flow of water upon another road immediately north of the Howell property. The road overseers testified that, unless this ditch is constructed, the water will flow off down the cut-off road.

The evidence shows clearly that the injury to Mrs. Howell's land arises from the obstruction maintained by Jackson in the natural drainway through or near his property; and, since that has been permitted by the chancellor to continue, it will necessarily prove a benefit, rather than a injury, to her land to have the ditch cut down the public road so as to carry off the water thus diverted.

Moreover, the plaintiffs allege in their complaint that in case of heavy rains large quantities of surface water are collected in the public road, and that it is necessary to cut ditches in order to drain the road and keep it in repair, and to protect the owners of adjacent lands from injury. In other words, they admit the necessity of draining the highway, but complain of the manner in which it is done.

The matter of draining public roads is one which falls within the discretion of the local authorities, including road commissioners and road overseers; and, even if there should be some incidental damages to abutting property owners therefrom, it does not fall within the province of the courts to control this discretion. Elliott on Roads and Streets, § 469.

Certainly, there has not been shown any such damage as would warrant a court of equity in interfering with the road overseers in this instance.

We think the chancellor erred in his decree, and the same is reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

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HARE v. SHAW.

Opinion delivered July 8, 1907.

1. INSANITY—VALIDITY OF APPOINTMENT OF GUARDIAN.—In an action instituted by the guardian of a person of unsound mind in the name and for the benefit of his ward, such ward can not appear by next friend and challenge the legality of the guardian's appointment where his letters of guardianship are regular on their face. (Page 34.)
2. SAME—COLLATERAL ATTACK ON APPOINTMENT OF GUARDIAN.—Where the records of the probate court show the appointment of a guardian of a person of unsound mind, but does not show that notice was given to such insane person, or that she was brought before the court or a jury of inquest for examination, it will be presumed on collateral attack that the probate court took all necessary steps to acquire jurisdiction of such insane person. (Page 35.)
3. APPEAL—DISMISSAL OF ACTION—NECESSITY OF MOTION FOR NEW TRIAL.—Where an action by a guardian was dismissed by the court for want of authority to bring it, and the evidence heard by the court on the motion was brought up by bill of exceptions, the action of the trial court in dismissing the action will be reviewed on appeal, though no motion for new trial was filed. (Page 36.)

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

STATEMENT BY THE COURT.

A A. McDonald, as guardian of the person and estate of Ella Hare, a person of unsound mind, instituted in the circuit court of Sebastian County on behalf of his said ward an action against Tillman Shaw to recover possession of certain tracts or lots of real estate situated in the city of Ft. Smith alleged to be the property of said ward and wrongfully in the possession of said defendant. He also instituted five similar actions against certain other persons to recover from them other tracts or lots of real estate alleged to be the property of said Ella Hare.

A short time before the commencement of these actions William L. Euper, as next friend of said Ella Hare, alleging that she was a person of unsound mind, instituted separate action against Shaw and the other defendants to recover the same real estate.

Said Euper, as next friend, filed a motion to dismiss this action, and also filed similar motions in the other actions in-

stituted by said guardian, on the ground that said guardian had not been legally appointed as such, and had no authority to maintain the action on behalf of said Ella Hare. The alleged ground of attack upon the appointment of McDonald by the probate court is that the court made the appointment and issued the letters of guardianship without first having caused Ella Hare to be brought before the court, and without having first adjudged her to be of unsound mind. McDonald, as guardian, thereupon filed a motion in each of the actions instituted by Euper as next friend to dismiss them on the ground that he (McDonald) had been duly appointed by the probate court of Sebastian County guardian of said Ella Hare, and that the actions had been improperly brought by the next friend. The attorneys representing McDonald in the actions instituted by him, and the attorney for Euper in the actions which he had instituted, filed a written stipulation to the effect that the decision upon the motion in this case should control the disposition of the other cases.

On the hearing of the motion the defendant Shaw joined in the motion to dismiss the case, and the court sustained the motion and dismissed the action on the ground that McDonald had not been legally appointed guardian of Ella Hare, and that another action against the defendant for the same land had been instituted for Ella Hare by Euper as next friend.

McDonald thereupon prayed an appeal to this court for his ward, which was granted.

Winchester & Martin, for appellant.

1. A motion for new trial was not necessary. 10 Ark. 404; 43 Ark. 403; 46 Ark. 17; 57 Ark. 374; 1 Thompson on Trials, § 2716; 34 Mo. 340; 38 Mo. 100; 72 Mo. 227.

2. A judgment of the probate court, regular on its face, appointing a guardian for a person who is *non compos mentis* may not be collaterally attacked. 55 Ark. 275; 66 Ark. 1; *Id.* 416; *Id.* 629; 70 Ark. 88; 53 Ark. 37; 72 Ark. 586; *Id.* 21; *Id.* 101; Am. Law of Guardianship, § 135. *Arrington* v. *Arrington,* 32 Ark. 674, was a direct appeal from the judgment of the lower court, and is not applicable as against this contention.

Ira D. Oglesby, for appellee.

1. The appeal should be affirmed because appellant acquiesced in the judgment appealed from by filing a petition immediately after its rendition to have Ella Hare adjudged insane. He was thereby estopped to question the judgment. 47 Ark. 32; 53 Ark. 514; 64 Ark. 213.

2. No motion for new trial was filed, and the action of the court is not open to review. Authorities cited by appellant are not applicable to this case. 26 Ark. 536; 27 Ark. 37; *Id.* 549; 25 Ark. 562; 64 Ark. 483; 101 S. W. 754.

3. Whether or not Ella Hare had been judicially declared insane, and whether or not McDonald was her guardian, were questions *dehors* the record which the court determined from the testimony The court's finding of facts is as conclusive before this court as the verdict of a jury. 53 Ark. 329; *Id.* 542; *Id.* 161; *Id.* 621; 73 Ark. 187; 57 Ark. 93; *Id.* 483; 50 Ark. 305; 55 Ark. 331.

This is not a question of collateral attack. These facts constituted a question which the lower court determined from the evidence, and this court will presume that the lower court correctly applied the law.

4. Where a probate court, without written information being given, without notice to the alleged insane person, without his being brought before the court and without any adjudication of insanity, appoints a guardian for such person, such appointment is void, and may be attacked either directly or collaterally. 32 Ark. 674; 46 Am. Dec. 280; 63 S. W. 783; 67 S. W. 880; *Id.* 206.

McCULLOCH, J., (after stating the facts.) The questions presented are whether, in an action instituted by the guardian of a person of unsound mind in the name and for the benefit of his ward, such ward can appear by next friend and challenge the legality of his appointment as guardian and letters of guardianship where they are *prima facie* regular; and, next, whether the guardian's appointment and letters in this case are legally sufficient to withstand a collateral attack upon them.

The first question can be readily answered in the negative. Probate courts are, under the Constitution and laws of this

State, superior courts within the limited jurisdiction assigned to them, and judgments rendered in the exercise of such jurisdiction can not be called in question collaterally. *Borden* v. *State,* 11 Ark. 519; *Montgomery* v. *Johnson,* 31 Ark. 74; *Adams* v. *Thomas,* 44 Ark. 267; *Apel* v. *Kelsey,* 52 Ark. 341; *Alexander* v. *Hardin,* 54 Ark. 480; *Blevins* v. *Case,* 66 Ark. 416; *Jackson* v. *Gorman,* 70 Ark. 88.

Under the Constitution, exclusive jurisdiction is vested in the courts of probate in "matters relative to the probate of wills, the estate of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates." Const. 1874, art. 7, § 34. The records of the probate court relative to appointment of a guardian of the said Ella Hare, introduced in evidence in the court below on the hearing of this motion, show that in October, 1894, one Matthew Grey presented to the probate court of Sebastian County his petition for appointment as guardian of Ella Hare. The court entered a judgment granting the prayer of the petition and ordering the issuance of letters of guardianship, which was done, upon the execution and approval of the bond. In January, 1904, another guardian was appointed in the place of Grey, and in May, 1905, on presentation of a petition alleging that Ella Hare was a person of unsound mind, a judgment was rendered appointing McDonald as her guardian, and letters of guardianship in due and regular form were issued to him after the execution and approval of his bond.

It must be conceded that the order of court making the appointment and the letters of guardianship are regular as far as they go, but it is contended that the probate court had no jurisdiction to appoint a guardian until a formal order had been rendered adjudging said Ella Hare to be a person of unsound mind, and that such adjudication must have been made upon notice to the person alleged to be of unsound mind or after she had been brought before the court.

In *Arrington* v. *Arrington,* 32 Ark. 674, it was held that the court exercising probate jurisdiction should not render a judgment declaring a person to be insane and appoint a guardian without notice to such person or without causing him to be brought before the court or jury of inquest. In that case, how-

ever, the validity of the appointment was directly called in question on writ of error to this court bringing up the whole proceedings for review, whereas in the case at bar the question of the validity of the appointment arises collaterally. We must presume, the record of the probate court being silent on the subject, that the court first inquired into the condition of the alleged imbecile and found her to be of unsound mind, and we must presume, too, where the record is silent, that the court took all necessary steps to acquire jurisdiction of the person of the imbecile. *Blevins* v. *Case,* 66 Ark. 416; *Jackson* v. *Gorman,* 70 Ark. 88.

We are clearly of the opinion, therefore, that the appointment of McDonald as guardian was valid, as far as it can be questioned in this case, and that the court erred in dismissing the action instituted by him in the name of his ward to recover possession of her property.

It is further contended by learned counsel for appellee that the questions involved can not be reviewed here because no motion for new trial was filed below. The evidence, record and oral, introduced at the hearing below was brought upon the record by bill of exceptions, but no motion for new trial was filed. None was necessary. This was not a trial of the merits of the case, but merely a preliminary motion to determine whether or not the action had been properly instituted. It is true that the hearing of the motion resulted in a decision which disposed of the case and was appealable, but it was not such a trial of the case upon its merits as required a motion for a new trial. There was no trial at all in that sense. The statute defines a motion for new trial to be a "re-examination in the same court of an issue of fact, after a verdict by a jury or decision by the court," and provides that "the former verdict or decision may be vacated and a new trial granted." Kirby's Digest, § 6215. Now, this provision manifestly has no reference to an inquiry and decision of the court upon a motion testing the power of the plaintiff or his legal representative to maintain that action, even though the action be discontinued as a result of the decision. 2 Thompson on Trials, § 2716.

It is unnecessary for us to determine in this case whether or not the guardian had the right to take an appeal in the name of his ward from the decision of the court refusing to dismiss the actions instituted in her name by Euper as next friend. This, it would seem, is a matter about which only the several defendants in those suits have grounds of complaint because they are improperly sued, and sued twice for the same subject-matter. Inasmuch, however, as this case is to be remanded, we should add that the court should either dismiss the actions brought by the next friend, or dismiss those brought by the guardian and substitute the guardian for the next friend, in the actions previously brought by the latter. Kirby's Digest, § § 6021, 6026. Either course is authorized by the statute, and either would work out orderly proceedings for the protection of the rights of the ward.

The judgment dismissing the action is reversed with directions to re-instate the action and for further proceedings not inconsistent with this opinion.

ROACH *v.* RICHARDSON.

Opinion delivered July 15, 1907.

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1. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Where, without objection on plaintiff's part, defendant directed his evidence to an issue not raised by the answer, and the trial court treated the issue as thus joined, the answer will be treated on appeal as amended to correspond with the proof. (Page 41.)
2. SALE OF LAND—RIGHTS OF VENDEE.—One who holds a bond for title to land has an equitable title which is descendible by inheritance, devisable by will and alienable by deed as if it were an absolute estate at law, subject to the rights of the vendor. (Page 41.)
3. HUSBAND AND WIFE—TENANCY BY ENTIRETY.—Where a husband and wife purchased land and took a bond for title to themselves, they became seized of an equitable estate by the entirety, and the survivor, upon payment of the purchase money, was entitled to the fee. (Page 42.)

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

STATEMENT BY THE COURT.

This suit was brought by appellant against appellees in the Clay Chancery Court. The complaint alleged that on the 29th day of June, 1887, John Whitson died seized in fee of a certain tract of land in Clay County, which is described in the complaint; that Whitson left Sallie Whitson his widow, and the appellant his sister and sole heir at law; that at the time of his death Whitson owed a balance of the purchase money on said land, which the widow paid, taking the deed to herself; that she married one Cole, and after he died she married Ed Richardson; that she remained in possession of the land with her husband, Richardson, until her death in 1902; that before her death she attempted to convey said land by will to Ed Richardson for life, with remainder to Jessie Miller Richardson, Rosette Richardson and Fred Cole; that Richardson was in possession of the land by his tenant, and had received the rents and profits therefrom since the death of his wife, which amounted to $500. Appellant prayed that the deed to Sallie Whitson be cancelled, and that she have judgment for $500, the rents and profits. The appellees denied that John Whitson died seized and possessed of the land mentioned, denied that Whitson had purchased the land, and alleged that Sallie Whitson had purchased the land, admitted that John Whitson died leaving Sallie his widow and appellant his sole heir, alleged that Sallie Whitson paid a part of the purchase money prior to the death of John Whitson, and after his death that she paid the balance with her own means. The marriage of Sallie Whitson, then Cole, with Ed Richardson is admitted, also that she remained in possession of the land until her death, also that she executed the will as alleged in the complaint; but it is denied that Ed Richardson received the rents and profits since his wife's death.

The answer of the minors was through their guardian *ad litem,* and denied all the allegations of the complaint. The court, after hearing the evidence, found generally in favor of appellees, and rendered judgment accordingly, quieting their title as against the appellant.

J. L. Taylor and *F. G. Taylor,* for appellant.

1. Whitson had an equitable interest in the land which he could perfect into legal title by paying the balance of the pur-

chase money. His widow's interest was in effect a life estate, which she could protect by paying the balance of purchase money, but she could not thereby obtain the legal title against Whitson's heirs. As to them she would hold as trustee. 35 Ark. 84; 47 Ark. 287; 72 Ark. 456.

2. Defendants are bound by the allegations in their answer, and they will not be permitted to take advantage of inconsistent positions. 14 Ark. 166; 32 Ark. 470; 64 Ark. 213.

3. A contract for sale of land to a husband and wife does not create an estate of entirety. There must be a conveyance. Devlin on Deeds, § 8; 29 Ark. 202; 47 Ark. 111; 61 Ark. 388. It must be by deed or devise. A contract of sale or bond for title is not a conveyance. *Supra;* Tiedeman, Real Prop. § 242; 29 Ark. 202; 67 Ark. 184.

D. Hopson, for appellees.

1. The evidence clearly shows that Gregson sold the land to John and Sallie Whitson and put them in possession, executing to them a bond for title. They thereby became the equitable owners. The vendee under a bond for title has the same interest in the estate as a mortgagor before foreclosure. 13 Ark. 534; 27 Ark. 61; 29 Ark. 357; 66 Ark. 167; 4 Kent. 160; 15 Ark. 188; 75 Ark. 52.

2. On the question of estates of entirety, authorities cited by appellant only hold that where land is conveyed to husband and wife such conveyance creates an estate by the entirety, which is true. Such an estate may be created, not only by deed or devise, but also by instrument of gift or purchase, and even by inheritance. 3 Blackstone, Com. 182; 9 Am. & Eng. Enc. of L. (Ed.), 851. See also *Id.* 850, note; Stuart's Husband & Wife, § 305; 5 Mass. 321. It arises from the legal unity of husband and wife, regardless of the kind of estate or the mode by which it is cast upon them. 36 Am. St. Rep. 65; 2 Kent, § 132; 30 L. R. A. 305, note; 61 Ark. 388.

3. Appellant can not complain that appellee's answer and proof are inconsistent. The evidence was taken and directed to the issue as to the sale to Whitson and wife without objection, and the answer will be treated as amended to correspond with the proof. 43 Ark. 451; 54 Ark. 289; 59 Ark. 215.

WOOD, J., (after stating the facts.) The contention of appellees that Sallie Whitson bought the land from the owner, W. C. Gregson, and paid for same with her own means, has no evidence in the record to support it. As to whether or not the land in controversy was purchased by John Whitson alone, or by him and his wife jointly, is purely a question of fact, Witnesses for appellant testified that Whitson told them, soon after he had taken possession of the land in controversy, that he had bought the same and was to pay $600 for it in installments, The best evidence to support the contention of appellant is that of the witness Taylor, who said that he thought that he drew up the papers concerning the purchase of the land, but was not sure about it, and did not state it as a fact. He was the attorney of Gregson, the owner, and transacted a great deal of business for him. He says that Gregson and Whitson talked over with him the matter of the sale of the land by Gregson to Whitson; says that the consideration was $600, and that the first payment was made in live stock. He did not write the deed, but thought he wrote the bond for title and the notes for the balance of the purchase money. He says that there was nothing said by either Gregson or Whitson that went to show that Sallie Whitson was a party to the contract. There were only two parties to the contract, and they were John Whitson and W. C. Gregson. That one of the reasons for his definite recollection was that he wanted to buy the land himself, and before he could get in shape to buy it Whitson bought it. The above, with proof to the effect that Sallie Whitson owned no property at the time she intermarried with John Whitson, is the evidence upon which appellant relies to have the deed which was executed to Sallie Richardson, formerly Whitson, cancelled. Appellees, to support their contention that the sale of the land was made to John Whitson and his wife, Sallie, jointly, had the testimony of Mrs. Ingram, who was appellant's witness, to the effect that she was once the wife of Gregson, that her husband sold the land in controversy to John Whitson and Sallie Whitson, that to the best of her recollection there were three payments, that she thought John and Sallie Whitson gave their notes for the deferred payments. After John Whitson died, Sallie, who had then married another man, paid the last of the purchase money, and Gregson and witness, his wife, made her a deed to the land

in controversy. Appellee Ed Richardson testified that he had seen and read a bond for title, or an agreement for the sale of the land in controversy, made by W. C. Gregson and S. E. Gregson to Sallie and John Whitson, and also two notes of two hundred each, executed by Sallie Whitson and John Whitson to Gregson for part of the purchase money; that these papers were in the possession of his wife, who was formerly Sallie Whitson, and that he and his wife, not considering them of any value, destroyed them. In view of this testimony, we can not say that the finding of the chancellor was clearly against the preponderance of the evidence. In the sharp conflict of the testimony and the difficulty of ascertaining the real facts by a preponderance of the testimony, we shall treat the finding of the chancellor as persuasive, and sustain it.

The testimony on behalf of appellees did not tend to show that the land was conveyed to Sallie Whitson solely, as was set up in her answer. But the testimony was taken, and without objection was directed to the issue of whether or not the land was conveyed to her and her husband, Whitson, jointly. The court below so treated the issue as thus joined on the proof, and after judgment we will treat the answer as amended to correspond with the proof. *Sorrels* v. *Self,* 43 Ark. 451; *Railway Co.* v. *Triplett,* 54 Ark. 289; *Texarkana Gas, etc., Co.* v. *Orr,* 59 Ark. 215.

Did the bond for title or contract of sale convey to John Whitson and his wife an estate in entirety? In *Strauss* v. *White* 66 Ark. 167-170, this court said: "It has been uniformly held by this court that when the owner sells land, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage, as effectually as if the vendor had conveyed the land by an absolute deed to the vendee and taken a mortgage back to secure the purchase money. * * * It follows, then, * * * that the vendee, in analogy to the mortgagor, is the owner of an equity of redemption, and that his is the real and beneficial estate which is descendible by inheritance, devisable by will, and alienable by deed precisely as if it were an absolute estate of in-

heritance at law, subject, of course, to the rights of the vendor." (Citing and quoting previous opinions.)

One who holds bond for title from the holder of the legal title has an equitable estate in the land so conveyed to him. In equity he is the real owner, but subject to have his interest defeated or taken away if he fails to comply with the conditions of the bond. *Norman* v. *Pugh,* 75 Ark. 52. Here it is not pretended that the conditions of the bond were not fulfilled by Whitson and his wife. The deed to her after the death of her husband evidenced the conveyance of the entire estate, which was hers by right of survivorship at his death. "If an estate in land be given to the husband and wife, or a joint purchase be made by them, during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and can not take by moieties. They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole. This species of tenancy arises from the unity of husband and wife, and it applies to an estate in fee, for life or for years." 2 Kent's Com. 132. See *Branch* v. *Polk,* 61 Ark. 388; *Shaw* v. *Hearsey,* 5 Mass. 521.

It follows that the decree of the court denying the relief prayed by appellants was correct, and the same is affirmed.

HILL, C. J., (dissenting.) This evidence, taken as a whole, convinced me that the claim that the deed in question was jointly made to the husband and wife was an afterthought, and is not sustained by a preponderance of the evidence.

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

Opinion delivered July 8, 1907.

DAMAGES—MENTAL SUFFERING.—Mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, can not be made the subject of an independent action against a carrier for damages, even where the act or violation of the duty complained of was wilfully committed.

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

STATEMENT BY THE COURT.

This is an action instituted by W. L. Taylor against the St. Louis, Iron Mountain & Southern Railway Company to recover damages alleged to have been sustained by the plaintiff on account of the willful and wrongful act of a servant of the defendant. The facts relied on by the plaintiff to sustain a recovery are substantially as follows:

The plaintiff was a traveling salesman for a wholesale dry goods firm, and carried on his trip a number of sample trunks weighing in the aggregate more than the amount allowed free to passengers. He made a trip to Judsonia, Arkansas, a station on the line of defendant's railroad, in the course of his business, and when he was ready to depart from the town on defendant's train he got into a controversy with defendant's station agent at that place concerning the weighing and checking of his baggage. The agent at first refused to check the baggage because the time was short before the arrival of the train, and when the plaintiff threatened to report him he told plaintiff to "report and be damned," called him a "thief," a "dirty cur" and other vile names, and, after the plaintiff struck him with an umbrella, picked up a gun in a threatening attitude toward plaintiff. He made no attempt, however, to shoot, and the plaintiff sustained no physical injuries in the encounter. The agent afterwards checked the baggage, and the plaintiff departed with his baggage on the train he had intended to take.

The only kinds of injury set forth in the complaint, or which the testimony tends to show, are mental anguish and humiliation resulting from the insulting remarks made by the station agent.

The court gave the following, among other, instructions, over the objections of the defendant:

"If the jury believe from the evidence that the plaintiff went to the depot of defendant company for the purpose of taking passage on its train, and at the time he had a mileage ticket for his passage and an excess baggage ticket, and exhibited the same to the agent, Ford, then he was entitled to all the privileges

and protection of a passenger, and it was the duty of the defendant company, through its agent, Ford, to treat him civilly, politely; and if you believe from the testimony that when the plaintiff went to the depot, he had a mileage ticket and excess baggage ticket, and presented the same to the agent, and that he intended to take passage on the defendant's train, and the agent, Ford, treated him in an insulting manner by imputing to him dishonest conduct, and otherwise willfully, wantonly or maliciously insulted or assaulted him, then the plaintiff is entitled to recover, and in arriving at damages to which he is entitled, you should allow him a fair pecuniary compensation for such damages as were the direct consequence of the act complained of, for any mental excitement, anguish of mind, sense of shame and humiliation, if any, which he may have suffered by reason of the wrongful conduct of the agent, Ford."

The court also refused to instruct the jury, as requested by the defendant, that there could be no recovery for mental anguish, shame and humiliation resulting from the insults offered.

Plaintiff recovered judgment below for the sum of $4,500 damages, and the defendant appealed.

T. M. Mehaffy and *J. E. Williams,* for appellant.

1. There is error in that part of the first instruction which permits the jury to consider an assault upon the appellee as an element of damage, whereas the proof shows that, although after he was struck by appellee he picked up a gun, he made no attempt to use it. Kirby's Digest, § 1583; 49 Ark. 179; 57 Am. St. Rep. 945; 53 *Id.* 354; 11 *Id.* 830.

2. The instruction is also erroneous because it allows the jury to consider, as an element of damages, mere mental pain and anguish unaccompanied by physical injury. 64 Ark. 538; 76 Ark. 348; 67 Ark. 123; 69 Ark. 402; 65 Ark. 177; 69 Ark. 85.

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

The relation of passenger and carrier being established, the passenger is entitled to damages for mental anguish caused by insulting and abusive conduct of the carrier's agent towards the passenger, though unaccompanied by physical injury. 3 Mason, 245; Fed. Cas. No. 2575; 1 East, 106; 103 Ill. 549; 3 Cliff. 416;

106 Mass. 180; 6 Ind. App. 205; 80 Md. 23; 62 Me. 90; 62 N. J. L. 286; 4 Elliott, Railroads, § 1638; 90 N. Y. 588; 8 Bush (Ky.), 147; 85 Ky. 547; 36 Wis. 657; 133 N. Y. 261; 18 Ill. App. 620; 62 Fed. 440; 54 L. R. A. 752; 59 *Id.* 590; 12 *Id.* 339; 66 *Id.* 618; 46 *Id.* 549; 31 *Id.* 390; 69 Miss. 421; 102 Ga. 479.

MCCULLOCH, J., (after stating the facts.) Many questions are presented in the record for our consideration, but the controlling one, for the purpose of disposing of this case here, is whether or not the plaintiff is entitled, under the circumstances shown in the case, to recover damages for mental anguish and humiliation, unaccompanied by physical injury. The evidence shows, sufficiently to warrant a finding, that the station agent of the railway company, while the plaintiff was in the station for the purpose of having his baggage checked preparatory to taking passage on the train, and while he was conferring with said agent concerning the checking of his baggage, willfully and without provocation insulted him by the use of profane, threatening and defamatory language. We do not determine whether the plaintiff should be held, under the circumstances, to be a passenger in the sense that the railway company owed him the same duty of protection from willful acts of its servants that it owes to passengers on trains. We prefer to dispose of the questions of the defendant's liability for the mental suffering and humiliation as elements of damages, disconnected from any physical injury, on the broader ground, treating the plaintiff, for the purpose of testing this question, as a passenger in the most complete sense.

The precise question involved has never been determined by this court. In *St. Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136, the question was mentioned but expressly reserved for decision, the court saying: "It is certain there could be no recovery for mental anguish unaccompanied by personal injury, where there was no willful, wanton or malicious wrong done. Whether there could be recovery for mental suffering alone, we reserve for decision."

In *Peay* v. *Western Union Telegraph Co.,* 64 Ark. 658, the court held, with reference to the liability of a telegraph company for negligent failure to promptly transmit and deliver a message, that there could be no recovery for mental anguish independent

of and disconnected from a physical injury. And in *Richardson* v. *Davis,* 76 Ark. 348, we held that there could be no recovery of damages by a female from an individual for mental anguish on account of an indecent proposal made to her. The court said in the opinion that mental suffering and humiliation are not elements of damages, citing the Peay case.

In *Texarkana & Ft. Smith Railway Co.* v. *Anderson,* 67 Ark. 123, the court held that in an action by a passenger to recover damages for being wrongfully carried beyond her destination, where no physical injury resulted or other loss or injury except mental anxiety and suffering, there could be no recovery for the mental suffering. In that case there were no facts or circumstances indicating malice or willfulness, and no insult offered to the plaintiff, but the mental suffering was claimed to have resulted from the anxiety on account of the delay in getting back to her destination, and in being compelled, during the period of the delay, to remain in the company of a crowd of partially intoxicated, boisterous and profane passengers.

So, we see that it has been decided by the court that a corporation is not liable for mental suffering, unaccompanied by physical injury, inflicted by the negligence of its servants in the performance of a contract, there being no element of willfulness in the commission of the negligent act complained of; and that an individual is not liable for the wrongful infliction of mental suffering, unaccompanied by physical injury, even where there is the element of willfulness in the commission of the act complained of.

It only remains, therefore, to decide whether a railway corporation is liable for such mental suffering and humiliation, unaccompanied by any physical injury, inflicted upon passengers by the wrongful act of one of its servants wilfully committed. The questions already decided by this court, as above stated are sought to be distinguished from the facts of this case on two points, viz: First, that the act complained of was committed by a servant of the railway company in violation of the contractual duty which the carrier owed to its passengers to afford them protection from either the negligent or wilfully wrongful acts of its servants; and second that the injury resulted from the willful act of the servant of the carrier. We do not think

that the distinctions are sound. It is true that a carrier owes to its passengers the absolute duty of protection against either the negligence or willfulness of its servants. *St. Louis, I. M. & S. Ry. Co.* v. *Dowgiallo,* 82 Ark. 289, and authorities cited.

But the carrier in such case can be required to respond only in such damages as the law takes heed of as proper elements of damages. If mental suffering and humiliation, unaccompanied by any physical injury, are not accounted in law as elements of damages in other cases, we see no reason why they should be made so in testing the liability of a carrier for the wrongful acts of its servants. While, as has been said, the carrier is liable to the passenger for all proper damages resulting from negligent or willful acts of its servants, yet mental suffering, independent of physical injury, is not specially made an element of damages applicable in that kind of case. It is not because the carrier is not liable for the willful acts of its servants that it escapes responsibility for such injury, but because the character of the injury is not such as the law affords compensation for.

The reason that mental suffering, unaccompanied by physical injury, is not considered as an element of recoverable damages is that it is deemed to be too remote, uncertain and difficult of ascertainment; and the reason that such suffering is allowed as an element of damages, when accompanied by physical injury, is that the two are so intimately connected that both must be considered because of the difficulty in separating them. 4 Sutherland on Damages, § 1245; *Fell* v. *Rich Hill Coal Mining Co.,* 23 Mo. App. 216; *Chapman* v. *Western Union Telegraph Co.,* 88 Ga. 763; *Johnson* v. *Wells, Fargo & Co.,* 6 Nev. 224; *Wyman* v. *Leavitt,* 71 Me. 227; *Ewing* v. *Pittsburg, etc., Ry. Co.,* 147 Pa. 40.

"So far as mental suffering originating in physical injury is concerned," says Judge Lumpkin in the Georgia case cited above, "it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical. So, in case of physical injury, the mental suffering is taken into view. But, according to good authorities, where it is distinct and separate from the physical injury, it can not be considered."

"Mental anguish of itself, it is said, has never been treated as an independent ground of damages, so as to enable a person to maintain an action for that injury alone; neither has insult or contumely." Wood's Mayne on Damages, p. 75. And it was said in an English case many years ago that "mental pain and anxiety the law can not value, and does not pretend to redress, when the unlawful act complained of causes that alone." *Lynch* v. *Knight,* 9 H. L. 577. Mr. Sutherland says that "mental suffering alone, unconnected with any other legal wrong, will not, according to the great weight of authority, support an action; it is only when some act is done which will constitute a cause of action that such suffering can be considered. This is not a cause of action, but an aggravation of damages, when it naturally ensues from the act complained of." 4 Sutherland on Damages, § 1245.

The authorities are by no means harmonious on this question, and we confess that there are many cases holding contrary to the views we express. Most of them, however, are cases decided in States where the courts are fully committed to the doctrine of allowing recovery for mental suffering unaccompanied by physical injury. Some of the authorities, though holding to the contrary doctrine, are in States where the courts had previously refused to allow such an element of recovery in telegraph cases. These cases are found in the States of Georgia New York, and Missouri. *Cole* v. *Atlanta & West Point Ry. Co.,* 102 Ga. 474; *Gillespie* v. *Brooklyn Heights Ry. Co.,* 178 N. Y. 347; *Smith* v. *Atchison, T. & S. F. Ry. Co.,* 97 S. W. 1007. We are unable to hamonize the doctrine of these cases with the former holdings of the same court that there could be no recovery for such an element of damages against a public service corporation for a breach of its contracts; nor is the reasoning of the above-cited cases reconcilable with each other. We fail entirely to see how a distinction can be founded upon the mere fact that the injury results from the willful act of the servants of the corporation or from a willful breach of its contract.

If the infliction of mental suffering alone can be made the subject of an action to recover damages in any case, we can not see why such recovery should not be allowed, even though it is

inflicted by mere negligence, and not by a willful act. As this court has already held in the Peay case that a negligent act resulting in mental suffering only can not be made the subject of an independent action for damages, we think that the only logical result of that holding is to say that such damages can not be recovered merely because there is an element of willfulness in the commission of the act complained of.

When this court reached the conclusion in the one case that the corporation could not be required to respond in damages for mental anguish alone on account of the negligent act of its employees, and in the other case that an individual could not be made to respond in damages for mental suffering alone on account of a willful act, we think that it established a doctrine that necessarily precludes recovery in this case. We prefer to adhere to the rule, as a sound one, that mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, can not be made the subject of an independent action for damages, even where the act or violation of duty complained of was wilfully committed; and that such suffering does not of itself constitute a cause of action, but is merely "an aggravation of damages when it naturally ensues from the act complained of."

There is no evidence tending to show that the plaintiff sustained any injury at all except mental anguish and sense of shame and humiliation on account of the insulting language used toward him by the station agent; but the instruction of the court permitted the jury to find a verdict in favor of the plaintiff based entirely upon those elements of damages resulting from the insulting language used as an independent grounds of action.

WOOD, J., (dissenting.) The law writes in every contract made by a railway company with its passengers the obligation that it will not wilfully, wantonly or maliciously insult or wound the feelings of such passengers, but, on the contrary, that its employees will give its passengers at least respectful treatment and have due consideration for their comfort. *Fordyce* v. *Nix*, 58 Ark. 136; 3 Thompson on Neg. § § 3083, 3086; 2 Hutch. on Car. § § 1093-94. In *McGinnis* v. *Missouri Pac. Ry. Co.*, 21 Mo. App. 399, it is said: "Among those recognized rights of the passenger is, not only to be safely and promptly carried to his destination, but to

be treated by the servants and agents of the carrier with kindness, respect, courtesy and due consideration, and to be protected against insult, indignities, and abuse from both the agents and other passengers."

No such contract is made by a telegraph company with its patrons. No such contract is made between private individuals. Herein lies the clear distinction between the case at bar and the cases of *Peay* v. *Western Union Tel. Co.*, 64 Ark. 658, and *Richardson* v. *Davis*, 76 Ark. 348, cited by the court in the opinion of the majority. The common carrier of passengers contracts, by law, that its passengers shall not suffer insult by reason of the wilful, malicious or wanton conduct of its agents and servants. When the carrier violates this contract, it is liable in damages for its breach; else there is a legal wrong without any remedy whatever. The mental anguish in such case is the direct, approximate and only damage produced, and is as certain and easy of ascertainment, and more so, than in hundreds of cases where damages for mental suffering are allowed as concomitant with some physical injury.

We are utterly unable to appreciate the fine distinctions necessary to be made in order to allow damages for mental anguish in cases of breach of contract where there has been a physical injury, however slight, produced by the wilful and malicious act of the employee or carrier, and yet to deny them where there has been no physical injury, but where the only injury is mental suffering.

According to the rule announced, the weight of the finger laid on in anger, or any other frivolous assault, will let in all the damages for mental anguish, while if there is no such trivial physical injury, there can be no recovery for the mental agony, although that may be of the most intense, humiliating and crushing character.

I will not indulge a figment of the imagination or fiction of the law that will enable common carriers of passengers to violate the plain terms of their contract, and yet leave their passengers remediless. There is certainly no logic or common sense in such a rule. And in my opinion such is not the law.

The section relied upon, from Mr. Sutherland (1245) supports our contention. "Mental suffering alone, unaccompanied with any other legal wrong," etc. Here mental suffering was

accompanied with the other "legal wrong" of wilful and malicious insult and ill-treatment, which the terms of the contract insured the passenger against. Mental suffering was the natural direct and inseparable accompaniment of the wilful and malicious maltreatment. Practically all the authorities in this country are in favor of allowing damages for mental anguish in such cases. *Chamberlain* v. *Chandler,* 3 Mason, 245, 5 Fed. Cas. 2575; *Pendleton* v. *Kinsley,* 3 Cliff. 416; *Goddard* v. *Grand Trunk Ry. Co.* 57 Me. 202; *Mabry* v. *City Electric Ry. Co.,* 59 L. R. A. 590; *Lafitte* v. *New Orleans City & Lake R. Co.,* 12 L. R. A. 339; *Gillespie* v. *Brooklyn Heights R. Co.,* 178 N. Y. 347, 66 L. R. A. 618; *Knoxville Traction Co.* v. *Lane,* 46 L. R. A. 549; *Richburger* v. *American Express Co.,* 31 L. R. A. 390; *Louisville, N. & T. R. Co.* v. *Patterson,* 69 Miss. 421; *Birmingham Railway & Electric Co.* v. *Baird,* 54 L. R. A. 752 (in this case there was an assault, but the court recognized the principle we contend for in strong terms); *Cole* v. *Atlanta & West Point R. Co.,* 102 Ga. 479;* 4 Elliott, Railroads, § 1638; 3 Thompson on Neg., § 3288; Moore on Car., 625, 636; 2 Fetter, Car. of Pass., p. 1327, § 531; 3 Hutch. on Car., § 1427; 5 Am. & Eng. Enc. L. 550; 13 Cyc. 44, and cases cited in note.

In *St. Louis, I. M. & S. Ry. Co.* v. *Dowgiallo,* 82 Ark. 289, this court, through Judge McCULLOCH, in a case where there was an assault, distinctly recognized the principle for which we contend. He says: "It (the carrier) is the insurer of the safety of the passenger against wilful assaults and *intentional ill-treatment of its servants for whose acts it is responsible. St. Louis & S. F. R. Co.* v. *Kilpatrick,* 67 Ark. 47." Again: "A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants, and *shall not be wilfully insulted and harmed by them;*" quoting Mr. Elliott, 4 vol., § 1638. In the present case the same learned justice says: "It is true that a carrier owes its passengers the absolute duty of protection against either the negligence or wilfulness of its servants. But the carrier in such case can be required to respond only in such damages as the law takes heed of as proper elements of damages."

I am unable to understand how a carrier can violate an absolute duty which it is bound to discharge, under its implied con-

*See *Wolfe* v. *Ga. Ry. & El. Co.,* 58 So. 899 (Rep.)

tract, and yet not be required for the breach of such contract to respond in damages. How else is it bound? What does its absolute duty avail the passenger, if he cannot recover when it is ignored?

I am of the opinion that the principle announced in *St. Louis, I. M. & S. Ry. Co.* v. *Dowgiallo, supra,* is sound whether there is a physical injury or not, and that the principle announced by the majority in this case is wholly inconsistent with that. The doctrine announced in the present case is unsound.

NOTE: Judge RIDDICK dissented from the opinion of the court, but died before this dissenting opinion was prepared.

Reversed and remanded.

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EL DORADO v. RITCHIE GROCERY COMPANY.

Opinion delivered July 15, 1907.

ADVERSE POSSESSION—STREET OF CITY.—Adverse possession of a street of an incorporated town for the statutory period will give title to the occupant and bar the town.

Appeal from Union Chancery Court; *Emon O. Mahoney,* Chancellor; affirmed.

Bunn & Patterson, for appellant.

On the question of acquiring title by adverse possession against the city after the dedication to it, this case is controlled by 58 Ark. 142. See also 42 Ark. 118.

One who is in the enjoyment of an easement can not plead the statute of limitations by adverse possession against another who holds under an easement not inconsistent with the right of the claimant. 54 Ark. 608.

Smead & Powell, for appellee.

58 Ark. 142, relied on by appellant, is not in point. Wright's possession in that case was consistent with the right of the city, and there was no act on his part in his lifetime, or by his heirs, giving notice to the city of any intention to deny its rights.

For the distinction between a stranger and a vendor in such cases, see 69 Ark. 567.

This case is controlled by 41 Ark. 52. See also 58 Ark. 156; 75 Ark. 514; 9 Am. & Eng. Enc. of Law (2 Ed.), 51.

BATTLE, J. The property in controversy in this suit is a certain strip of land, sixty feet wide, in the incorporated town of El Dorado, in this State, and is claimed by that town as a street. On the 13th day of April, 1892, C. W. Smith, T. J. Moore and his wife, S. E. Moore, being the owners thereof, donated it to the incorporated town of El Dorado for street purposes. A condition of this donation was as follows: "This property was dedicated to the town on condition solely that it was to be surveyed, laid out as streets, opened and put in good condition, as streets, and kept up and worked as such; and when the town failed or refused to keep them up as such streets, they are to revert to the present owners and donors or their assigns or successors." The town failing to survey, lay out or open it as a street for about two years, C. W. Smith, T. J. Moore, and Mrs. S. E. Moore conveyed it and other lands, on the 8th day of March, 1894, to R. A. Faulkner, who on the 17th day of February, 1893, conveyed one-half of it to W. M. Green, who and Faulkner, on the 4th day of May, 1903, conveyed to W. W. Brown and John C. Ritchie, who in 1903 conveyed it to Ritchie Grocery Company. The last grantee and those under whom it holds have held actual, open, continuous, hostile, exclusive, adverse possession of it for more than seven years, building and constructing lasting, permanent and valuable improvements on the same. By this means it acquired title to the property.

The town of El Dorado insists that it is entitled to hold the property under *Little Rock* v. *Wright,* 58 Ark. 142. In that case this court held: "Where a city has accepted the dedication of a public street, subsequent continued possession by the dedicator will not be presumed adverse to the city, nor the city's right lost by delay for more than seven years in opening up the street for public use, in the absence of proof of adverse holding."

In *Ft. Smith* v. *McKibbin,* 41 Ark. 45, it was held that "municipal corporations are bound, as individuals are, by the

statute of limitations, and adverse possession of an alley in a city for the statutory period will give title to the occupant and bar the city." In *Helena* v. *Hornor,* 58 Ark. 151, this ruling was approved and followed. In *Graham* v. *St. Louis, I. M. & S. R. Co.,* 69 Ark. 562, the distinction between cases like *Little Rock* v. *Wright,* 58 Ark. 142, and cases like this is pointed out as follows:

"The distinction between a vendor and a stranger in such a case relates to the character of evidence necessary to show that the possession was adverse. If the parties are strangers in title, possession and the exercise of acts of ownership are, in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas, if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed; it not being supposed, from mere acts of possession and ownership not inconsistent with the rights of the vendee, that the vendor intends to deny the title he has conveyed."

In this case the possession was held by strangers.

Decree affirmed.

ANDERSON *v.* STATE.

Opinion delivered October 7, 1907.

BURGLARY—BREAKING.—Proof that defendant pried loose a solid outside shutter and made a hole in the door of a building belonging to another too small to admit his hand or to permit of his committing a felony within the building is insufficient to sustain a charge of burglary.

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; reversed.

W. H. Dunblazier and *C. T. Wetherby,* for appellant.

Under the agreed statement of facts there was no breaking

within the meaning of the law. 71 Ark. 178; 4 Ala. 643; 39 Am. Dec. 314.

William F. Kirby, Attorney General, and *Daniel Taylor,* assistant, for appellee.

The facts agreed to are sufficient to constitute a breaking within the meaning of the statute. 63 Ala. 49; 1 C. & P. (star page), 300; 40 S. W. 245; 58 Pac. 968; 6 Cyc. 174.

WOOD, J. The appellant seeks to reverse a judgment of conviction for the crime of burglary.

The State and the appellant agreed that the evidence introduced at the trial is as follows:

"The defendant tore or pried loose from its two or only hinges a solid shutter made of three-fourths inch boards, which shutter covered a window about eighteen inches wide and three feet long, opening into a second-hand store belonging to one Coleman. The shutter was left hanging by an iron strap clasp which fastened from within, and the said shutter was about five or six inches from the window; the said window being closed and fastened, and was not unfastened or opened by the defendant, but was left intact. The shutter was made to close tight against the outside of the window frame, and was so closed on the night of the alleged offense by Mr. Coleman before leaving his store.

"Also a hole about one inch square was cut through the door, which was on the same side of the store as the window, and near the window, the door opening into the said store. The hole was about six inches from the hinge side of the door and about half way between the top and bottom of the door, the door being about three feet by six feet and of one inch lumber. The hole was too small to admit the hand and too far from the fastening to permit the use of an instrument to unfasten the door, which was held fast by a heavy iron bar placed under a broken lock on the side or edge of the door opposite to and about a foot below the hole made by the defendant. The defendant made no entrance at door or window.

"The evidence was sufficient to constitute the offense of burglary on all points except the breaking (it is agreed that

no entrance was made), and it is contended by the State that that there was a sufficient breaking, but denied by the defendant.

"Defendant was arrested by the officer while working to make an entrance, and before he had entered the house or could have entered."

The "breaking" disclosed by these facts was not sufficient under our statute to constitute the crime of burglary. The statute is as follows: "If any person shall, in the night time, wilfully and maliciously, and with force, break or enter any house, tenement, boat, or other vessel or building, although not specifically named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary." Sec. 1605, Kirby's Digest. "The manner of the breaking or entering is not material, further than it may show the intent of the offender." Sec. 1604, Kirby's Digest. The statute does not change the character of the "breaking" that was essential at common law to complete the offense. Such breaking at the common law was "any disrupting or separating of material substances in any enclosing part of a dwelling house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished." 2 Bishop, Cr. Law § 91. Rapalje, Larceny & Kindred Offenses, 375. That the term "break" in the statute is to be given the same meaning as that term at common law, see numerous authorities collated in 6 Cyc. 175. The essentials of the above definition as to the "breaking" must be met by proof before the crime of burglary by "breaking" is complete. The proof in this case falls short of it. There was no "opening or mode of entrance" here by which a felony could have been committed within the building. *Minter* v. *State,* 71 Ark. 178. The only opening into the building was the hole in the door, and it is not shown that it was possible to abstract anything through this opening, or that any latch or fastening could have been reached whereby to effect an entrance. Therefore the judgment has no evidence to support it, and the cause is reversed and remanded for new trial.

HILL, C. J., (dissenting.) At common law it was necessary to prove both breaking and entering in order to constitute

burglary. But the statute has changed the common-law rule and made the breaking or entering a house in the night time, with intent to commit felony, burglary. Sec. 1606, Kirby's Digest. And the statute has further made the manner of breaking or entering not material, further than to show the intent of the intruder. Sec. 1604, Kirby's Digest.

At common law, the breaking necessary to constitute burglary was an act of physical force, however slight, by which an obstruction to entering the house was forcibly removed. When the statute made this act of breaking, with the other essentials constituting the crime, sufficient, necessarily it intended the common-law breaking. That was the only breaking then understood in the nomenclature of the crime.

The facts here constitute breaking within the meaning of the common-law definition, and, the statute having made that breaking, the other essentials being present, sufficient, the crime is complete.

Authorities showing that the above is the correct definition of the common-law breaking, and its many applications by English and American courts, may be found collected in 5 Am. & Eng. Enc. Law, 45-8; and 6 Cyc. 174-178.

This dissent is in conflict with *Minter* v. *State,* 71 Ark. 178, as well as the views expressed in the opinion of the majority herein. But that said views are unsound and in conflict with the elemental principles involved is respectfully submitted for the consideration of those who may pass upon it hereafter.

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FIDELITY MUTUAL LIFE INSURANCE COMPANY *v.* BECK.

Opinion delivereed July 22, 1907.

1. TRIAL—DIRECTING VERDICT.—Where there was some evidence tending to prove a breach of warranty in the procurement of a policy of life insurance, it was error to direct a verdict against the insurance company. (Page 58.)

2. APPEAL—REVERSAL—PRACTICE.—The general rule of practice, on reversing a common-law cause of action, is to remand the case for

new trial; but where there is an affirmative showing that there can be no recovery, and that a new trial would only protract litigation, occupy time of the court and increase costs, it is the duty of this court to dismiss the action. (Page 60.)

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

Rose, Hemingway, Cantrell & Loughborough, for appellant; *F. H. Calkins,* of counsel.

The policy sued on is void because of false representations made in the application. The two, when forming one transaction, are read together as the entire contract. 49 Ark. 320; 75 Ark. 29. See also 58 Ark. 528; 72 Ark. 623.

Etter & Monroe, for appellee.

The application itself showing plainly that no attempt had been made to answer, appellant by accepting the application will be held to have waived an answer. 52 Ark. 11; 53 Ark. 215; 65 Ark. 581, 590. See also 53 Ark. 494; 71 Ark. 298.

HILL, C. J. Mrs. Beck, the beneficiary in a policy upon the life of her husband, Jas. W. Beck, brought suit against the appellant life insurance company upon the same, and the trial resulted in the court directing a verdict in favor of the plaintiff therein, and the insurance company has appealed.

There was a written application for insurance, which contained the following agreement: "The truthfulness of each statement above made or contained, by whomsoever written, is material to the risk, and is the sole basis of the contract with the said company; that I hereby warrant each and every statement herein made or contained to be full, complete and true." A question is raised as to whether all of the questions are fully answered.

The fourth question and answer read as follows: "That I have never had or been afflicted with any sickness, disease, ailment, injury or complaint, except rheumatism three years ago." Under the line whereon the words "except rheumatism three years ago" is written, there is printed in fine type the following: "Duration, whether trivial or otherwise—if rheumatism, state whether muscular, sciatic or inflammatory." This requirement

was not complied with, there being two lines left blank which were intended for this answer. The effect of not answering questions was recently considered in *Security Mutual Ins. Co.* v. *Berry,* 81 Ark. 92. But beyond this question was the question of the warranty. There was some testimony that the above statement in regard to the health of Mr. Beck was true. His wife testified that for the seventeen years of their married life he had had no sickness whatever until a short time before he was killed, when he was sick and called in a doctor. This was after the policy was issued. On the other hand, there was some testimony tending to prove that he had been ill, and that his sickness had been of such a nature that it might have affected his risk as a subject of insurance. Where the matter inquired of would affect the question of the assumption by the company of the risk, then the warranty is material, notwithstanding the death may have been from the accident or other cause totally disconnected with the question inquired of. It goes in such instance to the validity of the contract itself. The effect of these warranties has been fully considered in the cases of *Providence Life Assurance Society* v. *Reutlinger,* 58 Ark. 528; *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295; *Mutual Reserve, etc., Assn.* v. *Cotter,* 72 Ark. 620.

There was a question of fact in this case which should have gone to the jury, and the court erred in giving a peremptory instruction.

Reversed and remanded.

ON REHEARING.

Opinion delivered October 7, 1907.

HILL, C. J. Appellant insists, in motion for rehearing, that the judgment of the court should have been for a dismissal instead of remanding for a new trial, because it alleges there was undisputed evidence of a breach of a warranty contained in the sixth question and answer.

On the trial of the case in the lower court, there was a peremptory direction to find for the plaintiff, and there were two grounds for a reversal presented here; one the ground

mentioned in the opinion, and the other ground the one now urged in the motion for rehearing.

For reasons stated in the opinion, the direction for a peremptory verdict was error. That is as far as the court went in disposing of the appeal, and was as far as it was necessary or proper for the court to go. It is true that where there is an affirmative showing that there can be no recovery, and a new trial would only protract litigation and occupy the time of the courts and increase costs, then it is the duty of the court to dismiss the cause, as was well pointed out by Mr. Justice HEMINGWAY in *Pennington* v. *Underwood*, 56 Ark. 53. The ordinary rule of practice on reversal is to remand common-law cases for new trial unless there are exceptional reasons, as above indicated, why there should be a dismissal. The court does not see that this case belongs to that exceptional class. While it appears from the application in the transcript that the sixth question was answered by the assured, and it also appears from the testimony that it was not truly answered, yet the issue of fact whether or not there was a breach of warranty in regard to it, like the other issue disposed of in the opinion, has not been tried by the lower court, as it refused to go into a trial of these issues, erroneously holding that no defense was offered, whereas the defenses offered should have been tried, and that is what is now directed. That means, tried first by the lower court as to the sufficiency of the evidence to go to the jury; and, if the court should find it sufficient to go to the jury, then by the jury to find the truth where there is a conflict, or where there may be different conclusions drawn from undisputed evidence.

There should be a trial of the real issues in the circuit court before this court should exercise its power of dismissal. This is especially true in this case, where the testimony on this trial does not show that other evidence raising proper issues of fact may not be adduced not inconsistent with the facts now in evidence.

Motion for rehearing is therefore denied.

WILLIAMS v. RISOR.

Opinion delivered July 22, 1907.

1. LACHES—UNREASONABLE DELAY.—Where the title to land was taken by a son and held by him for twenty-five or thirty years, and after his death his mother claimed it as his heir and had dower in it assigned to his widow, it is too late after the mother's death for her heirs to claim that the land was purchased by the son with the mother's means and as her trustee. (Page 65.)
2. INJUNCTION—PROBATE ALLOWANCE.—A probate allowance will not, in the absence of proof that it was obtained by fraud, accident or mistake, be set aside by a court of equity on the ground that the claim was unjust, or that it was barred by the statute of limitations. (Page 65.)
3. SAME—PROBATE ALLOWANCE.—A probate allowance will not be enjoined upon the ground that the affidavit which accompanied the account sued on was not authenticated in the manner required by the statute. (Page 66.)

Appeal from Ashley Chancery Court; *G. P. George,* Special Judge; reversed.

STATEMENT BY THE COURT.

In November, 1900, A. H. Stewart, a resident of Ashley County, died leaving real and personal property in that county. He left surviving him his widow, Amanda Stewart, and his mother, Jane Stewart, a sister, Mrs. R. J. Risor, and certain nephews and nieces.

In 1901 W. T. Cone was appointed administrator, and took charge of the estate of A. H. Stewart. Afterwards Miss Mollie Williams, a niece of the wife of Stewart, probated a claim against the estate for $2,405.37. Afterwards the administrator made a report to the probate court, showing that the personal assets in his hands were insufficient to pay the debts of the estate, and procured an order of the probate court for the sale of certain lands of the estate to pay the debts.

Before the lands were sold, Mrs. R. J. Risor, who was a sister of A. H. Stewart, and who claimed the land as heir of her mother, Mrs. Jane Stewart, who had died after the death of A. H. Stewart, and also claimed them under the will of her mother, Jane Stewart, brought this action in equity to enjoin

the sale of the land. She alleged in her complaint that the account of Mollie Williams against the estate was at the time it was presented barred by statute of limitations, that the allowance of the claim was the result of a fraudulent collusion between Miss Williams and W. T. Cone, the administrator of A. H. Stewart.

The administrator and Miss Stewart filed answers denying the material allegations of the complaint. On the hearing the special chancellor before whom the case was heard found that the account of Miss Williams was, except $346.92, barred by the statute of limitations before the death of A. H. Stewart, and that it was the duty of the administrator to have pleaded the statute. He further found that the administrator had in his hands personal assets of the estate sufficient to pay all the debts of the estate. He therefore entered a judgment making the temporary injunction against the sale of the land perpetual, directing the administrator to pay Miss Williams the amount of her claim not barred by the statute, which, with interest, amounted to $560.56, and declared that the remainder of her claim was barred by the statute of limitations, and not a just claim against the estate of A. H. Stewart, and he directed that a copy of the decree be certified to the probate court for further proceedings in the settlement of the estate.

The defendants appealed.

Robt. E. Craig, for appellant.

1. It is in proof that Jane Stewart, in her lifetime, by three separate suits claimed, and recognized, her own interest in the lands as being that of an heir-at-law of A. H. Stewart, and that she had dower set apart to his widow. Jane Stewart and her privies were bound by these proceedings.

2. The administrator is under no legal duty to plead the statute of limitations, nor is it a fraud for him to fail to do so, if the claim, and his knowledge of the facts concerning it, are such as to warrant a conclusion on his part that the deceased, had he lived, would not have pleaded the statute. 6 Ark. 514; 13 Ark. 512; 20 Ark. 308; *Id.* 83; 22 Ark. 302; 50 Ark. 328; 68 Ark. 495. The only ground upon which the chancery court

would be authorized to set aside the judgment of the probate court in this case would be fraud in its procurement. 73 Ark. 444.

3. An administrator's settlements in the probate court are conclusive, until impeached in chancery upon allegation and proof of fraud, and here no fraud is shown.

Geo. W. Norman and *Vaughan & Vaughan,* for appellee.

1. The verification of appellant Williams's claim, viz., "that the above account is correct and no part of it has been paid," is not a compliance with the statute. Kirby's Dig. § § 114, 115; 66 Ark. 327; 48 Ark. 360; 65 Ark. 1-6. And the administrator should have objected to it for want of proper affidavit. 14 Ark. 245. A proper affidavit or authentication is a jurisdictional prerequisite. 18 Cyc. 485 and note 4; *Id.* 486 and note 5. Defective authentication may be taken advantage of at any time, and cannot be amended. 30 Ark. 756. In equity fraud may be inferred from the circumstances. 33 Ark. 425; 13 Ark. 507.

2. Where the appellant has not abstracted the evidence, this court will not explore the record in order to determine whether there was sufficient evidence to sustain the findings and decree of the chancellor. 78 Ark. 377; 79 Ark. 86; 102 S. W. 371. And his findings will not be reversed unless clearly contrary to the weight of the evidence. 67 Ark. 200; *Id.* 399; *Id.* 531; 70 Ark. 136; *Id.* 512; 71 Ark. 605; 72 Ark. 67; 73 Ark. 489; 74 Ark. 478; 75 Ark. 52; 77 Ark. 305; 78 Ark. 275.

3. An administrator is a trustee for all parties, creditors and heirs, interested in an estate, and it is his duty to protect the estate. 39 Ark. 577; 7 Ark. 520; 5 Ark. 367; 78 Ark. 111. And where a claim is barred by the statute of limitations, it is his duty to plead the statute. 13 Ark. 507; 20 Ark. 79. See also 11 Am. & Eng. Enc. of L. 920, note 2; *Id.* 921, note 2; *Id.* 921, par. 3; 18 Cyc. 422, par. 18; *Id.* 423, notes 6 and 7; *Id.* 424 (b) and note 12; *Id.* 425-6; 8 Am. Rep. 605; 38 *Id.* 15, *et seq.*; 65 Am. Dec. 118, 120; 111 N. Y. 204; 146 N. Y. 137; 2 Woerner on Ex. & Adm. § 401; *Id.* 843-845.

4. The administration upon this estate commenced in 1901, yet the administrator has never filed a settlement. Kirby's Digest, § § 133, 134. He has collected for four years from $500 to $600 worth of cotton and corn from the estate, yet he has filed only one inventory since the administration began. Neither has he filed additional appraisements. Kirby's Digest, § § 59 and 66. He has also violated the statute in appropriating money belonging to the estate to the payment of the claim of Cone & Company, without first presenting the claim to the probate court for allowance. *Id.* § 109.

RIDDICK, J., (after stating the facts.) This is an appeal by the administrator of the estate of A. H. Stewart and Mollie Williams, a creditor of that estate, from a judgment of the chancery court of Ashley County declaring that a judgment obtained by Miss Williams against the estate in the probate court was invalid and void as to the greater part of it for the reason that most of the debt on which it was based was barred by the statute of limitations before the death of Stewart, and holding that the administrator had assets in his hands sufficient to pay the valid debts of the estate without the sale of the lands thereof, and enjoining him from selling such lands as he had been ordered to do by the probate court.

The facts are, briefly, as follows: A. H. Stewart, a resident of Ashley County, died in November, 1900, owning certain real and personal property in that county. He left no direct descendants. His wife and mother, Mrs. Jane Stewart, have died since his death. After his death W. T. Cone was appointed administrator of his estate. Thereupon Miss Mollie Williams, a niece of the wife of Stewart, presented a claim against the estate for money loaned to Stewart at various times and for household services performed for him and his family during his life under an agreement by which he was to pay therefor the sum of $100 per annum in addition to board. This account commenced in 1885, and showed on the face of it that most of it was barred by the statute of limitations at the time it was presented. The administrator examined and allowed the account, which, with interest, amounted to over $2,400, and the same was afterwards adjudged by the probate court to be a valid claim

against the estate of Stewart and classed in the fourth class of claims against his estate.

Afterwards the administrator obtained an order for the sale of certain lands belonging to the estate to pay the debts of the estate, the principal, if not the only, probated debt being the one presented by Miss Williams. Thereupon Mrs. M. J. Risor, a sister of Stewart, claiming to own the land as an heir and under the will of his mother, Jane Stewart, who died after the death of Stewart, brought a suit in equity and obtained this decree against the administrator and Miss Williams enjoining the sale of the land and directing the administrator to pay only a small part of the claim of Miss Williams.

There was some evidence taken by the plaintiff to show that the land in controversy was purchased by A. H. Stewart with money furnished to him by his mother to purchase land for her, but that he took the title in his own name. The intention was to show that the equitable title to this land was in Mrs. Jane Stewart. But this land was purchased some twenty-five or thirty years before the death of Stewart or his mother, Mrs. Jane Stewart, and she made no claim to it in his lifetime. After the death of her son, Mrs. Jane Stewart claimed the land as his heir, and had dower assigned to his widow out of the land. These things show that she regarded the land as belonging to the estate of her son, and it is too late now, when both of these parties are dead and after such a lapse of time, for her heirs to question the matter.

We have read the evidence as found in the transcript, and we see nothing to show any fraud on the part of the administrator. The chancellor based his decree on the fact that the account presented by Miss Williams was as to most of the items therein barred by statute of limitations. Our statute does not expressly require that an administrator should plead the statute of limitations against claims which he knows are barred by lapse of time. But we may concede that it was the duty of the administrator to protect the estate against stale claims which were barred by the statute before the death of Stewart, and that he should have pleaded the statute of limitations in this case. It does not however follow that, because he failed to

plead the statute, the judgment of the probate court allowing the claim of plaintiff can be enjoined as to so much of the claim as was barred by the statute. The probate court had jurisdiction to hear and determine the question as to whether the account presented by Miss Williams was a valid claim against the estate. Its judgment in her favor cannot be overturned by showing that the court erred in deciding in her favor, for that should have been corrected by an appeal from the judgment of the probate court. In order to overturn that judgment by a proceeding in the chancery court, it must be shown, not only that there was fraud in the original cause of action upon which the judgment of the probate court was based, but that the judgment of the probate court allowing the claim of Miss Williams was obtained by fraud. It is not enough to show that the claim was barred by the statute of limitations. For the judgment of the probate court will not, in the absence of proof that it was obtained by fraud, accident or mistake, be set aside by a court of equity on the ground that the claim was unjust, or that it was barred by the statute of limitations, and in our opinion no fraud was shown. *Dyer* v. *Jacoway,* 50 Ark. 217; *James* v. *Gibson,* 73 Ark. 440-444.

Again, it is said that the account of Miss Williams was not, at the time she presented it for allowance, authenticated as required by statute. The affidavit of Miss Williams attached to the account is in the following words: "The above account is correct, and no part thereof has been paid." The statute requires that the affidavit, when made by the claimant, shall state "that nothing has been paid or delivered towards the satisfaction of the demand except what is credited thereon, and that the sum demanded, naming it, is justly due." Kirby's Digest, § 114. It will be seen that the affidavit of Miss Williams does not, strictly speaking, comply with the statute, though it does state that the account is correct, and that no part thereof has been paid. But that is a matter of no moment now, for this is not an appeal from the judgment of the probate court, and errors and irregularities of that kind in the proceedings before the probate court cannot be questioned by a proceeding in equity to enjoin the judgment of the probate court. *McMorrin* v. *Overholt,* 14 Ark. 244; *Alter* v. *Kinsworthy,* 30 Ark. 756.

In conclusion, we are of the opinion that the facts do not justify the interference of the chancery court, or show that the plaintiff is entitled to any relief in that court. The administration is still pending, and the probate court has ample power to compel the administrator to account for any funds or assets of the estate coming to his hands and for which he has not accounted, and this should be done. *Jacoway* v. *Hall,* 67 Ark. 340.

Judgment reversed and cause remanded with an order to dismiss the complaint of plaintiff for want of equity.

WILHITE v. STATE.

Opinion delivered July 8, 1907.

1. SEDUCTION—CHASTITY—BURDEN OF PROOF.—In a prosecution for seduction it is unnecessary for the State, in order to make out a case, to prove the previous chastity of the prosecutrix, though it was alleged in the indictment. (Page 69.)
2. SAME—CORROBORATION.—Where the defendant admits the promise of marriage and the sexual intercourse, no other corroboration of the prosecutrix is required under Kirby's Digest, § 2043. (Page 70.)
3. INSTRUCTIONS—ISSUES.—It is the duty of the trial court to instruct the jury upon the law governing the matters in issue, and to eliminate all matters which have been admitted and which are established beyond dispute, thus drawing the attention of the jury to the real issue of the case. (Page 70.)
4. SAME—BURDEN OF PROOF AS TO CHASTITY.—Although the burden is on the defendant, in a seduction case, to prove the unchastity of the prosecutrix by a preponderance of the evidence, yet, if upon the whole case there is a reasonable doubt of defendant's guilt, he is entitled to the benefit of such doubt. (Page 71.)
5. SEDUCTION—EVIDENCE.—Where, on a trial for seduction, accused admitted the promise of marriage and the sexual intercourse with the prosecutrix, and relied upon the defense that the prosecutrix was unchaste, it was not error to exclude a letter from her to him, written after she had surrendered her virtue to him, which indicated that her thoughts were bent upon sexual intercourse with him (Page 71.)

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

Hal L. Norwood, Pole McPhetrige and *Vaughan & Vaughan,* for appellant.

1. Having alleged that the prosecuting witness "was of previous chaste character," it devolved upon the State to prove it. 1 Bishop, Crim. Proc.; 2 Ed. § § 127-8. This allegation can not be rejected as surplusage. *Id.* § § 482, 485-6. See also 9 Ark. 193; 10 Ark. 259; 22 Ark. 251; 30 Ark. 131; 36 Ark. 168; 62 Ark. 459; 66 Ark. 120; 17 S. W. 725; Roscoe's Crim. Ev. 101-2; 3 Sumner, 12; 15 Me. 476; 30 Me. 29; 67 Me. 567; 19 N. H. 133; 34 N. H. 529; 11 Mass. 93; 20 Pick. 356; 126 Mass. 46.

2. The court erred in refusing to give instruction No. 1 requested by defendant. 71 Ark. 399.

3. It was error to charge the jury that, "the defendant having admitted the promise of marriage and the intercourse, no other corroberation of the prosecuting witness was necessary to establish these facts." Elliott on Ev. 3150; 132 Ind. 219. It was improper for the court to charge the jury upon the facts at all, and especially improper to single out any particular facts. 73 Ark. 569; *Id.* 148; 55 Ark. 247; 58 Ark. 108; 74 Ark. 563; 75 Ark. 76; 49 Ark. 439; 37 Ark 333; 51 Ark. 155.

4. It was error to exclude the letter of 8-12-03. Both letters should have been shown to the jury, not only to enable them to determine whether prosecutrix had written them, but also to throw light on the question of her chastity. 65 Ark. 476; 32 Ark. 337; 88 S. W. 242; 1 Thompson, Trials, § 1135, notes 3 and 4; 45 Mo. 302; 1 Greenleaf, Ev. § 578. It was additional error to exclude the testimony of expert witnesses to the effect that both letters were written by the same person.

Wm. F. Kirby, Attorney General, and *Dan'l Taylor,* for appellee.

1. In case of seduction it is not necessary to allege the previous chaste character of the prosecutrix; and if the indictment does so allege, it throws no burden on the State to prove it. Such allegation is mere surplusage, and the burden remains with the defendant, if he pleads her previous unchastity as a defense.

to prove it. 73 Ark. 139; 25 Am. & Eng. Enc. of L. 240; 77 Ark. 23; 40 Ark. 482; 73 Ala. 527; 48 Ia. 671; 27 Mich. 134; 1 Parker, Cr. Rep. 453; 10 Enc. Pl. & Pr. 530; 18 Ark. 540; 10 Ark. 318; 36 Ark. 74.

2. The court properly charged the jury on the question of corroboration. 77 Ark. 23; *Id.* 468; *Id.* 16.

3. The letter of 8-12-03 was properly excluded, except for the purpose of comparison with the letter of later date which prosecutrix had denied writing. It was admitted for the purpose, but it was immaterial to the issue, and could not, therefore, be proved and then used to impeach her chastity.

4. The first instruction requested by appellant was properly refused. 25 Am. & Eng. Enc. of L. 233; 40 Ark. 482; 73 Ala. 527; 18 Ia. 372; 78 *Id.* 494; 33 Mich. 112; 4 Minn. 325; Bishop, Stat. Cr. § 639.

5. The court's instruction with reference to the defendant's right to testify, etc., has met the sanction of this court. 62 Ark. 543; 61 Ark. 102; 58 Ark. 362. Besides, if the defendant desired a general charge as to credibility of witness, he should have asked for it, and, in the absence of such request, a failure to charge thereon was not error. 75 Ark. 373; 77 Ark. 455.

HILL, C. J. Pool Wilhite was indicted for seduction, and was convicted and sentenced to pay a fine of one dollar and to serve eighteen months in the penitentiary, and has appealed.

1. The indictment alleges in apt terms the seduction of Cordelia Bernard, and that she was of previous chaste character. It is admitted that it is not necessary to allege that she was of previous chaste character, yet the State, having made this allegation, it is insisted, must prove it. The necessity of allegation and proof of previous chaste character in seductions was considered in *Caldwell* v. *State,* 73 Ark. 139, and it was therein demonstrated that it is not necessary either to charge or prove that the seduced female was of previous chaste character, in order for the State to make out a case. The Code provides that "neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment." Kirby's Digest, § 2240. The fact that the prosecuting attorney has incorporated into the indictment a presumption of law does not render it necessary to prove the presumption. Chastity, like

sanity, is presumed; and it is no more necessary to allege chastity in seduction than it is to allege sanity in any indictment. In no event is it ever necessary for the State to prove either of these matters until evidence to the contrary is introduced by the defendant.

2. The defendant on the witness stand admitted the promise of marriage and the sexual intercourse with the prosecuting witness, and said that he had made the promise of marriage in good faith, and intended to fulfill it, but that he had not done so by reason of becoming convinced of the want of chastity of his affianced. The court gave this instruction: "The defendant having admitted the promise of marriage and the sexual intercourse, no other corroboration of the witness, Cordelia Bernard, is necessary to establish these facts;" and it is insisted that this is erroneous. It is the right and duty of the trial court to instruct the jury upon the law governing the matters in issue, and to eliminate all matters which have been admitted and which are established beyond dispute, thus drawing the attention of the jury to the real issue of the case. The law requires corroboration of the female as to the promise of marriage and the sexual intercourse. Kirby's Digest, § 2043; *Rucker* v. *State,* 77 Ark. 23. This is a safeguard of the defendant. If he admits essential facts which require corroboration, the reason of the rule is more than satisfied.

The only disputed matter, and hence the real and only issue of fact in this case, was the charge of the defendant that Cordelia Bernard was not of chaste character, and that he was thereby excused from fulfilling his marriage engagement with her. Hence the court was right in narrowing the case to the only issue in it.

3. The court refused to give this instruction: "You are instructed that, before you can convict the defendant, you must believe beyond a reasonable doubt that no one has ever had sexual intercourse with her before the defendant did; and if you have any doubt upon this point, you will resolve the doubt in favor of the defendant, and acquit him," but gave the following: "The prosecuting witness is presumed to have been virtuous, but this presumption can be overcome by evidence; and if the evidence introduced by the defendant raises in your minds a reasonable doubt as to whether or not the prosecuting witness was chaste and virtuous previous to the time the defendant had intercourse

with her, you will find the defendant not guilty." This covers every point in the refused instruction. For this reason there could be no error in refusing the former instruction.

However, there is an error in the former instruction which rendered it proper for the court to refuse it. The jury are therein told that, before they could convict, they must believe beyond a reasonable doubt that no one had ever had sexual intercourse with the prosecuting witness before the defendant. In *Caldwell* v. *State,* 73 Ark. 139, the court, referring to the allegation of previous chaste character, said: "And so this statute assumes that women are chaste, and imposes on the defendant charged with seduction the burden of showing to the contrary." See *Rucker* v. *State,* 77 Ark. 23. This want of chastity is purely a defensive matter, and, like other defensive matter, the burden is upon the defendant to prove it by a preponderance of the evidence. This principle places the burden of proof of the particular matter relied upon as a defense upon the defendant; but, if there is a reasonable doubt of defendant's guilt upon the whole case, then he is entitled to the benefit of that doubt. It is, therefore, not proper to instruct that the jury must be convinced beyond a reasonable doubt of the chastity of the prosecuting witness; but the requirement that it rests on the defendant to establish by a preponderance of the evidence her want of chastity before his defense is made out should be explained, and then such explanation should be qualified with the further instruction that if the evidence on this issue, taken together with the other evidence upon the other issues, leave the jury in reasonable doubt of defendant's guilt, then he is entitled to an acquittal. *Caldwell* v. *State,* 69 Ark. 322; *Rayburn* v. *State,* 69 Ark. 177; *Casat* v. *State,* 40 Ark. 523; *Bolling* v. *State,* 54 Ark. 588; *Ware* v. *State,* 59 Ark. 379; *Cogburn* v. *State,* 76 Ark. 110.

The instruction given is more favorable to the defendant than he is entitled to. It ignores the burden being upon the defendant, and only renders it necessary for a doubt to be raised by the defendant's evidence, instead of requiring the fact relied upon to be proved by a preponderance of the evidence before his defense is established. See Clark on Criminal Law, 2d Ed. pp. 68-9.

4. The court refused to allow the defendant to introduce a letter in evidence which he testified was written to him by the

prosecuting witness. She admitted writing part of the letter, but denied that certain parts of it were written by her. There was sufficient testimony of expert witnesses, familiar with handwriting, who testified that this disputed page was written by the same person who wrote the part that she admitted having written to have warranted its admission in evidence, if the letter was otherwise competent. The effect of this disputed letter would be to show that the girl was of a lascivious turn of mind, and indicated that her thought were bent upon sexual intercourse with the appellant. If this letter was written prior to appellant's having intercourse with her, clearly he would be entitled to it as evidence tending to prove his charge that she was not a woman of personal chastity at the time of her seduction. It is difficult to tell from her testimony when she surrendered her person to the appellant. She seems to have little idea of time, and her testimony is quite contradictory as to the beginning of this intercourse. But, when the testimony of the appellant is examined, it is found that he has made definite that which she has left uncertain. There is another letter which was introduced in evidence which he says he received from her, and it is dated on the 24th of March, 1904; and he says, and repeats it several times, that he had been having intercourse with her for a year before he received this letter. The disputed letter is dated the 12th of August, 1903. Therefore, she had been submitting herself to his embraces for four or five months prior to the date of the disputed letter. Having surrendered her virtue to him under a promise of marriage, and repeatedly submitted to intercourse with him for that period of time, it lies not in his mouth to say that her thoughts lasciviously inclined towards him, and that is the utmost that this letter proved. Therefore, it was not error for the court to have excluded this letter.

Other matters have been pressed in brief and in oral argument, and have been considered by the court. None of them are considered of sufficient moment to have amounted to prejudicial error.

Judgment affirmed.

MATHEWS v. STATE.

84 73
86 104
186 322

Opinion delivered October 7, 1907.

1. APPEAL—FAILURE TO BRING UP ALL THE EVIDENCE.—A statement in a bill of exceptions that it does not contain all the evidence precludes the appellant court from inquiring into the sufficiency of the evidence to sustain the verdict of the jury. (Page 73.)
2. SAME—EXCEPTION IN GROSS TO SEVERAL PRAYERS FOR INSTRUCTIONS.—An exception in gross to the court's failure to give seventeen instructions requested will not be considered on appeal if any one of the instructions asked were bad. (Page 73.)

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

June P. Clayton and *Robert J. White,* for appellant.

William F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

BATTLE, J. Fred Mathews was indicted by the grand jury of Franklin County, at the February (1907) term of the circuit court of that county, for the Ozark District, for seduction. He pleaded not guilty, was tried and convicted, and appealed to this court.

In the bill of exceptions in this case, after the statement of the testimony of witnesses, it is said: "This is *not* all the evidence introduced in the case. The evidence introduced was sufficient to support the verdict of the jury." We are precluded by this statement from inquiring into the sufficiency of the evidence to sustain the verdict of the jury; all the evidence adduced at the trial not being before this court.

The appellee, by its Attorney General, confesses that the court erred in refusing to instruct the jury, at the request of appellant, as follows: "If you find from the evidence in this case that the sexual intercourse was had prior to any promise of marriage, if you find a promise of marriage was ever made, then the defendant is not guilty, and you should acquit." This request and sixteen others for instructions were made by the appellant, and were refused by the court, at the same time, and he excepted to the refusal collectively. As one or more of the requests and the instructions thereby asked were bad, none of them can lawfully

be considered on appeal. *Young* v. *Stevenson,* 75 Ark. 181; *Kansas City Sou. Ry. Co.* v. *Morris,* 80 Ark. 528, 535.

Judgment affirmed.

84	74
186	335

84	74
90	412
90	480
90	566

WESTERN COAL & MINING COMPANY *v.* BURNS.

Opinion delivered July 22, 1907.

1. APPEAL—CONCLUSIVENESS OF VERDICT.—A verdict will not be set aside on appeal merely because it is against the preponderance of the testimony. (Page 77.)
2. MASTER AND SERVANT—DEFECTIVE APPLIANCES—CONTRIBUTORY NEGLIGENCE.—Where plaintiff, an inexperienced youth of fourteen years, was injured by reason of a defect in the appliances furnished by his master, it was a question for the jury to determine whether the danger therefrom was so obvious that plaintiff should be charged with contributory negligence in proceeding with his work with the defective appliances. (Page 78.)
3. SAME—ASSUMPTION OF RISKS.—In determining whether an inexperienced servant fourteen years old appreciated the danger from proceeding in his work with defective appliances, and whether he assumed such risk, the jury might consider his youth and inexperience. (Page 78.)
4. SAME—PROMISE OF MASTER TO REPAIR DEFECTS.—Where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance or within any period which would not preclude all reasonable expectation that the promise might be kept. (Page 79.)
5. INSTRUCTION—SHOULD BE SPECIFIC.—Where the defense to a personal damage suit was that plaintiff was guilty of specific acts of contributory negligence, the court, when requested, should submit the question of contributory negligence specifically, although a general instruction submitting the question had also been given. (Page 80.)
6. INSTRUCTION—FAILURE TO ASK CORRECT PRAYER.—A party cannot complain of the failure of the court to instruct specifically upon a certain point in the case where the court has given a correct instruction in general terms on the same subject, if he has not asked for a correct specific instruction. (Page 80.)
7. DAMAGES—WHEN NOT EXCESSIVE.—The plaintiff in a personal injury suit was painfully injured; the flesh and muscles were torn from the

bone of one of his legs; his back and hips were bruised, and he was on crutches for several months; there was evidence of a permanent injury. *Held,* That a verdict of $1,500 damages was not excessive. (Page 81.)

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

Ira D. Oglesby for appellant.

1. The court should have instructed a verdict for the defendant, because appellee Luther Burns's own testimony fails to establish the acts complained of, is uncorroborated in this respect, and is, moreover, contradictory and contrary to physical facts; it does not prove any negligence on the part of appellant, and shows that he was at a place where he should not have been. 79 Ark. 608; 3 Am. St. Rep. 632; 34 Ia. 153; 15 S. W. 141.

2. It is also clear from his own testimony, if the defects complained of existed, that Burns knew of the defects, was thoroughly acquainted with every part of the mechanism and appliances, understood and appreciated the danger. He must be held to have assumed the risk, and to have been guilty of contributory negligence. 126 Fed. 495, 511, 513.

Sam R. Chew, for appellees.

1. Where the master has promised to repair a defect, the servant may rely upon this promise, and may continue in the work, and will not be held to have assumed the risk of injury caused by such defects within such period of time as would be reasonably allowed for its performance, or within any period of time which would not preclude all reasonable expectation that the promise might be kept. 35 Ark. 602; 54 Ark. 289; 1 Shearman & Redfield on Neg. § 215; 49 Fed. 723; 1 C. C. A. 428; 44 Ill. App. 426; 43 Ia. 362; 14 Am. R. Rep. 575; 85 Mich. 519; 26 N. W. 1086; 82 Ia. 148; 49 N. Y. 521; 43 Ia. 682; 78 N. C. 300; 76 Pa. St. 393; 15 Am. & Eng. R. Cas. 218.

2. The servant will not be held to have assumed the risk of the master's negligence in the discharge of any of the duties he owes to the servant. Before the servant will be held to have assumed the risk, it must be shown that he knew of the master's negligence and realized the danger. 77 Ark. 367; *Id.* 458.

McCULLOCH, J. This appeal involves judgments for the recovery of damages in two actions against appellant, Western Coal & Mining Company, one instituted by Luther Burns, a minor, to recover for physical and mental suffering and permanent physical injury resulting from alleged negligence of appellant, and the other instituted by Julia Burns, his mother, to recover for loss of his services during disability, expenses of medical attention, nurse hire, etc., resulting from said alleged negligence. The cases were tried together, and in the first case the judgment was for the sum of $1500, and in the second the judgment was for $300. Luther Burns was, at the time he received the injuries complained of, a boy fourteen years old, and was employed as a trapper in appellant's coal mine. His duties were to watch the switch on the pit track and to throw the switch for the motor cars passing along the tracks.

The specific acts of negligence set forth in the complaint were "that the defendant allowed the taps or nuts on the bolts on and the switch in said track to become loose; the nuts to fall off of the bolts, and the threads on said bolts to become so worn that they would not hold and retain the nuts or taps on same, so as to hold said switch in a secure and reasonably safe condition; that the latch that held the rails or should have held the rails in said switch in proper position became so loose that it would not remain in proper position, and allowed and permitted the points of the rails in said switch to become so separated that the said motor and cars, in passing over same, would split and mount said rails and become derailed." It is alleged that by reason of these defects the motor and cars, in passing over the switch, left the track and struck and injured Burns.

The switch in question was situated at a point where the pit track connects with the main track and with a track running off into another passageway or entry called the 7th north entry, the switch being placed there so as to shift the motor and cars from the pit track to one of these tracks when desired. The trapper stood at this switch and set it for the motor and cars to go straight on down the main track or into the 7th north entry according to direction. There was a door across the north entry track which was closed when the accident occurred, and about ten feet beyond this door an air course or chamber ran off at right angles from the entry. Burns testified that his instructions

were, when he set the switch for cars to pass, to go into this air course and stand until the cars passed. On this occasion a motor with cars attached approached the switch coming down the pit track destined to continue down the main track. Burns testified that he set the switch for the cars to go on down the main track and signalled the motorman accordingly; that, after setting the switch, he went through the door across the north entry and stationed himself back up in the air course, as he was instructed to do. The cars, instead of going straight on down the main track, turned at the switch into the north entry, went through the closed door across the track and in some way struck Burns and injured him. He was found under the motor badly injured. The door was shattered, and some of the cars were piled up on the motor, but the motor was not derailed. Burns testified that, while standing in a stooping position in the air course, he was struck by a board or timber from the shattered door and knocked upon the track, where he was struck and run over by the motor. The principal controversy of fact is whether Burns negligently set the switch for the north entry track, instead of the main track, as he should have done, thereby turning the cars into the north entry, or whether the alleged defective condition of the switch caused it to fail to connect the rails so as to allow the cars to pass on down the main track and to cause them to turn into the north entry.

There was a conflict in the testimony on this point, and, it being sufficient to sustain the finding of the jury, we must treat the question as settled that Burns set the switch properly, and that the defect in the switch caused the cars to turn into the north entry. There was also testimony to the effect that Burns notified appellant's pit boss, who was a vice-principal, of the defective condition of the switch, and that the latter promised to have it repaired, but failed to do so.

Learned counsel for appellant contends with much force that the evidence shows conclusively that Burns could not have been back in the air course where he should have stood after setting the switch, but must have been out on the track or near it when he was injured. If this is found to be true, it precludes recovery, as the employee is bound to obey rules made for his safety and protection, and is guilty of negligence when he fails to do so. It does appear highly improbable that he was back

in the air course, but he swears positively that he was there, and that he was struck on the head by a piece of plank and knocked into the entry where the motor struck him. He is contradicted by other witnesses who testified concerning his physical injury, and who failed to find any wound on his head. We can not say, however, that it was impossible for the injury to have occurred in the way in which Burns swears that it did, and we should not, when the jury have credited his positive testimony, reject it because it is contradicted by circumstances and seems to us, according to the preponderance of the testimony, to be untrue. *Waters-Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, and cases cited.

It is argued that, even if the alleged defects in the switch existed, and the pit boss was informed of their existence and promised to repair them, yet it must be held, as a matter of law, that Burns by proceeding with his work with the defective appliances assumed the risk of injury from such defects.

The court gave the following instruction on this subject over appellant's objection:

"7. If there were defects in the appliances as set forth in the complaint, and the boy, Burns, knew thereof and complained to the pit boss about them, and the boss ordered him to continue his work, saying that he would repair the defect when he got ready, and thereupon the boy, Burns, continued in his work and was injured by reason of such defects, he is not barred from a recovery thereby, if otherwise entitled to recover, if an ordinary boy of his age, experience and intelligence would have continued in the service under the same circumstances."

Appellant asked for the following instruction, which the court, over objection, modified by adding the italicized clause:

"8. If the evidence shows that any bolt connected with the switch was out of repair, and that this caused the accident, yet, if you further believe from the evidence that Burns, for several days prior to the accident, knew of this defect, and knew and appreciated the danger of working about the switch while in this condition, and, knowing of the defects and appreciating the danger, continued to work at the switch, he assumed the risk of injury by reason of such defect, and can not recover. *But if he knew of the defect aforesaid, if it existed, but by reason of his youth or from any other cause did not appreciate the danger therefrom by continuing to work, and so con-*

tinued to work, then he did not assume such risk and hazard, and is not thereby barred from recovery by reason of having assumed the risk himself."

These instructions are not incorrect statements of the law applicable to the facts of this case. It was a question for the jury to determine whether or not the danger was so obvious that Burns should be charged with contributory negligence in proceeding with his work with the defective appliances, and in reaching a conclusion on this question his age, experience and degree of intelligence were proper matters for consideration, when it is shown that he was an inexperienced youth. It was also proper to tell the jury that, in determining whether or not Burns assumed the risk of danger in proceeding in his work with the defective appliances, and in determining whether or not he appreciated the danger in so continuing the work, they should consider his youth and other causes for not appreciating the danger.

It must be remembered that these instructions were given in a case where the injured employee was a boy fourteen years of age and necessarily below the age of mature discretion. There was evidence to the effect that he notified the pit boss of the defect, and was told to go ahead with his work, and that the defects would be repaired in due time. It would establish an intolerable condition of the law to hold that the youth or inexperience of an employee should not be considered in determining whether or not he had assumed the risk of a danger caused by the negligent act of the employer, for it is of the very essence of the doctrine of assumed risk that the employee must have realized the danger to which he was exposed by the negligent act of his employer before he can be held to have assumed the risk of it. *Choctaw, O. & G. R. Co.* v. *Jones,* 77 Ark. 367; *Southern Cot. Oil Co.* v. *Spotts,* 77 Ark. 458.

The servant has a right also to rely upon the superior knowledge of the master, and to proceed upon the assurance that it is safe to do so, and that the defects will be repaired.

The correct rule is, we think, is stated in Shearman & Redfield on Negligence (vol. 1, § 215) as follows:

"There is no longer any doubt that where a master has expressly promised to repair a defect the servant does not assume the risk of an injury caused thereby within such a period of time

after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept."

The modification to instruction number eight, just quoted, especially criticised wherein it says that if Burns "by reason of his youth *or any other cause*" did not appreciate the danger, then he would not be deemed to have assumed the risk. It is argued that the jury might have undertsood this to mean that, even if by reason of his own negligence he failed to observe and realize the danger, he would not be deemed to have assumed the risk. We do not think the language is fairly open to that construction, when we consider that the court told the jury in several other instructions that there could be no recovery if Burns was guilty of negligence which contributed to his own injury.

The court refused to give the following instruction at appellant's request:

"3. You are instructed that if the evidence shows that it was the duty of Burns, after throwing the switch, to go into the Seventh North Entry and then up into the air course, so as to be out of danger in case of accident, and that, if he had done this, he would not have been injured, you will find for the defendant."

Appellant was clearly entitled to have the question specifically submitted whether or not Burns stationed himself in the place of safety where he was instructed to go; and if a correct instruction had been asked, it would have been error to refuse it. It is true that the court gave instructions in general terms submitting the alleged contributory negligence of the plaintiff, but when asked it should have given instructions submitting the alleged specific acts of negligence. *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 134. But this instruction was not a correct one. It plainly assumed that Burns did not go into the entry where he was instructed to go, instead of leaving that question to the jury, as it was a disputed one. A party can not complain of the failure of the court to instruct on a given point in a case unless he himself asks for a correct instruction. *Allison* v. *State,* 74 Ark. 444. Especially is this true where a correct instruction on the subject in general terms has been given, and the party is asking for a specific one.

Other refused instructions are fully covered by those given

by the court, and no error is found in that respect.

Appellant contends that the damages are excessive, but we conclude that the evidence was sufficient to sustain the assessment of damages in both cases. The boy was very painfully injured. The flesh and muscles were torn from the bone on one of his legs and his back and hips were bruised. He was on crutches for several months, and there is some evidence of a permanent injury. The physician who attended him testified that at the time of the trial he still observed a defect in his ankle, and thought he would be lame all his life. We can not say that this evidence did not warrant an assessment of $1500 damages. Nor was an assessment of $300 to the mother for expenses and loss of her son's services during minority excessive.

Judgment affirmed.

MIDLAND VALLEY RAILROAD COMPANY v. HAMILTON.

84 86 | 81 365

Opinion delivered July 22, 1907.

1. WITNESSES—EXAMINATION—LEADING QUESTIONS.—Because the trial court permitted plaintiff's counsel to ask leading questions of his own witnesses will afford no ground for reversal of the judgment in plaintiff's favor unless the Supreme Court is satisfied that there was an abuse of discretion in so doing. (Page 84.)
2. CONTINUANCE—SHOWING OF DILIGENCE.—It was not error to refuse to postpone a trial for a few hours to permit appellant to secure the attendance of an absent witness where appellant made no showing of diligence in procuring his attendance, nor as to his whereabouts at the time of trial. (Page 84.)
3. INSTRUCTION—SPECIFIC OBJECTION.—If it was incorrect to instruct that carriers "must be extremely careful" not to mislead their passengers into the belief that the halting of a train is meant as an invitation to alight, a specific objection to the particular words employed was necessary in order to call the court's attention to the particular phraseology employed. (Page 85.)
4. CARRIER—NEGLIGENCE IN CALLING STATION—EVIDENCE.—Where plaintiff sued for injuries received while standing on defendant's platform, it was proper for him to prove, and to have submitted to the jury under appropriate instructions, the facts that he was invited

out by a negligently premature call of his station, and that defendant thereafter failed to warn him before suddenly moving the train. (Page 86.)

5. INSTRUCTIONS—REPETITION.—It was not error to refuse requests to charge which were fully covered by instructions given. (Page 87.)

6. SAME—DEFINITION OF COMMON TERMS.—The terms "drunk" and "sober" sufficiently define themselves. (Page 87.)

7. CARRIER—DRUNKENNESS OF PASSENGER AS CONTRIBUTORY NEGLIGENCE.—The fact that a passenger was intoxicated at the time he was injured on defendant's train was not material unless it contributed to his injury. (Page 87.)

8. TRIAL—MISCONDUCT OF JUDGE—PREJUDICE.—A verdict supported by abundant evidence and submitted to the jury upon proper instructions will not be set aside on account of improper conduct of the trial judge unless it appears that such conduct tended to prejudice the substantial rights of the appellant. (Page 87.)

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

Ira D. Oglesby, for appellant.

1. The conduct of appellee's attorney in persistently propounding leading questions to the witnesses, in the face of appellant's objections, and the remarks, attitude and manner of the trial judge toward appellant's counsel when he objected to such questions and excepted to the rulings of the court thereon, were highly prejudicial to the appellant, indicating bias on the part of the court in favor of the plaintiff and against the defendant which necessarily influenced the jury.

2. There is no evidence on which to base the court's fourth instruction that "railway carriers of passengers must be extremely careful not to mislead their passengers into the belief that the halting of the train is meant as an invitation to alight," etc. It is argumentative, misleading, conflicting, abstract. 63 Ark. 177; 77 Ark. 567; 76 Ark. 599; 65 Ark. 222; 69 Ark. 130; 70 Ark. 441; 74 Ark. 437; 70 Ark. 79.

3. The court erred in giving this instruction: "If the plaintiff could see, hear, talk and walk with a firm elastic step, then you would be justified in believing he was sober," and in giving the converse thereof. This attempt judicially to define drunkenness was a clear invasion of the province of the jury. Art. 7, § 23, Const.; 78 Ark. 88; 73 Ark. 377; 70 Ark. 130; 67 Ark. 447; 57 Ark. 441; 49 Ark. 439.

4. The trial should have been postponed in order to procure the attendance of the witness, Green, made necessary by the denials of the witness Parrott of the truth of a written statement signed by him in Green's presence. This denial could not have been foreseen, and the refusal to postpone was an abuse of discretion. The presumption is that error produces prejudice. 116 Fed. 458.

Jo Johnson and *Prentiss E. Rowe,* for appellee.

1. General objections to the admission or rejection of evidence are insufficient. They must be made specific. 74 Ark. 355. The rule in regard to asking leading questions is to be understood in a reasonable sense. 1 Greenleaf on Ev. § 434. And it is within the discretion of the trial court to permit one to ask leading questions, even of his own witnesses. 63 Ark. 120.

2. The instruction with reference to drunkenness is not erroneous. 40 Ark. 521. Neither does it invade the province of the jury, since it leaves the jury entirely free to find from the facts whether or not appellee was drunk. See also Proverbs 23: 29, 30; Job 12:25; Ps. 107:27.

3. The fourth instruction is the law. 75 Ark. 214; Hutchinson on Carriers, (2d Ed.), § 615.

4. The instructions as a whole cover every phase of the case, are fair to appellant, and state the law of the case.

McCULLOCH, J. This is an action instituted by J. L. Hamilton against the Midland Valley Railroad Company to recover damages for the loss of his arm, which was caused by his having been thrown from a moving passenger train on defendant's road. The plaintiff was a passenger on the train, and negligence of the servants of the company is alleged in prematurely calling the station to which plaintiff was destined, thereby inducing him to go out on the car platform to debark and then in causing the train to suddenly start or jerk, so that he was violently thrown to the ground with his arm under the wheels, and his arm was cut off.

The defendant denied each allegation of negligence on the part of its employees, and alleged that plaintiff's injury was caused by his own contributory negligence in being out on the platform of the car while the train was in motion, that he was

intoxicated at the time and fell off the platform while he was wrongfully attempting to set the brakes of the car.

The jury returned a verdict of $1,999.95 damages, and the defendant appealed.

The testimony was conflicting upon the issues in the case, and was sufficient to sustain the verdict. Counsel for appellant argue, as the most flagrant error in the record, the rulings of the court in permitting the plaintiff's attorney to propound leading question to his own witnesses. The record bears out the contention that this was done; but, as that was a matter resting to some extent in the discretion of the court, it affords no grounds for reversal of the judgment, unless we are satisfied that the court abused its discretion and permitted conduct of counsel in the examination of witnesses which resulted prejudicially to the interest of appellant. *Wallace* v. *Bernheim,* 63 Ark. 108; 1 Wigmore on Ev. § 770.

Mr. Wigmore states the correct rule to be as follows: "So much depends on the circumstances of each case, the demeanor of each witness, and the tenor of the preceding questions, that it would be unwise, if not impossible, to attempt in an appellate tribunal to consider each instance adequately. Furthermore, the harm in a single instance is inconsiderable and more or less speculative, and the counsel's repetition of an impropriety can be so easily controlled by the trial court, that no favor is shown in the appellate tribunals to objections based merely on the form of the question. From the beginning and continuously it has been declared that the application of the principle is to be left to the discretion of the trial court."

Error of the court is also assigned in not ordering a postponement of the trial a few hours to enable appellant to secure the attendance of an absent witness. The witness was appellant's claim agent, who had been in attendance upon the court the day before, but had left town because it was not thought by counsel for appellant that his testimony would be needed. The witness had, as such claim agent, procured the written statement of one of the witnesses to plaintiff's injury who denied on the witness stand having signed the statement, and appellant asked the court to postpone the trial a few hours in order to enable the claim agent to reach the place of trial. This request was made during the progress of the trial, after the other wit-

ness had denied having signed the statement. Counsel claimed to have been surprised at this, and asked time to procure the attendance of the claim agent as a witness to impeach the testimony of the other witness. This, too, was a matter within the sound discretion of the trial judge, and we can not say that it was abused. The trial of this case was in progress for two days, and the first witness introduced by plaintiff was the one whom the appellant attempted to impeach by proving a contradictory statement concerning the facts of the case. This witness denied having made or signed the statement, and appellant's counsel waited until noon of the following day, when the taking of testimony was concluded, before asking the court for a postponement, and then made no showing of diligence in procuring the attendance of the witness. No showing whatever was made as to the whereabouts of the witness or as to what effort had been made to procure his attendance after the necessity for having his testimony had arisen. Counsel contented himself with a statement to the court that the witness could get there in about three hours, and now asks the court to reverse the case on account of the alleged abuse of its discretion by the court in refusing to postpone the case. The assignment of error is not well taken.

The giving of the following instruction by the court is claimed to be error:

"4. Railway carriers of passengers must be extremely careful not to mislead their passengers into the belief that the halting of the train is meant as an invitation to them to alight, when it is not so intended; and if the conduct of the servants engaged in its management was such as might have reasonably produced that impression, and if you find from the testimony that the plaintiff in this case so understood it, and in the attempt to leave the coach at a place where facilities were provided for his doing so, and while in the exercise of due diligence in doing so, he was injured, the defendant would be liable."

Even if it be conceded that this instruction, in the use of the words "must be extremely careful," was incorrect, a specific objection to the particular words or terms employed was necessary in order to call the attention of the court to it. A general objection to the instruction as a whole was insufficient for that purpose. *St. Louis, I. M. & S. R. Co.* v. *Barnett,* 65 Ark.

255. There was evidence which justified the giving of an instruction on the subject, as the plaintiff and other witnesses testified that the porter came through the train calling the station, and that plaintiff, with other passengers, went out on the platform to debark when the train was started with a sudden jerk. While the sudden movement of the train was the immediate cause of the injury, it was necessary for the plaintiff to show the cause of his premature presence upon the platform of the car, and it was proper for him to prove, and to have submitted to the jury under appropriate instructions, the fact that he was invited out by a negligent, premature call of the station. Appellant also had this question submitted by an instruction given at its request telling the jury that, "in order for plaintiff to recover, the burden of proof is upon him to show by a preponderance of the evidence that, after stopping the train at what plaintiff had reason to believe was Bokoshe Station, the defendant negligently put the train in motion before plaintiff had time to depart therefrom by the exercise of ordinary diligence to do so, and that by putting the train in motion by a sudden motion or jerk he was injured." No reversible error is found in this.

Complaint is made of the refusal of the court to give certain instructions asked by appellant concerning the presence of plaintiff on the platform of the car before it arrived at the station, but we find that this question was fully and properly submitted on other instructions which were given.

Appellant requested the court to give the following instructions:

"16. The allegation of plaintiff's complaint upon which he seeks to recover is that he was injured by the gross negligence of the defendant company in calling out the station in the manner and at the time in which they did; and as to this, and upon this allegation, you are instructed that plaintiff is not entitled to recover.

"17. Another allegation is that defendant was guilty of gross negligence in failing to warn plaintiff of the danger; and upon this allegation plaintiff has failed to make out a case."

These instructions were properly refused, because they were calculated to lead the jury to believe that they should not consider the negligence of appellant's servant in prematurely call-

ing the station and in failing to warn the plaintiff before suddenly moving the train after having induced him by a premature call to go out on the platform. These were conditions which it was proper for the jury to consider as, under the circumstances of the case, his right to recover depended upon the existence of those facts. They were properly guarded from being considered sufficient grounds for recovery by other instructions given at appellant's request, particularly the following one:

"No. 9. If the jury believe from the evidence that plaintiff was not thrown from the train by a sudden starting of the train or by a sudden jerk in starting the train after it came to a stop, the jury should find for the defendant."

The refused instruction number eighteen was fully covered by the one just granted, and the refusal to give it was therefore not prejudicial error.

Instructions given by the court undertaking to define soberness on the one hand and drunkenness on the other are criticised and assigned as error. It must be confessed that these instructions, to some extent, lacked accuracy; and were of little aid to the jury in determining from the evidence whether the plaintiff was drunk or sober. In fact, it may well be doubted whether these terms are susceptible to any accurate definition for practical purposes. They sufficiently define themselves, and it would have been better to leave it to the jury, without attempt at definition, to determine what the condition of the plaintiff was in this respect. However, there was no prejudicial error in giving the instructions. The question as to plaintiff's condition on that occasion was material only in so far as it affected his conduct and contributed to his own injury. Unless his intoxication, if he was intoxicated at all, contributed to the injury, it was not material.

The court gave the following instruction at appellant's request, which properly submitted the question to the jury:

"No. 12. If the jury believe from the evidence that the plaintiff was drunk or partially so, that this condition contributed to cause the injury, plaintiff can not recover."

There was some unseemly controversy between the trial judge and counsel for appellant during the progress of the trial concerning the saving of exceptions, but it does not appear to us that any prejudicial effect could have resulted from it,

and we are unwilling to set aside a judgment supported by abundant evidence submitted to the jury upon proper instructions, unless we can see that the conduct of the judge tended to prejudice the substantial rights of the appellant in the presentation of the defense. *Tuttle* v. *State*, 83 Ark. 379.

Other rulings of the court are assigned as error, but we do not consider them of sufficient importance to discuss.

We find no error in the record which could have operated to appellant's prejudice, so the judgment is affirmed.

HILL, C. J., (dissenting.) Taking the conduct of the trial as a whole, together with the impossible instructions defining drunkenness and sobriety, I am of opinion that the appellant did not obtain a fair and impartial trial, and the judgment should be reversed.

MARSHALL v. STATE.

Opinion delivered October 7, 1907.

1. CRIMINAL LAW—DISMISSAL OF CHARGE—SUBSEQUENT INDICTMENT.—Kirby's Digest, § 2213, providing that "the dismissal of the charge does not prevent it being again submitted to a grand jury as often as the court may direct, but without such direction it can not again be submitted," refers to the resubmission of causes by the court, and does not prevent a grand jury, after a criminal charge against a person has been dismissed, from subsequently returning an indictment against him. (Page 90.)
2. EVIDENCE—CONFESSION OF ACCUSED.—Section 3087, Kirby's Digest, providing that where two or more persons are concerned in the commission of a crime either of such persons may be sworn as a witness, "but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense," prohibits the testimony of a person taken before an examining court from being used against him on a subsequent prosecution for the same offense. (Page 91.)

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

W. G. Dinning, for appellant.

1. The indictment should have been quashed. The statute clearly prohibits the resubmission of a criminal charge to the grand jury after they have once ignored the charge, except by specific direction of the court. This statute is mandatory. Kirby's Digest, § 2213; 82 Pa, 405; 109 N. Y. 615; 15 N. E. 880.

2. The court clearly erred in admitting as evidence on the trial of this cause, the testimony given by appellant at the examining trial, where he and two others were jointly charged with the crime, and he was required to testify. Kirby's Digest, § 3087; 78 Ark. 266; 66 Ark. 53. See also 73 Ark. 411.

William F. Kirby, Attorney General, and *Daniel Taylor,* assistant, for appellee.

1. Under their oath, which the law requires the grand jury to take when entering upon their duties, they are not only not precluded from again investigating a criminal charge which they have previously "dismissed," when they receive information that the party charged did commit the crime, but it is their duty to do so. Nor does the statute, Kirby's Digest, § 2213, take away that right. Appellant's objection is completely answered in 73 Ia. 542.

2. Even if the testimony of witnesses going to prove the confession of appellant at the examining trial was inadmissible, there was, nevertheless, evidence of other confessions by appellant sufficient to sustain a conviction; but the trial court found that this confession was freely and voluntarily made. The verdict ought to stand. 50 Ark. 305. The *corpus delicti* having been proved, a criminal may be convicted on his own uncorroborated confession. 3 Enc. Ev. 354; 73 Ark. 407; 74 Ark. 397.

WOOD, J. Appellant seeks to reverse a judgment of the circuit court of Phillips County, convicting him of the crimes of burglary and grand larceny, the offenses being joined in the indictment. The offenses charged in the indictment were the same that had been previously investigated by the same grand jury, and it had returned the papers into court as "dismissed." The court upon such return had adjudged that the prosecution abate, and had ordered that the defendant be discharged. The same grand jury at a subsequent day on its own motion, without any directions

from the court, took up the charges and returned the present indictment.

First. Appellant contends that the indictment upon these facts should be quashed. He relies upon the following statute: "The dismissal of the charge does not prevent it being again submitted to the grand jury as often as the court may direct, but without such direction it can not again be submitted." Section 2213, Kirby's Digest.

To make the meaning of this section clear, it must be read in connection with the one preceding and the one following it. These are as follows:

"Section 2212. All the papers and other matters of evidence relating to the arrest and examination of the charge against persons committed or on bail, returned to court by magistrates, shall be laid before the grand jury, and if upon investigation they refuse to find an indictment, they shall write upon some one of the papers 'dismissed' with the signature of the foreman, and therupon the court shall discharge the defendant from custody, if in jail, or exonerate the bail, if bail be given, unless the court should be of the opinion that the charge should again be submitted to another grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of the court."

"Section 2214. Unless an indictment be found at the term of the court next after the first submission of the charge to the grand jury, the defendant shall be discharged from custody or exonerated from bail, unless for cause shown the court shall otherwise direct."

These sections, taken together, show that the design of the Legislature was not to allow a defendant, who was under bond or in jail to await the action of a grand jury, to be kept in custody or under bond for that offense after the grand jury had once passed upon and "dismissed" it, without an order or some direction from the court. In other words, after the grand jury had once "dismissed" a cause, the defendant, if under bond or in jail, was entitled to have his bond discharged or to be released from custody, unless the court should direct that he be further held. The statute refers to the submission of causes by the court, and how they may be again resubmitted by the

court after the grand jury has "dismissed" them. But in our opinion it has no reference to the independent action of the grand jury over such causes. It contains no limitation upon the duty of that body, after it had been impaneled and sworn, to make its inquiries and presentments as broad as the oath it takes. The duty which that oath enjoins is that "you will diligently inquire of and present all treasons, felonies, misdemeanors and breaches of the penal laws over which you have jurisdiction, or of which you have knowledge or may receive information." Kirby's Digest, § 2194.

It is the function of the grand jury, therefore, to investigate and reinvestigate concerning matters within their jurisdiction as often as they "have knowledge or may receive information," and the statute under consideration is not intended to limit or restrain that function. The Supreme Court of Iowa under a similar statute and in a similar case so holds. *State* v. *Collis,* 73 Ia. 542.

Second. Appellant and two others were jointly charged before a committing magistrate with the offense of burglary. They were all apprehended and brought before the magistrate. Appellant was called by the justice, sworn and testified, and the testimony that he gave was used by the justice in committing them all to await the action of the grand jury. The testimony appellant gave before the examining court was a confession of guilt on his part, and implicated the other two. In the trial of appellant in the circuit court on the present indictment, witnesses were permitted, over the objection of appellant, to give in evidence what the testimony of appellant was taken before the examining court.

Section 3087 of Kirby's Digest is as follows: "In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense."

The ruling of the court in permitting the testimony of appellant taken before the examining court to be used against him on his present trial was in plain derogation of the above statute,

and was prejudicial error, for which the judgment must be reversed and the cause remanded to a new trial.

There was no error in the instruction of which appellant complains. Reporter set out in note.*

Reversed.

*The instruction complained of was as follows: "The evidence in this case is founded upon confessions made by defendant. Where a party commits a crime and then confesses freely and voluntarily, and without any promise of hope or reward or without any fear of punishment, then confessions are admissible and sufficient under the law to have a conviction. Confessions, it is true, are always to be received with caution, but they are taken with all of the facts and circumstances in the case and coupled with the additional proof that a crime has been committed." —(Rep.)

ROBINSON v. BLACK.

Opinion delivered July 15, 1907.

1. JUDGMENT—CONCLUSIVENESS.—Where the chancery court erroneously decreed that an administrator should account as such for all of the rents of certain lands, instead of directing that he should account to the estate for the proportionate amount thereof due to such estate, and such decree was affirmed on appeal, but the cause was remanded with directions to sell the lands and divide the proceeds, the affirmance precluded the parties from subsequently litigating the disposition of the rents collected up to the time of the decree below, but did not preclude them from litigating the disposition of rents thereafter collected. (Page 94.)
2. EQUITY—JURISDICTION IN ADMINISTRATION.—A chancery court should not lift an estate out of the probate court and proceed to administer it, but, having interposed on account of fraud or other ground of equitable interference, should send the cause back to the probate court with instructions to proceed in the regular course of administration. (Page 94.)

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

H. A. Parker, for appellant.

Manning & Emerson, for appellee.

McCULLOCH, J. John S. Black, one of the heirs at law of S. L. Black, deceased, and a creditor of the estate of said decedent, and Mallory, Crawford & Co., creditors of said estate, instituted a suit in chancery against F. J. Robinson, administrator of said estate, and against Polk Montgomery to set aside a sale of lands made to Montgomery and to hold Robinson accountable for the rents and profits of the lands. The chancery court rendered a decree in favor of the plaintiffs setting aside the sale to Montgomery and directing "that the defendant, F. J. Robinson, report by proper statement and account to the probate court of Monroe County for all rents from said lands and give the S. L. Black estate credit therefor in his settlement accounts as administrator of said estate, less the *pro rata* share thereof which the judgment of defendant Robinson bears to the Martin judgment against Charles Adams." The court did not ascertain the amount of such rents and profits. The defendants appealed to this court, and the decree of the chancery court was affirmed. *Montgomery* v. *Black,* 75 Ark. 184. Reference is made to the opinion in that case as reported above for more definite statement of the facts.

This court, in affirming the decree, ordered that "the cause be remanded with directions to enter a further decree for the sale of the land by a commissioner of the court upon such terms as the court may direct, and that the net proceeds of sale shall be applied first to reimbursement of appellant Robinson for the amounts paid by him in redeeming the lands from tax sales and subsequently paid for taxes, and next *pro rata* on the two said judgments against Adams." On the filing of the mandate of this court in the court below, a decree for sale of the lands was entered in accordance therewith, but, without any further pleadings having been filed, the court further decreed that defendant Robinson should be charged with all the rents and profits of the lands, and appointed a master to take testimony and state an account of rents and profits collected by him. The master heard testimony, and made the report at the next term, charging Robinson with rents found to have been collected by him from the year 1895 up to and including the year 1905, with interest to date of the report, amounting in all to the sum of $2,491.12, and crediting him with the sum of $485.68 found to have been paid out for taxes on the land and in redemption from tax sales, with interest. The court

overruled exceptions to the report, and approved it, and rendered a decree against Robinson for $1,594.73 as the proportionate part due the Black estate of the net amount of rents found to have been collected by Robinson. The court directed Robinson to pay over this amount to the solicitors of record of the plaintiffs. Robinson appealed.

When the case was formerly here, the decree of the chancery court was affirmed, and the cause was remanded for the sole purpose of having the lands sold in order for the proceeds to be divided. The litigation was then at an end as to all matters which were adjudicated or which could have been adjudicated when the final decree was entered by the chancery court. The chancery court should, in the former hearing, have ascertained the amount of rents collected by Robinson and the proportionate part thereof due the Black estate, and then directed the probate court to charge him with that amount in his settlement as administrator. It failed to do that, however, but simply decreed that he account to the probate court for the rents collected, leaving it to the probate court to ascertain the amount. The plaintiffs did not appeal from the decree, and did not call the attention of this court to that part of the decree, so it was affirmed. It therefore became final, and passed beyond the control of the chancery court or of this court. After having made that disposition of the rents collected up to the time of the decree below, it was beyond the power of the court to take up that matter again. *Collins* v. *Paepcke-Leicht Lumber Co.*, 82 Ark. 1.

It was competent for the court to enter upon a further investigation to ascertain the amount of rents collected by Robinson since the date of the original decree (*Collins* v. *Paepcke-Leicht Lumber Co., supra.*) for the purpose of directing the probate court to charge him with the proportionate amount due the Black estate, but it should not have done so without appropriate supplemental pleadings alleging that he had collected rents which he had not accounted for in his settlement with the probate court.

It was also error to direct the payment of the amount found due over to the plaintiffs or their solicitors. Administration was still pending in the probate court, and the chancery court, after ascertaining the amount of rents with which the administrator

should have charged himself, should have left it to that court to charge the amount to the administrator in settlement, and order it distributed to creditors and heirs, along with the other assets of the estate. A chancery court should not lift an estate out of the probate court and proceed to administer it, but, having interposed on account of fraud or other ground of equitable interference, should, after the special matter which called into exercise its peculiar powers has been disposed of, send the cause back to the probate court with instructions for further proceedings in the regular course of administration. *Shegogg* v. *Perkins,* 34 Ark. 117; *Hankins* v. *Layne,* 48 Ark. 544; *Brice* v. *Taylor,* 51 Ark. 75.

The decree is therefore reversed, and the cause is remanded with leave to the plaintiffs to file supplemental pleadings concerning the rents of lands collected by appellant Robinson since the date of the original decree on February 14, 1902, and for further proceedings with reference thereto not inconsistent with this opinion.

RIDDICK, J., not participating.

JOHNSON v. STATE.

Opinion delivered October 7, 1907.

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1. APPEAL—SUFFICIENCY OF EXCEPTIONS TO INSTRUCTIONS.—Exceptions in gross to several instructions will not be considered if any of them are correct. (Page 96.)
2. SAME—INTERLINEATIONS.—Lead pencil interlineations upon a transcript, if unauthenticated and unexplained, will not be regarded as part of the transcript. (Page 97.)

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; affirmed.

Edwin Hiner, for appellant.

1. The finder of lost goods may lawfully take them into his possession, and, before he can be convicted of the larceny thereof, it must be shown that the intent to steal existed at the time of the finding. 63 Ind. 285; Desty's Am. Crim. Law,

§ 145. If there is any guilt here, it is of embezzlement, not larceny. The same evidence will not support an indictment for both the offense of larceny and embezzlement. 13 Ark. 168.

2. The allegation of ownership is a material allegation in an indictment for larceny, and it must be proved. 55 Ark. 244; 58 Ark. 17; 73 Ark. 34.

3. The court's third instruction is erroneous in assuming appellant's confession of guilt, and that it was accompanied with proof. There is no evidence warranting the instruction. 14 Ark. 286; *Id.* 530; 16 Ark. 594; 18 Ark. 521; 20 Ark. 171; 24 Ark. 540; 36 Ark. 117; 79 Ark. 453.

William F. Kirby, Attorney General, and *Daniel Taylor,* assistant, for appellee.

1. There is ample proof of the ownership in the record. Ownership may be proved either by direct or circumstantial evidence.

2. There was no proper exception to the third instruction. Where any of the instructions are correct, a general exception is unavailing. 74 Ark. 355; 73 Ark. 315; 58 Ark. 353.

HILL, C. J. Johnson was indicted for grand larceny, charged with stealing $135, and was convicted and sentenced to one year in the penitentiary, and has appealed.

Only two questions are raised: First, as to the sufficiency of the evidence, and second, as to the correctness of instruction number three.

1. The evidence has been carefully examined, and the court finds it sufficient to sustain the verdict. It would serve no useful purpose to review it.

2. Instruction number three is as follows: "The confession of the defendant, accompanied with proof that the offense was committed by some one, will warrant a conviction." A correct principle is sought to be conveyed in this instruction, in consonance with *Meisenheimer* v. *State,* 73 Ark. 407. The instruction is not happily phrased, and may be subject to objection as assuming facts or charging upon facts. But the question is not properly presented. The record is made up in disregard of the rules of the court, and the original bill of exceptions seems to be incorporated in the transcript. The tran-

script should have been rejected by the clerk of this court, but its condition was evidently overlooked by him.

The motion for new trial has the following assignment of error: "The court also erred in giving to the jury, on its own motion, instruction number two," and thereafter in dim pencil interlineation appears, "& 3." The exception is to the instructions in gross, and would not be availing if any of them were correct. *Darden* v. *State,* 73 Ark. 315; *Powell* v. *State,* 74 Ark. 355.

Instructions one and two are mere elemental statements, and unquestionably correct.

But, even if the exception was good, the motion for new trial has not preserved the exception to instruction number three, and the failure to do so is a waiver of it. This pencil interlineation, which is unauthenticated and unexplained, is not to be regarded as a part of the transcript. It has been well said: "Such doubtful lead pencil interlineations do not make a record for an appellate court." *Cunningham* v. *Seattle Elec. Ry. Co.,* 3 Wash. 471. See also *Heilbron* v. *Heinlen,* 72 Cal. 376; 2 Enc. Plead. & Prac. 292.

Judgment affirmed.

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84 140

BENNETT v. STATE.

Opinion delivered October 7, 1907.

1. HOMICIDE—VARIANCE AS TO DECEASED'S NAME.—A variance in a prosecution for murder between the indictment and the evidence as to the Christian name of the person killed is not material if the identity of the party in the evidence with the one named in the indictment is established to the jury's satisfaction, or if the inaccuracy is not misleading. (Page 99.)

2. SAME—WHEN VARIANCE NOT MATERIAL.—An allegation in an indictment for murder as to the name of the person alleged to have been murdered is not material where the offense is otherwise described with sufficient certainty to identify the act. (Page 99.)

3. WITNESS—IMPEACHMENT BY CONTRADICTORY STATEMENT.—It is admissible to impeach a witness in a felony case by showing that his tes-

timony in the examining court was different from his testimony at the trial. (Page 99.)

4. FORMER TESTIMONY.—BEST EVIDENCE.—Oral evidence of the former testimony of a witness in an examining court is admissible, though the substance of his testimony was taken down by the magistrate, as required by Kirby's Digest, § 2148, and produced at the trial. (Page 100.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; affirmed.

William F. Kirby, Attorney General, and *Daniel Taylor,* assistant, for appellee.

1. There is testimony that the deceased's Christian name was "Mooney," as alleged in the indictment, and other testimony that it was "Monte." The State makes no contention that the two names are *idem sonans,* but that the doctrine of interchangeability of names applies. 68 Ark. 241. It is a question of identity; and where that is established, if the inaccuracy is not misleading, it will not be fatal. 14 Enc. Pl. & Pr. 287. See also 10 *Id.* 505; 30 Ark. 162; 46 Ga. 269. The question as to whether the deceased was known by both names was one of fact for the jury. 158 Mass. 499; 155 Mass. 534; 133 Mass. 580; 143 Mass. 568. Appellant's request for instruction on this point is incorrect, and does not embrace the law applicable to the testimony. Unless the instruction requested is correct, he can not complain of its refusal. 77 Ark. 531.

2. The proper method of proving what a witness testified before an examining court is to call another witness who heard it and let him testify as to the facts. 66 Ark. 545.

HILL, C. J. Bennett was indicted for the murder of Mooney Thomas, was convicted of murder in the second degree, and appealed.

1. There was testimony tending to prove that the deceased was known as Mooney Thomas, and on the other hand there was testimony tending to prove that he was known as Monte Thomas, and that Monte was his true name, and that he was known by no other.

The appellant asked the court to charge the jury as follows: "The court instructs the jury that if they believe beyond a reasonable doubt that Monte Thomas was the party killed by Wes Bennett, and not Mooney Thomas, as alleged in the in-

dictment, said allegation is material, and they should find the defendant not guilty."

Where the name of a party is necessary to the description of the offense, proof of a different person than the one named in the indictment makes a variance. Formerly, there was a strict application of this rule, and even slight variances, if the names were not *idem sonans,* were held fatal. But the modern rule is that it is a question of identity; and where the identity of the party in the evidence with the one named in the indictment is established, or where the inaccuracy is not misleading, the variance is not fatal. 14 Ency. of Plead. & Prac., 286-7.

The question of identity of the person described in the indictment with the one mentioned in the evidence is one of fact, to be established, like any other fact, to the satisfaction of the jury. *Commonwealth* v. *Gould,* 158 Mass. 499; *State* v. *Williams,* 68 Ark. 241. Hence the instruction in question should not have been given without qualifying it to fit the conflict in the evidence as to whether Monte Thomas was the identical person named in the indictment as Mooney Thomas and known by that name.

The instruction is erroneous in yet another particular; it instructs that the name of the party assaulted is a material allegation, whereas the Criminal Code expressly makes such allegations *not* material where the offense is otherwise described with sufficient certainty to identify the act. Section 2233, Kirby's Digest. See construction of said section in *State* v. *Seely,* 30 Ark. 162; *State* v. *Jourdan,* 32 Ark. 203; *Edmonds* v. *State,* 34 Ark. 720; *Boardman* v. *State,* 66 Ark. 65.*

2. The State was permitted, in rebuttal, to show that a certain witness had testified differently in the examining court from what he testified in the trial. The witness by whom this was proved was present in the examining court, and testified from his recollection of the testimony given. The defendant showed that the evidence in the examining court was taken down in writing and signed by the witness after it was read over to him, and then moved the court to exclude the impeaching testimony on the ground that the written evidence was the best.

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*See, also, *Blankenship* v. *State,* 55 Ark. 244. (Rep.)

It was entirely proper for the State to prove by a witness who recollected the testimony in the examining court what it was, after the proper foundation had been laid for the introduction of it, notwithstanding the substance of the evidence may have been taken down by the magistrate, pursuant to section 2148. This subject has been fully considered in *Shackelford* v. *State,* 33 Ark. 539; *Payne* v. *State,* 66 Ark. 545; *Wilkins* v. *State,* 68 Ark. 441; *Petty* v. *State,* 76 Ark. 515; *Butler* v. *State,* 83 Ark. 272.

The other assignments of error in the motion for new trial have been examined, and the court fails to find any reversible error. The instructions given fairly presented all questions of law which the defendant was entitled to have presented. While some of the refused instructions might well have been given, they were sufficiently covered in those given to prevent it being error to have refused any of them.

Judgment is affirmed.

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MURPHY v. CITIZENS' BANK OF JUNCTION CITY.

Opinion delivered June 3, 1907.

1. JUDGMENT—AMENDMENT—SUFFICIENCY OF EVIDENCE.—The record of a judgment of a court of record will be amended to speak the truth upon evidence that is clear, decisive and unequivocal. (Page 106.)
2. APPEAL—BRINGING UP THE EVIDENCE.—Where a decree in chancery appealed from recites that the testimony of certain witnesses was heard orally and not in the form of depositions, and their testimony is taken down and certified to by a stenographer, but not by the chancellor, such testimony will not be considered on appeal. (Page 107.)
3. SAME—PRESUMPTION WHERE EVIDENCE IS NOT BROUGHT UP.—Where some of the evidence upon which a decree was based was not brought up, it will be presumed on appeal that the decree was correct. (Page 108.)

Appeal from Union Chancery Court; *Emon O. Mahoney,* Chancellor; reversed.

STATEMENT BY THE COURT.

The appellant filed the following motion in the Union Chancery Court:

"Comes Guy Murphy, receiver, and moves the court to amend the record of this court, as follows:

"To show at page 540 of Chancery Record "F" that on January 24, 1905, the chancery court adjourned until January 30, 1905, instead of February 27, 1905, as now appears.

"To show the date at the top of the page 541 of said record to be January 30, 1905, instead of February 27, 1905, as now appears.

"To show the date at top of page 542 to be January 30, 1905, instead of February 27, 1905, as now appears.

"To show at page 543 that court adjourned on January 30, 1905, until February 6, 1905, instead of February 28, 1905, as now appears.

"To show the date of the following opening orders on said page to be February 6, 1905, instead of February 28, 1905, as now appears.

"And for reason states that the said amendments are necessary to make said record speak the truth; that said records did speak the truth, but were afterwards modified and changed so as to appear as above set out; that said alterations are due to misprisions of the then clerk of this court."

Appellant then introduced Mr. Floyd, his attorney, who testified that the record of the chancery court (record F) showed that an erasure had been made in the date of the opening order; that pages 540, 541, 542 and 543 showed that January had been changed to February, and that on page 542 the date had been changed. The capital "J" can be distinctly traced; also the figure "3." While he could not place the erasures from his own recollection, yet, by various memoranda that were made before there was any object in changing the record, he was enabled to testify that the chancery decree was rendered on the 30th of January, 1905, instead of February 27, 1905, as the record now shows. The decree of the chancery court is set out on pages 541, 542 and 543 of the chancery record book "F." One reason that he had for placing the date January was that he had a distinct recollection of sending a check for $100 to Judge George W. Hays in pursuance of an order by the chancellor for services to the receiver. He sent the check on the day following the day the allowance was made. "The allowance was

not made until the decree was made." The check to George W. Hays for $100 was dated January 31, 1905, signed "Guy Murphy, receiver, by R. L. Lloyd, attorney." The indorsement on the check shows that it was paid February 4, 1905. Witness was permitted to use this check to refresh his memory, and from this testified as above as to the day the order was made allowing the receiver for services. Witness Floyd further testified that he brought suit in the circuit court for the receiver against the Citizens' Bank of Junction City; that the complaint was based on the chancery decree, the date of which is now in controversy; that he referred to the chancery record for the purpose of getting the date of the decree, and that the date of that decree, as alleged in the complaint and amended answer in the law case, was January 30. He, after refreshing his memory from the papers in the law case, testified that the date of the chancery decree was January 30, 1905. Witness testified that he had occasion to look at the date of the chancery decree several times in order to get the date in another case. He looked at the date of the chancery decree especially to ascertain if the time for the filing of the transcript in the Supreme Court had expired, and he did not remember that it was January 30 "from pure memory," but that one year had elapsed from the date of the chancery decree, whatever it was.

W. J. Pinson, who was the clerk of the chancery court at the time the decree was entered, and who entered same on the record, testified that on the third report of the receiver, which was also a petition to be allowed to make a distribution of funds, there was an indorsement as follows: "Allowed 2-6-05," which means what it says. He further says he did not recollect whether the order was made, did not know whether it was filed in open court or not; "it might have been made, and it might not have been; it was filed February 6." On cross-examination by appellee, witness testified that the records speak the truth; all he ever wrote speak the truth. He testified that the alleged changes seemed to be in his handwriting. Sometimes in writing the record the court had him to change the date. He ordinarily wrote the dates in pencil, and "then in writing them up, if I changed the dates, it was done by order of the court."

Witness testified in behalf of appellee that in his experience as chancery clerk he never changed a record unless it was done by the order of the court, and finding that it was not the proper date; was never accused of such a thing before. In the rush of business it was sometimes two or three days before he could put up the record; never kept right up. It was sometimes the case that he would not get the dates of the record exact; that happened to every clerk. He was present when the case was tried before Judge Mahoney. The court said he would allow $100 to Judge Hays, and there was no objection to that. The court had the matter of the chancery decree under advisement for some time. Two or three days of chancery court intervened between the time he took the matter under advisement and the time the decree was rendered. On cross-examination by appellant's counsel, Mr. Floyd, the following are the questions and answers:

"Q. Did the court direct you to change the records? A. I don't know. Q. You know that it has been changed? A. No. Q. Look at it. Can't you see that the ink entry has been erased and a pencil entry made? A. Yes. Q. Isn't that a change? A. It is. Q. When was it made? A. I presume it was made at the time. Q. What time? A. At the time of the transaction. Q. You mean that it was actually February 27, and you wrote it in ink January 27? A. I do not know when it was. Q. Do you know that the pencil writing was made by yourself? A. I think I wrote that. Q. Turn to page 542. Who wrote that? A. In the absence of any one else having authority, I will say that I wrote it. Q. Do you remember my calling your attention to the fact that one year had elapsed between them? A. When. Q. In January, 1906? A. I do not remember that. I remember that the lawyers generally came in and asked about the time of the transcripts. Q. I asked you about this, didn't I? A. Yes, I suppose you did. Q. Don't you remember that I said to you that the time had already elapsed? A. No, I do not. Q. Don't you remember me telling you that there was an erasure? A. I do not remember you telling me. Q. Did I ever accuse you of changing the record? A. You did by this paper."

After the examination of the witness Pinson was concluded, the record recites the following:

The Court: "There is nothing in this question. I would swear that he wrote it, if I had to swear."

Mr. Floyd: "You know that he did write it?"

The Court: "I am sure he did. I often have the clerk change the records from the opening day of the court. The sheriff in Little Rock never walks into the court but twice a year, and that is on the opening days. I do not see the sense in this. Write the motion as overruled."

Copies of the pages of the chancery record in evidence are in the record. Page 540 shows that the chancery court opened January 24, 1905, and adjourned until February 27, 1905. Page 541 shows that the court opened February 27, 1905. There follows on this page and page 542 the decree of the court, which was rendered as indicated by these pages Monday, February 27, 1905.

In the decree is an order allowing George W. Hays $100 for services as attorney for the receiver. At the conclusion of the decree on page 542 is the adjourning order to February 28, 1905. Page 543 shows that the chancery court opened February 28, 1905, and adjourned to March 4, 1905.

The finding and decree of the court is as follows:

"That the said chancery record 'F,' pages 540, 541, 542 and 543, does speak the truth as it now stands, and that the proper dates of the opening of said court, as shown on said pages, are correctly given, and that said record should not be changed. It is therefore considered, ordered and adjudged by the court that the motion of the receiver herein be and the same is hereby overruled."

R. L. Floyd, for appellant.

Smead & Powell and *Marsh & Flenniken,* for appellee.

WOOD, J., (after stating the facts). The testimony shows conclusively that the dates of the decree of the chancery court in controversy here had been changed. The uncontroverted evidence also is that the original entry of the date was in ink, and that this entry was erased, and a pencil entry made. The

original record, showing the change in the date of the entry and in what the change consisted, is not before the court, but witness Floyd testified, and there is no contradiction of his evidence, that "January has been changed to February," that "you can distinctly trace the capital 'J' and also trace the figure '3.'"

In other words, the undisputed evidence shows that the date of the decree was first written in ink "January 3," something, and that this was erased, and the date as it now appears in the record "February 27, 1905," was entered in pencil. The question here is did the original entry of the date in January, 1905, represent the true date of the decree, or was the true date as represented by the pencil entry of February 27, 1905. The clerk who entered the decree testified in a general way that "the records speak the truth, and all he ever wrote speaks the truth;" and he also testified that he ordinarily wrote the dates in pencil, and whenever he changed the date it was by the order of the court, and that he never changed a record unless it was by order of the court after finding that it was not the proper date. But he also testified specifically that "the ink entry" of the date of this decree "had been erased, and a pencil entry made," and that he presumed the change was made at the time of the transaction, but that he did not know when the change was made. This evidence, while it shows that there was an erasure in the date of the decree as first written and that the date as it now appears was written instead in pencil, does not show when the pencil date was written, and when the erasure and change took place, and whether it was on the date of the entry of the decree or not.

On the contrary, the testimony of the witness Floyd is direct and positive, after refreshing his memory from memoranda made by him based upon the date of the decree, that the true date of the decree was January 30, 1905, instead of the date as now written, February 27, 1905. And the testimony of Floyd is so corroborated, clear and satisfactory and supported by other evidence in the record as to convince us beyond reasonable doubt that the date of the chancery decree in controversy was January 30, 1905, instead of February 27, 1905, as now written.

The record shows the first opening order of the court was

January 24, 1905. If court was adjourned on that day till January 30, 1905, and the decree was rendered on the latter date, and court adjourned on that date till February 6, 1905, as is contended by appellant, then the record entries will be consistent with the testimony of the clerk as to the length of time the case was taken under advisement, and also with his testimony showing that the report of the receiver and petition to make distribution was filed and allowed February 6, 1905.

The testimony of the clerk tends to show that the case was taken under advisement two or three days, "some days." But, if the case was submitted January 24, 1905, and taken under advisement till February 27, 1905, more than a month intervened. Again, if the court adjourned from January 24, 1905, till February 27, 1905, then it could not have made an allowance of a petition for distribution, as the clerk shows was done, on February 6, 1905. Again, if the true date of the decree had been February 27, 1905, instead of January 30, 1905, it is most improbable and unreasonable that the clerk would have first written January, instead of February, and that he would have first written 30, instead of 27, as the proof shows conclusively was done. It frequently happens that one in writing from habit continues to write the last month or year for a few days the succeeding year or month, but it would be most unusual and unnatural for one to enter a date of a month before the month arrives. It is unreasonable to suppose, or to find that if the decree was rendered the 25th of February, 1905, that the clerk should have first written it the 30th of January, 1905, and that he should have made the mistake three times. We are aware that proof to change and correct a record should be clear, decisive and unequivocal to the effect that the written memorial does not reflect the facts. *Foster* v. *Beidler*, 79 Ark. 418; *Davenport* v. *Hudspeth*, 81 Ark. 166; *Goerke* v. *Rodgers*, 75 Ark. 72; *McGuigan* v. *Gaines*, 71 Ark. 614.

We so regard the proof here. It matters not if the change was made, as the clerk says, by the order of the court. Parties litigant have the right to see that the record of the proceedings in their causes should reflect the facts, "speak the truth." The chancellor was in error in supposing that he could order a change of the date in the opening order of court without reference

to whether the date fixed by him was the correct one or not. The dates of the opening and adjourning orders of court often become most important in determining the rights of parties, and the court can not change these or any other matters occurring in due course of legal proceedings, contrary to the facts. And no change should be made in the record, after long lapse of time, even to make it speak the truth, without notice to the parties in interest and opportunity to be heard.

The decree of the court refusing to grant appellant's motion to have the record of the chancery court corrected in the particulars named therein is reversed, and the cause is remanded with directions to grant the relief sought. Treating the record corrected as herein directed, it results that the appeal in cause numbered 6247 was not taken in time, and same is therefore dismissed.

ON REHEARING.

Opinion delivered July 22, 1907.

WOOD, J. No. 6,616 is docketed as a separate case, but it is really a part of No. 6,247, being an appeal from an order of the chancery court overruling a motion to correct the record in a case that had been appealed from that court and was numbered in this court as No. 6,247. The opinions formerly delivered show the nature of the proceedings. When the case No. 6,616 was decided, there was no brief filed on behalf of the appellee, and our attention was not directed to a defect in the record which was unobserved by us. On motion for reconsideration, counsel for appellee makes an affidavit setting forth the reasons why no brief was filed when the case No. 6,616 was originally considered. These reasons are satisfactory to the majority of the judges, and we take up and consider now, on motion for rehearing, the questions presented for the first time for appellee the same as we would have done had the matter been called to our attention in the first instance.

The decree and final order of the court refusing to correct the record on the motion of appellant recites that: "The same is submitted on the deposition of George W. Hays, the testi-

mony of R. L. Floyd and W. J. Pinson, and pages 540, 541, 542, and 543 of chancery record 'F' of Union County Chancery Court. And the court, after considering all the evidence herein and being fully advised in the premises, finds," etc. This recital shows that the testimony of witnesses was heard in the cause, not in the form of depositions. There is copied into the transcript what purports to be this testimony taken down by a stenographer and afterwards reduced in longhand by her and certified to as follows: "I hereby certify that the foregoing is a true and correct transcript of the evidence taken by me in shorthand, in the case of C. P. McHenry et al., plaintiffs, *v.* El Dorado Lumber & Planing Mill Co., defendant, taken on January 28, 1907. May Craig." But this does not identify the testimony as that heard by the chancellor in the motion pending before him to correct the record. There is nothing to show that this testimony was ever filed and made part of the record in the cause. There is no authentication of same in a bill of exceptions under the hand of the chancellor, or in any other way, and we can not consider it. The case is ruled by *Beecher* v. *Beecher,* 83 Ark. 424, and by other cases there cited.

We must presume, in the absence of all the evidence upon which the decree was based, that it was correct.

The motion for reconsideration is therefore granted, the cause (No. 6,247) is reinstated, and the decree of the chancellor is reversed for the reasons stated in the opinion heretofore rendered.

ON SECOND REHEARING.

Opinion delivered October 14, 1907.

PER CURIAM. On the 3d day of August, Guy Murphy, receiver, presented a petition for a rehearing. His grounds were as follows:

"That the bank, by agreeing that the evidence in No. 6,616 be treated as depositions, waived any objection it might make to its not being made part of the record by bill of exceptions.

"That the failure to brief case No. 6,616 by the bank was due to the negligence of its counsel.

"That the evidence in No. 6,247 was taken orally in open court, but is not made part of the record by bill of exceptions, and the decree of the chancellor therein should be affirmed as is similarly held by the court in No. 6,616."

He now shows to the court that his attorney, on the 26th of August, took the transcripts of said cases out of the office of the clerk of this court in order that he might brief his said motion for rehearing, and that the grip containing the same was stolen; and he asks time in which to furnish the court with additional transcripts in lieu of the ones lost, and to prepare briefs, and says it will be about four weeks before the transcripts can be supplied.

The court would be inclined to grant the petition for time if the motion for rehearing could be availing; but the matters now sought to be reviewed were thoroughly and exhaustively considered by the court, and are discussed in the opinion. The transcripts were examined carefully by the judges in consultation, and the conclusion was reached after the most patient and careful investigation. For this reason, the petition for time is denied, and the motion for rehearing is overruled.

WILLIAMS v. JOHNSTON.

Opinion delivered July 22, 1907.

GIFT—WHEN IRREVOCABLE.—When a gift *inter vivos* has been perfected, that is, when nothing more is to be done to vest the title in the donee, such gift can no more be revoked by the donor than a sale or any other executed contract.

Appeal from Franklin Chancery Court; *J. V. Bourland*, Chancellor; reversed.

STATEMENT BY THE COURT.

This is a controversy over a wagon and team of horses and $965 delivered by Johnston to Williams. Johnston recovered judgment, and Williams appealed.

The substance of Williams's evidence is:

Since 1899 he has engaged in religious work, believing that he is the steward of the Lord, and has established various homes or colonies for those who accept his faith. He has established colonies in Colorado, Oregon and other States. In 1899 he purchased a farm near Ozark, in Franklin County, Arkansas, and established a home for his faith thereon, and conducted a fruit and vegetable farm. It seems that his homes are a series of fruit farms. He only permitted those accepting his faith to enter them. Persons entering his colony or home must not only accept his faith, but must subject themselves solely to his direction and authority in matters spiritual and temporal. They must give up all family ties, and consecrate their property, means and labor to the work. He never accepts any gifts except when made freely and voluntarily. Gifts are not received by him with conditions, and the giving of property does not of itself grant rights in a home. Property is given as a sacrifice and surrender, and accepted as a consecration of the person to the work, and no person can reside with him unless he makes full consecration; and, as soon as a person refuses to conform to the regulations, he would cease to be a member. The home privilege is a gift to the person, just as his property is a gift to the steward. There are no bargains and no agreements or conditions touching gifts, and the same with the homes. He reserves the right to determine who shall be inmates of the homes; he usually gives his followers a home when they conform to the regulations; but the giving of the home privilege is not conditioned on receiving any property. Most of the people in the work brought only themselves. He is the absolute owner of the property given, and it is not held in common. Gifts of money and property are used for the living expenses of his people. It would not be possible to receive gifts on condition, nor promise to return them, because, being used for expenses of his people, and so intended, there would be nothing to return after their consumption in the uses intended. It would not be possible to promise a return because, if the person would leave, his claim for a division would "impair all the efficiency, labor and safety of the work;" and, another reason, if the person should die, his heirs would claim division, and throw the entire work in confusion and the members in distress. He owned considerable

property before he went into this work, and his large property interests in the various homes were derived partly from voluntary gifts to further his work and partly from his own resources. Property received from gifts is for the benefit of the people in the work, and he understands the words in the Bible, "in common," to mean benefit, not ownership. He says that, legally, he is the owner of the property given him; spiritually, he is a steward of the Lord, and they consider Him the owner. There is no written constitution or articles of faith in his sect, and it is not an incorporated society.

He said appellee Johnston had been corresponding with him for some years with a view of joining his sect. He wanted to join his work in Colorado, but he advised him to go to Oklahoma, and take a land claim, which he did; and some years thereafter he renewed his request to join in the work. After some correspondence, from which it appears that Williams advised him that it was an advantageous time to sell his Oklahoma land, he came to the home at Ozark. He delivered his wagon and team and $750 to Williams's wife (the prohibition against marriage ties did not extend to the steward of the flock), Williams then being in Oregon. Later he delivered to Williams the balance of the money, in all $965, which was the sum realized from his Oklahoma land. Before he came, he was made to understand fully the rules of the sect, the life to be led was explained, that everything was received as a voluntary gift and sacrifice, and that he was not entitled nor permitted to have the ownership of any property after surrendering it to him. He gave the property in question, fully understanding the effect of the gift, and said that it was to be used as the Lord saw fit. Johnston stayed in the home at Ozark for four and a half years, was supported by him (Williams), and did some farm work, but not much, as most of the work was hired, the inmates as a general thing not being able to do much work. He first left the home voluntarily, and stayed a while in Ozark, and returned and stayed at the home for some time, and then again voluntarily left, and when he attempted to return this time he barred him out, and excluded him from the home, and expelled him from the faith, for the reason that he refused to accept his authority and was causing reproach to the home. He says a great change took place in

him before he left. When he first came, like the others, he was gentle and agreeable to the regulations; but he ceased to be before he left, and the disagreement was on account of his change in his religious belief. He became the defender of those who opposed his works.

W. M. Herring, an assistant to Williams, testified in full corroboration of all Williams's version of the rules of the faith, the giving of Johnston's property freely and understandingly. On cross-examination, these questions and answers were given:

"Q. Is it not a fact that all property is held in common for the mutual benefit of all? A. It is held by Mr. Williams alone. He has sole direction over everything that comes into the work. It belongs to him. It is turned over to him, and in his name, and no one has anything to do with the direction and the government of what is brought into the home. Q. Is it not a fact that Mr. Johnston was to have a home on the farm and support, the same as all other members of this home? A. Of course, that was considered his home as long as he abided by the principles. Q. What compensation are parties to have for property and money surrendered to this work? A. Well, he is to have none. He is supposed to consecrate and give all to the Lord, and, as Mr. Williams is simply a steward, he accepts them as an offering to God. That is all the compensation—only what he gets spiritually."

Mrs. Williams and her two daughters testified to Johnston's delivering the wagon and team and money to Mrs. Williams when he came. The substance of it was that he gave this property freely as air, that he wanted nothing more to do with it, that it was no longer his, and that he was received in the spirit in which he came, and the home opened to him, and he was given all its benefits.

W. H. Groves of Colorado testified to the work by Williams and the manner of receiving property. His testimony sustains in full Mr. Williams. He tells of one Mr. Redding, of Colorado, who is ambitious to supplant Mr. Williams, and is inciting suits, hoping to be made receiver of the property. On cross-examination, he says that he is in unity with Mr. Williams, but free in all respects. He says Mr. Williams does not consider persons in his home servants, but as persons voluntarily seeking his direction in all matters.

Messrs. J. M. Ferguson, Henry Mahler, W. L. Morrow and W. W. McCallay testified substantially to the same effect as Mr. Groves.

The appellee, Ed Johnston, testified in detail as to all matters covered in Williams's testimony, and, excepting in a few matters, there is no serious conflict between them. His account of his reason for giving his property and his idea of the sect is thus explained:

Q. "What induced you to come and put that amount of property and money into the home? A. Because I thought it was the work of the Lord on the earth, and I did it with a feeling of love toward the work. From what I had heard of the work, I understood it to be the continuation of the organization that was started at Jerusalem wherein those that had land and possessions sold them, and brought their price and laid it down at the disciples' feet in common, to be divided up to every man, according to his need. Q. What was your understanding as to the ownership of property put into the work and of the benefits to be derived therefrom? A. I understood, of course, that every one should be provided for without any partiality whatever; that every one in the home should have just as good a right to a say so and also to the privileges of the property in the whole colony. That was my understanding. Q. When you speak of the whole colony, do you mean the property situated in Colorado and other places as well as Ozark? A. Yes, sir, I do; the whole colony."

He tells of a disagreement with Mr. Williams over his protesting against the way the horses he had given the home were being treated, in which Williams denied his right to have any will concerning them, saying they were his individually. His account of his expulsion was as follows: "Q. You may state, Mr. Johnston, what was the cause, if you know, of Mr. Williams turning you out of the home or away from the place out there. A. Yes, I do. On the 19th of November, he put the question right square at me and said, 'Are you willing to take my word as the voice from His altar to you in everything?' I said 'No, sir; I denounce it. I will not take your voice as the voice of God to me.' Then he said, 'You are not my friend.' On the 22d day of November last he wrote me a letter expelling me from the community and mem-

bership forever. Mr. Williams sent a copy of this letter to this man Redding, at Cripple Creek, Colorado. In about eight days I got a letter from Redding telling me I was now a free man. I read the letter before them all. I said that I thought that this was my Father's house; that this was where I put my all. 'Now,' I says, 'here is the place that I am going to stay.' Mr. Williams spoke up and said, 'I rebuke you.' I said, 'Your rebuke doesn't amount to anything. Here is where I am going to stay.' Herring spoke up and shook his head and said, 'You will not, either.' "

He tells of the beginning of the litigation between them, and of the gates to the home being fastened against him. He tells of the work he did on the farm, which shows he must have been quite a useful worker, and that he did not even receive shoes when needed, and that $3.80 was all the money he had received for his own use.

On cross-examination, he says that he had corresponded with W. A. Redding covering a period of five years before he came to Ozark; it was on Bible themes and in reference to the colony of which Mr. Williams is the head. He admits that no one can become a member without surrendering all he has, and he complied with it, and that when he gave it he said he gave it as freely as air. He showed a preference for Mrs. Powell, and refused to quit paying attentions to her when requested.

Mrs. Mary Powell, who had been a member of Mr. Williams's home for twenty-four years, testified in Johnston's behalf. Much of her testimony is a repetition of the history of the sect, its purposes, etc., and Johnston's connection with it, as given by the other witnesses. But her account of Williams's methods differs from the other witnesses. Her testimony on this point is as follows:

"Q. State, Mrs. Powell, what was your understanding of parties as to surrendering or giving of property or money into this home? A. Well, I can answer that question better in reference to my own self. Well, when I came to the home, I was led by the spirit to the home, and it was with the feeling of love to God that I laid all my property down, and it was for Him I felt like in the days of old, when the disciples laid everything down on the altar and had everything in common. I was led into it, and I think it was a year after I went into the home

before my all went out of my hands. We were just led into it, step by step. It came up on the line of discerning of spirits. Q. Explain, please, what was meant by the discerning of spirits. A. Mr. Williams claimed a gift of discerning of spirits, and he gave many of the members in the home the power to tell the works of the spirits, and are all called to tell spirits by the different operations of spirits. Q. This discerning of spirits that you speak of originated with Mr. Williams, did it not? A. Yes, sir. Q. Then this discerning of spirits was what led you to surrender your property to Mr. Williams? A. Yes. None of us wanted to be under spirits, and we did it to get free. What we wanted was to be a free people. Q. Then you were led to believe that, in order to be a free people, you had to surrender this property? A. Yes, sir. Q. Now, what was the understanding as to benefits to be derived by parties surrendering this property? A. Well, we all lived in the home, and all shared the benefits of everything as it was given to the home, and all worked together, you know. Q. Was it understood that you had all things in common for the common good of all? A. Well, I don't know. That was the understanding—that everything was to be owned and controlled alike."

She tells of Johnston's differences with Williams, resulting in his expulsion, substantially as Johnston does. She says that the difference was religious, and that Mr. Johnston had not been in accord with the religious principles of Mr. Williams for some time prior to his expulsion. She left the home because she did not feel in union with Mr. Williams's dealings with Mr. Johnston.

The chancellor gave judgment in favor of Johnston for the $965 and the value of the horses and team; and Williams appealed.

W. W. Cotton, for appellant.

1. The property and money were a gift *inter vivos* by the appellee to the appellant, the donor being competent to give, having the right to give, and the donee being competent to receive. The transaction was completed by transfer of possession, is an executed contract and irrevocable. 1 Parsons, Cont. (7th Ed.), 262; 8 Am. & Eng. Enc. of L. (1st Ed.), 1313.

Delivery may be made to a third person in the capacity of trustee of the donee. 66 Ark. 301; 59 Ark. 194; 60 Ark. 172; 32 Md. 87; 43 Conn. 518; 43 Ark. 320. See also 75 N. Y. 134; 95 N. Y. 206; 123 Ill. 621. Acceptance of donee is presumed. 52 N. H. 238; 30 Cal. 123.

The nature of the religious work in this case precludes the idea of a return of any money or property invested in it, and this order with all others is protected by our fundamental law. Art. 2, § 24, Const. 1874.

2. Appellee is barred. The gift was made and accepted in June, 1901, and no suit instituted until December, 1905. 66 Ark. 452.

3. No trust relation is proved. It is shown that appellee had five years in which to learn the principles, customs and regulations of the work, previous to his coming into it, and in accordance therewith delivered his property and went into the home voluntarily. In addition, that he made no claim to the property whatever until four and a half years thereafter. 26 Ark. 250; 42 Ark. 511; 50 Ark. 71.

Geo. W. Barham, for appellee.

1. There was no absolute gift, but a conditional surrender of property for the common benefit, the condition being that the donor should have a home; and when appellant violated the condition of the donation, he forfeited all rights, if any he had, to the property. It then became a trust fund in his hands, for which he was liable. 10 Am. & Eng. Enc. of L. (1st Ed.), 2; *Id.* 4 and note 2; *Id.* 4 and note 3; Bispham, Eq. (4th Ed.), 118; Pomeroy's Eq. 136; Bouvier's Law Dict., tit. Trust; *Id.* tit. Constructive Trust; Burrill's Law Dict., tit. Implied Trust; 21 Ark. 639; 26 Ark. 240; Perry on Trusts (3d Ed.), 166; Wharton's Law Lex., tit. Constructive Trust.

2. Appellant cannot be permitted to retain possession of this property, because of the fiduciary and confidential relations established between the parties, and the influence he had with them by reason of fraudulent representations. *Vide* Mrs. Powell's testimony. 8 Am. & Eng. Enc. of L. (1st Ed.), 646; *Id.* 647; *Id.* 650; 94 N. C. 581; 33 Ark. 425; 55 L. R. A. 60; 6 Enc. of Ev. 242; *Id.* 220; 132 Cal. 49.

3. The chancellor's findings, though not conclusive, will

not be disturbed unless clearly against the preponderance of the evidence. 71 Ark. 605; 68 Ark. 314; 72 Ark. 67; 73 Ark. 489; 67 Ark. 200; 75 Ark. 52.

HILL, C. J., (after stating the facts.) It may be well to say, on the threshold of the consideration of the evidence, that if the testimony of Mrs. Powell prevailed, the gifts of money and property to Williams would be set aside. If her version of the reason why she gave property obtained as to Johnston, then the case would be ruled by those where similar gifts to spiritualistic mediums, etc., are held void. See authorities cited in note 14 Am. & Eng. Enc. of Law, 1013. But the testimony of Mrs. Powell has no support—not even by Johnston himself. The weight of the testimony—in fact, all the testimony except that of Mrs. Powell—is that the gifts were free and absolute gifts to the head of a peculiar religious faith. Whether the gift carried with it a home for Johnston is a matter of some doubt in the evidence; but that it was an absolute gift there can be no doubt.

Whether Williams held the property thus acquired by gift as his own absolutely, or whether he received it in trust, is a question not important in this suit. If he received it in trust, the evidence is convincing that it was a trust for the benefit of those believing in his faith—a gift to all of them, and not a gift to be returned to the individual donors under any circumstances.

It might be well to call to mind the elemental principles which control here. To constitute a valid gift, there must be actual delivery of the property. *Hynson* v. *Terry,* 1 Ark. 83; *Danley* v. *Rector,* 10 Ark. 211; *Nolen* v. *Harden,* 43 Ark. 307.

When a gift is perfected by delivery, then it becomes irrevocable. Thornton on Gifts, § 105; 2 Schouler on Personal Property, 103; *Ryburn* v. *Pryor,* 14 Ark. 505; *Nolen* v. *Harden,* 43 Ark. 307; *Williams* v. *Smith,* 66 Ark. 299.

In a recent compilation it is thus stated: "Where a gift *inter vivos* has been perfected, that is, where nothing more is to be done to vest the title in the donee, such gift can no more be revoked by the donor than a sale or any other executed contract." 20 Cyc. 1212.

The same rule prevails where the gift is for the benefit of third persons or an institution. Thornton on Gifts, etc., 110.

The application of these settled principles to the facts in hand shows that the gifts in question was consummated by the delivery to Williams, and the evidence is convincing that the gifts and the delivery thereof were made with a full understanding and recognition of the nature and terms of the gift.

After the gifts had been perfected, Johnston continued in the faith for four years and a half, apparently satisfied with the conduct of the home and the treatment he received. But there came a change "o'er the spirit of his dreams." Whether that change was due to religious differences solely or was induced by Redding, who seemed to be playing the Voliva to Williams's Dowie in this sect, or whether it was induced by a preference for Mrs. Powell, causing the inhibition against contracting tender ties to become galling, is a matter left to speculation. That he did become dissatisfied is certain. All the witnesses, including Mrs. Powell, say that his disagreement with Mr. Williams grew out of religious differences. And Mr. Williams claimed that, under the peculiar rules of this faith, he was justified in excluding Johnston from the home on account of this religious difference. But the court does not care to go into that question, because it is not before it.

The only question here is as to the right to recover personal property under the facts set out in the statement; and, as seen, that can not be done without violating the elemental principles governing gifts of personal property by a donor of sane mind.

The case of *Ellis* v. *Newbrough,* 6 New Mex. 181, also reported in 27 Pac. 490, contains all the unique elements of this case, and more, and may be consulted with profit by anyone interested in a peculiar sect.

Judgment is reversed, and cause dismissed.

WOODWARD v. STATE.

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Opinion delivered October 21, 1907.

1. TRIAL—SUFFICIENCY OF VERDICT.—Where two persons were jointly indicted and tried for a felony, a verdict finding them both guilty and assessing their punishment at one year in the penitentiary is sufficient to support a judgment of imprisonment for the term specified against each of them. (Page 120.)
2. EVIDENCE—OTHER CRIMES.—In a prosecution for receiving stolen property, proof that the defendants had other stolen property in their possession was admissible to throw light upon the knowledge or intent with which the property in question was held. (Page 120.)
3. WITNESSES—WIFE OF CODEFENDANT.—Where several persons are tried together under a joint indictment, the wife of neither one of the defendants is a competent witness in favor of a codefendant when her testimony in any way affects the interest of her husband. (Page 121.)

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

STATEMENT BY THE COURT.

The appellants were indicted for larceny in the first count, and for receiving stolen property in the second count, and the jury returned the following verdict: "We, the jury, find the defendants in the first count not guilty. B. W. Benton, Foreman. We, the jury, find the defendants guilty in the second count as charged in the indictment, and assess their punishment at one year in the State penitentiary. B. W. Benton, Foreman." Judgment was rendered, sentencing each to one year in the penitentiary, and they have appealed.

The appellants, father and son, were living upon and running a trading boat on the Arkansas River. Evidence was adduced tending to prove that the articles in question were stolen by a man named Walter Christopher, who went by the name of John Jones, and were brought by him to the boat, and that the appellants knew that they were stolen goods when they were received by them. Evidence was also adduced tending to prove that the appellants had other stolen property upon their trading boat. Various stolen articles, not those mentioned in the indictment, were identified. Evidence was also adduced tending to prove the appellants not guilty.

Objection was made by the appellants to the testimony showing they had other stolen property than that for which they were indicted in their possession. The appellants were tried jointly, and during the trial the wife of each was tendered as a witness by the other defendant, and severally rejected.

William F. Kirby, Attorney General and *Daniel Taylor,* for appellee.

1. Evidence tending to prove that defendants had received stolen property other than that described in the indictment was admissible as tending to show their guilty knowledge with reference to the property named in the indictment. 75 Ark, 427; 72 Ark. 586; 49 Ark. 449; 52 Ark. 303; 43 Ark. 367; 2 Ark. 229.

2. The wife of one of two defendants jointly indicted and tried is not competent to testify for the other. 6 Enc. Ev. 880; 20 Ark. 36; 42 Ark. 204; 74 Ga. 431; 106 Ga. 116.

3. In the light of the testimony there is no ambiguity in the verdict. The form of a verdict is immaterial if the intention of the jury is sufficiently apparent. 29 Am. & Eng. Enc. Law, 1038, 1017.

HILL, C. J., (after stating the facts.) 1. Objection is raised to the form of the verdict as too indefinite to fix the punishment of each separately. It was manifestly intended by the jury to assess their punishment at one year each, as it would be improbable that they intended a joint sentence, each serving six months alternately or concurrently. "While absolute certainty is not essential (in a verdict), there must be certainty to a common and reasonable intent." 29 Am. & Eng. Enc. of Law (2d Ed.), 1016. This verdict is sufficient to meet the requirement.

2. Objection is raised to the evidence of the presence of other stolen property in the house-boat of the appellants.

Mr. Wigmore, in discussing where evidence of other offenses or similar acts may be admitted, says, regarding the crime of stolen goods: "The act of possession is in this class of cases (except rarely) conceded, and the question is as to the criminal intent, and, specifically, as to the knowledge accompanying the possession. In what way does the fact of possession of other stolen goods at other times throw light upon this knowledge or this intent?" And answers the question as follows: "(*a*) As to the first element, it may be assumed that the receipt of stolen goods is in itself always more or less likely to

result in a warning, chiefly because the owner is apt to follow them up and reclaim them, but also in part because a purchase not made in the ordinary course of trade has often suspicious features about the vendor's offer. (*b*) As to the second element, the warning thus obtained can affect the subsequent receipt of other goods upon one condition only, namely, that there is a similarity in the transactions *i. e.,* that the same person comes to dispose of the second article, or that the second article is of the same lot as the first," 1 Wigmore on Evidence, § 324.

In discussing the admissibility of evidence of other crimes, this court said: "It must be remembered always that such evidence is admissible only for the purpose of showing particular intention, knowledge, good or bad faith, when these are in issue and essential to constitute the crime?" *Howard* v. *State,* 72 Ark. 586.

The court approved this case in another application of the same principle in *Johnson* v. *State,* 75 Ark. 427.

There was no error in admitting evidence of the possession of the other stolen property in this case.

3. As to the admissibility of the testimony of the wife of either of the defendants, while they were jointly upon trial: "where several persons are tried together under a joint indictment, the wife of neither one of the defendants is a competent witness against a co-defendant of her husband, where her testimony in any way affects the interest of her husband:" 6 Enc. Evidence, 880, and authorities cited. See also *Trowbridge* v. *State,* 74 Ga. 431; *Stephens* v. *State,* 106 Ga. 116.

The appellants seem to have had a fair and impartial trial according to the principles of criminal jurisprudence.

Judgment affirmed.

BLACK v. STATE.

Opinion delivered October 21, 1907.

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1. HOMICIDE—THREATS.—Threats alleged to have been made by the deceased are admissible in murder trials, whether communicated or not, when there is doubt as to who was the aggres-

sor, and some evidence has been given which tends to show that the act was done in self-defense; and, when communicated, they are admissible to show defendant's motive. (Page 124.)

2. SAME—WHEN EXCLUSION OF EVIDENCE NOT PREJUDICIAL.—The exclusion in a murder case of communicated threats made by deceased is not prejudicial error where they would have thrown no additional light upon the defendant's motives. (Page 125.)

3. SAME—JUSTIFICATION.—No one, in resisting an assault made upon him in the course of a sudden brawl, is justified in taking his assailant's life unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life or to prevent great bodily injury, and has employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. (Page 125.)

4. SAME—JUSTIFICATION.—Instructions requested upon the law of self-defense were properly refused where they omitted the requirement that defendant must have employed all the means in his power, consistent with his safety, to avert the necessity of the killing. (Page 126.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; affirmed.

Joe E. Cook, for appellant.

The court erred in excluding the testimony showing that deceased had threatened the life of appellant, and also, when it was offered in asking the State's attorneys why they did not object, and then asking appellant's attorney: "Don't you know such evidence is improper in this case?" Appellant was further prejudiced before the jury when the trial judge asked appellant's attorney: "Do you pretend to say that when deceased was running from defendant as fast as he could, when defendant shot him, that he was the aggressor?" 54 Ark. 489; 77 Ark. 418; 75 Ark. 373; 74 Ark. 269; 73 Ark. 569; 51 Ark. 147; 71 Ark. 38; *Id.* 65; 76 Ark. 468; 62 Ark. 156; 34 Ark. 696; 72 Ark. 436.

William F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

1. It does not appear that the appellant acted under reasonable apprehension of danger to his own life, or fear of great bodily harm. The testimony as to threats was properly excluded. 34 Ark. 469; Wharton's Law of Hom. § 243.

2. That no prejudice resulted from remarks of the court is shown by the verdict, which only found the degree of the crime committed, and left the punishment to be fixed by the court.

BATTLE, J. J. B. Black was indicted for murder in the first degree, for killing Sam Coker. The jury found him guilty of murder in the second degree, and, failing to agree as to the punishment, the court assessed it at fifteen years in the penitentiary.

In the trial of the defendant, J. L. Countz testified in behalf of the State in part as follows: "Defendant, B. Ward, Sylvester Sanders, Dave and Zeke Cooper drove along in the road to where deceased and he were standing at side of fence. Witness said 'How do you do?' and Ward said: 'Mr. Coker, I have heard I was going to be arrested, and want to know what I have done.' Coker said, 'I do not know if you have done or said anything, but I will find out,' and defendant jumped out of the wagon, and said: 'What have you got against me, Mr. Coker?' and Mr. Coker said: 'I do not know that I have anything.' Defendant started toward him like he was going to make a fight, and Coker picked up a stick of stove wood, and defendant stopped, and deceased went on down the fence toward the house talking pretty loud; did not understand what he was saying. Defendant turned back to the wagon, and said: 'Never mind, we have got one right here,' and took the shotgun out of the wagon and shot deceased."

Dave Cooper, one of the party in the wagon, testified, on behalf of the defendant, in part as follows: "Deceased lives on the public road going to Fouke, and when we got right close to the house, or just passing his house, we saw him. Ward had told me Coker was going to have him arrested, 3 or 4 of them. I never learned how many. When we saw deceased, Ward said: 'Well, I believe we ought to talk to Mr. Coker, and see whether this is so or not;' and suggested that we stop. Defendant said, 'Well, if you want to talk to him, you do the talking.' When we got to him, we all spoke, and stopped the wagon. Ward said: 'Mr. Coker, we heard that you were going to have us arrested, and would like to know what you have against us;' and says, 'If you have got anything against me, tell me what it is. We are willing to ask you, in the humblest way we know, to forgive us for anything we have done to you.' Deceased got mad, and commenced to fuss and curse, and raised his hand this way,

and says: 'God damn you, you run my boy out of the country, and I am going to have every one of you arrested that was into it that Sunday when he had the scrap.' Defendant jumped out of the wagon, and says: 'What have you against me?' Deceased then picked up a club about 18 to 24 inches long. Defendant then said: 'If you want to fight, lay down your club and fight me with your fist.' Deceased shook the stick in defendant's face, and started towards the house, saying: 'I will get my gun and kill you, God damn you!' and hollered to his daughter to bring his gun. Defendant says, 'Hold on there!' and deceased called again for his gun, and defendant jumped to the wagon, and got the gun, and grabbed a couple of shells, and tried to unbreach the gun, but it was loaded. They had loaded it when they started to shoot the hawk, and did not unload it. I looked up and saw deceased's daughter, Ollie, coming with a shotgun, and I jumped out of the wagon, as I saw something was going to happen. About the time I hit the ground gun fired, and deceased fell."

The defendant testified in his own behalf. His testimony was substantially the same as Cooper's.

During the progress of the trial the defendant offered to prove that deceased had threatened his life, and that a part of these threats were communicated to him before the killing, and while one of defendant's attorneys was discussing, before the court, the admissibility of this evidence, the judge remarked to the attorney in the presence of the jury: "Do you pretend to say that when deceased was running from defendant as fast as he could, when defendant shot him, that he was the aggressor?"

The court refused to instruct the jury at the request of the defendant as follows: 3. "Upon the law of self defense the court instructs the jury that when a person has reasonable grounds to apprehend some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may safely act upon the appearances and kill the assailant, if that be necessary to avoid apprehended danger; and the killing will be justifiable."

"4. The jury are instructed that if you believe from the evidence in this case, or have a reasonable doubt thereof, that the defendant with friends was on the day of the tragedy on a

peaceful mission, and passed deceased's residence on the public road, which they were traveling, and that deceased was near his house on the public road; that deceased and defendant were on bitter terms; that when they passed deceased a heated conversation came up between them; that during said conversation deceased called to his daughter to bring him his gun, at the time starting to get the gun from his daughter, who was running to bring it, and defendant shot him, then defendant is not guilty, if you further find that defendant, from his standpoint, honestly believed, without fault or carelessness on his part, that the danger was urgent and pressing, and to save his life or to prevent great bodily injury he fired the shot."

"11. The jury are instructed that if you find from the evidence that, at the time the defendant shot the deceased, said deceased was then and there making a wrongful effort to shoot defendant, with good prospects of being successful, and that defendant shot deceased with the sole purpose of saving his own life at the hands of deceased, then he is not guilty."

"12. You are instructed that, while mere words will not justify an assault, if you find in this case that deceased used opprobrious and threatening words to defendant, and at the same time by his overt acts led defendant to believe that he was then and there about to carry them into execution, and the life of defendant was, or it appeared to him, in urgent and pressing danger, he had the lawful right to defend himself as a reasonable and prudent person would do under similar circumstances."

No prejudicial error was committed in the refusal to permit the defendant to prove that threats were made against him by the deceased, nor in the remark made by the court when the attorney was discussing their admissibility. Threats in trials for murder are admissible "when there is doubt as to who was the aggressor, and some evidence has been given which tends to show that the act was done in self defense," and when communicated to show defendant's motive. *Lee* v. *State,* 72 Ark. 436, 439. The undisputed evidence in the case shows that the deceased was not the aggressor at the time he was killed. The threats could not have thrown any additional light upon the motives of the defendant.

The court properly refused to give instructions asked. The following is the law of this case: "No one, in resisting an as-

sault made upon him in the course of a sudden brawl or quarrel, or upon a sudden rencounter, or in a combat on a sudden quarrel or from anger suddenly aroused at the time it is made, is justified or excused in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. The danger must apparently be 'imminent, irremediable and actual,' and he must exhaust all the means within his power, consistent with his safety, to protect himself, and the killing must be necessary to avoid the danger." *Duncan* v. *State,* 49 Ark. 543, 547.

If an assault was made upon the defendant by the deceased, it was from anger aroused at the time it was made. Deceased was unprepared for the encounter. Yet in none of the instructions refused was the court asked to instruct the jury that, before they could acquit, it was necessary for them to find that defendant employed all the means in his power, consistent with his safety, to avert the necessity of the killing. There was evidence to show that he did not.

Judgment affirmed.

CLEVELAND-MCLEOD LUMBER COMPANY *v.* PIGGSE.

Opinion delivered October 21, 1907.

LABORER'S LIEN—ENFORCEMENT.—One who performed no labor of any value upon certain logs is not entitled to have a laborer's lien enforced thereon.

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

Otis T. Wingo for appellant.

It is shown that appellee was a sub-contractor, that he had no contract with appellant, that he looked to Fisk, and not to appellant, for his pay, and that he performed no labor in per-

son upon the logs. He had no lien upon the product of the labor of his men. 71 Ark. 334; 2 Jones on Liens, 1629.

BATTLE, J. Appellee brought this action before a justice of the peace by filing an affidavit, alleging that the appellant was indebted to him in the sum of forty dollars for labor performed on certain logs; that he had a lien on the logs for said sum; and prayed for an attachment against the logs, and for judgment against appellant for the sum.

Attachment and summons were issued and served by seizing 280,000 feet of logs and by service of summons upon appellant.

On return day, appellant answered, denying that it was indebted to appellee and denying that he had a lien upon the logs attached.

From a judgment of the justice of the peace appellant appealed to the Sevier Circuit Court, where, upon trial before the court sitting as a jury, judgment for the debt was given against appellant, and from this judgment appellant has appealed to this court.

There was no evidence adduced in the trial before the circuit court to prove that appellant was indebted to appellee. He did not undertake to pay the appellee upon any condition. Appellee performed no labor upon the logs attached. One Fisk made a contract with Cleveland-McLeod Lumber Company to remove certain logs. Fisk employed appellee to do a certain part of the labor. There is no evidence that the Lumber Company knew anything about, or had notice of, the latter contract. Appellee performed no labor of any value upon the logs attached, so far as shown by the evidence, and had no lien. *Klondike Lumber Co.* v. *Williams,* 71 Ark. 334, 338.

Reversed and remanded for new trial.

BELL v. STATE.

Opinion delivered October 21, 1907.

1. HOMICIDE—INDICTMENT—VARIANCE.—Where an indictment for murder alleged that defendant killed one J. E. B. by shooting him with a pistol, and that from the effects of a wound so inflicted the said T. J. B. did then and there die, the variance as to the initials of the deceased was a clerical misprision, and was properly disregarded. (Page 128.)
2. SAME—EVIDENCE.—It was not error to refuse, in a murder case, to permit defendant to prove an alleged statement made by deceased to another that the latter ought to stand up for his rights, that people beat him out of a whole lot; the statement not being in the nature of a threat nor having reference to the defendant. (Page 129.)
3. TRIAL—IMPROPER ARGUMENT—OBJECTION AND EXCEPTION.—It was not sufficient merely to object to an improper argument of appellee's counsel; appellant should have called for a ruling of the court thereon, and if the court failed to restrain counsel an exception should have been taken. (Page 129.)

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

Will Steel, Nichols & Steel and *W. H. Collins,* for appellant.

William F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

McCULLOCH, J. Appellant, J. R. Bell, appeals from a judgment of conviction of the crime of murder in the second degree, his punishment having been fixed by the jury at seven years' confinement in the penitentiary. The indictment (omitting caption and formal part) is as follows:

"The said defendant, in the county and State aforesaid, on the 20th day of January, 1907, unlawfully, willfully, feloniously, and of his malice aforethought, did kill and murder one J. E. Britt by then and there shooting him, the said J. E. Britt, with a pistol loaded with gunpowder and leaden balls, and then and there held in the hands of him the said J. R. Bell, and from the effects of the wound then and there so inflicted the said T. J. Britt did then and there die, against the peace and dignity of the State of Arkansas."

The defendant filed a demurrer, and also a motion to quash the indictment, on the ground that the several allegations were

at variance, it being charged therein that J. E. Britt was shot by the defendant, and that T. J. Britt died from the effects of the wounds. This was a clerical error in the preparation of the indictment, and the court properly disregarded it.

Error of the court is assigned in refusing to permit the defendant to prove an alleged statement made by Britt to one Hudson that "you (Hudson) ought to stand up for your rights; people beat you out of a whole lot."

The killing occurred at Britt's house. He was the tenant of Hudson and Tom Bell, appellant's father, had been one of Hudson's tenants the previous year. Tom Bell owed Hudson a balance on rent, and left a lot of corn with the latter to be held until this rent should be paid. Hudson left the corn in Britt's charge, and instructed him not to allow the corn to be taken away without an order from him. He also promised to sell the corn to Britt if Bell did not pay the balance on rent and take it back. Subsequently Bell and Hudson made a settlement, and Hudson gave Bell an order for the corn. Bell and his son, the appellant, went to Britt's house to get the corn, and the killing occurred there. Bell failed to present the order given him by Hudson, and Britt refused to allow the corn to be taken. Appellant said to his father: "Why don't you go and get the corn?" Britt then said to appellant: "Why don't you get it?" A controversy was thus provoked between appellant and Britt, and appellant drew a pistol from his bosom and shot Britt, they having in the meantime advanced toward each other in a threatening attitude. There is some conflict between the witnesses as to the circumstances, but the foregoing are substantially the facts established by the testimony. Britt was unarmed at the time, and there is no evidence that he was about to do appellant any serious bodily harm.

Now, we can not see that the statement of Britt to Hudson, excluded by the court, was material. In the first place, it does not seem that the remark related especially to the Bells, and for this reason, if for no other, it was not material. But, if it had done so, it was not in the nature of a threat, and could have shed no light on the circumstances as to the material facts. No error was committed in excluding the remark.

Exception was also taken to a remark made by the prosecuting attorney in his argument to the jury, as follows: "I

asked Tom Bell yesterday if he made that statement." Tom Bell was introduced as a witness by the defendant, and was cross-examined by the prosecuting attorney concerning an alleged contradictory statement made by him before the grand jury. It does not appear from the record whether the remark of the attorney related to a question propounded to Tom Bell out of court or in his cross-examination before the jury. The transcript of Bell's cross-examination does show, however, that such a question was asked of him while on the witness stand. Nor does the record disclose that the prosecuting attorney undertook to state what Bell's reply was to the question. Nor that defendant's counsel appealed to the court to exclude the remark. They contented themselves, so far as the record shows, merely with an exception to the remark. This is not sufficient, even if it appeared affirmatively that the remark was improper, *Kansas City So. Ry. Co.* v. *Murphy,* 74 Ark. 256.

Error of the court is assigned in refusing to give instructions numbered four and ten on the subject of reasonable doubt. The court gave three instructions on this subject asked by appellant's counsel, and they were sufficient to cover the question. Instructions numbered eight on the subject of killing to prevent the commission of a felonious assault by deceased, and instruction numbered twelve on the subject of accidental killing were both properly refused because there was no evidence to warrant them.

Other exceptions in the motion for new trial are argued in the brief, but it does not appear that they were noted in the record, and they can not, therefore, be considered.

There is nothing in the record showing any improper ruling of the court to the prejudice of the defendant. He had a fair trial, and was convicted by the jury upon evidence which fully warranted the verdict.

The judgment is therefore affirmed.

BROWNING *v.* STATE.

Opinion delivered October 21, 1907.

1. TRIAL—IMPROPER ARGUMENT.—A new trial will not be granted on account of improper remarks of appellee's counsel where the court directed the jury not to consider them, and where the evidence was sufficient to sustain the verdict. (Page 135.)
2. SAME—IMPROPER QUESTION.—Where one of the State's attorneys asked defendant's witness whether his father was not tried for murder, and on objection the question was withdrawn, the court remarking: "I will instruct the jury to pay no attention to it, regardless of what the answer might be," the question was harmless. (Page 135.)

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

Gustave Jones and *McCaleb & Reeder* for appellant.

The appellant was prejudiced on the trial of this case by counsel for the State asking the witness Blanchett, on cross-examination, if his, Blanchett's father had been indicted for a felony in Lawrence County, and by the refusal of the court to rebuke counsel for asking such question when requested so to do. Appellant was further prejudiced by the statement of counsel in argument to the jury that he and his co-counsel had requested witness Blanchett to meet them for the purpose, not to ascertain the facts, but to find out how many and what ridiculous lies he would swear to, this being appellant's only witness beside himself. 58 Ark. 368; 61 Ark. 130; 63 Ark. 174; 75 Ark. 577; 74 Ark. 300; 77 Ark. 19; 73 Ark. 148; 72 Ark. 138; 70 Ark. 305.

William F. Kirby, Attorney General and *Daniel Taylor,* for appellee.

The only reasonable conclusion to be drawn from the evidence is that appellant became enraged over the opprobrious epithet applied to him by the deceased, and for that reason shot him down; and the theory that deceased was about to strike him at the time of the shooting is contrary both to the testimony and the situation and attitude of the parties. Mere words do not justify an assault, and, in view of the facts developed in testimony and the light punishment imposed upon him, appel-

lant could not have been prejudiced by the remarks of counsel complained of. 74 Ark. 256; 75 Ark. 67. Nor will this court presume that prejudice resulted, since the trial court promptly instructed the jury to disregard the alleged improper remarks. 75 Ark. 246; *Id.* 347; 77 Ark. 65; 76 Ark. 39; *Id.* 286; 67 Ark. 365.

BATTLE, J. Appellant, Frank Browning, was indicted by a grand jury of Lawrence County for murder in the first degree, committed by killing Thomas W. Midkiff at Hoxie, in Lawrence County, in this State. The venue in the case was changed to Independence County, where he was tried and convicted of manslaughter, and his punishment was fixed at five years and six months in the penitentiary; and he appealed to this court.

Midkiff, the deceased, was a telegraph operator at Hoxie, and had his office in what had been a box car. On the 28th of December, 1905, about eleven o'clock in the forenoon, the appellant, Browning, called at his office, sent a telegram, and left. He returned about 1:30 P. M. to inquire about an answer to his telegram, and Midkiff informed him that he would probably not get an answer until four or five o'clock in the evening. He demanded the fee he had paid for an answer to his telegram. Angry words followed.

Joseph O'Shea, a ticket agent of a railroad company at Hoxie, who was within a few feet of the appellant and deceased at the time of the difficulty btween them, testified that, before there were any words between them, he heard the appellant say to the deceased: "I paid for service, and expect to get it." Afterwards, he heard the deceased order the appellant to leave his office, and then heard a noise like one hitting the counter with a club, and heard Browning say: "All right, I will go; open the door." Midkiff opened the door with his left hand, Browning stepped out; Midkiff reached up his right hand for a wire latch, about six feet high, to close the door, and as he did so appellant fired a pistol at him, and he fell in the arms of the witness, and expired immediately.

Harve Harris testified that he was at Hoxie on the day of the killing; was standing at the end of the car used as a station; looked in and saw Midkiff hit the counter with a club two or three feet long, and heard him tell Browning to get out, and Browning replied he would, to open the door; Midkiff opened

the door; Browning walked out, and as he did so Midkiff said, "You bastard," and when he said this Browning turned and shot him, and then said, "Don't call me a bastard. You robbed me."

H. L. Coffman testified that on the day of the killing he passed directly in front of what is called the box car depot, and went across to the platform, and there heard the remark: "Get out," and heard some one say, "Open the door, and I will get out," and he (witness) thought it was probably some one drunk, and started over to see. As witness crossed the track, Midkiff opened the door with his left hand, and had a club in his right hand raised in a position for striking. Browning stepped out, when Midkiff remarked, "You damned bastard, stay away from here!" and then Browning wheeled and shot him, killing him instantly. Midkiff had the club in a position to use, but did not attempt to do so, as he did not have time. After he fired Browning said he allowed no man to call him a bastard.

Less Dennington testified that he was standing near the Hoxie crossing, opposite the Iron Mountain track, at the time of the killing, and heard loud talking, and saw Browning back out of the door sideways and fire a pistol; "do not know what Midkiff was doing, but saw his hand raised above the door, and seemed to be reaching for something."

John Blanchett, a witness for defendant, testified as follows:

"I was on the platform across from the box car used as a station at Hoxie, and nearly in front of door of telegraph office, at time of difficulty between Midkiff and Browning. Heard some loud talking at box car; heard Midkiff tell Browning to get out; called him a son-of-a-bitch, and told him to get out. Never heard Browning say anything. Midkiff had club drawn back, like he was aiming to hit the man with it. While he had the club drawn, he called Browning a bastard, and told him to get out, and told him if he didn't he would kill him. Browning walked out, and then turned around, and shot Midkiff, and said that he would not submit to being called a bastard. Gibson and other attorneys for the State asked me to come around to their room and go over the case with them. Knowing I had been summoned here as a witness for defendant, I met them last night at Mr. Casey's office, and told them all I knew about the case, as I have told it here today."

One of the attorneys for the State, on cross-examination, asked witness if he was the son of Joe Blanchett, and he answered that he was. The attorney then asked if his father was not tried for murder. The question was objected to, and withdrawn, and was not answered, and the court remarked, "I will instruct the jury to pay no attention, regardless of what the answer might be."

Frank Browning, the appellant, in behalf of himself, testified as follows:

"I went into the operator's office about 10 or 11 o'clock to send a message. I went away, and about one, or something after, went back, and Mr. Midkiff told me I would not receive the message until four or five o'clock, and I told him I wanted to get service earlier, as I wanted to get back. He said I could not get service any quicker. I said, 'If I can't get service quicker, I have paid you, and you can give me back my twenty-five cents, and if I am here when it comes I will pay you.' He said 'Get out,' and I backed up, and he grabbed the stick. He struck at me, and I threw up my hand. I said, 'Open the door and let me out,' and as I got even with him he said. 'Get out of here, you damned bastard, or I will kill you!' and as I stepped out and turned my back I saw he had the club raised, and I jerked my gun out and fired. I thought he was going to strike me with the club."

On cross-examination he further testified: "I told him (Midkiff) to give me back my twenty-five cents, and if I was there when it (answer to telegram) came I would receive it and pay him, and that was when he grabbed the stick. He struck me with it before he struck the counter. He struck me on the right side of the head."

During his argument before the jury one of the attorneys for the State stated to the jury that on the night previous to the day on which the witness (Blanchett) testified, he and his co-counsel requested said witness to meet them at a certain room for the purpose, not of ascertaining the facts, "but to find out how many and what outrageous lies said witness would testify to," and to this statement appellant at the time excepted, and the court instructed the jury not to consider the statement, nor

let it have any weight with them in arriving at their verdict.

The appellant relies solely on the improper remark of the attorney as to witness Blanchett and the question asked him as to the trial of his father for murder, for reversal. He insists that they were prejudicial, and the judgment against him should be reversed.

The rulings of this court upon the improper conduct of counsel is summed up in *Kansas City Southern Railway Co.* v. *Murphy,* 74 Ark. 256, as follows: "In the final analysis, the reversal rests upon an undue advantage having been secured by argument which has worked a prejudice to the losing party not warranted by the law and facts of the case. In the one class of cases the reversal rests upon the abuse of the discretion of the trial judge in not confining the argument within its legitimate channel, and not properly instructing upon it or sufficiently reprimanding or punishing the offending attorney; and in the other or exceptional class rests upon the extremely harmful nature of the remarks, which can not be cured other than in a new trial upon the merits of the case freed of extraneous prejudice." In the latter class of cases this court has said: "As a general rule, 'an objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench, and an admonition from the presiding judge to the jury to disregard prejudicial statements,' is sufficient to cure the prejudice." *Holder* v. *State,* 58 Ark. 473, 483; *Kansas City, Ft. Scott & Memphis R. Co.* v. *Sokal,* 61 Ark. 130, 138; *German-American Insurance Co.* v. *Harper,* 70 Ark. 305, 307.

It does not appear that the case at bar is an exception to the general rule. The appellant promptly interposed an objection to the remark of counsel, and the court directed the jury to disregard it, and thereby rebuked the counsel for making the same. Was the remark nevertheless harmful? The evidence was sufficient to sustain the verdict of the jury. The most reasonable view of the facts sustains it. Appellant was convicted of manslaughter. The evidence shows that he did the killing in the heat of passion. The testimony of Blanchett, the impeached witness, supports this conclusion. He testified that, at the time Browning fired the fatal shot, he said he could not submit to being called a bastard. The remark was explanatory of his

action. We therefore see no good reason to conclude that the objectionable remark prejudiced the appellant.

The objectionable question propounded to Blanchett on cross-examination by appellee did not affect the credibility of the witness, and was withdrawn unanswered, the court remarking, "I will instruct the jury to pay no attention to it, regardless of what the answer might be." It was harmless.

Judgment affirmed.

MEARS v. STATE.

Opinion delivered October 21, 1907.

1. INDICTMENT—MISJOINDER OF OFFENSES—WAIVER.—The objection that an indictment improperly joined two offenses is waived by defendant's failure to demur to it on that account. (Page 139.)
2. BANKS—FALSE ENTRIES ON BOOKS.—In a prosecution under Kirby's Digest, § 1726, providing that any person who, with the intent to defraud, shall make any false entry or shall falsely alter any entry upon the books of account of any banking corporation shall be punished as for forgery, instructions which made the accused's guilt to depend upon whether he made false entries on the bank's books were erroneous in omitting the intent to defraud as an element of the crime. (Page 139.)
3. EVIDENCE—EXISTENCE OF CORPORATION.—In a prosecution for altering the books of a banking corporation with intent to defraud, it is sufficient to prove that there was such a corporation *de facto*, which may be proved by general reputation. (Page 140.)
4. SAME—NAME OF CORPORATION.—In a prosecution for altering the books of a banking corporation, the allegation as to the name of the corporation may be sustained by evidence that it was known by such name. (Page 140.)

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

STATEMENT BY THE COURT.

The grand jury of Little River County indicted E. A. Mears for making false entries in the books of a banking corporation as follows:

"The grand jury of Little River County, in the name and by the authority of the State of Arkansas, accuse the defendant, E. A. Mears, of the crime of making false entries, committed as follows, viz: The said defendant, in county and State aforesaid, on the 18th day of November, 1904, then and there being cashier of the First Bank of Winthrop, a corporation organized under the laws of the State of Arkansas, and engaged in the banking business in the town of Winthrop, in said county, did unlawfully and feloniously make two several entries upon the books of account of the said Bank of Winthrop, showing credit to himself for the sum of five hundred dollars and two hundred dollars respectively, when said entries were false, and the said E. A. Mears was not then and there entitled to credit on said books for the sum so entered, or any other sum; that said entries were made with the felonious intent to defraud said Bank of Winthrop, and to claim credit for said sum in violation of the law, against the peace and dignity of the State of Arkansas."

The defendant demurred to the indictment on many grounds, and the demurrer was overruled by the court.

It was proved that entries were made by the defendant upon the books of a bank of Winthrop, in this State, of which he was president. Evidence was adduced to prove them false. As it will not be necessary to determine its sufficiency to sustain the verdict, it will not be necessary to state it or its substance in this opinion.

The court instructed the jury over the objection of the defendant as follows:

"2. If the jury believe from the evidence beyond a reasonable doubt that the defendant took credit upon the books of the Bank of Winthrop, that such bank was at that time a corporation, and that at the time of taking such credit he was not entitled thereto, and knew that he was not entitled to such credit; you will convict the defendant."

"4. You are further instructed that he would not be authorized to take credit upon the books of the bank for any claim or demand to himself in the way of services or in promoting said bank until such claim or demand has been audited and allowed by the board of directors of such bank."

"5. If the jury believe from the evidence beyond a reason-

able doubt that the defendant and others formed themselves into an association under the laws of the State of Arkansas for the purpose of operating a banking institution, and proceeded to execute articles of agreement and incorporation, and caused the same to be filed with the county clerk of Little River County, and in the office of the Secretary of State for the State of Arkansas, and thereupon began operating as such bank under such articles of agreement, they would be estopped to deny or assert that such association was not a corporation, although at the time of some of the transactions herein complained of said articles of association had not been filed with the Secretary and his certificate thereof issued."

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

"1. You are instructed that the First Bank was not a corporation until its articles were filed with the Secretary of State; and if the persons composing such association did business before that time, they did it as private individuals, or as a company, but not as a corporation."

And the defendant asked for the following instructions, and the court, after amending them by incorporating the words in brackets over the objections of the defendant, gave them as amended:

"2. You are instructed that if the defendant ordered books and other stationery before the bank was incorporated, it used them, and he was entitled to credit in the books of the bank for them, and if he made such credit it was not a false entry, [if you further find that such supplies were charged to the defendant, and not to the bank.]"

"5. You are instructed that if it is shown by the evidence that the defendant drew up the articles of incorporation, and spent time in securing subscribers thereto, and performed other services that were accepted by the corporation, he was entitled to a credit on the books of the bank for the amount they were reasonably worth, and was entitled to a credit on the books of the bank for the same [after the same had been allowed by the board of directors]. You are instructed that the defendant is entitled to the benefit of every reasonable doubt; and by reasonable doubt is meant that, unless you have a firm and abiding

conviction to a moral certainty of the truth of the charge, you must acquit the defendant."

The defendant was convicted, and his punishment was assessed at two years' imprisonment in the State penitentiary, and he appealed.

Appellant *pro se.*

William F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

1. The indictment is sufficient. The crime is stated with such degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case, and there is no defect therein tending to prejudice the substantial rights of the defendant upon the merits. Kirby's Digest, §§ 2228-9.

2. The effect of the court's fifth instruction is that the doctrine of estoppel is applicable in a criminal case. On this point authorities are divided, but it is submitted that the weight of authority, as well as the better reason, supports the view that the doctrine of estoppel does apply in criminal case. Supporting this view, see 26 L. R. A. 252; 32 Gratt. (Va.) 899; 24 Kan. 1; 11 Wheat. 393. *Contra,* 60 Ia. 478; Hughes' Crim. Law & Proc. §§ 537, 3185; Gillett, Collateral Ev. § 119.

3. The first instruction asked by appellant was properly refused, if the word "corporation" in the statute means a corporation *de facto* as well as *de jure.* This was at any rate a corporation *de facto.* Clarke on Corporation, 86. In a prosecution for an offense committed on the property of a corporation, proof that it was a corporation *de facto,* doing business as such in the corporate name set out in the indictment, is sufficient. 28 Fla. 169; 49 Cal. 342; 29 Fla. 439; 28 Ind. 321; 74 Ind. 337; 28 Neb. 832; 18 O. St. 366; 58 Ark. 98. See also Kirby's Digest, § 3084.

BATTLE, J., (after stating the facts). The indictment was sufficient, unless it be defective because it charged the defendant with two offenses; but this defect, if a defect, was waived by the failure to demur to it on that account. *Ince* v. *State,* 77 Ark. 426, 428.

The indictment was based upon the following statute: "Every person who, with the intent to defraud, shall make any

false entry, or shall falsely alter any entry made in any book of account by any banking corporation within this State, or in any book kept by such corporation, by which any pecuniary obligation, claim or credit shall be or purport to be discharged, diminished, increased, created, or in any manner affected, shall, on conviction thereof, be punished as for forgery," which is by imprisonment in the State penitentiary not less than two years nor more than ten years. Kirby's Digest, § 1726.

The statute makes an intent to defraud an essential element of the offense charged. Instructions given at the instance of the State numbered 2 and 4, and modifications in instructions numbered 2 and 5, given at the request of the defendant, taken in connection with the instruction numbered 2 given at the instance of the State, made it unnecessary to prove such intent in order to convict, and for that reason were and are fatally defective and prejudicial.

It was sufficient to prove the existence of the corporation mentioned in the indictment to show that there was such a corporation *de facto,* and evidence of general reputation of its corporate existence is competent to prove it. Section 3084 of Kirby's Digest; *Fleener* v. *State,* 58 Ark. 98, 102. As to what is necessary to constitute a *de facto* corporation, see *Whipple* v. *Tuxworth,* 81 Ark. 391. The name of the corporation as alleged in the indictment may be shown by evidence that it was known by such name. *Bennett* v. *State, ante* p. 97.

In view of the evidence in the case and what we have said as to corporations *de facto,* it is unnecessary to notice instruction numbered 5 and given at the instance of the State, as it was not prejudicial.

Reverse and remand for a new trial.

CHICOT LUMBER COMPANY v. DARDELL.

Opinion delivered October 21, 1907.

1. ADVERSE POSSESSION—SUFFICIENCY.—Evidence that a tax purchaser of land openly maintained a stave camp upon it and kept men upon the land continuously for more than two years, cutting and removing

stave timbers, and that there was no other occupancy of the land, shows sufficient possession, under Kirby's Digest, § 5061, to give title. (Page 143.)

2. EQUITY—JURISDICTION TO ADMINISTER COMPLETE RELIEF.—Under the rule that where equity has properly taken jurisdiction of an equitable suit it is competent to adjudicate all the issues therein, both legal and equitable, relating to the subject-matter of the controversy, where an injunction was brought to restrain defendant from cutting timber on land claimed by plaintiff, equity had jurisdiction of a cross suit by defendant asking damages for timber converted by plaintiff. (Page 144.)

3. INJUNCTION—DAMAGES ON DISSOLUTION.—Although Kirby's Digest, § 3998, authorizes the assessment of damages against one who applies for an injunction only where proceedings upon a judgment have been stayed, this does not prevent the defendant in other cases from filing a cross complaint asking for the recovery of damages growing out of the issuance of the injunction. (Page 145.)

Appeal from Chicot Chancery Court; *James C. Norman,* Special Chancellor; affirmed.

June P. Wooten and *Baldy Vinson,* for appellant.

1. Appellees' claim that the land was in their possession for two consecutive years is not sustained by the proof. Cutting timber alone, even for two years continuously, would not be sufficient to constitute adverse possession in this State. 68 Ark. 551; 49 Ark. 266. And appointing an agent to look after land, who goes upon it only occasionally, falls short of the actual possession required by law. 64 Ark. 100.

2. The sale of the lands for non-payment of taxes of year 1889 to the State was void. Kirby's Digest, § 7083; 66 Ark. 422; 70 Ark. 326; 60 Ark. 63; 65 Ark. 595; 55 Ark. 218; 68 Ark. 248; 61 Ark. 36; Kirby's Digest, § 7086; *Id.* § 7092; 70 Ark. 326.

3. The State, having no title to the lands, could convey none to Dardell, nor did he acquire title by two years' actual, adverse and continuous possession; and, he having no title and not being in possession, Roderick's action in breaking appellant's fence, etc., constitutes a mere trespass and waste, which did not dispossess appellant, and which equity would enjoin. 40 Ark. 192. There was no ouster of appellant. 4 Mass. 416, 3 Am. Dec. 227.

4. The chancery court was without jurisdiction to assess damages for the wrongful suing out of the injunction. Kirby's

Digest, §§ 3998-9, 3940. If wrongfully obtained, the remedy was by suit on the bond. 52 Ark. 534; 48 Ark. 21.

Bolton & Kirten and *Garland Streett,* for appellees.

1. The object of an injunction is to maintain the *status quo* of the parties until the final decision of the suit, and the plaintiff, having obtained an injunction, will not upon its dissolution be permitted to take advantage of any rights which he has thus wrongfully prevented his adversary from enjoying. 76 Ark. 48; 6 Vesey Jr. 73; 2 Daniell's Ch. Pr., 5 Ed., 1639 and note; 134 Ill. 603.

2. If it be conceded that appellants had title prior to 1889, they, having permitted the land to forfeit in that year, and having failed thereafter for thirteen years to pay taxes thereon, permitting appellees to purchase the same and bear the burden of tax payments for that length of time, with full knowledge of appellees' claim, were barred under the doctrine of laches from asserting any claim in 1902.

The enclosure by Wood & Mathews is shown by a clear preponderance to have been made by consent of Dardell, and for his benefit. Possession, however long continued, is not adverse unless accompanied and evidenced by a claim of title. 59 Ark. 626; 77 Ark. 201.

3. The possession of Dardell's employee, Davis, for more than two years constituted a complete bar to any claim adverse to Dardell after the expiration of that time. 76 Ark. 447; Kirby's Digest, § 5051; 58 Ark. 151; 59 Ark. 460; 71 Ark. 390; 75 Ark. 514; 76 Ark. 442.

The acts done upon the land, in constructing a house, sinking a well, manufacturing timber into staves, fencing a lot in which to keep stock, were sufficiently notorious and open to put an owner on notice of an adverse claim, and, being continued for two years, perfects title. 98 Ala. 181; 56 Ala. 449; 90 Mich. 50. Possession of part under color of title is possession of the whole. 80 Ark. 435; 71 Ark. 390; 75 Ark. 395; 78 Ark. 99; 18 Ill. 539. See also, 75 Ill. 51; 89 Ill. 183; 18 Neb. 619; 20 Mich. 384; 47 Tex. 529.

Damages were not assessed for the wrongful suing out of the injunction, hence the statute and authorities cited by appel-

lant do not apply. The chancery court having jurisdiction of the subject-matter of the suit and of the parties, it was its duty to settle all the rights of the parties thereto. Appellees are not remitted to a suit on the bond. 37 Ark. 286; 75 Ark. 52; 77 Ark. 570.

HILL, C. J. The Bliss-Cook Oak Company, successor in title to the Chicot Lumber Company, was the owner of a large body of timbered land in Chicot County, and within the limits of its holdings were the four hundred acres of land in controversy. Assuming, without deciding, that the Lumber Company had title to this tract also, the first question is whether Dardell's title under deed from the State should prevail over the fee title. The land was forfeited for the taxes of 1889, and sold to the State. The tax sale was void for numerous reasons. Dardell purchased the State's title on the 10th of August 1894, and received a deed from the State Land Commissioner on that date, and recorded same on August 21st, 1894. The chancellor found that Dardell had two years' actual possession under said deed, and the facts authorizing this finding were as follows:

In September or October following his purchase in August, Dardell went upon the land with a surveyor, who ran out the lines, and located a camp suitable for stave making. Dardell placed one Tom Davis in charge of the camp. This camp consisted of a log cabin, covered with cypress boards. It had a mud chimney and a door provided with a lock. The cabin was large enough to accommodiate eight or nine men, and that number occupied it at various times during the stave making. There was a lot for horses, a well was dug and put in use, and a large quantity of timber was cut down and made into staves. Davis lived about four miles and a half from this camp, and for over two years he lived in the camp during the week and joined his family on Saturdays, remaining until the first of the next week. He had with him various laborers, engaged in making staves, and some one would be left in charge when he went to his home. Dardell visited the camp during this time once or twice a month overseeing the work. This occupancy of Davis continued until his death, which was two or three years after he was placed in charge of the camp. There was no other occupancy of the tract, and no one lived within four miles of this camp. This possess-

ion was sufficient, under section 5061, Kirby's Digest, to give title. *Sparks* v. *Farris,* 71 Ark. 117; *Boynton* v. *Ashabranner,* 75 Ark. 514; *Carpenter* v. *Smith,* 76 Ark. 447.

It is true that this camp was of a temporary character, and was abandoned some time after the two years had run. But while the possession of Davis for Dardell lasted, it was open, notorious, hostile and adverse to all the world. The cutting of the timber and its manufacture into staves on the property by a large force of employees was a daily assertion of ownership of the property. This was done openly, and the staves hauled from the land to the railroad. All these acts were hostile to the owner of the title. A foreign flag was flying in the middle of his domain, and it was kept flying until the statutory time required by the nature of the title asserted by Dardell, was completed. This vested the title in Dardell, and the subsequent abandonment of the camp could not affect the title thus perfected.

The Lumber Company claims that, even if Dardell's title was perfected, it has acquired a title by adverse possession for seven years subsequent to the death of Davis and the abandonment of the camp. A large tract of land was fenced by Wood and Matthews as a pasture. Some half dozen sections of the land were leased from the Lumber Company to them for this purpose, including the land in question. There is a conflict in the testimony as to whether this large pasture fence which included this land was built in 1897 or 1898. This suit was brought in November, 1904. If the fence was built in 1897, it would be in time for the seven years' statute to run. There is substantial testimony that Wood and Matthews got permission from Dardell as well as from the Lumber Company to build the fence. In that event their fence would not be hostile to Dardell's title. There is also substantial testimony that the fence was not kept up for the last three or four years.

The chancellor's finding was against adverse possession having been acquired by the Lumber Company after Dardell's title was perfected, and it can not be said that his finding is against the preponderance of the evidence.

The chancellor gave judgment on cross complaint of Dardell against the Lumber Company for the value of the timber and staves converted by it while in possession of the land, and it

is insisted that this is awarding damages on the dissolution of an injunction, contrary to the statute (Kirby's Digest, § 3998), as construed in *Greer* v. *Stewart,* 48 Ark. 21; *Stanley* v. *Bonham,* 52 Ark. 354.

The Lumber Company did obtain an injunction against Dardell, and those claiming under him, from cutting timber on the land or removing any timber therefrom, and thereafter it cut timber therefrom, and took possession of about 42,000 staves manufactured by Dardell, most of which it sold in the market, and the balance was permitted to rot.

Dardell answered, and filed a cross complaint against the plaintiff, asserting title in himself, asked that it be quieted, and also asked for damages for the timber and staves converted by the Lumber Company.

The chanceller's finding as to the value of the timber and staves converted is sustained by the evidence. If there had been no injunction in the case, Dardell's right would have been clear to have recovered the value of the timber cut from his land and staves converted by the Lumber Company to its own use. The fact that there was an injunction, which may or may not have aided the Lumber Company in making this conversion, will not prevent Dardell having redress therefor exclusive of a possible remedy upon the injunction bond. This is purely a legal right arising in an equitable suit. Equity having properly taken jurisdiction of an equitable action, it was competent to adjudicate all the issues therein, both legal and equitable relating to the subject-matter of the controversy. *Cribbs* v. *Walker,* 74 Ark. 104; *Norman* v. *Pugh,* 75 Ark. 52; *Dickinson* v. *Ark. City Imp. Co.,* 77 Ark. 570; *Bush* v. *Prescott & N. W. Ry. Co.,* 83 Ark. 210.

The damages asked in the cross complaint of Dardell are not dependent upon the conduct of appellant in obtaining the injunction, and their recovery is not dependent upon the dissolution of the injunction, and no remedy is sought upon the injunction bond. It is simply a legal right to recover the value of the timber and staves which were wrongfully taken from realty proved to be Dardell's, and not the Lumber Company's. The rule invoked does not apply.

Judgment is affirmed.

KEAR v. STATE.

Opinion delivered October 21, 1907.

INFANCY—PRESUMPTION AS TO INCAPACITY TO COMMIT CRIME.—The presumption that an infant between twelve and fourteen years of age, accused of murder, was incapable of crime is not overcome by a mere scintilla of evidence that he was conscious that he was doing wrong when he fired the fatal shot.

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant, a boy little over thirteen and a half years old, shot and killed a negro boy about the same age. They lived on adjoining farms. Appellant was convicted of murder in the second degree, his punishment was fixed at five years in the penitentiary, and he appeals.

The killing was done sometime early in the morning, and the sheriff arrested appellant about one o'clock P. M. When the sheriff first arrested appellant, he denied doing the killing. Then, after his father said to the sheriff: "You need not ask the boy anything; he will not tell you anything; you can not get anything out of him; I told the boy to take the gun and go down there and kill him," appellant told all about it. He said he shot the negro because he had been over in the field bothering him; said the negro came over there abusing him, and had a shotgun and an ax with him, and he went to the house and got the gun and came back down there and shot him. Leonard Caltharp, the boy who was killed, was just outside of the field in the lane, and appellant was in his father's field at the time of the shooting, about 220 steps from deceased.

Witness, Morrow, who was with the sheriff at the time the arrest was made, gave the following account of what appellant did and said: "The boy got up behind me (witness was horse back), and after we left the house (appellant's), and before we got to the negro's house, I asked him (appellant) what he did it for, and what he did it with, and he said he did not have anything to do with it, that he did not know anything about it. Rode on further, and Norris (sheriff) got down and looked at the negro. Then we started on, and got nearly back to the place where the

shooting was done, and I questioned the boy again, and so did Norris, and Kear, the father of defendant, said: 'There is no use asking that boy anything; the boy is not to blame; I told him to do it.' The boy then turned around, and said: 'Now, I will tell you the whole thing, just how it happened.' Then he pointed out the rock pile in the field, something about 175 or 200 yards, and said he stood there, and the negro was standing in the lane; said that he missed him the first shot; that the negro was going through the wire fence out of the field the first shot, but that he got him the next; that the negro was going like hell the second shot.

This witness said that appellant first gave as his reason for shooting the negro boy that he had been over in the field bothering him (appellant), and then he said his father told him to get the gun and kill him. In some of the conversations, the defendant told the witness that he did not intend to kill the negro, but wanted to shoot him in the heel to see him jump. The defendant asked the witness about what witness thought it would cost him, and how long it would take him to get out of it.

Witness was asked this question: "When you talked to the boy, did he seem to realize what he had done or what the punishment would be?" and witness answered: "He asked me what I thought about it, but did not seem to realize it himself." The witness further testified that defendant said that they (the Caltharps) would have to walk the chalk line, or he would get them all; said if they bothered him he would get them all; would get old Bill Caltharp if he fooled around him."

Another witness testified that he asked appellant in jail why he shot the little negro boy, and he said: "Pa told me to." He told his Pa that the negroes had been over in the field, and his Pa told him to go down and run them out or kill them. Witness proceeds as follows: "I said: 'Did you run them out, or kill them?' He says: 'Yes, I taken two shots at them with the target first.' I said, 'Did you hit him?' and he said, 'No'; that the target cartridge did not cost much, 'and then I got the rifle, and fired one shot at him, but didn't take much pains, but the next shot, I took particular pains,' and I said: 'Did you hit him?' and he said, 'Yes.' And I said: 'How do you know you hit him?' And he says: 'I heard him squeal.' I said: 'Don't you know it is a penitentiary or hangable offense to kill a negro in Arkansas,' and

he says, 'Oh you are just trying to scare me.' " Witness continues: "I had no acquaintance with him till after the shooting occurred. He said his father told him to run the negro out of the field or kill him. He did not seem to be alarmed in talking to me about it; laughed all the time. He did not seem to be uneasy about it; laughed about it; seemed to regard it as a joke."

This was all the testimony on the part of the State tending to throw any light on the mental capacity of the appellant at the time of the killing. On behalf of the appellant, there was evidence tending to show that he was a weak-minded child; had been puny from his birth, and at three years of age had spinal meningitis, which left him of weak mind; that he was addicted to somnambulism, and was morose, apathetic and suspicious.

The evidence conclusively showed that appellant was under fourteen years of age when the killing took place.

T. B. Pryor, for appellant.

1. The court erred in charging the jury, in substance, that if they convicted the defendant of any degree of homicide less than murder in the first degree, the punishment would be imprisonment in the penitentiary, and that, being under the age of eighteen years, defendant would be transferred from the penitentiary to the reform school. There is nothing in the act (of 1905, p. 515, § 6) authorizing the court to call attention to the jury to the establishment of the reform school.

2. It is conclusively shown that appellant was only thirteen years of age. The law presumes that a boy thirteen years of age is incapable of committing a crime, and it devolves upon the State to show that he had mental capacity and intelligence enough to know right from wrong with reference to the crime with which he was charged. 72 Ark. 117.

William F. Kirby, Attorney General, and *Daniel Taylor,* assistant, for appellee.

1. There was no prejudice in the court's stating to the jury that, upon conviction of a less degree of homicide than murder in the first degree, the appellant would be taken to the reform school. The establishment of the reform school for youthful criminals is a general law, with which the jury are presumed to be familiar.

2. There is sufficient evidence upon which to base the con-

clusion that the appellant was mentally capable of committing the crime, and intelligent enough to understand the nature of the deed and to realize its consequences.

WOOD, J., (after stating the facts.) In *Harrison* v. *State*, 72 Ark. 117, we said:

"The law presumed that a boy thirteen years of age is incapable of committing a crime, and it devolved on the State to show that he had mental capacity and intelligence enough to know right from wrong in reference to the offense with which he was charged. In this the State failed, and the presumption of his incapacity, in the absence of such proof, must prevail. In *Dove* v. *State*, 37 Ark. 261, it is said that 'when the accused is between the ages of 12 and 14, the common-law presumption still prevails that he or she is not *doli capax*, or capable of discerning between good and evil, until the contrary is affirmatively shown by the evidence. No witness was examined as to the intelligence of appellant, or as to his knowledge of right and wrong, good and evil.'"

Measured by this rule, the evidence on the part of the State does not overcome the presumption that appellant was incapable of committing the crime charged. There must be affirmative evidence of that kind by experts or those so intimately acquainted with his nature, habits, and disposition as to enable them to testify intelligently about them. Or the facts and circumstances of the killing, and the conduct of the defendant with reference thereto, must show that the appellant at the time he did the killing had a guilty knowledge that he was doing wrong. I Bishop, New Cr. Law, § 368; *Rex* v. *Owen*, 4 Car. & P. 236; 4 Blackstone, Com. *23; Broom's Legal Maxims, 8th Ed. 316.

There is at most not more than a scintilla of evidence to show that appellant was conscious of the fact that he was doing wrong when he fired the fatal shot. This is not sufficient to warrant his conviction.

The verdict is without evidence to support it, and the judgment for this reason is reversed, and the cause is remanded foı new trial.

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

Opinion delivered October 21, 1907.

1. CARRIER—REFUSAL TO RECEIVE FREIGHT—PENALTY.—Under Kirby's Digest, § 6803, a penalty is imposed upon a carrier for refusing to accept property for transportation and to issue receipts or bills of lading therefor, even though, on account of a temporary congestion of freight, the carrier has insufficient stational facilities for taking care of such property during temporary delay while awaiting shipment. (Page 153.)

2. SAME—DEFENSE.—In an action against a carrier for failure to accept property tendered for shipment where the evidence shows a failure on the carrier's part to provide sufficient stational facilities for taking care of such property under ordinary conditions, it is no defense that an unusual emergency caused a shortage of cars, so that the property could not be shipped out as rapidly as customary. (Page 154.)

3. SAME—STATUTE CONSTRUED.—Kirby's Digest, § 528, forbidding a carrier to issue a receipt or bill of lading for property until the same has been received into its custody, does not relieve a carrier from liability to the penalty for refusal to receive property tendered to it for shipment. (Page 155.)

Appeal from Izard Circuit Court; *Charles E. Elmore,* Special Judge; affirmed.

J. E. Williams and *T. M. Mehaffy,* for appellant.

1. The statute does not admit of the construction that the failure to give a bill of lading was intended to constitute an offense. Acts 1899, pp. 88-9, § 10. This section deals with the question of rates and charges for transportation, and the issuing of a bill of lading is clearly a matter only incidental to the principal purposes intended by the statute.

Penal statutes must be strictly construed, and in favor of the alleged delinquent. In construing such a statute, the whole must be construed together. 19 Wall. 228.

2. A railroad company is prohibited from issuing any receipt or bill of lading for goods until they are actually received into its custody. Kirby's Digest, §§ 524-5, 528, 531. Hence, appellant could not have complied with the demands of the shipper in this case without subjecting itself to the penalties denounced by these statutes.

3. A railway company has the right to make reasonable regulations, and to designate the place where it will receive goods

intended for shipment. Moore on Car. 137. And may refuse to take goods when tendered to it at an unreasonable hour, or at a place other than that which it has appointed for their delivery to it. I Hutchinson, Carriers, 3 Ed., 155, § 147, note 9; Elliott, Railroads, § § 41, 199, 200; 125 Fed. 445; 61 C. C. A. 405; 64 C. C. A. 281. Its liability commences when it receives the entire custody of the goods for immediate transportation. 60 Ark. For definition of a station within the meaning of a statute imposing a penalty for refusing to accept freight tendered, see 104 N. C. 48.

4. In case of emergency or rush of business which the carrier in the ordinary course of business was not bound to anticipate, it is not liable for refusal to receive or to transport goods; and it is excused for delay in shipping or in receiving goods for shipment until, in the ordinary course of business, such emergency can be removed. 77 Ark. 357; 1 Hutchinson, Car., 3 Ed.; § 146; Elliott, Railroads § § 1465-6, 1470.

William F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

1. The act clearly prescribes a penalty for failures to receive goods and issue bill of lading. Carriers are required to "receive, load, unload, transport, store and deliver to the consignee thereof any and all property offered for shipment, * * * * * and *shall on demand issue to shippers duplicate freight or express receipts,* etc. Act, § 10. See also § 18. The commissioners are required to "execute and enforce the provisions of this act and all laws of the State concerning railroads." Section 5, of act creating Railroad Commission. If the commissioners' jurisdiction were limited to one matter, viz.: rates, as contended by appellant, the words "any matter," "determination" and "relating to the regulation or supervision of railroads" would not have been used. Under the statute, as well as common law, all persons have equal rights to have persons and property transported by common carriers and without discrimination or delay. Const., art. 17, § 3; Kirby's Digest, § 6804; 64 Ark. 275, and dissenting opinion same case; Moore, Carriers, 18, 19. While the courts are bound to construe statutes strictly, they are also bound "to construe them according to the manifest import of their words, and to hold all cases which are within the words and mischiefs to be within the remedial influence of the statute." 1 Gall. 117; 3

Sumn. 207; 128 Mo. 384; Sutherland, Stat. Const. § § 526 *et seq.*; 108 Fed. 120; 33 Del. 1; 47 Md. 241; 53 Vt. 516; 91 U. S. 29.

Remedial statutes are to be construed "liberally throughout, notwithstanding the imposition of a penalty for their violation, on the ground that their primary object was redress and punishment. 26 Am. & Eng. Enc. of L. 661; Sedgwick on Stat. Const. 32, 310. And a liberal construction of railroad commission acts has often been given. 47 L. R. A. 572; 22 Am. & Eng. R. Cas. 499; 26 *Id.* 29.

2. The right of a carrier to make reasonable regulations is not contraverted; but such regulations must be in fact reasonable in their application. And where a tender of property for transportation is made, and their acceptance is refused, the burden is on the carrier both to show that its refusal to accept the property for transportation was justifiable, and that the regulation relied upon as an excuse was reasonable. The court's finding that "no reasonable excuse is shown for appellant's failure and refusal" to accept and transport the property is amply sustained by the evidence.

3. Appellant's contention that to have complied with the shipper's demands and issued bills of lading would have subjected it to the penalties prescribed by statute (Kirby's Digest, § § 524 *et seq.*) is without foundation. This is not an action involving the issuance of receipt or bill of lading for goods not in actual possession, but the arbitrary refusal to accept and issue bills of lading for goods offered to be placed in actual custody.

MCCULLOCH, J. This is an action instituted by the State of Arkansas, pursuant to an order of the Railroad Commission of the State, against the St. Louis, Iron Mountain & Southern Railway Company to recover penalty for an alleged violation of its duty as a common carrier in refusing to accept for transportation, and issue bills of lading for, ten bales of cotton tendered to its agent at Calico Station in Izard County, Arkansas, for shipment to Newport, Arkansas.

The case was tried before the court sitting as a jury, the court found against the defendant, and assessed the penalty at the sum of fifteen hundred dollars. Judgment was rendered accordingly, and the defendant appealed.

The facts are as follows: J. T. Garner, a merchant at Cal-

ico, Arkansas, a station on appellant's railroad, hauled ten bales of cotton to the station, and tendered them to appellant's agent for shipment to Newport, Arkansas. The platform at the station was then covered with cotton from one to three bales deep, which necessitated extraordinary expense and trouble in getting it on the platform. The station agent of the company refused to accept the cotton for shipment or to issue a bill of lading for it until it was put on the platform by the shipper, which Garner declined to do on account of the extra expense and trouble. Garner thereupon presented his petition to the Railroad Commission, and upon hearing of the matter it was there adjudged that the railroad company had incurred the penalty under the statute for refusing to accept the cotton for transportation, and the prosecuting attorney of the circuit in which Izard County is situated was directed to institute an action for recovery of the penalty prescribed by statute.

There was testimony introduced by appellant to the effect that at the time of the occurrence which formed the basis of this action (November, 1905) there was a scarcity of cars on account of the detention of many cars in the State of Louisiana under the quarantine regulations then in force, and that this prevented the prompt transportation of cotton and other such commodities. Witnesses testified that, but for such emergency, cotton could have been shipped out promptly, so as to prevent a congestion at the stations along the line of appellant's railroad, and that under usual conditions the platform at Calico was of sufficient capacity to hold all the cotton awaiting shipment.

On the other hand, there was testimony tending to establish the fact that the platform was insufficient to hold the cotton, under usual conditions, offered for shipment, and that there was no material increase in the amount of cotton shipped from that station during the season of 1905 over the amount shipped during the preceding season.

We must, of course, accept as established the state of facts most favorable to appellee's side of the case which the evidence will warrant, and test the correctness of the court's findings accordingly.

It is first contended that the statute under which the penalty is sought to be imposed does not prescribe a penalty for failure

of a carrier to issue a bill of lading for commodities offered for transportation. It is argued that the statute was intended to deal with the question of rates for transportation and with the publication and posting of schedules thereof; and that the matter of issuing bills of lading is one only incidental to the main object of the statute.

It is true that the purpose of the statute seems, primarily, to be to require common carriers to establish rates of freight or express charges and to post the schedule of such rates. But in the same section of the statute it is plainly provided that *every* such carrier "shall receive, load, unload, transport, store and deliver to the consignee thereof any and all property offered for shipment, whether as freight or express matter, at and for charges not greater than those specified in such schedule as may at that time be in force, and shall, on demand, issue to shippers duplicate freight or express receipts, which shall state the class of freight shipped, the weight and charges." Kirby's Digest, § 6803. We are therefore of the opinion that the statute in question denounces a penalty for the refusal of a carrier to accept property for transportation and to issue receipts or bills of lading therefor. We see no reason for any other view of the statute. It is just as important, if not more so, for the Legislature to require, under penalty for failure so to do, the carrier to accept the property tendered for transportation and issue the bill of lading, as it is to require the posting of tariff schedules, and it seems plain to us that the Legislature has by this statute treated alike the failure to perform any of the requirements mentioned in the statute and prescribed the same penalty therefor. It is the duty of a public carrier to provide reasonable facilities for the acceptance of property for transportation and to transport the same with due diligence, and this statute prescribes the penalty for failure to do this. The carrier undoubtedly has the right to prescribe reasonable rules and regulations for the delivery to its agents of property for transportation, but it has no right to impose unusual conditions upon a shipper or to require him to undergo unusual expense or trouble in delivering his goods for transportation. It must accept goods tendered for immediate transportation and provide reasonable facilities for taking care of the same during temporary delays while awaiting shipment. 1 Hutchinson on Carriers, § 113.

In this case it appears from the evidence—at least the evidence warrants the conclusion—that sufficient platform facilities for receiving cotton were not provided by appellant. During the cotton shipping season of 1905 the platform was insufficient to hold the amount of cotton ordinarily on hand awaiting transportation. When this cotton was offered for shipment, the platform was covered with cotton from one to three bales deep, necessitating unusual trouble and expense in putting more upon the platform. This was an extraordinary expense, which the carrier should have borne, instead of imposing it upon the shipper, as it was the fault of the carrier that more abundant facilities had not been provided. Nor was it a defense to show that an unusual emergency had caused a shortage of cars, so that cotton could not be shipped out as rapidly as customary. This is not an action for damages caused by delay in transportation. Nor is the liability of appellant based on its failure, under extraordinary conditions, to accept the cotton and issue bill of lading therefor. As we have already shown, the evidence does not establish any extraordinary local conditions at that time concerning the shipment of cotton from that station and locality. On the contrary, it shows that the amount of cotton was about the same that it had been the year previous. But the penalty is imposed because the carrier refused to accept the cotton for transportation and issue a receipt or bill of lading to the shipper; and, having failed to provide suitable facilities for receiving cotton for transportation, the carrier can not shield itself behind a plea that the shipper refused to undergo the extra expense and trouble which it had by its own shortcomings made necessary in placing the cotton for shipment. In other words, the carrier was bound to accept the cotton at the congested platform, where it was tendered for immediate shipment, and provide a place and the extra expense of putting it in that place.

It is strenuously urged by counsel for appellant that to require the acceptance by the carrier of the cotton under the circumstances shown and the issuance of a bill of lading would be in conflict with another statute (Kirby's Digest, § 528) which forbids a carrier from issuing a recipt or bill of lading for property until the same has been received into its custody. The carrier can not in this instance escape liability because of that stat-

ute, for the shipper, when he offered to place the cotton in the custody of the carrier, did all that is required of him, and it became the duty of the carrier to accept the property, take it into its custody, and issue a bill of lading.

We are asked, also, to hold that the trial judge imposed an excessive penalty and to reduce it. The statute fixes a minimum and maximum amount of penalty, and it is the duty of the trial court or jury to assess the amount. We see no reason why we should disturb the assessment made in this case.

Affirmed.

RANKIN v. FLETCHER.

84 156
s86 88

Opinion delivered June 17, 1907.

MANDAMUS—CONTROL OF JUDICIAL DISCRETION.—Where the Supreme Court, on remanding a chancery cause for further proceedings, made no order with reference to the property involved or the rents and profits therefrom, mandamus will not lie to compel the trial court to determine such matters in any particular manner; the rule being that the judicial discretion of inferior courts can not be controlled by mandamus.

Mandamus to Woodruff Chancery Court; *John Fletcher,* Special Chancellor; mandamus denied.

Gustave Jones, N. W. Norton, H. F. Roleson, P. R. Andrews and *H. M. Woods,* for petitioner.

1. Construction of the intent and meaning of the opinion of the Supreme Court is not a matter for the exercise of judicial discretion by the inferior court, and such a case is a proper one for a mandamus by the Supreme Court to compel the inferior court to carry out the mandate. 51 L. R. A. 3; 148 U. S. 228; 160 U. S. 225; 12 Pet. (U. S.) 493; 14 *Id.* 51; 94 U. S. 498; 97 S. W. 293.

2. In *Rankin* v. *Schofield,* heretofore decided by this court, it is settled that L. B. McDonald and all claiming under him acquired nothing by his purchase, the same being absolutely void; that he acquired no rights by reason of his attempted purchase

which affect petitioner's right of possession. The decree of the respondent, therefore, in postponing the right of petitioner to possession of the land until after an accounting and report of a master, was not in substance and effect a carrying out of the mandate of this court. That decision is the law of the case, and is conclusive of every question of law or fact presented upon the record which was necessary to have been decided in order to enable the court to arrive at such conclusions. 14 Ark. 523. The right to restitution does not have to wait on the subsequent litigation in the case, but the order goes as a matter of course, and the right may be enforced by mandamus. 89 Ala. 237; 98 N. Y. 486.

3. Since the sale of the land to McDonald was absolutely void, the betterment act does not apply, and it was error to postpone petitioner's possession to an accounting. 53 Ark. 545; 70 Ark. 415.

Moore, Smith & Moore, for respondent.

1. This court on the former appeal said: "We have not undertaken to determine the rights of parties to return of proceeds of sale of land received by appellant, rent of lands or 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." Under such conditions this court will not seek to control the discretion of the chancellor by mandamus. 77 Ark. 101; 81 Ark. 440.

2. Under the issue thus undetermined the defendant in the supplemental proceeding claimed and was entitled to the benefit of the betterment act. Kirby's Digest, § 2754. Under this act, the test is actual notice, as distinguished from constructive notice. 48 Ark. 186; 51 Ark. 275; 45 Ark. 410. The right of occupants under this act is not affected by the plaintiff's infancy. The statute is general, and no exception is made in favor of infants; and the right of a minor to show cause against a judgment directing the sale or conveyance of land and to recover the same must be exercised upon the conditions prescribed by law in regard to compensation for betterments, etc. 52 Ark. 132.

BATTLE, J. The facts in this case appear in *Rankin* v. *Schofield* (81 Ark. 440), recently pending in this court, on appeal from Woodruff Chancery Court, up to the tenth day of December,

1906, when the decree of the chancery court was reversed, and the cause was remanded for further proceedings. In remanding it this court said: "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 same. They were undetermined by the chancery court, and we are without sufficient information to do so." No special directions were given, except to enter a decree in accordance with the opinion of the court, "and for other proceedings."

Two decrees were rendered in this cause by the chancery court, which were reversed by this court. When the first was reversed and the cause remanded, Mrs. Rankin, one of the defendants in the suit, upon whose appeal the first decree had been reversed, filed a supplemental complaint in the chancery court, in which she made persons who were in possession and claiming the land in controversy defendants, and asked that a decree be entered restoring the land to her possession, and for the rents and profits during the time she had been out of possession. The persons made defendants by the supplemental complaint claimed and held the lands under L. B. McDonald. They answered, alleging that McDonald had purchased the lands at a judicial sale, and that he had conveyed the lands to them, denying Mrs. Rankin's right to recover the lands; and set up, among other things, the amount paid by the purchaser at the sale under the first decree of the chancery court for the property and for taxes, and the value of improvements and betterments made by them and their grantor, alleging that McDonald and defendants holding under him were *bona fide* occupants under color of title. The chancery court, finding that McDonald purchased the lands at a sale under the first decree, and that the decree, though erroneous, was not void, found that he acquired a valid title to the lands against all parties to the suit, and denied the relief prayed for by Mrs. Rankin; and, consequently made no order in regard to rents and profits, improvements and return of purchase money. On appeal this court reversed this the second decree, but made no order as to the rights of parties to return of the proceeds of the sale, rents of lands and improvements thereon, or other questions consequent on the recovery by Mrs. Rankin, on the ground that

they were undetermined by the chancery court, and this court was without sufficient information to do so; and left that, if necessary, to be done by the lower court.

Upon the filing of the mandate of this court, after the last reversal, defendants filed an amendment to their answer to the supplemental complaint; and the chancery court set aside the sale to McDonald, and rendered a decree in favor of Mrs. Rankin against the defendants for the lands in controversy, and ordered that an "account be taken of the value of the improvements made and the amount of the taxes paid on said land by the defendants and those under whom they claim, and also that an account be taken and stated of the rents and profits of the land and the amounts expended in keeping the lands and improvements in proper and suitable repair," and appointed a special master for that purpose, and refused to order the lands to be restored to the possession of Mrs. Rankin until the master made his report.

Mrs. Rankin thereupon filed in this court a petition for a writ of mandamus, in which she asks that John Fletcher, special chancellor of the Woodruff Chancery Court, the respondent, be directed to enter a decree in this cause restoring the immediate possession of the lands to Mrs. Rankin, and directing that the rents and profits and improvements be adjusted in a manner consistent with the opinion of this court heretofore rendered.

It was the duty of the chancery court to determine the rights of parties to value of improvements, rents and profits, and return of proceeds of sale of lands received by Mrs. Rankin, this court having expressly declined to do so and left so much of the case undisposed of and left it to be determined by the chancery court. If, in attempting to discharge this duty, the court erred, petitioner's remedy is appeal or writ of error, and not mandamus.

"The judicial discretion of inferior courts can not be controlled by mandamus." *Lowe* v. *Walker,* 77 Ark. 101, and cases cited. It can not be used where appeal or writ of error affords an adequate remedy to correct the judicial errors committed by an inferior court in the progress of a cause; can not be used to perform the office of an appeal or writ of error. Ex parte *Williamson,* 8 Ark. 424; Ex parte *Perry,* 102 U. S. 183; Ex parte *Baltimore & Ohio Railroad Company,* 108 U. S. 566; *People* v. *Garnett,* 130 Ill. 340; *State* v. *Marshall,* 82 Mo. 484; *State* v.

County Court of Platte County, 83 Mo. 539; *Marshall* v. *Strane,* 35 Iowa, 445; *State* v. *Board of Supervisors of Sheboygan County,* 29 Wis. 79.

Petition denied.

STUBBS *v.* PITTS.

Opinion delivered July 22, 1907.

1. TRUST—WHEN IMPLIED.—When a contract for the sale and purchase of land is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the purchaser; and one who, with knowledge of such trust, pays the balance of the purchase money of such land and takes deed to himself will be held a trustee for the vendee and his heirs. (Page 168.)
2. HOMESTEAD—ABANDONMENT BY WIDOW—RIGHTS OF HEIRS.—As the widow is entitled to one-half of the rents of her deceased husband's homestead, where he left minor children, if she abandons the homestead, the right to the entire homestead thereupon vests in the minor children; but the fact that the widow has lost the right to recover her half of the rents and profits of the homestead by laches does not vest in the minor children the right to recover her half of the rents and profits except from the time when they have recovered possession of the homestead from the adverse holder, or the widow specifically abandoned the homestead. (Page 169.)
3. TRUST—STATEMENT OF ACCOUNT.—In decreeing a constructive trust against one who paid the purchase money for the vendee, and took deed to the land and possession thereunder, the trustee will be allowed credit for the purchase money paid, with interest, and the value of improvements made, and will be charged with the rental value of the land during the period of such possession. (Page 170.)

Appeal from Yell Chancery Court; *Jeremiah G. Wallace,* Chancellor; reversed in part.

STATEMENT BY THE COURT.

This is an action in equity to establish the title of Nannie M. Pitts and her daughter, Gardie V. Stubbs, to an interest in 187 acres of land in Yell County, the legal title to which is in Mrs. V. E. Stubbs, the defendant in this action. The circumstances out of which the litigation arose are as follows:

In 1882 one William Stubbs purchased from John Main, of Missouri, 303 acres of land in Yell County, Arkansas. This land was in a part of the Arkansas River bottom known locally as "Carden's Bottom." The land was fertile, but subject to occasional overflows, and at that time not much improved. William Stubbs had no money, and purchased the land on credit, giving his notes to Main for the price, $2,100, with ten per cent. interest from date, and Main executed and delivered to him his written obligation to convey the land to him upon the payment of the purchase price. Stubbs took possession of the land under the contract, and commenced to improve it. But, when the purchase money notes became due, he was unable to pay them. In the meantime, his mother, Mrs. V. E. Stubbs, had received from her father's estate about $1,400. She agreed with her son and the agent of the vendor, Main, that she would purchase 116 acres of the land and pay therefor one-half of the purchase price that her son had agreed to pay for the whole tract, and that she would join her son in executing new notes for the remainder. The title bond was thereupon surrendered to Main, and he executed a quitclaim deed to Mrs. Stubbs for 116 acres of the land, and she paid him half of the purchase price. She or her son paid about $200 to Main on the price of the other part of the tract purchased by William Stubbs, and William Stubbs gave Main two notes for $425 each, with ten per cent. interest from date, for the balance of the price. These notes were signed by both William Stubbs and his mother, but she was only a surety to him, as he was the purchaser of that part of the tract. There is some evidence to show that, after the original title bond was returned to Main, he never executed another title bond, though that point is not very material, for the notes executed by Stubbs and his mother to Main recite that they were executed for the purchase price of the land, and give an accurate description of it.

On December 11, 1884, Stubbs paid one hundred and ninety dollars on one of these notes. He died in November, 1885, without making any further payments. At the time of his death he had made considerable improvements on the land, and had about 50 acres in cultivation. He lived on the land with his family, it being his home. Afterwards in January,

1896, Mrs. Stubbs, his mother, paid the remainder of the purchase money on the land, which the evidence shows was $880, and Main executed a quitclaim deed, conveying the land to her. The deed recites a consideration of $1,050.

After the death of Stubbs, his wife did not reside on the place again, which passed into the hands of Mrs. V. E. Stubbs, she claiming to be the owner by reason of the fact that she had paid the larger part, if not all, of the purchase money, and had received a deed from Main conveying the land to her. Since she took possession, she has had nearly all of it cleared and put in cultivation, and has had several houses and barns erected on it for the use of tenants, by reason of which its value has been greatly increased.

At the time of his death William Stubbs left two infant children. One of them, Mattie, a child by a former wife, was reared by Mrs. V. E. Stubbs, her grandmother, the other, Gardie Stubbs, was born only a few months before her father's death, and after his death lived sometimes with her grandmother and sometimes with her mother, who subsequently married one Pitts. Mattie Stubbs is now a married woman, her husband being one Lynch.

In March, 1905, Mrs. Pitts and her daughter, Gardie Stubbs, brought this action in the Yell Chancery Court for the Dardanelle District, in which they set out the facts stated above and alleged that the rents and profits received by Mrs. V. E. Stubbs from the 187 acres of land bought by Stubbs had more than repaid the money advanced by her to pay the purchase notes and interest thereon with costs of all improvements made by her, wherefore they asked that Gardie Stubbs and Mattie Lynch be declared to be the equitable owners of the land, subject to the dower interest of Mrs. Pitts, and that Mrs. V. E. Stubbs be compelled to account for the rents and profits received over and above the amounts expended by her. Mrs. Mattie Lynch, the married daughter, refused to join in this action, and was made a defendant. Mrs. Stubbs filed an answer, in which she denied that plaintiffs had any interest in the land, or that they had any right to require her to account for the rents and profits thereof.

On the hearing, the chancellor found in favor of the plain-

tiffs, and made a decree in which he held in effect that William Stubbs had his homestead on the land; that at the time of his death he had paid all the purchase money except $880; that this was paid by Mrs. V. E. Stubbs after his death; that the rents and profits had more than repaid this sum; that Mattie Lynch and Gardie Stubbs, daughters of William Stubbs, were in equity the owners of the land, subject to the dower interest of Mrs. Pitts; and that the plaintiffs were entitled to an accounting. He thereupon appointed a master to hear evidence and state an account. Gardie Stubbs at that time was not 21 years of age, and the chancellor appointed commissioners to lay off 160 acres of the land as a homestead, and to make partition of the land. On the coming in of the report of the commissioners and that of the master, the court proceeded to make a decree partitioning the land, declaring the rights of parties thereto, and also gave a personal judgment in favor of Gardie Stubbs against Mrs. V. E. Stubbs for over $3,500, and a judgment in favor of Mrs. Pitts against her for $120.34 and costs of the action, the costs of the partition being taxed against the plaintiff Gardie Stubbs. Mrs. Stubbs appealed.

Brooks & Hays and *Sellers & Sellers*, for appellants.

1. To establish an implied trust in land so as to authorize a court of equity to divest the legal title, the evidence must be clear, strong, full and satisfactory, and where parol evidence is resorted to to prove such a trust, it is received by the courts with great caution. 3 Pomeroy, Eq. Jur. § 1040; 15 Am. & Eng. Enc. of L. (2 Ed.), 1174; 11 Ark. 82; 27 Ark. 77; 44 Ark. 365; 48 Ark. 173; 64 Ark. 155; 41 Ark. 301; 75 Ark. 451; 76 Ark. 14.

2. Though infancy usually excuses from the defense of laches, lapse of time will subject his evidence to doubt and suspicion; and delay may cause the court to refuse relief. 50 Mich. 573; 25 W. Va. 179; 18 Am. & Eng. Enc. of L. (2 Ed.), 106; 43 N. Y. 222. Since females are of full age for all purposes at the age of 18, Gardie Stubbs, when this action commenced, was *sui juris*. Kirby's Digest, § 3756; 55 Ark. 97. And, to avoid the penalty of laches, should have acted promptly. 18 Am. & Eng. Enc. of L. (2 Ed.), 106. See 7 Words & Phrases, 5977, for definition of *"reasonable time."* Conscience, good

faith and diligence are required of the suitor who invokes the aid of equity. 120 U. S. 377; 68 S. W. 489; 12 Am. Dec. 367 and note; 54 *Id.* 130; Wood on Limitation, 148; 34 O. St. 463; 64 Ark. 345; 41 Ark. 303; 58 S. W. 672; 55 Ark. 92; 2 Dembitz, Land Tit. § 188; 139 U. S. 693; 23 Pac. 910; 146 U. S. 101; 8 How. (U. S.) 221; 10 L. R. A. 125; 35 Ark. 141.

No reason is shown why Mrs. Pitts and her daughter could not have sued twenty years since, when they knew appellant had bought the land, was treating it as her own, and was improving it. Equity will not enforce stale demands, where the party has been guilty of negligence, and has slept upon his rights. Wood on Limitation, 151; Buswell on Limitation, § 18; 14 Ark. 62; 19 Ark. 21; 43 Ark. 483; 58 Ark. 589; 33 Fed. 447; 28 Fed. 285; 18 Md. 130; 23 Am. St. Rep. 147; 67 Mo. 187; 47 Mich. 79; 2 Pomeroy, Eq. (3 Ed.), § 817; 123 Fed. 566. One who is chargeable *prima facie* with laches must allege and prove facts that excuse the delay. 33 Fed. 840; 46 Fed. 280; 115 U. S. 96; 12 Enc. Pl. & Pr. 836. See also 41 Ark. 303.

3. A resulting trust, from payment of the purchase money, can only be brought about when the deed is made, *i. e.*, the payment of purchase money and the execution of the deed must amount to one transaction. No subsequent payment of the purchase money will create the trust. 29 Ark. 612; 30 Ark. 230; 40 Ark. 62; 95 S. W. (Ark.) 146; 51 Am. Dec. 755; 9 Am. Dec. 264; 5 Johns. Ch. 1; 2 *Id.* 408. If it be said that Mrs. Stubbs paid the money for appellees, that would not create a trust. 40 Am. Dec. 238.

4. Appellees are barred under the doctrine of election and acquiescence. Wood on Limitation (3 Ed.), § 61.

Moreover, because of appellant's long possession and exercise of the rights and claim of ownership, she, under the policy of the law that favors certainty in titles, will be presumed to have a grant or conveyance of the land. 22 Am. & Eng. Enc. of L. (2 Ed.) 1289; 4 How. (U. S.) 289; 7 Wheat. (U. S.) 59; 120 U. S. 534; 52 S. W. 121; 52 Fed. 838; 85 Am. Dec. 145; 6 East, 208; 1 Camp. 463; 23 Pick. 141; 17 Wend. 562; 23 Barb. 473; 1 Greenleaf, § 47.

5. The court erred in its decree as to the mesne profits.

Kirby's Digest, § 2756. Minors are included in general laws unless specifically excepted, even in statutes of limitation. 53 Ark. 421.

Bullock & Davis, for appellees.

1. Deceased, W. B. Stubbs, was vested with an equitable estate of inheritance in the lands. Main, by virtue of the contract, was a trustee of an express trust, holding the legal title to the land in trust for Stubbs, his heirs and assigns, subject to the payment of the purchase money. 71 Ark. 164; 16 Ark. 122; 1 McClain, 132; 90 U. S. 119; 3 Pomeroy's Eq. (3 Ed.), § 1046 and note 2. A purchaser with notice of the trust, express or implied, becomes himself a trustee for the beneficiary with respect to the property, and is bound in the same manner as the original trustee from whom he purchased. 2 Pomeroy's Eq. (3 Ed.), § 688; 30 Ark. 249; 52 Ark. 331.

2. The proof is insufficient to sustain the contention that W. B. Stubbs rescinded the contract, or that it was discharged. His continuous possession of the 187 acres and cultivation and improvement thereof up to the time of his death disprove such intention on his part. Mere surrender of the title bond, or its delivery, with no intention of releasing his title, cannot be treated as a discharge, rescission or abandonment of his contract. 52 Ark. 381; 43 Ark. 203; 42 Ark. 170; 20 Cyc. 223. The presumption is, if he surrendered the title bond, it was done to meeet the changed conditions brought about by appellant's purchase of the 116-acre tract, and that it was with the intention of having another executed to him. Until a new instrument was executed, the old would be effective to protect his interest remaining. 1 Pomeroy, Eq. Jur. (3 Ed.), § 420. To establish a rescission of a written contract, the evidence must be clear and satisfactory. 52 Ark. 207. And such a contract may not be rescinded by parol. Clark on Contracts, 621; 9 Cyc. 599; 9 Ark. 488; 20 Cyc. 228; 130 Mass. 388; 20 Cyc. 221, note G; 96 Tex. 86; 97 Am. St. Rep. 871; 45 Fed. 332.

3. The parol agreement, if made, to convey to appellant, in the event Mrs. Stubbs, as surety, had to pay for the land, was void under the statute of frauds. Kirby's Digest, § 3654. Payments alone are not part performance, nor execution of notes for purchase money. 70 Ark. 351. Possession taken and im-

provements made after the death of W. B. Stubbs are not such part performance as will take the defense out of the statute. 41 Ark. 97; 66 S. W. 333; 21 Ark. 278.

Appellees are not barred by the statute of fraud, because Stubbs went into possession under a written contract, retained 187 acres when the contract was changed, and died in possession before maturity of all the notes, and after having made lasting improvements. 129 U. S. (32 L. Ed.) 673.

4. The plea of adverse possession can affect only the widow, Mrs. Pitts. The heirs have three years after reaching the age of 21 years in which to bring suit. Kirby's Digest, § 5056. And the homestead right of Gardie Stubbs had not expired. 53 Ark. 400.

The statute of limitation will not run in favor of the heirs against the widow's dower as long as the lands are in their possession. 33 Ark. 294; 29 Ark. 651; 40 Ark. 24; Scribner on Dower, 572. And they could not lay off her dower while it was held adversely to them. The statute does not run in favor of a trustee of an express trust. 44 Ark. 452; 43 Ark. 469; *Id.* 504; 20 Ark. 198. See also 52 Ark. 76; 46 Ark. 26.

5. There is no error in the decree as to mesne profits. 47 Ark. 458; 70 Ark. 489; 47 Ark. 528; 37 Ark. 316; 29 Ark. 633; 55 Ark. 369; 52 Ark. 381; 61 Ark. 26.

RIDDICK, J., (after stating the facts.) The contention of counsel for appellant is that when Mrs. Stubbs agreed to purchase and pay for 116 acres of the land and to sign the notes of William Stubbs for the balance due for the remaining 187 acres it was done with the further agreement between herself, the vendor, Main, and William Stubbs that the title bond executed by Main to William Stubbs for the conveyance of the 303 acres purchased by him should be surrendered to Main, and that, if William Stubbs failed to pay the notes at maturity, she should pay them, and that thereupon Main should execute a deed conveying the land to her, and that all interest in or right to purchase the land held by William Stubbs should terminate. They say that, in obedience to this contract, Mrs. Stubbs, after the death of William Stubbs, paid the purchase money notes on which she was surety, and received a deed from Main conveying the land to her, and that she thus became the absolute

owner of the land. This contention is based mainly on the testimony of the defendant Mrs. Stubbs. She is not only an interested party, but she is testifying to a matter that happened twenty years before, and where the other party to the contract is dead. At the time she signed the notes of her son for the purchase of this land, she no doubt had confidence in him, and felt that, if she was compelled to pay for the land, he would protect her in some way, and she may have believed that, if she paid for the land, it would belong to her; but, when the whole circumstances are considered, we are of the opinion that the chancellor was justified in attaching little weight to her testimony in reference to the oral contract above referred to and in finding that there was no agreement on the part of William Stubbs to the effect that, if he failed to pay for the land, it should be conveyed to and belong to her on the payments of the notes by her. Having been compelled by the death of her son to pay the notes for the purchase price of the land which she had signed, she no doubt had the right to hold the land for the re-payment of the money advanced, but that did not divest the rights of his heirs in the land. Potts, who was the agent of Main, and through whom the new contract of purchase with William Stubbs was made, testified that he remembered that the title bond was surrendered, and that Mrs. Stubbs became the purchaser of a portion of the land, paying therefor in cash; that she agreed to assist her son, William, to buy the remainder of the land, and signed the purchase money notes for that purpose, but he did not remember that there was any agreement that the land should be conveyed to her if she had to pay for it. On the contrary, he testified that, after the death of her son, she said to him that "rather than lose what had been paid on the land she would take it up for the children." Counsel for defendant say that she probably referred to her own children, but it seems unreasonable to believe this. The reference was to the children of the son, and tends to show that she knew that these children still had an interest in this land. The statement of herself and Potts, the agent of Main, that at the time the deed was executed by Main to her they thought there was no legal obstacle in the way of such a conveyance amounts to nothing, for it was only their opinion as

to the law, and does not show that the facts justified such belief. Besides, if she paid the money and took the deed to secure herself, there was no wrong in it, but she cannot hold the land after the money is paid.

There is no question that William Stubbs purchased this land and executed his notes therefor, which described the land and recited that they were executed for the purchase price of the land, and that his mother went his security, and afterwards paid the balance due on the notes, and received a conveyance of the land. These facts are established by the notes and other evidence beyond controversy, and constitute the only solid basis upon which to rest the decision in this case. Taking these as the facts, it is clear that at his death William Stubbs was in equity the owner of the land. The notes which describe the land and recite that they were given for the purchase money thereof, taken in connection with the undisputed evidence that he was the principal in the notes, that he took possession under his contract of purchase and made valuable improvements on the land, show that he had a contract for the conveyance of the land which a court of equity would enforce. "The moment," says Lord Hatherly, "that a contract for the sale and purchase of land is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the purchaser." *Shaw* v. *Foster*, L. R. 5 H. L. 321; *Lysaght* v. *Edwards*, L. R. 2 Ch. Div. 499-506. This is founded on the principle that equity treats that as done that ought to be done. By the terms of the contract, the purchase price ought to be paid to the vendor, and the land ought to be conveyed to the vendee; equity therefore regards this as done. The consequences of this doctrine, says Prof. Pomeroy, are carried out. As the vendee holds the equitable estate, "he may convey or incumber it, may devise it by will; on his death, intestate, it descends to his heirs, and not to his administrators; in this country his wife is entitled to dower in it; a specific performance is after his death enforced by his heirs; in short, all the incidents of a real ownership belong to it." 1 Pomeroy on Equity, § 368. In commenting further on this doctrine the learned author says that it is a mistake to suppose that this doctrine does not apply until the purchase price is paid. It applies at once, so

soon as a valid contract of sale is made, though, until the purchase money is paid, it is a lien on the equitable estate of the vendee, and by the enforcement of this lien in a court of equity the equitable estate of the vendee may be sold or cut off. Note to § § 368, 1046, 1161, 1260, 1261.

Now, it is clear, as before stated, that William Stubbs had an equitable estate in this land that descended to his heirs. This estate was not lost by the conveyance to Mrs. Stubbs, for she knew all the facts, and took only the right of the vendor to hold the land as security for her debt. Equity therefore will compel her to convey the land upon the payment of the debt and interest. As she has taken possession of the land and collected the rents and profits, it is proper that she should account therefor to the heirs. There is no need to cancel the conveyance from Main to her, for equity can compel her to convey to the heirs or vest the title acquired by her in them so soon as the purchase money is paid.

The next question relates to the interest of these plaintiffs in the land. The chancellor held that William Stubbs had a homestead in the land, that Mrs. Pitts, the wife of William Stubbs, had lost her homestead interest in the land by abandonment, and that Mattie Lynch and Gardie Stubbs were entitled to a homestead in the land until they became of age, and that afterwards Mrs. Pitts, as against them, was entitled to a dower interest therein. In the opinion of a majority of the judges this decision of the chancellor was correct. But the fact that Mrs. Pitts has lost her homestead interest in the land does not vest the right to recover the entire rents thereof in the two children. After the death of a husband owning a homestead, his widow is entitled to the possession thereof; but, if there are minor children, she must share the rents and profits of the homestead with them until they arrive at age, she being in law entitled to half of the rents and the children to one-half. If the widow abandons or waives her homestead rights by some definite act, as by executing a deed thereto conveying the land to a third party, the right thereto vests in the children. But the mere fact that she has lost the right to recover her portion of the rents and profits through laches or the statute of limitations does not vest the right to recover them in the children

until they have recovered possession of the homestead from the adverse holder. In this case the widow never conveyed the land, and the only showing that she had acquired a new homestead is that she and her husband had a home in Conway where they had resided for a year. The only specific act of abandonment shown was that she had for a year previous to the time she testified lived at the home of her husband in Conway. The rights of the minors to the entire rents of the homestead could not have accrued before that time. It is true that the right of Mrs. Pitts to recover the rents and profits of the homestead from Mrs. Stubbs is now barred by laches. But, if Mrs. Stubbs had waived this defense, admitted her liability, and paid one-half of the rents and profits to Mrs. Pitts, the heirs could not have complained. For they had no right to the rents and profits of the widow's half until the widow had been guilty of some specific act of abandonment, or until they had recovered possession of the premises against the adverse holder. We are therefore of the opinion that the decree of the court that held that the minors were entitled to call Mrs. Stubbs to account for the full amount of the rents, without regard to whether there had been any specific act of abandonment of her part of the homestead by Mrs. Pitts, was erroneous. The court did not err in charging Mrs. Stubbs with the full value of the rents and profits due from the land as against the improvements and money expended by her in paying for the land, but, after the rents had paid the money paid by her and the value of the improvements, the minors can recover only one-half the rents of the homestead up to the time of the recovery of the land, or until Mrs. Pitts acquired a new home. The other half belonged to their mother, and is barred by statute of limitations.

The findings of the court that Mrs. Stubbs only paid $880 on the purchase price of the land is in our opinion against the weight of evidence. Mrs. Stubbs testified that she furnished her son about $200 or more to pay on this land. This evidence is not contradicted, and it is shown that she had money at that time, while her son was very poor, and told others that he could not pay the debt. Besides, the deed of Main to her recites a consideration of $1,050 paid by her. The payment of the purchase price of this land by Mrs. Stubbs has been the means of

saving a valuable piece of property for the heirs, and she deserves to have the full amount paid by her returned with interest, and we think the evidence shows that she paid at least the amount recited in the deed.

Five dollars per acre, the amount of rents charged against Mrs. Stubbs for the use and occupation of the place during the years she controlled the place, excepting the overflow years, seems to us excessive. According to the findings and decree of the court, Mrs. Stubbs took this tract of 187 acres of land in 1886, when there were only fifty acres cleared on it, and practically no other improvements excepting the fence, a small cabin and an old house boat, when very little of the purchase money had been paid, except that paid by her, and so managed it that after twenty years she had put nearly the whole of it in a high state of cultivation, erected three or four tenant houses, dug wells, and erected the necessary barns for the same, paid the taxes and repaid herself the money paid for the land, and saved over thirty-five hundred dollars for one of the heirs, nearly as much for the other, and over a hundred for the widow of her son. Besides this she reared, clothed and supported one of the children and the other one most of the time.

If it is true that Mrs. Stubbs has made all of these profits out of a small farm that was subject to occasional overflows, causing the fences to be washed away and requiring the expense of replacing them, she has certainly achieved a phenomenal success as a manager of a small farm, and deserves to be made a public guardian of small estates in that county. But in our opinion this result is another illustration of the fact that it is much easier to figure out profits on paper than to realize them by actual experience. Certainly, one that has been as successful as that should be allowed something for the loss of time, care and attention that she gave this place. The place would not have leased or rented itself or collected the rents, and it seems unjust after she has done this to charge her the full amount of the rent received by her without any allowance for the service she performed. The evidence tends to show that the rental value of this land was, when rented for long periods, $3.50 to $5 an acre, and we are of the opinion that four dollars an acre is as much as should have been charged against her.

It results from the conclusions reached by us that the account must be restated. The judgment is therefore reversed, and cause remanded with an order that the account be restated in accordance with this opinion.

PARKER v. WELLS.

Opinion delivered October 28, 1907.

1. APPEAL—HARMLESS ERROR.—Error of the chancellor in holding that the burden of proof is upon the plaintiff in a garnishment case to prove that the money in question does not belong to an intervener is not prejudicial if a preponderance of the testimony supports the chancellor's finding upon this point. (Page 174.)
2. PARTNERSHIP—LIABILITY OF PROPERTY FOR INDIVIDUAL DEBTS.—Where a partnership exists between two persons, only the balance due each partner after settlement between each other would be subject to the satisfaction of individual debts. (Page 175.)
3. ACCOUNTING—NECESSITY OF APPOINTING MASTER.—Where the chancellor correctly found that the defendant in a garnishment case had no interest in the fund garnished, it was not error to refuse to appoint a master to state an account between defendant and another who intervened claiming the fund. (Page 175.)
4. WITNESS—PRODUCTION OF PAPERS.—Where the defendant in a garnishment case testified that he had no record of transactions with an intervener claiming the fund garnished which would throw light upon the question of ownership of the fund in controversy, the chancellor did not abuse his discretion in refusing to require defendant at the trial to produce all papers showing his dealings with the intervener, if no timely application for the production of such papers was made as required by Kirby's Digest, § 3079. (Page 175.)

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

W. C. Adamson and *Carmichael, Brooks & Powers,* for appellant.

1. On the application for the appointment of a master, there was evidence clearly showing a sharing of profits between appellee and the intervener. A sharing of profits in no fixed proportion, but upon a basis to be determined by the amount

acquired in the conduct of the business, is a cogent evidence of a partnership. 74 Ark. 437; 63 Ark. 518.

Though it may not be erroneous to refuse to appoint a master, yet in complicated transactions it is better to do so. 35 Ark. 113; 86 Wis. 255.

2. It was error to place the burden on the plaintiff to show that the money in bank did not belong to the intervener. 39 Ark. 97; 20 Cyc. 1134-5.

3. Wells should have been required to produce in court the documentary evidence called for, which was necessary to throw light on his transactions with the intervener.

4. It was error to hold that the fund in bank belonged to the intervener. Money deposited in bank in an agent's name with his own funds, or kept with his own money, cannot be identified, and, in a contest betwen the principal and a third party, belongs to the agent. 11 La. Ann. 76; 3 Am. & Eng. Enc. of L. 832. See also 5 Cyc. 515.

E. M. Merriman, for appellees.

1. Since the chancellor found that there was no necessity for the appointment of a master, and it was within his discretion to make his own findings without the assistance of a master, appellant cannot be heard to complain. The chancellor may himself state an account if he chooses. 35 Ark. 113.

2. The evidence does not establish a partnership between the defendant and intervener. One who is to share in profits as compensation for services is not a partner. 1 Bates, Partnership, § 43. Community of loss and profit is the test of partnership. 7 Ala. 569; 19 Ala. 744; 14 Ala. 303. It is shown in evidence that Wells did not share in the losses.

3. The court properly refused to compel the witness Wells to produce the documentary evidence called for. It was irrelevant to the issue raised by the intervention. Moreover, Wells and Carden had been made appellant's own witnesses, and he would not be permitted to introduce documentary or other evidence to contradict them.

McCULLOCH, J. Parker recovered judgment at law against Wells for $500, and then instituted this suit in equity seeking to subject toward the satisfaction of his judgment a sum of

money deposited in the Exchange National Bank of Little Rock by Wells in the name of the Arkansas Loan & Collection Agency. It is alleged in the complaint that the money deposited as aforesaid belonged to Wells, that the Arkansas Loan & Collecting Agency was a mere trade name of Wells in which he was doing business, and that he had deposited the said funds in bank under that name as a device, among others, to cover up his property and put it beyond the reach of his creditors. The Exchange National Bank was made party defendant, and answered that it had on deposit the sum of $129.66 in the name of the Arkansas Loan & Collecting Agency.

Wells filed his answer, denying that the money belonged to him and alleging that the same belonged to one A. J. Carden.

Carden filed his intervention, claiming the funds on deposit in the bank; that Wells was his agent, and deposited the money as such agent, and had no interest therein. Parker filed his answer to this plea, denying the allegations thereof, and upon the issues thus raised the chancellor heard the case and rendered a decree in favor of the intervener. The plaintiff appealed. The only testimony introduced at the trial was that of the intervener, Carden, given by deposition, and that of the defendant, Wells, given orally in open court.

This testimony was to the effect that Carden, from time to time, placed money in the hands of Wells for the latter to lend at interest and to purchase the time or wage checks of railroad employees, under an agreement that Wells should receive one-half of the interest on money loaned and checks purchased as compensation for his services. They both testified that Wells had no interest in the money deposited in bank, but that it belonged to Carden. Wells testified that he spent his share of the profits as fast as they were earned and collected.

We are of the opinion that the testimony sustains the finding of the chancellor that the funds on deposit belonged to Carden. The evidence preponderates in support of this conclusion.

The record recites that the chancellor ruled that the burden of proof was on the plaintiff to show that the money in bank did not belong to the intervener. This was an erroneous ruling; but since the case is heard *de novo* here upon the evidence,

and we find that the testimony preponderates in favor of the chancellor's finding, the erroneous ruling was harmless.

It is unnecessary to determine whether the evidence establishes a partnership relation between Carden and Wells with respect to the profits of the business operation described, or the relation of principal and agent. In neither event, according to the evidence, did Wells have any interest in the particular fund in controversy, for he had received his share of the profits and spent it. The fund in question was a part of the principal or capital, and as such belonged to Carden. Even if a partnership existed, only the balance due each partner after settlement between each other would be subject to the satisfaction of individual debts, and the evidence shows that Wells had received his share, and therefore had no interest in the funds on hand.

It was not erroneous, even if a partnership had been found to exist, for the chancellor to refuse to appoint a master to state an account between the parties. *Bryan* v. *Morgan,* 35 Ark. 113. The chancellor himself heard the evidence, and reached a correct conclusion that the defendant Wells had no interest in the funds in controversy. It would have been a useless expense and delay for the chancellor to refer questions of fact to a master upon which he had already reached a correct conclusion.

During the progress of the examination of Wells as a witness, counsel for plaintiff asked the court to require the witness to produce his bank books, check books, cancelled checks and stubs showing his dealings with the bank, and all books and accounts showing transactions with Carden. This the court refused to do, and the ruling is assigned as error. There is a statute which provides that "the court, in an action by equitable proceedings, shall have power, on sufficient showing by affidavit, due notice of the application being given to the adverse party, to require the parties, or either of them, to produce books, deeds or other writings in their power, which are alleged to contain evidence pertinent to the matter in controversy." Kirby's Digest, § 3079. This statute was not resorted to by the plaintiff to require the production of the books, etc., asked for, but it was sought to require the defendant, who was on the witness stand, to procure and produce them. We think that, under those circumstances,

it was a matter within the discretion of the chancellor whether he would delay the trial in order to have the books and papers produced. No showing was made that their production would disclose any information material to the controversy in addition to the testimony of the witness. On the contrary, the testimony of the witness was to the effect that he had no record of his transactions with Carden which would throw any further light upon the question of the ownership of the funds in controversy. We can not, therefore, say that the chancellor abused his discretion in refusing to require the witness to produce books and papers which he testified would add nothing to the information already before the court.

Decree affirmed.

HART, J., disqualified and not participating.

SCOVILLE v. STATE.

Opinion delivered October 28, 1907.

CRIMINAL PROCEDURE—ORDERING SPECIAL PANEL OF JURORS IN DEFENDANT'S ABSENCE.—The defendant in a felony case cannot complain because the trial court in his absence ordered a special panel of jurors to be summoned to be used in case the regular panel was exhausted.

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; affirmed.

Edwin Hiner, for appellant argued the case orally.

William F. Kirby, Attorney General and *Daniel Taylor,* Assistant, for appellee.

1. Having pleaded to the indictment, without objection, and the transcript failing to reveal the error complained of, this court will presume that a copy of the indictment was served, or that defendant waived it. 42 Ark. 94; 43 *Id.* 391.

2. The punishment is not excessive. The testimony shows a shocking and atrocious murder, wholly without provocation.

HILL, C. J. George Zeigler was killed by Lee Scoville, and the grand jury of Sebastian County for the Fort Smith District

indicted Scoville for murder in the first degree. He took a change of venue, and the case was tried before a jury in the Greenwood district of Sebastian County, and he was convicted of murder in the second degree, and sentenced to fifteen years in the pentitentiary, and he has appealed.

His counsel in oral argument has presented two questions to the court:

1. On the day before the trial, and in anticipation thereof, the court had ordered a special panel of thirty jurors; and, after exhausting the regular panel, this special panel was used to complete the jury. A challenge to the array of the special venire was made on the ground that it was prematurely ordered, and that the defendant was absent when the order was given therefor, and in an affidavit attached to the motion for new trial the defendant swears that he did not consent nor authorize any one to consent to the making of the order for the special venire. Practically this same question was presented in *Mabry* v. *State,* 50 Ark. 492. After reviewing the change made by the Criminal Code in the procedure of trials, Chief Justice COCKRILL said: "'The defendant can not therefore be heard to complain that the order to summons jurors to complete the term jury was made in his absence." See also *Polk* v. *State,* 45 Ark. 165; *Bearden* v. *State,* 44 Ark. 331.

2. Counsel insists that the punishment of fifteen years was too severe for the crime, and asks the court to modify the judgment under the authority conferred by section 2436, Kirby's Digest. The court has gone through the evidence, and fails to agree with counsel; but, on the other hand, thinks the jury was quite lenient with his client.

Judgment is affirmed.

ALLEN v. STATE.

Opinion delivered October 28, 1907.

1. CRIMINAL PROCEDURE—FORMER TESTIMONY OF ABSENT WITNESS.—Before the written testimony of a witness should be admitted against the defendant in a felony case upon the ground that the witness is absent from the State, the trial court should have diligent inquiry made as to his absence or be satisfied from competent proof that inquiry would do no good. (Page 180.)
2. SAME—WHEN IMPROPER TO ADMIT FORMER TESTIMONY.—Neither the inquiries of the court made before the commencement of the trial in determining whether an attachment should be issued for the absent witness, nor the testimony of defendant's witnesses that the absent witness had been last seen in the county about one month before the trial, justifies the admission against the defendant in a felony case of the former testimony of an absent witness. (Page 180.)

Appeal from Scott Circuit Court; *Daniel Hon,* Judge; reversed.

J. P. Roberts and *A. G. Leming,* for appellant.

The unsigned testimony of Milo Williams taken in an examining court was improperly admitted as evidence. 73 Ark. 399.

Wm. F. Kirby, Attorney General, and *Dan'l Taylor,* for appellee.

Sufficient proof was introduced to show that Milo Williams was without the jurisdiction of the court, and his whereabouts unknown. His testimony before the examining court was properly admitted.

HART, J. Andrew Allen and Math Larimore were jointly indicted for the crime of arson. After the testimony was taken, the indictment as to Math Larimore was quashed on motion of the prosecuting attorney.

The State introduced the following evidence: the testimony of Harvey DeFore, an accomplice, who made a statement in detail of the time and the manner of the commission of the offense; the testimony of James Sutton, showing that he owned the gin, that it was located in Scott County, Arkansas, and was destroyed by fire in October, 1904, that about eight months be-

fore the gin was burned he had asked Math Larimore if he wanted his cotton weighed, that Larimore replied, "No, I want to roll it away from that gin, that the gin is liable to get burned;" the testimony of Sam Herrin that he heard this conversation between Sutton and Larimore, and that Larimore seemed angry; and the written testimony of Milo Williams, taken at the preliminary hearing before the justice of the peace as follows: "Milo Williams, being duly sworn, says, 'I am sixteen years old, and a resident of Cedar Creek. I know Andrew Allen and Math Larimore. I heard them, while I was fishing, talking about burning out the Sutton outfit last summer. I think it was in June or July. One of them said: 'I would give $150 to have it (the gin) burned, and the other said he would rather do it himself and save the $150.' I told my mother about it, and she said I must not tell it, and afterwards told McDowell and Mrs. Wasson."

The foundation for the introduction of the written testimony of Milo Williams is that of Free Malone, who says: "I was the justice of the peace before whom was had the examining trial of Math Larimore and Andrew Allen charged with burning James Sutton's gin. I wrote the substance of Milo Williams's testimony. I read it over to him. He never signed it. The examination was held in November or December, 1904. I identify the paper here presented me as that written by me."

Jim Sanders and Will Norris, witnesses for the defendant, testified that they saw Milo Williams in Arkansas about one month before the trial, and that he was traveling around with a snake show. The records show that an attachment was issued for Milo Williams on August 7, 1907; that a jury was impaneled to try the case, the statements of counsel were made, and then the court was adjourned until the next morning; that on the 8th day of August, 1907, the testimony was taken, the case argued and submitted to the jury.

All else there is in the record in regard to admissibility of this testimony is contained on page 108 of the transcript, and is as follows:

Mr. McDonald: "If the court please, upon the proof we made of the fact that the witness is out of the jurisdiction of the court, we now ask to read the testimony of Milo Williams to the jury."

Mr. Harwell: "We object to the introduction of the testimony, because there was no proof to the effect that the witness was out of the State or out of the jurisdiction of the court, and I desire now to save our exceptions."

The court. "That is the matter we had up yesterday and passed on it, and it was admitted. Objection overruled, and exceptions saved."

Then the testimony of Milo Williams as written above was read to the jury.

The defendant, Allen, adduced evidence tending to prove that he was not present at the time and at the place where the arson was committed.

He was convicted. He now insists that the conviction should be set aside because the court allowed the written testimony of Milo Williams to be read to the jury.

In the case of *Vaughan* v. *State*, 58 Ark. 371, the court said that, before the testimony of an absent witness taken at a former hearing of the case should be allowed, the trial court should have diligent inquiry made, or be satisfied from competent proof that inquiry would do no good. In this case, upon the offer by the State to introduce the written statement of Milo Williams, in overruling the objections of the defendant, the court said: "That is the matter we had up yesterday and passed on it, and it was admitted." Obviously this could not have been done; for the record shows that the trial only lasted two days; that on the first day no testimony was taken. Hence we must conclude that no competent proof was introduced at the trial to show that by diligent inquiry the absent witness could not be found. Neither the inquiries of the court made before the commencement of the trial in determining whether or not an attachment should be issued for the absent witness, nor the testimony of defendant's witnesses that the absent witness had been last seen in the county about one month before traveling with a snake show, are sufficient conditions calling for the introduction of secondary evidence. The written statement of Milo Williams should not have been admitted. For the error complained of in admitting this testimony the cause is reversed and remanded for a new trial.

ABELSON v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY

Opinion delivered October 28, 1907.

WITNESS—CROSS-EXAMINATION AS TO BIAS.—Where, in a suit against a railway company, a witness for defendant testified that he did not have a pass over defendant's road, and that he did not remember whether or not he paid his fare on that particular day, but thought that he did, it was not error to refuse to require the witness to answer whether defendant's conductor was in the habit of allowing him to ride on his train for nothing.

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; affirmed.

John N. Cook and *Scott & Head,* for appellant.

1. It was competent to show that the witness, Coleman, had been riding free on freight trains of the company, in order to show any bias he might have in favor of the defendant, and as affecting his credibility. 80 Ark. 587.

2. There is no proof that appellant heard any warning, if given; hence, in the absence of a showing that he had heard it, he is not chargeable with contributory negligence. 31 Atl. 694; 36 Pac. 1018; 36 N. E. 443.

3. The announcement of the station and stopping of the train is an invitation to the passenger to alight from the car. 75 Ark. 165; 70 Ark. 264. See also 147 U. S. 571; 24 So. 392. Appellant was not chargeable with notice of what was posted up on the side of the car, in the absence of a showing that it was posted in a place where it could readily be seen, or that he knew of it. 30 So. 349; 22 Atl. 323; 85 S. W. 421. See also 6 So. 696; 32 Mo. App. 438.

T. M. Mehaffy, for appellee.

HART, J. Appellant, Abelson, got on the caboose of the appellee's local freight train in Texarkana to go to Homan.

Abelson testifies that the station "Homan" was called out, and that the train stopped. That he got up from his seat, and went out to the back of the caboose on the first step, and that just as he got there the train gave a jerk and slapped him with a piece of iron on the face. That he had ridden on local freight trains before. That he was badly injured and suffered for

about five weeks. On cross-examination, he stated that he did not hear the conductor warn the passengers to keep their seats until the train stopped.

Other testimony was introduced to corroborate his statements.

The defendant railway company introduced one Coleman, who testified that he was a passenger on the local freight the day that Abelson was injured. That when the train began to slow up the passengers began to get up, when the conductor told them to keep their seats until they reached the station. That all the passengers except two kept their seats. The conductor testified that there was a notice posted up in the car warning passengers that they were forbidden to occupy the moveable seats, or to stand up while the train was in motion or switching was being done. The other facts are sufficiently stated in the opinion.

This is an action to recover damages which plaintiff, Abelson, alleges that he suffered on account of the negligence of the railroad company. The defendant company set up contributory negligence on the part of the plaintiff.

There was a verdict and judgment for the defendant.

Counsel for the appellant contend that the court erred in refusing to allow the witness Coleman to answer questions as to whether or not he had been riding free on the local freight trains of the defendant by permission of the conductors. The testimony on that point is as follows:

"Q. You say you were a passenger on the train that day, Did you pay your fare on that day? A. I can not tell you. I think I did. Mr. Mehaffy (defendant's counsel): We object. It does not make any difference whether he paid his fare or not." The objection was by the court sustained, and the plaintiff then and there excepted. "Q. Have you got a pass over the road? A. No, sir. Q. You know this conductor, don't you? A. Yes, sir. Q. How long have you known him? A. I do not know. I have known him five or six years; quite a number. Q. Wasn't he in the habit of letting you ride free on the train at the time and prior to the time of the injury?" The defendant objected to the question. Mr. Head: "We have a right to show the bias of this witness if any. If this conductor al-

lowed this witness to ride for nothing, I think it is proper to prove it." The court sustained the objection, and the plaintiff excepted.

It was decided, in the case of the *Kansas City Southern Ry. Co.* v. *Belknap,* 80 Ark. 591, that it is always proper to show the bias or prejudice of a witness toward a party litigant as affecting his credibility. In this case the witness answered that he did not have a pass over the road of the defendant company, and that he had known the conductor five or six years. After the witness had stated that he did not remember whether or not he had paid his fare on that particular day, counsel for the defendant objected to his answer. The court sustained his objection, but did not withdraw the testimony from the jury. A long and tedious detail by the witness concerning his relations with the conductor could not have been of more aid to the jury in their deliberations. We do not think the court erred in sustaining an objection to further examination of the witness on this point.

The objection to the instructions is not well taken.* While the appellant stated to the jury that he did not hear the warning given by the conductor, he admitted that he had frequently ridden on local freight trains before, and knew that there was posted in them warnings similar to the one exhibited to the jury, headed in large capital letters: "WARNING NOTICE! DANGER!" The objections to the instructions given by the court at the instance of the defendant company are fully covered by the instructions given on behalf of the plaintiff, and are substantially the same as those approved in the case of the *St. Louis, I. M. & S. Ry. Co.* v. *Farr,* 70 Ark. 269. See *Krumm* v. *St. Louis, I. M. & S. Ry. Co.,* 71 Ark. 593.

Judgment affirmed.

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*One of the instructions given at the defendant's instance was as follows:

"(4) A passenger should inform himself of the carrier's regulations, and should occupy a seat inside the car; and if he negligently stands or gets up to get off while the train is moving, and this conduct on his part contributes to produce the injury of which he complains, he cannot recover, and your verdict should be for the defendant." (Reporter.)

NABORS v. DIXIE MUTUAL FIRE INSURANCE COMPANY.

Opinion delivered October 28, 1907

1. INSURANCE—WARRANTY—BREACH.—Where an applicant for fire insurance was asked whether there was any other insurance on the property, and answered in the negative, the fact that there was a prior invalid policy on the property did not constitute a breach of the warranty in the policy that the answer was correct. (Page 186.)
2. SAME—PROCURING ADDITIONAL INSURANCE.—Where a policy of fire insurance contains a clause avoiding the policy if insured procures additional insurance, the procurement of such additional insurance without the insurer's consent avoids the policy. (Page 186.)
3. SAME—BURDEN OF PROOF AS TO BREACH OF WARRANTY.—The burden is upon a fire insurance company, relying upon a breach of warranty in a policy, to establish such breach. (Page 187.)

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

W. G. Dinning, for appellant.

The fifth instruction is erroneous. Where a policy forbids the creating of incumbrances on the property insured, giving a mortgage thereon renders the policy void. 62 Ark. 348; 151 U. S. 452. There can be no existing insurance without such insurance is valid and in full force, and capable of being legally enforced or collected in case of the destruction of the property insured. 129 Ill. 599; 13 Am. & Eng. Enc. of Law, 305; 33 Ia. 325; 65 Me. 368; 34 Am. Dec. 69; 83 Md. 63; 119 Mass. 121; 43 Mo. 573; 31 Gratt. (Va.), 176; 9 New Bruns. 173.

A contract in the nature of the Capital Fire Insurance Company policy is entire and indivisible, and the avoidance of part avoids the whole. 10 Ark. 326; 78 Ark. 111; 63 Ark. 202; 52 Ark. 257; 43 Ark. 275; 22 Ark. 158.

Jacob Fink and *Morris M. Cohn,* for appellee.

It is well settled that an answer in an application for insurance which is warranted to be true must be true, whether it relates to a material matter or not. "It is not necessary that the fact or act warranted should be material to the risk, for the parties by their agreement have made it so." 58 Ark. 528; 6 Wend. 488; 16 Am. Dec. 463; 6 Fed. 672; 20 Fed. 482; 3

Gray (Mass.) 580; 53 Miss. 1; 108 Ill. 91; 49 Me. 200; 17 Mo. 247; 2 Denio, 75; 30 Pa. St. 315.

HART, J. This is an action to recover on a policy of insurance against fire issued by the appellee to appellant. The facts, briefly stated, are as follows:

G. B. Sawyer testified that he was secretary and treasurer of the Capital Fire Insurance Company, of Little Rock, Arkansas. That a policy of insurance was issued by said company in favor of Thomas Nabors to take effect November 29, 1904, and to expire November 29, 1907. That the policy covered insurance on a two-story frame house and furniture, bedding, etc., in said building. That the policy did not permit additional concurrent insurance, and did not permit a mortgage to be given against the property. That Nabors sent to his company a proof of loss. That he informed Nabors that his policy had been violated in that, subsequent to the issuance of the policy, he (Nabors), without the permission of the company, had mortgaged the property covered by the policy, and had also taken out additional insurance on the same, either of which avoided the policy, and that the company refused payment. That then at the request of Nabors on November 7, 1905, the policy was cancelled.

It was agreed by counsel that the mortgage mentioned by Sawyer was excuted and delivered on the 4th day of May, 1905.

The policy sued on was issued by appellee, the Dixie Mutual Fire Insurance Company, on the 24th day of August, 1905.

About three weeks after the issuance of the policy, the property covered by the policy of insurance was destroyed by fire. The company denied liability under the terms of the policy, and refused payment, and this suit was commenced on April 27, 1905. There was a verdict and judgment for the defendant. Counsel for appellant asks a reversal of this case because the court erred in giving to the jury instruction No. 5 as follows:

"The jury is instructed that there is no competent testimony before them showing that the policy of the Capital Fire Insurance Company was avoided as to the personal property therein described, prior to August 24, 1905, by reason of the plaintiff having executed a deed of trust to ———— Carter on —— May, 1905, on the house containing said personal prop-

erty, and the jury is instructed that, as a matter of law, said policy of said Capital Fire Insurance Company was subsisting insurance on the 24th day of August, 1905, on the personal property described in the policy of said Capital Fire Insurance Company, and the plaintiff's answer as to other insurance was untrue, and the plaintiff can not recover."

The application of appellant, Nabors, to appellee for insurance is in part as follows:

"Q. Have you any other insurance on any of this property? A. No.

"This application shall be considered a part of the contract for insurance and a warranty by the applicant."

This is all the representation made about other insurance. The policy contains a clause avoiding it if any of the statements or warranties are not true.

"If the prior policy is totally invalid before the issuance of the policy in suit, it cannot be regarded as constituting an insurance which must be disclosed, in the absence of a specific requirement as to the disclosure of insurance, whether valid or not. If the policy requires 'all insurance (valid or not) to be disclosed,' however, a failure to mention a former policy apparently valid on its face but in fact void will vitiate the insurance." 19 Cyc. p. 705, and cases cited.

It will be observed that the question asked appellant by appellee was whether he had any other insurance, not whether he had any other insurance, valid or invalid. Under the rule announced *supra,* this presents to the court the question whether or not the Capital policy was subsisting insurance on the 24th day of August, 1905, the date of the issuance of the policy by appellee.

Where a policy of insurance contains a clause avoiding the policy if insured procures additional insurance, the procurement of additional insurance without the insurer's consent avoids the policy. *Planters' Mutual Insurance Company* v. *Green,* 72 Ark. 305.

The policy of the Capital Fire Insurance Company was not exhibited. The only evidence we have of its terms is contained in the deposition of Sawyer. His testimony was read on behalf of the defendant. The effect of his testimony is that the Capital

policy was void, on two grounds: first, because the insured executed a mortgage on the property in violation of the terms of the policy; second, because the insured had taken out additional insurance not permitted by the policy.

Counsel for appellee contends that there is no competent proof that the policy of the Capital was void. The burden of proof was upon the appellee to show that the warranties and representations made in its policy in regard to "other insurance" were not true. For this purpose the deposition of Sawyer was read to the jury, that being all the evidence introduced on that point, and, the burden of proof being on the appellee in that regard, appellee is bound by this statement.

For the reason that the effect of Sawyer's testimony is that the policy of the Capital Fire Insurance Company was void because of the execution of the mortgage to Carter in May, 1905, anl because of the taking out of additional insurance, we think the court erred in instructing the jury that as a matter of law the policy of the Capital Fire Insurance Company was subsisting insurance on the 24th day of August, 1905.

Reversed and remanded for a new trial.

BUCKLEY v. WILLIAMS.

Opinion delivered October 28, 1907.

EXEMPTIONS—COSTS.—Where costs are recovered independent of any other judgment, they do not constitute a debt founded upon contract, but are based upon a statutory liability, and are not within the meaning of Const. 1874, art. 9, § 1, providing that a certain amount of personal property "shall be exempt from seizure on attachment or sale on execution or other process from any court issued for the collection of any debt by contract."

Appeal from Washington Circuit Court; *James S. Maples*, Judge; affirmed.

The *appellant, pro se.*

1. The property was exempt under the laws of Arkansas, and no question was raised as to the form, time and manner of

schedule. Art. 9, Const. 1874; Kirby's Digest, § § 3904, 3906, There was *at least* an implied contract to pay all costs adjudged against plaintiff, which created a *debt by contract.* 58 Iowa, 281; 84 *Id.* 602; 3 Blackst. Com. 160. Costs are necessary appendages to a judgment, and are allowed in all cases by statute. 57 Ark. 209; Kirby's Digest, § § 965-6. Exemption laws construed liberally to carry into effect the intent and purpose of the law. 12 Am. & Eng. Enc. of Law (2 Ed.), p. 75; 63 Ark. 83; 36 *Id.* 160; 42 *Id.* 541; 31 *Id.* 656; 38 *Id.* 114; Thompson, Homest. & Ex. § 7; 42 Ark. 415. In an action when plaintiff is cast and judgment for costs, judgment for costs is treated as a *debt.* 2 Grant, Cases, 424; 160 Pa. St. 72; Thompson, Homest. & Ex. 383, n. 2; Maples on Homest. & Ex. 758-9, etc.

The only case holding *contra* is 8 How. Pr. 627, but in the same report see *id.* 523; 5 Denio (N. Y.), 119. *Massie* v. *Enyart,* 33 Ark. 688 (citing 2 Tidd, 945), did not pass on the question raised here.

WOOD, J. Appellant brought suit to contest the validity of a will, and was cast in his suit; judgment being rendered against him for costs.

Execution was issued by the clerk to collect the costs adjudged, and certain personal property of appellant was levied upon, which appellant claims was exempt, under our Constitution and statutes. Const., art. 9. § 1; Kirby's Digest, § 3904. Section 1, article 9, of the Constitution provides: "That personal property of any resident of this State who is not married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of two hundred dollars in addition to his or her wearing apparel, shall be exempt from seizure on attachment or sale on execution, or other process from any court issued for the collection of any debt by contract."

A judgment for costs is not a debt by contract, either express or implied. It is a liability created by statute, and, in the absence of the statute allowing same, there could be no judgment rendered in favor of a defendant against a plaintiff, where the latter fails in his suit. Kirby's Digest, § 965.

There are no contractual relations between a plaintiff and defendant as to the costs of a suit.

There are two distinct lines of authority upon the subject. The Supreme Court of Indiana, under provisions similar to ours, holds that there can be no exemption against an execution for costs. *Donaldson* v. *Banta,* 29 N. E. 362. See also *Schouton* v. *Kilmer,* 8 How. Pr. 527.

The Supreme Court of Pennsylvania takes the opposite view. *Lane* v. *Baker,* 2 Grant, Cases, 424.

We prefer the doctrine announced by the Supreme Court of Indiana, in *Donaldson* v. *Banta, supra,* as follows:

"Where costs are recovered independent of any other judgment, they do not constitute a debt founded upon contract. There is no contract, express or implied, that an unsuccessful plaintiff will indemnify the defendant for the costs occasioned by the litigation; but the right to recover costs is purely statutory, and, in the absence of statute authorizing it, they could not be recovered as such by the prevailing party."

This is not a suit based upon section 3528, Kirby's Digest, allowing officers to issue fee bills for costs against the party at whose instance the services were rendered, and we express no opinion on that question.

Judgment affirmed.

McDONALD v. TYNER.

Opinion delivered October 21, 1907.

1. STATUTE OF FRAUDS—CONSTRUCTIVE TRUSTS.—Kirby's Digest, § 3666, requiring that declarations of trust shall be manifested by writing signed by the declarant, refers to express trusts, and not to trusts *ex maleficio.* (Page 192.)
2. TRUST—WHEN ENFORCED.—Where a debtor conveyed substantially all of his property, either absolutely for an inadequate consideration, or upon the grantee's verbal promise to hold the title as trustee for the grantor's creditors, which trust the grantee subsequently disclaimed, in either case equity will enforce a constructive trust against the grantee in favor of the grantor's creditors. (Page 192.)

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

W. W. Bandy, for appellant.

1. The deed from Wilcockson to appellant is absolute in its terms. Under the allegations of the cross-complaint and under the proof, if there is a trust, it is an express trust, and void under the statute. Kirby's Digest, § 3666. Oral testimony cannot be heard to engraft an express trust upon a deed absolute in terms. 57 Ark. 632. See also 1 Perry on Trusts, § § 81, 82; Reed on Stat. Frauds, § 851.

2. A deed, absolute on its face, conveying real estate, will not be set aside and a trust declared in favor of a stranger to the deed, unless the proof is strong, clear, convincing, practically overwhelming. 57 Ark. 637; 48 Ark. 20; 37 Ark. 146; 50 Ark. 71; 40 Ark. 146; 19 Ark. 278; 31 Ark. 163; 40 N. W. 717; 10 S. W. 26.

Johnson & Huddleston, for appellee.

1. Appellants should have specially pleaded the statute below, and will not be permitted to plead it here for the first time. 56 Ark. 263; 32 Ark. 97; 9 Enc. Pl. & Pr. 707-8. There was no objection to the competency of the evidence relating to the real arrangement between the parties which led to the execution of the deed; hence the plea of the statute, if there was a plea, will be held to have been waived. 29 Am. & Eng. Enc. of L. (2 Ed.), 811.

2. The evidence establishes not an express trust but a resulting trust. Kirby's Digest, § 3665.

3. The act of McDonald in procuring the deed to be made to him absolute on its face, in the absence and without the knowledge of his co-sureties, was a fraud upon them, against which equity will grant relief. The statute of frauds will not be permitted to protect the perpetrator of such a fraud, and the rule prohibiting the introduction of parol testimony to engraft a trust upon a deed obtained by such means will not apply. 1 Ark. 391; 19 Ark. 278; *Id.* 146; *Id.* 49; 36 Ark. 146; 69 Ark. 513; 52 Ark. 207; 24 O. St. 623; 29 Am. & Eng. Enc. of L. (2 Ed.), 845.

4. If it be conceded that the transaction was an express trust, appellant is not benefited. No one of the sureties had any right to take security or indemnity from the principal for his

own benefit alone. If he should take security, it would inure to the benefit of all. 27 Am. & Eng. Enc. of L. (2 Ed.), 487 and cases cited; 13 O. St. 514; 39 Vt. 620.

HILL, C. J. T. R. Wilcockson was guardian of Mary, Laban and Henry Cupp, minors. Sims, Hester, Camp and Light, and appellant McDonald were sureties upon his guardian's bond. Wilcockson was short in his accounts with his wards, and financially embarrassed in other ways. Sims and McDonald, two of his sureties on his guardian's bond, insisted upon his conveying to the sureties all his property to indemnify them, and he agreed to do so; and he and McDonald left Sims, and went to the office of McDonald's lawyer to have the conveyance prepared according to agreement. There is a conflict in the testimony between McDonald and Wilcockson as to what occurred thereafter; Wilcockson saying that there was no change in the agreement, but only a change in the form of the transaction, and McDonald saying that he declined to take the property in trust for the sureties, and that he offered to buy, and did buy, the real estate which was conveyed to him for $2,300—$300 paid in cash and his note for $2,000, payable five years after date. Other assets were conveyed at the same time; Wilcockson saying, to carry out the agreement to convey the sureties all his property, and McDonald giving another version of it. Whatever may be the truth of this controversy, the fact remains that Wilcockson conveyed to McDonald all of his property, the value of which is variously estimated by the witnesses from $2300 to nearly double that sum. McDonald says that any shortage in Wilcockson's accounts as guardian was to be credited on the $2,000 note.

Tyner, as successor of Wilcockson as guardian of the Cupp minors, brought this suit against Wilcockson and his sureties, and the sureties and Wilcockson filed a cross-complaint against McDonald, seeking to hold him as trustee of the property conveyed by Wilcockson to him. The chancellor gave judgment against Wilcockson and his sureties for the sum of $1,304.79, and sustained the cross-complaint, and held that McDonald was trustee for the benefit of his co-sureties, directed an accounting to be had of the property received, and after a full accounting charged certain property remaining in his hands with a lien in favor of Tyner as guardian. McDonald has appealed.

The principal contention which appellant makes here is that, if the evidence established a trust, it was an express trust, and parol evidence of it was contrary to section 3666 of Kirby's Digest. "But the statute in question refers to express trusts, and has no reference to what are called trusts *ex maleficio,* and which are a species of constructive trusts which equity impresses upon property in the hands of one who has obtained it through fraud, in order to administer justice between the parties." *Ammonette* v. *Black,* 73 Ark. 310.

Prof. Pomeroy thus defines trusts *ex maleficio*: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The form and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit." 3 Pom. Eq. Jur. § 1053.

Shortly before this transfer of all his property to McDonald was made, Wilcockson had agreed to turn over all of his property for the benefit of his sureties. This transfer stripped him of all property (and none was exempt against such a debt) which could respond to their just claims, save alone a negotiable promissory note payable five years after date, which could easily be negotiated. He was pressed for other debts at the same time, and the value of the property conveyed was largely in excess of the named consideration. These facts stamp the transaction of such a character that the chancellor was fully justified in finding it to be fraudulent; and consequently that McDonald should hold as trustee *ex maleficio* for the benefit of the sureties.

If Wilcockson's testimony of what occurred after he and

McDonald parted from Sims be true, then there was no change in the original agreement to convey the property to McDonald in trust for the benefit of the sureties; and a conveyance was made contrary to that agreement; and this would bring the case squarely within the rule announced by Prof. Pomeroy and quoted in *Ammonette* v. *Black, supra,* as follows: "A second well settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to lands by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose, * * * * * and, having thus fraudulently obtained the title, he retains, uses and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement."

Take either view of the testimony—if it was a sale, as McDonald says it was, the evidence justifies it in being held in fraud of creditors; if it was not a sale, then it was fraudulently obtaining a title in the form of a sale to himself when in fact it was to be in trust for all the sureties on the guardian's bond. And this being accomplished by means of actual deceit constituted him a trustee *ex maleficio,* instead of a trustee of an express trust, and takes the case out of the statute of frauds.

Other questions are presented and have been considered. There is nothing found which could warrant a reversal of the judgment, and it is affirmed.

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

Opinion delivered October 28, 1907.

1. CARRIER—LIABILITY FOR ASSAULT ON PASSENGER.—A railroad company is not responsible for an assault upon a passenger committed by one of its employees acting beyond the scope of his employment. (Page 197.)

2. SAME—FAILURE TO PROTECT PASSENGERS.—A railroad company is not responsible for failure to protect from assault one who was waiting at its station intending to become a passenger on its train if the assault was committed so suddenly that the railroad company could not reasonably have anticipated and prevented it. (Page 198.)

3. SAME—LIABILITY FOR ACTS OF EMPLOYEE.—A railroad company is not liable for the unauthorized act of one of its employees in causing the arrest of a passenger. (Page 198.)

4. SAME—LIABILITY FOR FALSE IMPRISONMENT OF PASSENGER.—A railroad company is not liable for the authorized act of one of its employees in causing the arrest of a passenger if such employee had reasonable cause for believing that such passenger had committed a felony. (Page 198.)

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

B. R. Davidson, for appellant.

1. Where a complaint alleges in one count a breach of contract to provide protection for a passenger, and in another count charges false imprisonment, there is a misjoinder, and a motion to strike out one of the causes of action should be sustained. Kirby's Digest, § § 6079-6081; 69 Ark. 209; 80 Ark. 167. A misjoinder renders the entire declaration bad. 23 Ark. 637.

2. An allegation, in the alternative, that the agent knew, or by the exercise of ordinary care could have known, that the plaintiff was threatened with injury, etc., without alleging facts showing that he had notice of the intended assault, or was negligently ignorant of it, is not sufficient. 70 Ark. 136; 37 Am. St. Rep. 386; 54 *Id.* 80; 24 S. E. 467; 37 S. W. 485.

3. In an action against a railroad company for false imprisonment, it is not sufficient to allege that plaintiff's arrest was caused by persons in the employ of the company, without showing that they were acting in some manner connected with the company's business, and within the scope of their authority, or that the act was authorized or ratified by the company. 59 Ark. 395; 8 Am. St. Rep. 512; 100 Am. Dec. 448; 29 N. E. 952.

4. The relationship of passenger and carrier can not be established by one party alone. Where the party has bought

no ticket, nor made known to the company's agent that he intended to become a passenger, but leaves the station and is standing on the platform, the relationship does not exist. 4 Elliott on Railroads, § 1578 *et seq.*; 12 Am. & Eng. R. Cas., N. S. 180. Where one buys a ticket, and enters the train, and then temporarily leaves the train, he ceases to be a passenger. 36 N. E. 583; 37 N. E. 165; 4 L. R. A. 632.

5. It is in proof that Penn had no authority from the company to make an arrest, and there is no proof that he had apparent authority to do so. An officer making an arrest is presumed to do so in his official capacity, not upon suggestions from others, nor upon authority conferred by the company. 14 Atl. 590; 20 Atl. 188; 50 N. E. 540; 30 Am. & Eng. R. Cas. N. S. 774.

6. Before the company can be held liable, it must be shown that the party committing the assault and the one causing the arrest were acting within the scope of their employment. Hence the first, second, third, and fifth instructions requested should have been given. 8 Enc. Pl. & Pr. 848, 1.

Sam R. Chew, for appellee.

1. Both counts of the complaint sound in tort, being for personal injuries, and were properly joined. Kirby's Digest, § 6079; 33 Ark. 316.

2. The relation of passenger and carrier arises when the passenger goes into the waiting room of the carrier or upon its station platform with the *bona fide* intention of becoming a passenger. 3 Thompson on Negligence, § 2638. And that relation would not cease if one had bought a ticket, boarded a train and then temporarily left it. 102 S. W. 198 (Ark.)

3. The law confers the power upon carriers to protect persons in their cars and at their stations, and makes it their duty to make and enforce rules for the protection of those who go to their stations for the purpose of becoming passengers. Kirby's Digest, § 6606; 70 Ark. 136.

4. The evidence was sufficient to establish the agency of Penn, and to show that he was acting within the scope of his employment. 75 Ark. 579. No offense having been committed in the presence of Goss, the officer, he had no authority to make

the arrest without a warrant; and, no felony having been committed, Penn was without authority to arrest. It was therefore illegal. Kirby's Digest, § § 2119-20.

WOOD, J. Bertie Wyatt, a young man nineteen years old, in company with Arthur Wood, another young man, on the 15th of October left his home to attend a circus at Ft. Smith. He carried with him a black slicker. After the circus they went to the depot to purchase a ticket to Van Buren over appellant's road. Appellee asked the ticket agent when the train was due, and he replied at six o'clock, but informed appellee that the train was an hour and a half late. Appellee then left the ticket office without purchasing his ticket, went out of the door, met some companions not far from the door and near the corner of the building, was standing leaning against the wall talking to these parties when one Davis, a switchman in the employ of appellant, came up, and began cursing appellee, and accused him of stealing his slicker, and pounded him over the head with his lantern. He hit appellee over the left eye; made a wound which bled profusely; knocked appellee down. Appellee ran around the trucks on the platform, all the while calling for help, the man still after him and pounding him with the lantern, and almost knocking appellee senseless. Appellee then ran into the waiting room and back to the water cooler, between the ticket office and the stairs, when and where a man by the name of Penn came, and took hold of appellee's arm, and carried him into the baggage room, where there was a policeman, and Penn told the policeman to take charge of appellee. Penn told the policeman it was for "*suspicious* larceny," or something of the kind, about the slicker. He said to the policeman: "Take these young men; they are charged with stealing a man's coat." The policeman carried appellee and his companion, Arthur Ward, to jail, where they remained for twelve or sixteen hours. Appellee had the money to purchase his ticket, and intended to do so and to take the appellant's passenger train to Van Buren.

Penn was appellant's special secret service agent. It was his duty to look after criminal matters for the appellant. He looked after anything that was stolen out of the box cars or the stations; he had authority to inquire into complaints of larceny about the station. When any trouble came up about the

station, it was his duty to investigate the facts, and report the matter to the civil authorities. He had no power to make arrests himself. That was not in the line of his duty. But he was expected to report matters to the officers when trouble came up, and in this way he caused arrests to be made.

Davis, the switchman, who did the injury to appellee, was off duty at the time; he had quit work. He worked on the yards; had no control over the station or passengers. It was his duty to look after switches. He had a black slicker, and, on missing it from his engine, he started out through the crowd to look for it, and when he came upon appellee with the slicker he supposed it was his and began to pound appellee in the manner described.

Davis was also arrested by the policeman, but was not put in jail, but simply directed to appear before the police court. The ticket agent made no effort to stop the fight, but he testified that he had no opportunity to do so. When the trouble first began, however, some one in the ticket office told the special secret service agent, Penn, that there was about to be a fight or trouble on hand, and that he "had better get busy." Appellee was discharged by the police court from the charge of larceny. The above are substantially the facts stated in brief (and in the strongest light for appellee) upon which he predicates his suit against appellant, alleging two causes of action, one for failure to protect a passenger from assault and one for false imprisonment.

1. A majority of the court is of the opinion that these facts do not constitute a cause of action against appellant. Davis, the switchman who made the assault, was acting entirely beyond the scope of his employment in so doing, and the appellant was in no manner chargeable with his unlawful acts. Nor was appellant liable, under the proof, for failing to exercise ordinary care to protect its passengers, and those intending to become passengers, from insults and injuries of the kind here complained of. The assault upon appellee was so sudden that appellant could not reasonably have anticipated and prevented it. Nor, in the exercise of ordinary care, could it have done more than it did to quell the trouble after it began. Appellant's secret service agent was on the ground. It was his duty to have pre-

vented the trouble, if possible. He testifies: "Was in Ft. Smith on the day of the circus; was at the station; heard some disturbance; I was in the ticket office at the time; was talking over the telephone. Mr. Milligan and Mr. Robinson were in the office. They looked out the window and said: 'There is a fight or something out here, and you had better get busy.' I hung up the receiver, and started promptly, and met one of these young men at the waiting room door, and noticed he had some blood on his face and hands, and said, 'What is the matter?' and he said a man struck him with a lantern." Other witnesses show that the crowd was dense, and the attack so sudden they could not have prevented it, had they tried. This evidence is undisputed, and it shows that the rencounter was on and off so quickly that the failure of appellant to prevent it, or to stop it after it commenced, was not actionable negligence.

A majority of the court is of the opinion that the court should have given appellant's second request for instruction.*

2. We are of the opinion that the undisputed evidence shows that the special agent, Penn, had no authority to make arrests, and that if he arrested appellee he acted beyond the scope of his employment, and the appellant company is not liable therefor. Even if it may be said that appellee was arrested at his instance and request, and that such arrest was in the line of the special agent's employment, appellant would not be liable therefor, provided its special agent exercised ordinary care, and there was probable cause for having appellee apprehended. There was certainly evidence to warrant the submission of the question to the jury as to whether or not there was probable cause to believe that appellee had committed the crime of larceny. The court erred in refusing to give appellant's third request for instruction.† The court, having refused this

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*2. I charge you that the evidence is not sufficient to warrant a recovery under the first cause of action set forth in the complaint. You will therefore find for the defendant on said first cause of action.

†3. I charge you that the evidence is not sufficient to warrant a recovery on behalf of plaintiff in the second cause of action. You will therefore find for the defendant in the second cause of action.

instruction, should certainly have given subdivisions (a) and (b) of appellant's fifth request for instruction.‡ For the errors indicated, the judgment is reversed and the cause is remanded for new trial.

‡5th. I charge you that the second cause of action is for an alleged unlawful imprisonment. To sustain this cause of action it is necessary for plaintiff to prove:

(a) That the arrest was procured by special agent Penn, an employee of the company acting within the scope of his employment. If the proof fails to establish this, you will find for defendant.

(b) The plaintiff must prove that the special agent Penn had no reasonable or probable cause for believing that plaintiff had stolen the coat.

LAND v. STATE.

Opinion delivered October 28, 1907.

1. BASTARDY—POWER TO IMPRISON.—Though a proceeding to affiliate a bastard child is a civil proceeding, the power given to the court by Kirby's Digest, § § 486, 487, to commit the father to jail for failure to pay the judgment for lying-in expenses and to give the required bond for payment of the monthly allowance for the child's maintenance is a proper exercise of the police power of the State, and not an imprisonment for debt. (Page 200.)
2. SAME—EVIDENCE—EXHIBITION OF CHILD.—It is not error in a bastardy case to permit the child to be exhibited to the jury. (Page 202.)

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

Hunt & Toney, for appellant.

1. It is error to exhibit a bastard child to the jury on the trial. 16 Ill. App. 299; 19 Ind. 152; 24 Neb. 33; 23 Utah, 541; 64 Wisc. 84. Also to show that the child resembles person charged to be its father, or to show color of its hair and eyes, etc., 4 Allen (Miss.), 435; 45 Md. 144; 16 Me. 38; 29 Hun (N. Y.), 47. The resemblance of an infant is too indistinct and uncertain. 80 Me. 454; 81 Minn. 501; 40 S. W. Rep. 589; 48 Iowa, 43; 64 Wisc. 84; 112 *Id.* 416.

2. The imprisonment feature of the sentence should have been stricken out. Sections 486-7, Kirby's Digest, are unconstitutional and void. Bastardy is in the nature of a civil, and

not a criminal, proceeding. 45 Ark. 56; 55 *Id.* 387; 61 *Id.* 507. No person can be *imprisoned for debt.* Art. 2, § § 9 and 16, Const. Ark.; 2 G. Greene (Iowa), 501; 2 Conn. 357; 6 Blackf. 1; 11 N. H. 137; Kirby's Digest, § § 720, 723, 486; 59 Ark. 237. See also 1 Martin, Chan. Dec. p. 328.

Byron Herring, for appellee.

The affidavit was based on Kirby's Digest, § 482, and case was tried on *Id.* § 486. The imprisonment was a mere police regulation, and the law is not void. 21 Ohio St. 353; 116 N. C. 981; 37 S. C. 263; 34 Kans. 96; 13 Neb. 193; 69 Ark. 378.

McCULLOCH, J. Appellant, James Land, was adjudged at the trial below to be the father of a bastard child, and appeals from that judgment.

The trial jury, in addition to finding that appellant is the father of the child, assessed the lying-in expenses of the mother and a monthly sum for the maintenance of the child, and the court rendered judgment against him for the amounts, in accordance with the provision of the statute, which is to the effect that, unless the defendant in a bastardy case shall pay the judgment for lying-in expense, together with the costs of the case, "then the court shall have the power to commit the accused person to jail until the same shall be paid," and that if he shall neglect or refuse to give bond for payment of the monthly sum allowed for maintenance of the child the court "shall commit him to the jail of the county there to remain until he shall comply with such order or until he shall be otherwise discharged according to law." Act March 17, 1879, Kirby's Digest, § § 486, 487. The appellant objected to the judgment committing him to jail, and now asks that it be set aside.

Counsel for appellant contend that the statute in question authorizing the court in bastardy cases to commit the defendant to jail for failure to comply with the judgment of the court is void. They say that, inasmuch as a proceeding to affiliate a bastard child is of a civil and not a criminal nature, the effect of the order committing the defendant to jail is imprisonment for debt, which the Constitution prohibits.

It is true that the court has held proceedings of this kind to be of civil and not criminal nature. *Pearce* v. *State,* 55 Ark. 387; *Chambers* v. *State,* 45 Ark. 56. But it does not follow

from this that the Legislature can not impower the court trying the case to enforce its judgment by committal to jail. On the contrary, such authority may be given, according to the great weight of the adjudged cases, as a proper exercise of the police power of the State, as a regulation for the good of society and public order. *Bell* v. *State,* 124 Ala. 77; *Lower* v. *Wallick,* 25 Ind. 68; Ex parte *Wheeler,* 34 Kansas, 96; Ex parte *J. C. H.,* 17 Fla. 362; Ex parte *Bridgeforth,* 77 Miss. 532; *State* v. *Brewer,* 38 S. C. 263; *State* v. *Giles,* 103 N. C. 391; *Musser* v. *Stewart,* 21 Ohio St. 353; Ex parte *Cottrell,* 13 Neb. 193.

"The statute," says the Ohio court, "is in the nature of a police regulation. Its main object is to furnish maintenance for the child and indemnity to the public against liability for its support. The act of the putative father is regarded as an offense against the peace and good order of society, and the penalty which the law imposed for his transgression is to enforce upon him the duty of making provision for the maintenance of his illegitimate offspring." *Musser* v. *Stewart, supra.* The obligation of the father does not arise out of contract, express or implied, but payment or security for payment is exacted of him by operation of law as indemnity to the public against the burden of supporting the child. The power to require indemnity implies adequate power to enforce the requirement, and the only way in which the court can enforce its order is to imprison the accused until the order is complied with.

But it is said that where the accused is unable to comply with the order the result is to imprison him for an indefinite length of time, perhaps for life. This, of course, depends on his ability or inability to comply with the order of the court. We have no such question before us in this record, as no effort was made by the appellant to show that he was unable to pay the lying-in expense and cost, or to give bond for payment of the monthly allowance. The statute clearly gives the court power to discharge the defendant from custody when it is made to appear to the satisfaction of the court that he can not comply with the order.

Imprisonment under this statute may be likened to that for failure in a divorce case to comply with an order of the court with respect to alimony. This court said, in a case of that kind,

"that imprisonment in such a case is justified on the ground of willful 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." Ex parte *Caple,* 81 Ark. 504.

The orders of the court in the present case followed closely the language of the statute, and there is nothing in the record to show that it was not properly made.

It is next contended that the court erred in permitting an exhibition to the trial jury of the bastard child. While the record does not specificially disclose the purpose of the prosecution in making the exhibition to the jury, it is necessarily inferred that an opportunity was sought to allow the jury to observe whether or not the child bore any resemblance to the putative father. There is some conflict in the authorities on this question, but the following cases properly, we think, establish the rule that it is not error to allow the child to be exhibited to the jury. *Crow* v. *Jordon,* 49 Ohio St. 655; *State* v. *Woodruff,* 67 N. C. 89; *Gilmanton* v. *Ham,* 38 N. H. 108; *Gaunt* v. *State,* 50 N. J. L. 490; *Scott* v. *Donovan,* 153 Mass. 378; *Jones* v. *Jones,* 45 Md. 144.

The cases that hold to the contrary base the conclusion upon the inherent weakness of such testimony.

We think, however, that the weight to be given to the testimony is for the jury, and its weakness or uncertainty affords no reason for excluding it.

The youth of the child and the relative improbability of a child of that age having any perceptible resemblance to its parent goes to the weight of the evidence, rather than to the question of its admissibility.

No other grounds for reversal of the judgment have been suggested by counsel. The evidence as to the paternity of the child was conflicting, but it was abundant to warrant the verdict.

Affirmed.

BOYNTON *v.* CHICAGO MILL & LUMBER COMPANY.

Opinion delivered October 28, 1907.

1. BILL OF REVIEW—NEW MATTER.—The fact that the original decree upon which a subsequent decree was based was vacated or set aside after the subsequent decree was rendered constitutes new matter which could not be evidence in the second suit, and which demonstrates error in the subsequent decree correctable by bill of review if relief could not be obtained otherwise. (Page 211.)
2. SAME—WHEN DOES NOT LIE.—Where a decree based upon the plea of *res judicata* was properly reached upon other grounds than such plea, a bill of review would not lie because the decree relied upon as constituting *res judicata* was subsequently vacated. (Page 212.)
3. SAME.—Where a decree relied upon as *res judicata* was either void or inapplicable, or otherwise ineffective as a bar, error of the court in sustaining the plea of *res judicata* may not be reached by bill of review, but by appeal or other appropriate remedy. (Page 212.)
4. JUDGMENTS—CONCLUSIVE THOUGH APPEALED FROM.—A decree may be operative as a bar, though an appeal to a higher court with supersedeas has been taken. (Page 213.)
5. SUIT BASED ON WARNING ORDER—COMMENCEMENT.—A suit based upon constructive service is pending when the complaint is filed and an order is made by the clerk warning the defendant to appear. (Page 214.)
6. JUDGMENT—PURCHASE PENDENTE LITE.—A purchaser of land *pendente lite* is as fully bound by the decree as the parties thereto. (Page 214.)
7. BILL OF REVIEW—NEW MATTER—DILIGENCE.—To support a bill of review for newly-discovered matter, the matter must be such as could not have been discovered by the use of reasonable diligence. (Page 214.)
8. SAME—LACHES.—Failure of a party to a suit to discover that the authenticated copy of a decree filed by his adversary and relied upon as *res judicata* was incomplete, when a complete copy would have shown the invalidity of such decree, is not such laches as will prevent such party from availing himself of the invalidity of the decree upon a bill of review. (Page 214.)

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

W. J. Driver, E. F. Brown and *Murphy, Coleman & Lewis,* for appellant.

1. The bill as drawn, seeking in one respect to vacate the former decree on account of the manner in which its entry was

obtained and the violation of the agreement upon which the cause was heard, and in other respects being a bill of review proper to bring into the record the fact of the reversal of the Federal court decree, is permissible under the practice in this State. 36 Ark. 532.

The identical title in question here has already been passed upon by both Federal and State courts. 120 Fed. 819; 75 Ark. 415.

2. A purchaser of property *pendente lite* is conclusively bound by the result of the litigation, as much so as if he had been a party to the action from its beginning. 93 U. S. 163; 57 Ark. 229; *Id.* 97; 50 Ark. 551; 38 Ark. 599; 2 Black on Judg. § 550. Where two suits for the same cause of action progress simultaneously, the judgment first rendered will be an absolute bar in the other suit. 76 Ark. 423. The parties, therefore, were bound by the Federal court decree. If it was *res judicata* of the title involved in this suit in its original form, it was likewise *res judicata* as to that title in its final form. That decree not having been reversed until after the rendition of the decree in the present suit, such reversal constitutes a recognized cause for bill of review. 2 Beach, Mod. Eq. 882; 15 Fed. 196; 38 Wis. 107; Black on Judg. § 333. A decree based in whole or in part on a plea of *res judicata* will be reversed on appeal when, pending such appeal, the judgment held to constitute an estoppel is reversed. 129 Fed. 40. And no technicalities will be permitted to prevent relief in the main suit upon the reversal of the decree in the collateral suit. 130 U. S. 50; 45 Fed. 741; 141 U. S. 240.

3. A further ground for bill of review, as shown by the proof, was the discovery, after the rendition of the decree, that the decree in Foulkes' Heirs *v.* Citizens' Bank of Louisiana, which was the foundation of appellee's title, was absolutely void. 75 Ark. 420. That appellee took advantage of a false record, and imposed it upon the court in such manner as to mislead the appellants, affords ground for bill of review, and is sufficient to vacate the decree under the statute. Kirby's Digest, § 4431; 54 Ark. 539.

N. W. Norton, Caruthers Ewing and *Lamb & Caraway,* for appellee.

1. Since, as shown by the record, the warning order in the Federal case was not published until the 29th day of July, that suit, notwithstanding the complaint was filed on the 1st of July, was not commenced until the first named date. The presumption is that the delay in publication was the fault of the appellants, and that the warning order remained in the office of the clerk. 100 Tenn. 64; 11 Ind. 48; 18 Johns. 14. And appellee, having purchased on July 20th, nine days before the publication, was not a purchaser *pendente lite.* 1 Am. & Eng. Enc. of L. 750; 108 Ind. 229; 36 Neb. 73; 10 Barb. (N. Y.), 258; 5 Cowen, 158; 18 Johns. 486; 36 Ind. 23; 11 Ind. 48; 43 Miss. 241; 20 Ind. 479; 1 Blackf. 379; 1 Ind. 276; 17 Johns. 63; 23 Mo. App. 376. See also 55 Ark. 633.

2. The assignments in the bill of review are not of a character to be reached by a bill of review, but by appeal only. They contain nothing of error apparent upon the face of the decree, but, at most, only show errors in the decree. For distinction between error apparent upon the face of a decree and error in the decree, see 11 Ark. 114; 24 Ark. 528; 32 Ark. 753; 61 Ala. 354; 50 Fed. 490; 53 Ala. 229; 50 Ala. 46; 18 Ark. 320; 45 Mich. 394; 29 Fed. 33; 1 Lea (Tenn.) 313; 82 Tenn. 596; 17 Ves. 177. For what constitutes error upon the face of a decree for which a bill of review will lie, see 70 Ala. 479; 84 Ala. 349; 1 Tenn. Ch. 452; 3 *Id.* 386; 42 Mich. 304; 44 Miss. 699; 57 Miss. 465; 3 How. (Miss.) 377; 52 Fla. 927; 75 Ill. 255; 13 Ga. 24; 5 Call (Va.) 459; 3 Bush (Ky.) 218; 1 Sandf. Ch. (N. Y.) 120; 16 Fla. 773; 3 Heisk. (Tenn.) 567.

3. Notwithstanding a copy of the deed record, instead of a copy of the court record in the case of Fowlkes' Heirs *v.* Citizens' Bank of Louisiana, was used upon the trial of the cause at Wynne, if any of the appellants, or their counsel, knew that that decree was entered in vacation, or if, by the exercise of reasonable diligence on their part, they could have known the facts, the bill of review is unavailing. 60 Ark. 55; 59 Ark. 441; 55 Ark. 22; 47 Ark. 17; 26 Ark. 600; 3 Dana (Ky.) 500; 107 Tenn. 300; 83 Va. 141; 79 Ala. 319; 30 N. J. Eq. 559; 11 B. Mon. (Ky.) 220; 6 Rich. Eq. (S. C.) 364; 51 Ala. 301; 77

Va. 600; 5 Mason (U. S.) 303; 32 W. Va. 335; 66 Wis. 85; 55 Ill. 458; 5 Sneed (Tenn.) 100; 64 Ark. 126; 39 Fed. 680; 21 So. 490. Because the court, upon consideration, gave to the muniments of title introduced in evidence an erroneous construction, is no ground for bill of review. 70 Ala. 479; 79 Ala. 319; 82 Ill. 116; 127 Pa. St. 420; 6 Heisk. (Tenn.) 79; 12 *Id.* 704; 6 Lea (Tenn.) 69; 76 Va. 609; 76 Va. 160; 75 Va. 76; 19 W. Va. 167; 37 *Id.* 201; 95 U. S. 434; 19 Fla. 455; 45 N. H. 81; 3 Ia. 574; 24 Tex. 526; 6 Vt. 177. The muniments of title referred to in the record are evidence only, and not a part of the pleadings. The court will not review the evidence. 59 Ark. 441; 106 U. S. 552; 22 Wall. 60; 95 U. S. 99; 13 Pet. 6; 39 Ala. 409; 45 N. H. 81; 3 Ia. 514; 75 Va. 418; 81 Va. 711; 83 Va. 81.

4. Since there was no service upon Haggart & McMasters in the Federal case until after the sale by them to appellee, and no entry of appearance by them until long after that time, the decree of that court was without effect upon the title of appellee. It was, nevertheless, proper to file the plea of *res judicata* in the State case, since it could not be foreseen what this court would hold with reference to the date of the commencement of the Federal case. Moreover, the appeal in the Federal case was without supersedeas, which left the decree in the trial court in full force; and, such being the case, it was properly pleaded in bar. Appellants will not be permitted to prosecute the same cause of action in numerous courts to final decision, and then adopt the decree that best subserves their purposes.

5. Appellants ought not to be heard to ask this court to relieve them from difficulties which they have brought upon themselves. Appellee cannot be held responsible for their mistakes, and the court should leave them where it finds them. 3 Munf. (Va), 112; 1 A. K. Marsh. (Ky.), 459; 13 W. Va. 236; 17 Ark. 45. And, under the conditions prevailing in this case, the reversal of the Federal decree affords no ground for bill of review. 53 S. E. 209; 10 Yerg. (Tenn.) 55; 52 S. E. 489.

E. Foster Brown, and *Murphy, Coleman & Lewis,* for appellants in reply.

1. The indorsement of the warning order upon the complaint constituted the process, and its subsequent publication was merely its service. 31 Ark. 93. Appellee's contention that the

earliest date on which the Federal case can be deemed to have commenced would be July 29th, the date of the first publication, is not borne out by the cases cited, except two, viz., 108 Ind. 229, and 36 Neb. 73, and in each of those cases special statutes *authorize* that construction. Rev. Stat. Ind. 1881, § § 314. The Nebraska statute is similar.

2. The bill of review in this case is based on all of the three recognized grounds for that procedure: first, error of law apparent on the face of the record; second, newly discovered evidence; third, matters arising subsequent to the decree sought to be reviewed. It is conceded, under the first head, that it is neither necessary nor proper for the appellate court to consider the evidence; but the court may consider the record, and in this State the record in a chancery case consists, not only of the pleadings, but also of all exhibits thereto. Story's Eq. Pl. 407; 52 Fed. 7; 60 Ark. 459; 26 Ark. 600.

3. Appellee is the sole beneficiary of the act whereby the lower court was imposed upon and appellant's counsel misled by the introduction of the certified copy of the deed record, and it lies not in its mouth to charge appellants with negligence in failing to examine the deed record and also the chancery record, when the copy introduced was offered by appellee's counsel. Is suspicion a necessary ingredient of diligence and confidence in counsel culpable negligence?

HILL, C. J. The widow and heirs at law of C. O. Boynton, deceased, in July, 1903, filed a petition for leave to file a bill of review, and tendered their bill of review. The chancellor entertained this bill, and granted a temporary injunction upon it.

After answer and development of the evidence, a final hearing was had, and the court dismissed the bill of review for want of equity, and the plaintiffs therein have appealed.

Questions of fact, professional ethics and equity jurisprudence have been presented in the briefs and at the bar. While many of these questions will not be noticed in the opinion, they have not escaped the attention of the court; but only such matters as are controlling will be set out and discussed.

There were three suits, representing practically the same property, and between the same parties or successors or privies of those parties; and for convenience they will be designated

"first suit," "second suit," and "present suit," the last named being the bill of review.

THE FIRST SUIT.

On the first day of July, 1899, C. O. Boynton filed his complaint in chancery in the Mississippi Chancery Court against Jas. Haggart and Wm. McMasters and others claiming under them, in which he alleged title in himself to a large body of land in Mississippi County, the subject-matter of this controversy, and set forth a chain of title to the same. The only portion which is material to this suit is a deed from the Citizens' Bank of Louisiana to W. L. Culberson, of date September 26, 1883. He alleged that Haggart & McMasters claimed title to said land, and set forth their chain of title, which will be hereinafter noticed, and alleged that the other defendants, claiming under Haggart & McMasters, were trespassers upon the land, and were about to interfere with his possession; and he prayed that the deeds under which Haggart & McMaster claimed be canceled as clouds upon his title, and that his title be quieted against the defendants. The complaint was duly verified on the 1st day of July, and there was also an affidavit made on said date, and attached thereto, alleging that the defendants were non-residents of the State of Arkansas, and asking that a warning order issue calling upon the defendants to appear in court in thirty days to answer the complaint. A bond for costs was also given, and on said date the clerk appointed an attorney for the non-resident defendants, and also indorsed upon the complaint a warning order against the defendants. These proceedings conformed to sections 6055-6 of Kirby's Digest.

The warning order was published in a weekly newspaper in Mississippi County for four weeks, the first publication being on the 8th day of July and the last on the 29th of July, 1899.

At the October term, 1899, of the chancery court, Haggart & McMasters removed the cause to the United States Circuit Court for the Eastern District of Arkansas. The defendants filed answer and cross-complaint in the Federal court. They claimed title in themselves, and asked that their title be quieted against Boynton, and set forth their chain of title. So far as

this litigation is concerned, the only material part of their chain of title is as follows:

"These defendants admit that the Citizens' Bank of Louisiana executed a paper on September 26, 1883, in favor of W. L. Culberson, but these defendants deny that thereby any title to the lands involved in this suit passed to the said Culberson for the reason that they were not set out therein, and for the further reason that said paper only attempts to convey such lands as the Citizens' Bank of Louisiana then owned, and said bank at that time had no right, title or claim to any of the lands involved in this suit, for the reason that prior thereto, to-wit, on the 3d day of May, 1880, a decree had been rendered by the chancery court of Mississippi County, Arkansas, divesting all title out of the said Citizens' Bank of Louisiana in and to said lands and vesting the same in the heirs of Jeptha Fowlkes."

This is the decree which this court considered in *Boynton* v. *Ashabranner,* 75 Ark. 415.

The suit proceeded to judgment in the United States Circuit Court in favor of Haggart & McMasters on the 11th day of June, 1901. Boynton appealed from this decree, and on the 16th of February, 1903, the United States Circuit Court of Appeals of the Eighth Circuit reversed that decree and directed that the cause be remanded with instructions to enter a decree quieting the title to the lands in controversy in Boynton. The case is reported in 120 Fed. 819 (*Boynton* v. *Haggart.*)

On the 10th of October, 1903, the United States Circuit Court for the Eastern District of Arkansas entered a decree quieting the title of the Boyntons in pursuance to the mandate of the Circuit Court of Appeals.

THE SECOND SUIT.

On the 29th of January, 1901, the widow and heirs at law of C. O. Boynton filed a complaint in the chancery court of Mississippi County against the Chicago Mill & Lumber Company. The allegations of this complaint are practically the same as those in the first suit, with these differences: First, they allege the death of Boynton, and that they are the widow and heirs at law; and second, that the Chicago Mill & Lumber Company is claiming to own said lands.

The Chicago Mill & Lumber Company answered this complaint substantially as Haggart & McMasters had answered the suit of Boynton against them, and added a cross-complaint against the Boyntons in which it claimed title to the land under the same chain of title set forth by Haggart & McMasters, with the additional claim of a conveyance from Haggart & McMasters to it, which conveyance was executed on July 20, 1899. This cross-complaint was answered. Subsequently the defendant filed an amendment to its answer and cross-complaint, in which it set forth the litigation in the first suit, and alleged that it had gone to a final judgment in favor of Haggart & McMasters; that by virtue thereof the title of Haggart & McMasters had been quieted against Boynton and those claiming under him, and that said title had passed to it by virtue of the conveyance of Haggart & McMasters to it; and a copy of the decree was attached to the amendment.

The plaintiffs answered this amendment; they denied the force and effect of the *res judicata* therein set up, and put in issue the rendition of the decree in the United States Circuit Court. At the time this plea of *res judicata* was entered the appeal from the judgment of the circuit court was then pending in the United States Circuit Court of Appeals.

This cause proceeded to a hearing before the chancellor at chambers in Wynne, Cross County, with an understanding that the decision of the chancellor would be entered at the ensuing term of the Mississippi Chancery Court. There is conflicting evidence and considerable discussion as to an alleged agreement of counsel covering the completion of the record in such a way that it could be perfected for appeal. But, as the court views the questions, none of these matters are material.

One matter, however, developed there which has become material, and that is the evidence used to prove the decree in the case of Fowlkes's heirs *v.* Citizens' Bank of Louisiana, divesting the title from the Citizens' Bank of Louisiana and vesting it in said Fowlkes's heirs.

Mr. N. F. Lamb, the attorney representing the defendant at this hearing, testified as follows:

"The chancery record of the decree showed that it was entered in vacation. I had a certified copy of the deed record

made, rather than a certified copy of the decree as it appeared in the chancery record, and took the same for use in evidence in the hearing of this case at Wynne, knowing that the chancery record showed that the decree had been entered in vacation. I did not take a certified copy of the chancery record because I certainly did not intend to furnish evidence which would enable my adversaries to win the case. I do not ordinarily load guns for the other party to shoot me with. Following the decree rendered in vacation is an order made at the next term of the court changing the name of the defendant in the Fowlkes suit from the Citizens' Bank of New Orleans to the Citizens' Bank of Louisiana. I had a certified copy of this order made and introduced it also on the hearing at Wynne."

The chancellor found against the plaintiffs in this action, and a decree to that effect was entered at the October term of the Mississippi Chancery Court. The decree does not state the grounds of decision. It shows that the case was submitted on the pleadings, which were enumerated, the documentary evidence and the stipulation of counsel; and it does not identify the documentary evidence, and the stipulation of counsel is not on file. It is concerning this documentary evidence and stipulation of counsel that much of the evidence and discussion is here directed, none of which it is essential to notice here.

No appeal was prosecuted from this decree.

THE PRESENT SUIT.

As stated, this suit was filed in July, 1903, and asks a vacation of the decree in the second suit, and assigns many reasons therefor. Issue was taken on practically all of the allegations in the complaint, and a hearing was had in which all the matters above outlined were developed, and many more, resulting in a decree against the plaintiffs; and it is the refusal of the court to vacate that decree in the second suit that this court is called upon now to review.

1. In his work on Equity Pleadings, Mr. Justice Story said: "But if a case were to arise in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree,

it should seem that it might be used as ground for a bill of review, if relief could not otherwise be obtained." Story on Equity Pleadings, § 415.

This principle has been applied by the Supreme Court of the United States in *Ballard* v. *Searls,* 130 U. S. 50, and *Butler* v. *Eaton,* 141 U. S. 240, to a judgment resting upon another judgment which has been vacated or reversed; holding such vacation or reversal to be new matter which could not be evidence in the original cause, and yet demonstrating error in the decree which should be corrected by bill of review if relief could not otherwise be obtained. While the authorities are not numerous nor very satisfactory, yet this seems to be the rule upon the subject. *Vetterlein* v. *Barker,* 45 Fed. 741; *Ætna Ins. Co.* v. *Aldrich,* 38 Wis. 107; *Hennessy* v. *Tacoma, S. & R. Co.,* 129 Fed. 40; 1 Black on Judgments, 333; 1 Beach on Modern Equity Practice, 882.

The above rule obtains where the decree is based in whole or in part upon a plea of *res judicata. Hennessy* v. *Tacoma S. & R. Co.,* 129 Fed. 40; *Vetterlein* v. *Barker,* 45 Fed. 741.

The new matter must be such as would have changed the result, had it been brought forward. 3 Encyc. of Plead. & Prac., 850-2. In other words, if the decision was properly reached upon other grounds than the plea of *res judicata,* a bill of review would not lie merely because the effect of the *res judicata* has subsequently been changed.

The decree here shows that the case was tried upon issues presented in the pleadings, especially mentioning the amendment raising the issue of *res judicata,* and upon the documentary evidence introduced to sustain the various pleadings; and, as a copy of the decree was attached to the amendment, necessarily this was before the court. Hence it is seen that it was one of the issues upon which the case might have been decided, and that the reversal of the decree would be new matter demonstrating error, and the relief should be granted if the other essentials to such relief are present.

2. The first inquiry into the other essential prerequisites to sustaining this extraordinary relief is whether the plaintiffs had any other remedy. Was it proper for the chancery court to have sustained the plea of *res judicata?* If it was error to

have sustained it on account of the decree pleaded being a void decree, or not applicable, or otherwise not effective as a bar, then the remedy would not be by bill of review, but by appeal or other appropriate remedies. 1 Black on Judgments, § 304a; *Vetterlein* v. *Barker,* 45 Fed. 741.

If the decree was a bar to the second suit, then the plea of *res judicata* should have been sustained, notwithstanding an appeal was taken from the decree, and was then pending undecided in the appellate court. Judge Thayer, speaking for the Federal Circuit Court of Appeals for this circuit in *Ransom* v. *City of Pierre,* 101 Fed. 665, said:

"In many cases the question has been mooted whether, when a writ of error has been sued out, or when an appeal has been taken which operates essentially as a writ of error to review a judgment at nisi prius, and a supersedeas bond has been given to stay proceedings, such a judgment may be received in evidence in another suit between the same parties in support of the plea of *res judicata;* and, while the decisions upon this question have not been uniform, yet, in our judgment, the weight of judicial opinion, as well as sound reason, is that, when a case which is removed to an appellate court by a writ of error or an appeal is not there tried *de novo,* but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, unless some local statute provides that it shall not be so used pending the appeal. A supersedeas bond merely operates to stay an execution or other final process on the judgment. It does not vacate the judgment nor prevent either party thereto from invoking it as an estoppel." Citing many authorities.

This is in accord with *Cloud* v. *Wiley,* 29 Ark. 80, and *Miller* v. *Nuckolls,* 76 Ark. 485. While there is a conflict in authority, this view seems to be the most generally accepted one. 2 Black on Judgments, 510-11.

This decree being effective as a bar, notwithstanding the appeal, it must next be decided whether it should have been held a bar in the second suit. The first suit was brought on the first day of July, the warning order was issued on the 8th day of

July, and the conveyance from Haggart & McMasters to the Lumber Company was made on the 20th of July; and the question has been raised as to whether a suit based upon constructive service is pending until the service is completed on the thirtieth day after the making of the order as provided in section 6058 of Kirby's Digest.

Section 6033 of Kirby's Digest provides: "A civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon." There is no statutory provision defining the commencement of a suit where service is constructive and made pursuant to sections 6055-6 of Kirby's Digest. But by analogy it seems clear that a suit commenced by constructive service, as authorized by sections 6055-6, is commenced when the proceedings therein provided for are complied with. In fact, this is a method of summons fitted to a case where the defendant is a non-resident. Therefore the Chicago Mill & Lumber Company was a purchaser *pendente lite.*

A purchaser *pendente lite* is as fully bound by the decree as the parties thereto. *Brown* v. *Bocquin,* 57 Ark. 97; *Burleson* v. *McDermott,* 57 Ark. 229; 2 Black on Judgments, § 550. The issues as to which title should prevail were identical in the two cases.

Thus it is seen that every element to make the decree a bar to the second suit was present. Hence it was the duty of the chancery court to have decided the second suit in favor of the defendant on the plea of *res judicata;* and therefore it follows that an appeal would not have restored the plaintiff's rights, because the case was correctly decided against them on this issue at that time.

3. Were the plaintiffs guilty of such negligence or laches as should defeat the bill of review? This rule was deduced from the authorities in *Bartlett* v. *Gregory,* 60 Ark. 453: "Where a bill of review is for newly discovered matter, the rule now is that the matter must be such as could not have been discovered by the use of reasonable diligence, 'for, if there be any laches or negligence in this respect, that destroys the title to the relief.'" In application of this rule, the court recently decided that equity would not relieve against a judgment obtained on a foreign

judgment, notwithstanding the foreign judgment had been vacated in the jurisdiction where rendered, because the litigant had negligently failed to plead here the pending litigation in the other State seeking to vacate it, or to plead the same matters there pleaded which went to the jurisdiction of the court rendering the judgment, and were as available here as there, but let a default be taken. *Parker* v. *Bowman,* 83 Ark. 508.

It is strongly urged upon the court that there was negligence in this case which should defeat the bill of review within these principles. The negligence imputed to plaintiffs and their counsel is in not perfecting their appeal in the second suit and not discovering that the decree in Fowlkes' Heirs *v.* Citizens' Bank was a decree rendered in vacation, and utterly without force. This appears not to have been known to them until, on the hearing of the present suit, an attorney not connected with the litigation informed them of it, and these facts were then brought into the pleadings and evidence. An appeal would not have availed the plaintiffs because the decree, as shown, was proper for the defendant on account of the plea of *res judicata.* Still, negligence would be fatal if they did not properly present all defenses, so that with a reversal in the Federal court they would have a record entitling them to judgment with the *res judicata* eliminated; for even after appeal a way may be found to let in such new matter. *Ballard* v. *Searls,* 130 U. S. 50; *Butler* v. *Eaton,* 141 U. S. 240.

Therefore, the diligence of plaintiffs and their counsel in ascertaining their defenses must be tested. Both parties derived their title from the Citizens' Bank of Louisiana—the Boyntons by virtue of a conveyance from its grantee, the lumber company, through mesne conveyances going back to a decree purporting to divest the title from the bank and invest it in Fowlkes' heirs, from whom it deraigns title, prior to the conveyance to Boynton's grantor. The lumber company in the second suit set up affirmatively that the title of the Citizens' Bank had passed from it prior to said decree in the Federal court, and made said decree one of its muniments of title. The burden rested upon it to prove this. The cause was heard, not in Mississippi County, where the records were accessible, but at Wynne, in Cross County; and the copy of the record introduced before the chan-

cellor was from the deed record. The decree was so entered in the deed record that it did not show that it was a decree entered of record in vacation, but on the face of it showed a valid decree of the Mississippi Chancery Court divesting the title from the bank and investing it in the Fowlkes heirs. Heretofore is set out the testimony of the Lumber Company's attorney as to the production of a certified copy of the deed record in said form, and his statement that he knew that the court record showed that it was a vacation decree, and that he purposely had this copy made from the deed record, instead of the court record, because, as he expressed it, he didn't "intend to furnish evidence which would enable his adversaries to win the case."

It is only justice to this attorney to say that he, and other able lawyers, have insisted that this was not a void decree, but that the subsequent court order changing the name of the defendant therein adopted the vacation decree and made it thereby a decree of court from that date. It is not a question of his motives or conduct in presenting a certified copy of a decree true in itself but from a record which did not show a fatal defect in it, for they are immaterial to the issues under discussion; but the question is whether his opposing counsel were negligent in accepting this copy and not examining the court record itself in order to ascertain the truth in regard to this turning point in the titles. If they were negligent and derelict in their duty in accepting this certified copy, then this bill must fail, although it be otherwise well founded; for, if their negligence rendered relief in the second suit impossible, a bill of review does not lie to remedy it.

Litigants and counsel have a right to rely upon a certified copy of a record introduced into evidence in court by a practicing lawyer as being the truth; and there is no negligence that can be imputed to either a litigant or his counsel in not verifying a certified copy of a public record. Records are considered the highest form of evidence, and authenticated copies of them are made by statute as admissible as the records themselves. And when they are used no one should be required to examine the originals, usually miles distant, to see if they are authentic copies or forgeries, nor examine them to see if they were made up, as in this case, true in fact but, by the sup-

pression of other facts, false in effect. The court is of opinion that litigant and counsel were not negligent in accepting as true the copy presented in court. Certainly, it lies not with the appellee to complain of an acceptance of what it offered as the truth.

4. The question recurs whether the decree in the second suit is right without the effect of the *res judicata.* As heretofore shown, it was right to decide the case for the defendant upon that issue. But, if it was right to decide it for the defendant upon some other issue, then this action would not lie, as it would be unavailing to set aside a decree which should be re-entered upon another hearing with the *res judicata* eliminated. Since the decision in the second suit, this court has passed upon the decree of the Fowlkes heirs against the Citizens' Bank in *Boynton* v. *Ashabranner,* 75 Ark. 415, and held that it was of no force. Some of the questions there presented and considered are presented again by appellee's counsel, but the rule of *stare decisis* forbids a re-examination of the questions there decided.

Now, with the plea of *res judicata* eliminated, and the title settled by said decision, it necessarily follows that the decision in the second suit should be in favor of the Boynton title, since the only grounds upon which it should have been otherwise decided are now eliminated. That being the case, all of the necessary elements to sustain a bill of review are found to be present, and it is sustained.

The judgment of the court dismissing the bill of review is reversed, the cause is remanded to the Mississippi Chancery Court with directions to vacate the decree in the second suit and enter judgment therein for the Boyntons, and to adjust such equities as may properly arise from payment of taxes, improvements, rents, etc.

DANIEL v. GORDY.

Opinion delivered November 4, 1907.

84 218
187 168

1. COUNTERCLAIM—CONNECTION WITH SUBJECT OF ACTION.—In a suit against a partner based upon a partnership obligation, defendant cannot set up a counterclaim alleging that he was induced by fraudulent representations of plaintiff, who was an employee of the partnership, to become a member thereof, where the representations had nothing to do with the obligation. (Page 219.)

2. PAYMENT—EXECUTION OF RENEWAL NOTES.—The execution of renewal notes for a debt is not payment of the debt unless taken as such. (Page 220.)

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

Morris M. Cohn, for appellant.

1. No one can take advantage of his own wrong. It was Gordy's misrepresentations and fraud that placed Daniel in the position of liability as a member of the firm. 1 Ark. 497-9; 2 *Id.,* 73-80; 4 *Id.,* 173-4; 35 *Id.,* 483; 17 *Id.,* 71; 50 Cal., 498; Bigelow on Fraud, 201; Bates on Part., § 514; 33 Penn. St. (9 Casey), 358.

2. Plaintiff elected to stand on second settlement of notes, and he can not look to the first settlement executed by different parties. 10 N. H. 77; 56 N. Y. 402; 40 Oh. St. 431; 4 Yates (Pa.), 337; 171 Penn. St. 82; 4 Rich. Law (S. C.), 59; 59 Vt. 154; 14 Ark. 276, 267; 58 Ill. 360; 10 B. Mon. 277.

3. The surrender and cancellation of the first notes evidenced their extinguishment. 5 Cal. 329; 1 La. 527; 75 Va, 726; 81 N. Y. 226.

W. C. Adamson, and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

1. The alleged facts of the counterclaim did not arise out of the contract or transaction, and had no connection with the $2,000 loan. Kirby's Digest, § 6099; 40 Ark. 75; 27 *Id.* 490; 66 *Id.* 406.

2. Where one note is given in renewal of another, it is only conditional payment; and when default is made upon the second note, the first revives. 68 Ark. 233; 51 *Id.* 300; 48 *Id.* 267; 45 *Id.* 313; 49 *Id.* 508; 32 *Id.* 733.

Both sets of notes could be sued on. Kirby's Digest, § 6079; 5 Enc. Pl. & Pr. 323.

HART, J. The Smith Grain Company, of which appellant, Daniel, was a member, was a partnership in the city of Little Rock. Appellee, Gordy, was a clerk in its employ. On December 3, 1900, Gordy lent the firm two thousand dollars, for which it executed its notes. On February 4, 1901, it executed other notes to take up the first series. None of the notes were paid, and Gordy brought suit against Daniel upon the second set, alleging that he was a member of the firm of Smith Grain Company. Daniel did not deny the advancing of the money or the execution of the notes, but set up some other defense not material to this appeal, and filed a counterclaim against Gordy alleged to have been sustained by reason of false and fraudulent statements and reports of the solvency of the Smith Grain Company made to him by Gordy to induce him to become a member of said firm.

Gordy amended his complaint by asking that, if for any reason judgment was denied him on the second set of notes, he be given judgment on the first.

Thereupon Daniel filed an amendment to his counterclaim reiterating the statements made in his first, and further saying that, after the substituted notes were executed, the Smith Grain Company, parties thereto, consisted of himself and Albert Cox; and that the said Albert Cox had no interest in the old concern of the Smith Grain Company, but that one Eggleston and one Potts were interested therein, and he further says that, after the substituted notes had been executed, Gordy collected thereon the sum of $219.37.

A demurrer was sustained to the counterclaim and the amendment thereto, save as to the allegation of the payment of $219.37, and, Daniel electing to stand thereon as a sole defense to the action, judgment was entered against him, and he has appealed.

The statute provides that a counterclaim "must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action."

Kirby's Digest, § 6099. There is no connection between the cause of action set forth in the complaint and that contained in the counterclaim. It is not disputed that Gordy lent the two thousand dollars to the Smith Grain Company, a firm of which Daniel was a member. Daniel claims that he was induced to become a member of the firm by fraudulent misrepresentations of Gordy in regard to the firm's solvency; but it does not appear that the representations had anything to do with the loan of the two thousand dollars. The statute in question has been recently construed in the case of *Barry-Wehmiller Machine Company* v. *Thompson,* 83 Ark. 283, and that case is decisive of the present suit.

In answer to the second proposition of appellant, it is well settled in this State that the giving of notes for a debt is no payment of the debt unless by agreement of the parties the notes are taken in payment, and the execution of the renewal notes for the debt is not payment of the debt unless taken as such. *Triplett* v. *Mansur-Tebbetts Implement Company,* 68 Ark. 233.

Judgment is affirmed.

WASHINGTON *v.* MOORE.

Opinion delivered November 4, 1907.

1. UNLAWFUL DETAINER—WHEN ACTION LIES.—The action of unlawful detainer does not lie to determine the right of parties in the property sued for, but to decide who shall have present possession. (Page 224.)
2. LANDLORD AND TENANT—ESTOPPEL.—A tenant cannot dispute the title of his landlord so long as he remains in possession under him; to do this he must first surrender possession to his landlord, and then bring his action. (Page 224.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* judge; affirmed.

John N. Cook, for appellant.

The paragraphs stricken out stated a good defense. The allegations in paragraph 4, particularly, stated a case for the jury under proper instructions. 44 Ark. 444. With reference

to the paragraph which states the inducements leading to the signing of the notes, the fact that they state that they were given for rent would not preclude appellant from showing that they were given for purchase money. 51 Ark. 218; 45 Ark. 447.

Moore & Moore, for appellee.

The parts of the answer stricken out, except the last clause, were irrelevant and not responsive to the issue, and were properly stricken out. As to the last clause, defendant was entitled in this action to neither six months nor ten days. The statute requires three days only.

Appellant could not litigate the title to the property in this action, nor dispute the landlord's title. Kirby's Digest, §§ 3648, 3630; 1 Ark. 495; 13 Ark. 385; *Id.,* 448; 27 Ark. 50; *Id.* 531; 33 Ark. 536; 38 Ark. 587; 39 Ark. 138.

Appellant should first surrender possession if he desires to litigate the title. 15 Ark. 104; 28 Ark. 154; 41 Ark. 535; 43 Ark. 32; 53 Ark. 533; *Id.* 94; 54 Ark. 461; 57 Ark. 303.

BATTLE, J. Henry Moore brought an action of unlawful detainer against Frank Washington. He alleged in his complaint "that he is the owner of the W. ½ SW. ¼ of section 6, township 15 S., range 26 W., and the improvements thereon; that on or about January 7, 1905, he rented same to appellant for 1905 for $50, for which on said day appellant gave his note, due October 1, 1905, with interest at 10 per cent. per annum from maturity until paid; that appellant entered upon the lands under said rental terms as tenant of appellee, and has been in possession thereof ever since up to the time of the commencement of this action; and that defendant has refused to pay the rent on the lands, as he agreed to do, and now holds and retains the same wilfully and unlawfully after lawful demand therefor by plaintiff in writing. Plaintiff further states that he is lawfully entitled to the immediate possession of the lands and the houses situated on same. He asked that writ of possession issue and the possession of the lands and premises be delivered to him without delay; that defendant be summoned to answer his complaint; and that plaintiff have judgment against defendant for $50 with interest from October 1, 1905, as damages for detention of the lands."

To the above complaint defendant filed the following answer:

"He denies that plaintiff is the owner of the lands in his complaint described. He denies that he rented the lands or the buildings thereon from the plaintiff for the year 1905, or that he entered upon the lands as the tenant of plaintiff. He denies that he holds or retains the lands unlawfully, or that plaintiff is lawfully entitled to the possession thereof.

"Defendant, further answering, says that it is not true that plaintiff is the owner of the lands or entitled to the possession thereof, but he alleges the facts to be that on or about the .... day of ....., 1893, plaintiff executed and delivered to him a bond for title, whereby he obligated himself to convey the lands and the east half of the southwest quarter and * * * , all in section 6, township 15, of range 26 west, upon the payment by defendant to him of the sum of six hundred dollars, and that under the bond for title the defendant was put into possession of and entered upon the lands on or about the .... day of ....., 1893, by peaceable and uninterrupted possession of the lands in the complaint described for the period of thirteen years last past, occupying same as his homestead and claiming to be the owner thereof under the bond, and has paid all of the purchase money except about one hundred dollars, which he is ready to pay if plaintiff will accept the same. The bond was destroyed by fire about the year 1904, and defendant can not file the same or a copy thereof with his answer.

"For further answer, defendant admits the execution of the note in the complaint mentioned, but he says he was induced to sign the same upon the express understanding and agreement with the plaintiff that the same represented the balance of the purchase money due by defendant to plaintiff on the lands, and that when the same was paid plaintiff would execute to defendant a good and sufficient deed under the terms of the bond. He says that the note was procured from him by plaintiff with the fraudulent intent of plaintiff to cheat and defraud him out of the land.

"For further answer, the defendant says that plaintiff ought not to have and maintain this suit against him because he says he has been in the peaceable and uninterrupted possession of the

lands for three years immediately preceding the filing of the complaint.

"For further answer to the complaint defendant says that, if it should be held that he is the tenant of plaintiff, the notice served upon him by the plaintiff to quit was not sufficient under the law, but that he should have been (given) six months' notice, instead of ten days,' as alleged in the complaint.

"Prayer that plaintiff take nothing by his suit, that he be adjudged entitled to the possession of the lands, and for costs and other relief."

Plaintiff filed a motion to strike from the answer the following parts, to-wit:

"Defendant, further answering, says that it is not true that plaintiff is the owner of the lands or entitled to the possession thereof, but he alleges the facts to be that on or about the .... day of ....., 1893, plaintiff executed and delivered to him a bond for title, whereby he obligated himself to convey the lands and east half of the southwest quarter and * * * all in section 6, township 15 south, range 26 west, upon the payment by defendant to him of the sum of six hundred dollars, and that under the bond for title the defendant entered upon the lands, and has held peaceable and uninterrupted possession of the lands in the complaint described for the period of thirteen years last past, occupying the same as a homestead, and claiming to be the owner thereof under the bond."

Also that part contained in the following words:

"But he says he was induced to sign the same upon the express understanding and agreement with plaintiff that the same represented the balance of the purchase money due by defendant to plaintiff on the land, and that when the same was paid plaintiff would execute to defendant a good and sufficient deed under the terms of the bond.

Also that part contained in the following words:

"For further answer to the complaint the defendant says that if it should be held that he is the tenant of plaintiff the notice served upon him by the plaintiff to quit was not sufficient under the law, but that he should have been given six months' notice, instead of ten days,' as alleged in the complaint."

The court sustained the motion, and struck the parts of

appellant's answer mentioned therein from it, and the appellant excepted and saved proper exceptions.

In the trial which followed the plaintiff sustained by evidence the allegations in his complaint. The defendant offered to prove the allegations stricken from his answer, and the court refused to allow him to do so.

The court instructed the jury to return a verdict in favor of the plaintiff, which they did, and defendant appealed.

The action of unlawful detainer does not lie to determine the right of parties in the property sued for, but to decide who shall have the present possession. A tenant can not dispute the title of his landlord so long as he remains in possession under him. He can not acquire possession from the landlord by lease and then dispute his title. By accepting the lease and acquiring possession he is estopped from so doing. To do this he must first surrender possession to his landlord, and then bring his action. *Thorn* v. *Reed,* 1 Ark. 495; *Miller* v. *Turney,* 13 Ark. 385; *Simmons* v. *Robertson,* 27 Ark. 50; *Hershey* v. *Clark,* 27 Ark. 527, 531; *James* v. *Belding,* 33 Ark. 536; *Littell* v. *Grady,* 38 Ark. 584; *Fordyce* v. *Young,* 39 Ark. 138; *Clemm* v. *Wilcox,* 15 Ark. 104; *Hughes* v. *Watt,* 28 Ark. 153; *Johnson* v. *West,* 41 Ark. 535; *Bryan* v. *Winburn,* 43 Ark. 32; *Hoskins* v. *Byler,* 53 Ark. 532; *Logan* v. *Lee,* 53 Ark. 94; *James* v. *Miles,* 54 Ark. 461.

We find no prejudicial error in the proceedings of the court. Judgment affirmed.

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187 174
88 122

ARKANSAS MUTUAL FIRE INSURANCE COMPANY *v.* CLARK.

Opinion delivered November 4, 1907.

1. FIRE INSURANCE—FAILURE TO FURNISH PROOF OF LOSS.—Where a policy of fire insurance stipulated that the insured should, within sixty days after a fire, render a sworn statement to the insurance company showing the amount of the loss, etc., and that no suit on the policy should be sustainable until after full compliance with the foregoing requirement, a failure to furnish such proof of loss within the stipulated time forfeited the policy. (Page 227.)

2. SAME—DELIVERY OF PROOF OF LOSS TO SOLICITING AGENT.—Delivery by the insured of the proof of loss to a soliciting agent was not delivery to the insurance company. (Page 227.)

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

C. S. Collins, for appellant.

1. No proof of loss was made within the time prescribed by the policy. This is fatal to a recovery. 65 Ark. 240; 72 Ark. 484.

2. Slayton was only a soliciting agent, and could not bind or estop the company by his acts.

H. F. Roleson, for appellee.

Failure to furnish proof of loss is not among the fifteen forfeiture clauses contained in the policy, but merely provides that no suit shall be maintained "until after" compliance by the insured with all the provisions of the policy. 93 Mich. 81; 53 N. W. 514; 18 L. R. A. 85; 112 Tenn. 151; 79 S. W. 119; 64 L. R. A. 451; 95 Wisc. 618; 70 N. W. 828; 35 W. Va. 666; 14 S. E. 237; 35 So. Rep. 228; 45 S. E. Rep. 773; 98 N. W. Rep. 227; 37 So. Rep. 62; 88 S. W. Rep. 125; 80 Pac. Rep. 213. The case of *Teutonia Ins. Co.* v. *Johnson,* 72 Ark. 484 (citing 111 Ga. 622), is not an authority against us.

2. The company was bound by the acts of Slayton, its agent. 41 N. E. Rep. 658; 75 *Id.* 66; 25 Ark. 219; 49 *Id.* 320.

HART, J. This suit was instituted by M. A. Clark to recover on a policy of insurance issued to him by Arkansas Fire Insurance Company.

M. A. Clark testified that the building covered by the policy sued on was totally destroyed by fire on the first day of August, 1905. That a short time after the fire he had a carpenter named Tilson to make an estimate of the amount and kind of lumber and materials of which the building was built. That after it was made out by Tilson he handed it to Mr. Slayton, to be sent to the company. That he does not know, but he supposes that Mr. Slayton sent it to the company. That Slayton was the agent who solicited and procured him to take out the insurance. That the firm of Weld-Duprey-Mixon Company showed him a letter from the company, dated August 24, 1905, and that, upon

reading it, he came to the conclusion that the company had received the estimate of the proof of loss prepared by Tilson and handed to Slayton to be sent to the company, and further understood that the company was going to send some one to adjust the loss.

C. S. Collins, for the insurance company, testified that he was, at the time of the original transaction, secretary of the company. That the E. G. Slayton referred to by Clark in his testimony is dead. That said Slayton was in the employ of Weld-Duprey-Mixon Company. That they were not recording agents at all, not authorized to issue any policies, but simply acted as soliciting agents to take applications and send them to the company. That he wrote the letter of August 24, 1905, referred to by Clark in his testimony. The letter is as follows:

"Messrs. Weld-Duprey-Mixon Co.,

Marianna, Ark.

Gentlemen:

Your favor relative to loss policy No. 6816 M. A. Clark, received. We got everything ready for the trip, but were (and are) informed that the shotgun quarantine was so strict and rigid in your region that, should one representative go there with any number of certificates, he would have trouble. If you will advise us how and in what manner we can come to Marianna, and, if necessary, to Helena, and be sure to get away and past Forrest City on the way back, we will come at once.

"Yours very truly,

"The Arkansas Fire Insurance Co.,

"By C. S. Collins, Secretary."

Clark, recalled, testified that he had no idea that the estimate prepared by Tilson had not been sent in until he saw the letter of the company dated September 29, 1905, to Weld-Duprey-Mixon Company in which this language is used: "Mr. Clark had better read his policy. If he brings suit without complying with any of its formalities we will leave him to his own devices. * * * We will take the matter up very shortly, and whatever we do will be done within our legal obligation. * * * On the other hand, if he wants to resort to threats he should have filed his proof of loss promptly."

The policy and the application were exhibited to the jury.

There was a verdict and judgment for the plaintiff. The defendant filed its motion for a new trial, and, upon its being overruled, took an appeal.

The appellant contends that the court erred in not instructing a verdict for the defendant, and in giving to the jury at the request of the plaintiff, over its objections, instructions on the question of waiver of forfeiture.

The clause in the policy sued on in regard to giving immediate notice of loss and filing proof of loss within sixty days after the fire, and as well the clause providing that no suit shall be brought until after full compliance by the insured with all the requirements of the policy, are precisely the same as those set out in the case of *Teutonia Insurance Company* v. *Johnson,* 72 Ark. 484, and this case is ruled by it. In that case it was held where a policy of fire insurance stipulated that the insured should, within sixty days after a fire, render a sworn statement to the insurance company showing the amount of the loss, etc., and subsequently provided that no suit on the policy should be sustainable until after full compliance by the insured with all the foregoing requirements, a failure to furnish proof of loss within the stipulated time operated as a forfeiture of the policy."

There is no proof in the record that the estimate prepared by Tilson, or the proof of loss, if it may be so called, was sent to the company. Slayton was only a soliciting agent, and delivery of proof of loss to him was not a delivery to the company.

The record shows that a proof of loss was afterwards prepared and sent to the company, but this was not within sixty days after the date of the fire.

Reversed and remanded.

ROBERTS *v.* BODMAN-PETTIT LUMBER COMPANY.

84 186 227 488

Opinion delivered November 4, 1907.

HUSBAND AND WIFE—APPARENT OWNERSHIP OF PROPERTY—ESTOPPEL.—Where a married woman permits her husband and son to use her property as an apparent basis of credit, she will be estopped from

claiming the property as against creditors who extended credit to the husband and son upon the faith of their apparent ownership.

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

J. T. Coston, for appellant.

1. Not only does a purchaser from an insolvent debtor in discharge of an antecedent debt stand in a more favored position than a purchaser for a present consideration, but the fraudulent intent of the grantor with reference to other creditors will not affect the title of the purchaser, unless he participated in the fraud. 20 Cyc. 472; 49 Ark. 22; 60 Ark. 433; 61 Ark. 455; 81 N. W. 63. An insolvent husband, when justly indebted to his wife, may, without fraud, prefer her claim to that of others. 88 S. W. 879.

2. Where the conveyance is in discharge of a *bona fide* pre-existing debt, the burden is on the party attacking the title to show that the consideration was grossly inadequate, and that the grantee participated in the grantor's fraudulent design. 46 Ark. 551; 64 Ark. 187; 31 Ark. 167; 38 Ark. 427; 63 Ark. 22; 16 N. W. 50; 9 S. E. 43; 13 N. W. 891; 14 S. E. 61; 61 Ark. 454.

3. The burden resting upon appellant to show the payment of the consideration, and her testimony that she did not take the conveyance for the purpose of aiding her husband in placing the property beyond the reach of creditors, etc., is uncontradicted. This testimony should be accepted as true. 63 Ark. 461.

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

1. Because of the intimate relations of husband and wife, transactions of the kind in question in this case are, and ought to be, regarded with suspicion, and the burden is upon the wife to establish by proof the perfect good faith of the conveyance. 76 Ark. 254. Every presumption is against her, and she must prove the existence of the demand, to discharge which the husband has made the conveyance, by clear and satisfactory proof. 56 L. R. A. 827.

2. To support a preference by an insolvent debtor, it is not only necessary to prove a *bona fide* debt, but also that the

debt shall not be largely disproportionate to the value of the property transferred. 26 Ark. 265; 56 Ark. 417; Bump, Fr. Conv. § 173; 20 Cyc. 500; 68 Ark. 167; 84 Ala. 274; 37 Fla. 78; 2 Leigh (Va.), 48; 66 Pac. 807; 56 L. R. A. 829, note; 54 Fed. 696; 53 Mo. App. 493; 70 Tex. 47.

McCULLOCH, J. Appellee, Bodman-Pettit Lumber Company, as judgment creditor of one S. Roberts, instituted this suit in equity against appellant, Julia Roberts, who is the wife of said S. Roberts, to cancel and set aside a conveyance of certain lands in Mississippi County executed to appellant by her husband, and to have the said lands subjected to the payment of the judgment. The chancellor granted the relief prayed for, so far as the land involved in this appeal is concerned, and the defendant, Mrs. Roberts, appealed to this court.

S. Roberts and G. G. Roberts, husband and son respectively of the defendant, were engaged in the saw-mill business in Mississippi County under the firm name of S. & G. G. Roberts. They entered into a contract with plaintiff for the sale of the output of the mill; and plaintiff agreed to advance money to them for use in operating the mill. Pursuant to this contract, plaintiff advanced about $2,100 to them from July, 1899, up to December 21, 1900, when further advances were refused for the reason that the debtors were not cutting any lumber to amount to anything, and were not making payments on what they owed plaintiff. At the time of these transactions S. Roberts owned the land in controversy (11,200 acres), and the defendant owned other tracts of timber lands in the same locality aggregating 600 acres which had been conveyed to her by her husband, S. Roberts, in the years 1891 and 1898. The two principal officers of plaintiff company testified that when they extended credit to S. & G. G. Roberts the latter represented to them that all these lands belonged to them. This is denied by G. G. Roberts in his testimony, but as the chancellor doubtless accepted the testimony offered by the plaintiff as the truth of the matter, and as his conclusion is not against the preponderance of the testimony, we also accept it as true. It appears also from the testimony that the defendant allowed S. & G. G. Roberts to cut timber from her land in operating the mill business. It appears also from the testimony that Mrs. Roberts owned the mill which

she permitted her husband and son to operate in their own names.

On May 18, 1901, S. Roberts, while indebted to plaintiff as aforesaid, conveyed the lands in controversy to his wife, and it is undisputed that he and his son were then and have continued to be insolvent. They owned no other property.

This deed of conveyance recites a cash consideration of $800, but the defendant undertakes to show that the real consideration for the conveyance was the satisfaction of four notes for $200 each executed to her by her husband and son for money furnished them some years before (date not given) to operate a planing mill and hub factory at Dyersburg, Tenn., which was afterwards destroyed by fire.

We are of the opinion that the chancellor reached the correct conclusion in the case, and that the land in controversy should be subjected to the payment of plaintiff's judgment. All that need be said concerning the law of the case is stated by this court in *Davis* v. *Yonge,* 74 Ark. 161, and *Waters* v. *Merit Pants Company,* 76 Ark. 252. It appears that Mrs. Roberts now owns considerable property, most of which she has acquired from time to time from her husband. He and his son came to Arkansas and operated in their own names a saw mill which is now claimed to be the property of Mrs. Roberts, but which she permitted them to operate, and which she must have known formed the basis of credit extended by those who dealt with them. She also allowed them to cut timber from her lands in the locality. Now, since they have become indebted to the plaintiff who extended credit on the faith of the property which they appeared to own, she accepted a conveyance from her husband of the only property he in fact owned, and undertakes to sustain the conveyance by showing that he owed her for money borrowed a number of years before in Tennessee, and lost in another business venture. The notes are not produced nor the dates of the transactions given. This is the account she now gives of the transaction, but her statement is contradicted by that of her husband, who testified, in a former law suit between these same parties concerning the title to a lot of lumber, that the consideration for the deed was $800 in money advanced by her to S. & G. G. Roberts in the year 1901 after plaintiff had refused to advance any more

money, to enable them to operate the mill. It is shown that she was present when her husband gave this sworn account of the transaction, and she did not contradict or correct him, though his testimony was given in a suit in which she was a party, and in which the *bona fides* of her transactions with the firm of S. & G. G. Roberts was under investigation.

We are clearly of the opinion that she should not, as against the plaintiff, be allowed to retain the fruits of this conveyance for both the reasons that she has failed to satisfactorily prove a valid and subsisting consideration for the conveyance, and that her course of conduct in permitting her husband and son to use her property as an apparent basis of credit estops her from claiming the property against creditors who extended credit on the faith thereof. *Driggs* v. *Norwood,* 50 Ark. 42; *Davis* v. *Yonge,* 74 Ark. 161; *Waters* v. *Merit Pants Company,* 76 Ark. 252.

Decree affirmed.

DUNBAR *v.* WALLACE.

Opinion delivered November 4, 1907.

1. SUIT IN EQUITY—RIGHT TO DISMISS AFTER CROSS-BILL FILED.—Where a plaintiff brought suit for the recovery of property, and defendant answered and asked affirmative relief by cross-complaint, plaintiff could not thereafter dismiss the suit upon payment of the costs, at least so far as the cross-complaint is concerned. (Page 232.)
2. MANDAMUS—RIGHT TO FILE SUGGESTION OF JUDGE'S DISQUALIFICATION.—Mandamus will not lie to compel a chancellor to permit a party to a suit to file a suggestion that the chancellor is disqualified because the fee of one of his adversary's counsel is contingent, and such counsel is related within the fourth degree to the chancellor. (Page 232.)

Prohibition and mandamus to Yell Chancery Court; *Jeremiah G. Wallace,* chancellor; denied.

Jo Johnson, for petitioners.

R. C. Bullock, for respondent.

PER CURIAM. Dunbar had a cause pending in Yell Chancery Court, in which he was plaintiff and Bell and others defendants. The action was for the recovery of both real and personal property. Bell answered, and asked affirmative relief in the nature of a cross complaint. Dunbar in vacation dismissed as to defendant Evans, and later in vacation attempted to dismiss as to all defendants and pay costs, including dismissal costs, but the clerk refused the costs and to enter a dismissal. In court Dunbar filed a motion setting forth these facts and asking that the cause be dismissed as a right, and also asked that the cause be dismissed on the ground that the claim of Bell grew out of a lottery, and was illegal. The court overruled the motion, and Dunbar asks that the chancery court be prohibited from proceeding with the suit.

The cross complaint of Bell against Dunbar gave the court jurisdiction of the parties and the controversy between them, in so far as the cross complaint is concerned, at least. Thus, the chancery court having jurisdiction of the parties and the subject-matter, the matter is ended here, so far as prohibition is concerned. Whether the court proceeded correctly or erroneously are matters which may be reviewed on appeal, not by this extraordinary writ.

Petitioner asks a mandamus to require the court to permit him to file a "suggestion of disqualification" of the chancellor, which the chancellor treated as contemptuous, and refused to permit it to be filed. The paper is a suggestion that the fee of one of cross complainant's attorneys is contingent, and that the attorney is related within the fourth degree to the chancellor. The prayer was that the attorney be interrogated as to his interest in the subject-matter of the suit, so that the judge may decline to sit at the hearing if found proper to decline. Such motion has no place in this case. It is not proper nor right to call upon a judge to start an investigation into the fees of attorneys who may be kinsmen of his in order to find out from such investigation whether there may be disqualification. If there is filed a properly verified and supported allegation that such kinsman has a direct pecuniary interest in the subject-matter of the litigation, then a far different question is presented.

Upon the hearing of the petitions, the relief prayed was re-

fused from the bench, and this memorandum of the reasons therefor is now filed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* BROOKS.

Opinion delivered October 28, 1907.

1. CARRIER—INTERSTATE COMMERCE.—State laws regulating railway passenger rates do not apply to the case where a passenger enters a train at a station within the State and offers to pay his fare to a station without the State. (Page 236.)
2. SAME—INTERSTATE COMMERCE.—A railway passenger who enters a train within the State intending to journey to a point beyond the State line has a right to break the continuity of the trip by paying fare to an intermediate point within the State, and the railway company will be liable to a penalty imposed by the Legislature for an overcharge made by it for transporting him to such intermediate point. (Page 237.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* judge; reversed.

STATEMENT BY THE COURT.

Appellees seek to recover of appellant penalty for overcharge in passenger fare by appellant between the stations of Ashdown in Arkansas and Texarkana, Texas, on appellant's road.

The complaints allege that the distance between Ashdown and Texarkana is twenty miles, and that the regular fare for transportation between said stations is sixty cents, but that appellant, through its agent, wilfully demanded and received for the transportation of plaintiffs from Ashdown in Arkansas to the station of Texarkana, Texas, the sum of eighty cents, the same being an excessive charge of twenty cents over the regular fare between said stations, and overcharge of ten cents on the combined local rates in Arkansas and Texas, and that said sum was a greater compensation than the law allowed.

The prayer was for three hundred dollars and a reasonable attorney's fee.

The appellant denied all the material allegations of the complaint, and set up affirmatively that the act (sections 6611 to 6620 of Kirby's Digest) under which appellees seek to recover, if held to apply to continuous transportation of passengers between Ashdown, Arkansas, and Texarkana, Texas, is in violation of the Interstate Commerce Act of February 4, 1887, and also of June 29, 1906, amendatory of the act of February 24, 1887.

The suits were separate, but by order of the court and consent of parties were consolidated and tried as one; separate verdicts, however, being rendered in each case.

The appellant, over the objection and protest of appellees, exacted and received from appellee the sum of eighty cents for their transportation as passenger from the station of Ashdown in Arkansas to Texarkana, Texas. In the case of Brooks, he did not offer to pay his fare to Ogden a station in Arkansas, where the train stopped, and where passengers could purchase tickets from that station to Texarkana. He testified that he did not have time to get a ticket at Ashdown, so he paid his fare on the train from Ashdown to Texarkana where he intended to go.

In the case of Armstrong he asked to be allowed to pay his fare to Ogden in Arkansas, and to be allowed to purchase his ticket from there to Texarkana. This request was refused; appellant's auditor giving as a reason that appellee would not have time to get his ticket at Ogden, that the train did not stop long enough there. Ogden was a regular stopping place for the train, and the train stopped there on this occasion. It was shown that the ticket rate from Ashdown to Texarkana was sixty cents. The train rate, without a ticket, was eighty cents.

Appellant offered to show that four cents per mile train rate from Ashdown, Arkansas, to Texarkana, Texas, was the regularly established, printed and published rate in existence on November 8, 1906, but the court would not admit the evidence, to which ruling appellant excepted.

The court, over the objection of appellant, gave the following instructions:

"1. If the jury find from the evidence that the plaintiff, W. S. Brooks, boarded the train of the defendant as a passen-

ger at Ashdown, and was required to pay eighty cents for passage from Ashdown to Texarkana, you are instructed that the same is under the law an overcharge, and subjects the defendant to a penalty of not less than $50, nor more than $300, as you may find under the evidence.

"2. If the jury find from the evidence that the plaintiff, M. B. Armstrong, boarded the train of the defendant as a passenger at Ashdown, and was required to pay eighty cents for passage from Ashdown to Texarkana, you are instructed that the same is under the law an overcharge, and subjects the defendant to a penalty of not less than $50, nor more than $300, as you may find under the evidence.

"3. If you find from the evidence that M. B. Armstrong offered to pay his fare to Ogden, Arkansas, and then to buy a ticket from Ogden to Texarkana, and that he was refused permission so to do by the agent of defendant in charge of defendant's train, you are instructed that said defendant could not force the payment of fare from Ashdown to Texarkana as interstate commerce; and if defendant or his agent charged said Armstrong eighty cents, the same is an overcharge, and he is entitled to recover from the defendant a penalty of from $50 to $300, in whatever amount you may agree upon."

To which ruling appellant excepted.

The jury returned a verdict in each case for $150.

Motion for new trial, reserving the exceptions saved, was overruled, judgments entered in accordance with the verdict, and this appeal prosecuted.

Read & McDonough, for appellant.

1. Section 6620, Kirby's Digest, does not and can not apply to interstate commerce. Carrying passengers from a point in Arkansas to a point in Texas is made interstate commerce. Acts 59 Congress, p. 584, § 1; 17 Am. & Eng. Enc. of L. (2 Ed.), p. 61-2; 187 U. S. 617; 158 *Id.* 98; 76 Ark. 82; 202 U. S. 242; 78 Ark. 182; 80 Ark. 536; Acts of Congress June, 1906, § 6; 158 U. S. 98.

2. The four cent rate was established by act 1887 as amended and remained in force under act June, 1906. To have charged plaintiffs three cents a mile would have subjected both

railway and passenger to fine and railway's agent to a term in the penitentiary. There is a conflict between the State law and both Interstate Commerce Acts. Interstate Commerce Acts 1887, 1889 and 1906. The State law must give way. 158 U. S. 98.

Webber & Webber, for appellees.

The maximum rate in Texas is four cents for passengers without a ticket. In Arkansas three cents. Kirby's Digest, § 6611, 6613. Branches are part of the main line, whether wholly in this State or extending beyond. *Id.* § 6614; *Id.* § 6620 fixes penalty. The contract was made in Arkansas, and the ticket rate sixty cents. *Id.* § 6613. The sum of the two rates is 69.1 cents. This is the limit of the charge.

The schedules of rates, etc., was not printed and kept open etc., Act Feb. 4, 1887, § 6. Comp. St. U. S. 1901, West. Pub. Co. Ed. The cases 76 Ark. 82; 78 Ark. 182 and 80 Ark. 536 are not overlooked, but, before appellee can invoke the protection of the Interstate Commerce Act, it must comply with it, which was never done. The proof shows that Brooks did not have time to purchase a ticket at Ashdown, and that Armstrong asked to pay to Ogden and there purchase a ticket to Texarkana, which was refused. Ogden was a regular station. Appellees had a right to pay to Ogden, and there buy a ticket. There was an overcharge both in Arkansas and Texas.

WOOD, J., (after stating the facts): The proof conclusively shows that the payment of the transportation charge in the case of Brooks was an interstate commerce transaction. Brooks was on a continuous journey from Ashdown, in Arkansas, to Texarkana, in Texas. He did not wish or offer to break up the continuous passage. The contract he entered into with the company was to take him from Ashdown, in Arkansas, to Texarkana, in Texas. This was clearly a contract concerning interstate commerce. Act February 4, 1887, § 1; 3 Fed. Stat. Annotated, 809; *Gulf, C. & S. F. Ry. Co.* v. *Hefley,* 158 U. S. 98; *Spratlin* v. *St. Louis S. W. Ry. Co.,* 76 Ark. 82; *Porter* v. *St. Louis S. W. Ry. Co.,* 78 Ark. 182; *Halliday Milling Co.* v. *Louisiana & N. W. Ry. Co.,* 80 Ark. 536.

The Legislature had no power over it. That was for the

Congress of the United States. Our statutes (sections 6611 to 6620 Kirby's Digest) do not apply to interstate commerce transportation.

The court therefore erred in giving the first instruction in the case of Brooks. For this error the judgment in his case is reversed, and the cause is dismissed.

But the case of Armstrong is different. There was evidence to justify the finding by the jury that the transportation as to him was not interstate commerce business. For there was evidence tending to prove that he offered, and was refused permission, to pay his fare to Ogden, in Arkansas. He offered to make a part of his journey an intrastate contract. If this were true, the appellant would be liable for the penalty for overcharge as between these points.

But the court erred in not properly submitting the question to the jury in its instruction number two. That instruction makes appellant liable, although the contract as herein stated may have been an interstate contract, and did not leave the jury room to consider the evidence as to appellee's offer to pay to Ogden, in Arkansas, and there to purchase a ticket to Texarkana. He had the right to break the continuity of his journey, if he so desired. He had the right to purchase "ticket from Ashdown to Ogden, and then to purchase a ticket from there to Texarkana, Texas." See *Gulf, C. & Sante Fe Ry. Co.* v. *Texas*, 204 U. S. 403.

The third instruction submitted this question, but it was in irreconcilable conflict with the second. The instructions should have been consistent.

For the error in giving instruction number 2 concerning the case of appellee Armstrong, the judgment is reversed, and the cause is remanded for new trial.

McGILL v. HUGHES.

Opinion delivered November 4, 1907.

MORTGAGE—STATUTE OF LIMITATION—SUSPENSION BY DEATH.—Upon the death of the maker of a note and mortgage before the statutory period of limitation of five years has expired, that statute ceases to run as to these instruments, and the two-years statute of non-claim begins to run from the time letters of administration were granted.

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

Manning & Emerson, for appellant.

1. The land in controversy was the homestead of appellant and her husband. At his death she became the owner for life, and no one could disturb her title or take possession, if she objected, except in the way pointed out by the Constitution. Art. 9, § § 6 and 3, Const. 1874.

As to the right of appellee to foreclose the mortgage, the widow is a third person. 136 U. S. 379; 2 La. 125; 28 Ore. 74; 53 Ark. 259.

2. The right of action having accrued on January 1, 1900, and no credits having been indorsed on the margin of the record within five years thereafter, the mortgage was barred as against the widow. Kirby's Digest, § 5399; 64 Ark. 317. Where the Legislature makes no exceptions in a statute of limitation, the courts can make none. 6 Ark. 14; 16 Ark. 487; 13 Ark. 291; 64 Ark. 321.

Thomas & Lee, for appellee.

1. Having married McGill subsequent to the execution of the note and mortgage, the widow's rights in the property are subject to the rights of the mortgagee. She could have no greater rights in the property than existed in her husband at his death; hence, the legal title being in the mortgagee, no homestead rights could descend to the widow. Art. 9, § 6, Const.; 41 Ark. 97; 29 Ark. 280; 33 Ark. 462; 33 Ark. 399; Thompson on Homestead, etc., 1 Ed. § 547.

2. Payments having been made on the note within five years after its maturity, it was not barred, and the mortgage lien was alive as to the husband at his death.

BATTLE, J. On the third day of February, 1889, John W. McGill executed his promissory note to Henry A. McGill, and thereby promised to pay him the sum of $1,775.10 on the first day of January, 1900, and on the same day executed to him a mortgage of certain lands then and there owned and occupied by the mortgagor as a homestead, with power to sell the lands in default of the payment of the note at its maturity. The mortgage was duly acknowledged, and was filed on the 4th day of February, 1899, for record. In the fall of 1902 the plaintiff in this suit and John W. McGill were married. On the third day of November, 1904, McGill died intestate, leaving the plaintiff in this suit, Emma McGill, his widow surviving. He and his wife occupied the lands mentioned as a homestead from the time of their marriage up to the time of his death. A few days after his death and before the 20th of November, 1904, Mrs. Emma McGill and Robert McGill verbally agreed that she should have one-third of the personal property and one-third of the difference between the value of the land and the amount due on the mortgage. This difference was to be paid in money by Robert McGill. There was nothing done in part performance of this agreement, and it was never reduced to writing. Mrs. McGill left the land sometime about the 25th of December, 1904, and went to the home of her father. She never delivered the land to Robert McGill, or any one for him. In her absence H. A. McGill took possession for Robert.

On the 8th day of January, 1900, Henry A. McGill transferred the note and mortgage to J. M. Hughes. There were no credits indorsed upon the margin of the record where the mortgage is recorded until the 22d of March, 1905, and 21st of April, 1905. Letters of administration upon the estate of John W. McGill were granted to J. H. Plumlee in January, 1905, and he was succeeded by H. A. McGill.

There was no proceeding instituted to foreclose the mortgage until the 23d day of March, 1905, when notice was given that the land would be sold to satisfy the mortgage. The reason for the delay was the verbal agreement of Mrs. McGill and Robert and the request of the latter for further time to pay the mortgage and his promise to do so. Mrs. McGill was not a party to this request and promise, and offered no inducement to postpone the foreclosure of the mortgage.

On the 20th of April, 1905, Mrs. McGill instituted a suit against Hughes in the Monroe Chancery Court to enjoin the sale of the land and to cancel the mortgage upon the ground that it was barred by the statute of limitation and the mortgagee had lost his lien on the land. The defendant answered, and asked that he be permitted to sell the land under his mortgage; that a commissioner be appointed by the court to sell the same; and for all other and further relief to which he is in equity entitled. The court, upon final hearing, refused to enjoin the sale and cancel the mortgage, but found that it was not barred, and decreed that it be foreclosed; and plaintiff appealed.

Was the mortgage barred as to the appellant? The statutes of this State provide: "In suits to foreclose or enforce mortgages or deeds of trust, it should be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided, when any payment is made on any such existing indebtedness before the same is barred by the statute of limitation, such payment shall not operate to revive said debt or to extend the operation of the statute of limitation with reference thereto, *so far as the same affects the rights of third persons,* unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with the date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk." Kirby's Digest, § 5399.

In this case five years after the right of action accrued was the time within which the law provides that the action upon the note should have been commenced. The right of action accrued on the first day of January, 1900, and was barred on the first day of January, 1905, unless the time for bringing the same was extended by payments or the death of McGill. He died before the expiration of the five years, and the statute of limitation then ceased to run against the note and mortgage, and was succeeded by the two-years statute of non-claim, which ran from the grant of letters of administration to Plumlee in January, 1905. The note and mortgage continued in full force and effect for two years after that day, or until they were paid or

satisfied. *Ross* v. *Frick Company,* 73 Ark. 45. The decree of foreclosure of the mortgage was rendered on the 20th day of February, 1906, within the two years. They were not barred.

The marriage of the appellant and John W. McGill being subsequent to the filing of the mortgage for record, she acquired no rights in the land superior to those of the mortgagee, but took whatever rights she had in the land subject to the mortgage, and as against her appellee is entitled to the foreclosure of the same.

Decree affirmed.

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

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Opinion delivered July 15, 1907.

1. JUROR—DISQUALIFICATION—OPINION.—A juror is not disqualified because he entertains an opinion regarding the case, based on rumor, which it would take evidence to remove if, notwithstanding such opinion, he is able to try the case fairly on the evidence. (Page 245.)

2. CONTRIBUTORY NEGLIGENCE—ACTION IN EMERGENCY.—Where there were two courses left open to a person in the face of imminent danger, and on the spur of the moment he chose the more dangerous, he cannot be held as a matter of law to be negligent in his choice, although by choosing the other course he might have escaped. (Page 245.)

3. DAMAGES FOR DEATH—CONSCIOUS INTERVAL—EXCESSIVENESS.—Deceased was struck on his hip by a train at a bridge, was thrown upon an iron girder parallel with the bridge with force enough to cause him to fall into the rive, wherein he was immediately drowned; it was not known whether he made outcry, but he was seen to move his hands while falling; when his body was found, there were indications of bruises on the head. *Held,* that it cannot be said that there was not a substantial interval of conscious mental and physical suffering from the time deceased was struck until he was drowned, and a verdict of $500 as compensation for such suffering was not excessive. (Page 247.)

4. EXEMPLARY DAMAGES—CONSCIOUS INDIFFERENCE TO CONSEQUENCES.—The evidence tended to show that deceased, a railway bridge tender, was killed by the defendant's employees while in the discharge of his duty; that they were keeping a lookout and saw his signal to stop the train when they were three hundred or more feet distant, and made no effort to stop in time to avoid injuring him. *Held,* suffi-

cient to support a finding that they were guilty of that conscious indifference to consequences from which malice may be inferred, and which will sustain a verdict for exemplary damages. (Page 248.)

5. INSTRUCTION—GENERAL OBJECTION.—The error of instructing the jury that if certain requisite elements of negligence are found "you will find punitive or exemplary damages," instead of telling them "you may find," etc., should have been pointed out by a specific objection. (Page 256.)

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

T. M. Mehaffy and *J. E. Williams,* for appellant.

1. The court erred in its instructions as to exemplary damages, nor was this error corrected when his attention was called to it. 70 Ark. 136; 50 *Id.* 10.

2. Deceased was guilty of contributory negligence, and can not recover. 70 Fed. 24, 28, etc.; Labatt, Master & Servant, § § 365, 365a.

3. There should not have been any recovery for more than nominal damages. The suit was only for the benefit of the estate, for pain and suffering, and as the death was instantaneous compensation for pain and suffering can not be sustained; 68 Ark. 1-8; 145 U. S. 335.

4. The case calling for only nominal damages, there could be no exemplary damages. 12 Am. & Eng. Enc. Law (2 Ed.), 21; 37 N. W. 118; 70 Ark. 226, 228; 1 Sutherland on Dam. (2 Ed.), § 406; 2 Am. & Eng. Enc. p. 29. The court erred in permitting the question of exemplary damages to go to the jury. 1 Sutherland on Dam. § 403 and notes; 53 Ark. 10.

5. An administrator of an estate in an action of tort can not recover exemplary damages. Kirby's Digest, § 6285; 41 Ark. 296; 11 Ired. (33 N. C.), 247.

6. The challenge to the jurors should have been sustained. 69 Ark. 322.

P. R. Andrews and *H. M. Woods,* for appellee.

1. The jurors were competent. 66 Ark. 53; 95 S. W. 159; 69 Ark. 322.

2. No contributory negligence is shown.

3. There is sufficient evidence to sustain the recovery for conscious pain and suffering. 59 Ark. 215.

4. The court properly permitted the question of exemplary

damages to go to the jury, and the verdict is sustained by the evidence. 70 Ark. 226; 2 Sutherland on Damages, p. 1131 and cases cited.

5. The action was properly brought by the administrator. Kirby's Digest, § 6285; 59 Ark. 222.

6. Exemplary damages may be recovered in a case calling for nominal damages only. 70 Ark. 226; 2 Sutherland, Dam. p. 1131; 1 Sedgwick on Dam. § 361; 73 Fed. 196.

7. There was no error in the court's charge. 67 Ark. 209.

HILL, C. J. This was an action by R. D. Stamps, as administrator of the estate of S. W. Kirby, to recover damages, compensatory and exemplary, for his death, against appellee railroad company. The trial resulted in verdict and judgment for $500 compensatory damages for the benefit of the estate, and $2,500 exemplary damages, and the railroad company has appealed.

S. W. Kirby was assistant watchman on the appellant's bridge over White River, near Augusta. The bridge is a drawbridge, and it was the duty of the watchman and assistant watchman to open the draw for boats when they received signals from them. Boats were given precedence over trains unless the train was too close to be stopped. It was the custom and duty of the watchman, when he received a boat signal, and no train then being on hand, to put out red signal flags at either end of the bridge, one hundred to one hundred and fifty feet away, before opening the draw. These flags called for the train to stop. It was the duty and custom of the watchman to go to the end of the draw when the train approached and there personally signal a stop. There was a signal post about a thousand feet west of the bridge at which the engineers were to give notice of their approach and slow down the speed of their trains and get them under control. There was another post called the stop post, about 150 feet west of the bridge, and trains were to stop at that post unless they received the proper signal to proceed across the bridge.

The draw span of the bridge is 270 feet long—135 feet from the middle pier to either end—and the bridge proper extends 35 or 40 feet west of the end of the draw span, and then commences the approach to the bridge, which, on the west side, is over a thousand feet in length.

On the 26th of December, 1905, Mr. Kirby was in charge of the bridge, and about the middle of the afternoon he received a signal from a boat to open the drawbridge, and he proceeded to do so, but did not place any flags at either end of the bridge. He unlocked the west end, and this caused the rails on the draw to be raised above the rails with which they were connected when the draw was closed. The east end had not been unlocked.

A freight train whistled from the west when at a distance variously estimated from 1,200 to 2,000 feet from the bridge. Kirby responded to this signal, but when and where was the controversy. That he was caught by the engine between the west end and the center of the bridge, as he was running back from the west end, cast into the river and drowned are facts established. It was some two months before his body was recovered.

There were four eye witnesses besides the engineer and fireman; three of these were introduced by the appellee, and one by appellant. They all say that Kirby was unlocking the draw when the train whistled, and that he at once went to the west end of the draw with his signal flag; was there waving to the train when it came in sight around the curve, a distance of not less than 800 feet, and usually estimated at one thousand or more.

The engineer and fireman say that Kirby was not at the west end of the bridge when the train came in sight; that the first time he appeared was when the train was near the stop sign, some 200 or 300 feet away, when he began signalling from near the center of the bridge. Then the engineer attempted to stop; put on the emergency brake and sanded the track (the steam had already been cut off); and that was all that could have been done to bring the train to a stop. The engineer says that, owing to the curve and grade at that point, it was very inconvenient to stop long trains just before reaching the bridge, and that the custom had grown up among engineers of getting their trains under control when about 1,200 feet away and watching for the signals on the track as to the bridge being clear, and, if it was clear, to proceed without pause so as to make the curve and grade. If the signal flags were out, they could see them in time to come to the necessary stop. That in this instance he had his engine under control at that point, and looked

out where the flag should have been, and, not seeing it, assumed that the bridge was clear, and released his brakes and went ahead. That, when Kirby did appear upon the bridge, he could not regain control of the train at once because, having just released the brake, the air was out of it, and prevented his getting the train under immediate control; he ran on the bridge and, striking the upraised track on the draw, the locomotive and one or two cars were derailed. The bridge was considerably torn up by the derailment. The train stopped a little short of the middle of the bridge.

The decided weight of the testimony is that the absence of the flags at the distance of 100 or 150 feet from the bridge had nothing to do with the action of the train, for the witnesses say that Kirby was in plain sight, waving his flag before the train came in view. It was indisputably established that a man standing at the west end of the draw where they say Kirby stood could be seen further down the track than a stationary signal flag posted at the usual place. This was admitted by the engineer himself. The irreconcilable conflict in the evidence is as to Kirby being at this point when the train came in sight. Other facts will be stated as the different issues are discussed.

1. A question preliminary to the merits of the cause of action is presented as to the qualification of certain jurors. These jurors stated that they had formed opinions regarding the case, and that it would require evidence to remove those opinions; but they stated that their opinions were based upon common reports and rumors, and not from personal knowledge, nor derived from witnesses, and these opinions would not preclude them from considering the case fairly. This statement from *Sullins* v. *State*, 79 Ark. 127, is applicable here: "We attach little importance to their (jurors') statements that it would take evidence to remove the opinions held by them; for, if one man has an opinion of any kind, it is natural that it should take evidence of some kind to remove it. That would be true of an opinion formed from rumor merely, but our statute expressly provides that such an opinion shall be no ground for challenge."

2. It is insisted that Kirby was guilty of contributory negligence in two particulars. First, in failing to put out a danger flag before attempting to open the draw.

The court in the tenth instruction, given at the instance of the appellant, which is set out in the footnote,* submitted this question to the jury; and the finding of the jury that his failure in this respect did not contribute to the accident can not be disturbed, and is responsive to the preponderance of the evidence.

The second ground of the alleged contributory negligence is that he could have stepped out of the way of the train and got upon a floor beam. These floor beams are about 20 feet apart, and cross the girders which run parallel with the track, and they are for the purpose of riveting the bridge together. They are 12 or 14 inches wide, and from the rail to the upright post of the superstructure the distance is five feet and a half. An engine or car extends about two feet and a half over the rail, thus leaving a space of about three feet by 12 or 14 inches for a person to stand on and be clear of a passing train. Some of the witnesses thought Kirby might have escaped danger by getting out on one of these floor beams, while others regarded it as a risky venture. There was a platform about fifty or sixty feet back from the west end of the draw. This was about 18 feet lengthwise with the track, and sixteen feet wide. It was called a "jigger." And there was a little house in the center of the draw span, over the middle pier. Kirby was evidently trying to reach one of these places as he ran from the approaching train.

Where there are two courses left open to a person in the face of imminent danger, and he chooses on the spur of the moment the one which is really the more dangerous, he can not be held as a matter of law to be negligent in his choice, although by choosing the other course he might have escaped. In this instance, had he chosen to have stepped out on a floor beam and been knocked into the river by a flying timber, the argument might as well have been made that he should have tried to reach the platform.

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*"10. If Kirby, at the time the steamboat gave the alarm for the opening of the draw section of the bridge in question, knew, or by the exercise of reasonable diligence could have discovered, that it was his duty, before unlocking the drawbridge, to set out a flag at or beyond the end of such drawbridge, as a warning to trains, and failed to set out such flag, and his failure in any manner contributed to the accident in question, then the plaintiff can not recover, regardless of whether or not the train crew, or any of them, were negligent."

The court submitted, at the instance of appellant, the question of contributory negligence in this respect to the jury in the 12th instruction, which will be found in the footnote.†

There is nothing in the record to justify the court in disturbing the acquittance of the deceased of contributory negligence in either respect.

3. The next point raised is that there was instant death, and hence compensation for pain and suffering prior to death can not be sustained. The facts testified to by eye witnesses were that the steam cylinder of the locomotive struck Mr. Kirby on the hip and knocked him from the bridge, and he fell on an iron grider, parallel with the bridge; that he struck this grider with some force, enough to make him bounce. Then he dropped his flag, which fell on one side of the grider and he on the other; and that as he fell from it he drew up his hands close to his breast. Another witness saw his left arm raised as he was falling. The bridge was 20 or 25 feet above the water. The river was swift and deep at this point. He was not seen after his fall. The train was making so much noise that it is not known whether he made any outcry or not. When the body was found some two months later, there were indications of bruises on the head.

For a recovery to be had for pain and suffering, there must be some appreciable interval of conscious suffering after the injury and before death. *St. Louis, I. M. & S. R. Co.* v. *Dawson,* 68 Ark. 1.

In *Texarkana Gas Co.* v. *Orr,* 59 Ark. 215, it was said "that the struggles of deceased were of the briefest character. He cried out twice, and his hands were burnt and drawn by the wires. He died almost instantly." Yet in that case a recovery for conscious pain and suffering was sustained.

There is a conflict in the authorities as to whether in case of death by drowning there can be a recovery for conscious pain

†"12. If Kirby, after discovering any danger to himself by reason of the approaching train, discovered, or, as a reasonably prudent person under the circumstances, ought to have discovered, that he was in danger, and if he could have thereafter avoided such danger to himself by stepping upon one of the floor beams or any other part of the bridge, where he could have avoided the injury, and failed to do so, then the plaintiff can not recover."

and suffering. See *St. Louis, I. M. & S. Ry. Co.* v. *Dawson, supra.*

It can not be said, in view of the evidence above detailed, that there was not a substantial interval of conscious mental and physical suffering from the time Mr. Kirby was struck on the hip by the locomotive on the bridge until he met his death in the river below; nor can it be said that the jury's verdict of $500 is an excessive compensation for such suffering.

4. The remaining question is as to exemplary damages. The testimony of the engineer and the fireman can not be reconciled with that of the other eye witnesses. It is impossible to take it as explanatory of facts established by other witnesses, for it is in direct conflict upon a vital point. The witnesses who saw the engineer and fireman say that they were looking ahead. They also testify that they were keeping a sharp lookout. And yet they say that they did not see Kirby on the west end of the bridge signalling to them as soon as the train rounded the curve, and they say that he was not there then nor later, and that he did not appear until they were within two or three hundred feet, when he commenced signalling them from near the center of the bridge. Whereas, as stated, the other eye-witnesses say that it was before the train came in sight that Kirby went out upon the west end of the draw, and was there signalling the train, when it was distant about a thousand feet. Either their testimony must be accepted and that of the engineer and fireman discarded, or the latter accepted and the former discarded. The jury is the tribunal which settles such matters, and it has discarded the testimony of the engineer and fireman, and this court must take as the truth of the case the testimony of these other eye witnesses.

It was proved that the train approached the bridge without slackening speed (some say it was running 20 miles an hour when it struck the bridge), which was contrary to the rules of the company (and, it must be added, contrary to common sense and common prudence as well); but it was sought to be justified by custom. Be that as it may, nothing can justify the running of a train upon a drawbridge in this manner when a man was standing upon it waving a danger signal. Kirby was thirty-five or forty feet back from the west end of the bridge at the begin-

ning of the draw span, and was sixty feet west from the platform called the "jigger," and 135 feet from the house in the center of the bridge. The only other places where he could seek safety, and that a precarious safety, were the floor beams which occurred about every 20 feet. It was Kirby's duty to be where he was at the end of the draw; and, if the operatives of the train had obeyed the rules, he was safe in being there; if they had obeyed the signals given by him, and there is no circumstance or custom to excuse their failure to do so, he was safe. But, instead of doing either, they ran upon him without signal or warning. There was no signal given that they intended to disregard his stop sign, and he had a right to assume that they were going to obey it. Unfortunately for him, he relied upon their obeying his signal until it was too late for him to save his life. They have now sought to justify their conduct by saying that Kirby was not there. But, as indicated, the court can not, in the light of the finding of the jury upon substantial evidence, accept that as the truth of the case, but must regard it otherwise. Taking it as established that they were looking at him while travelling the distance of a thousand feet, and that they did nothing to warn him of their intention to run on the bridge, and made no effort to stop the train until too late to save his life, can it be said that the verdict for exemplary damages was not sustained by sufficient evidence?

In *Railway* v. *Hall,* 53 Ark. 7, Mr. Justice SANDELS, speaking for the court in his terse style, distinguished the elements of exemplary and compensatory damages, and said of the former that it must contain "the element of willfulness or conscious indifference to consequences, from which malice may be inferred;" and that "a careless unconsciousness of plaintiff's possible danger" was not sufficient to constitute a basis for exemplary damages. Applying this principle here, it can not be said that the jury was not warranted from the facts in evidence in finding the train operatives guilty of "conscious indifference to consequences, from which malice may be inferred."

Criticism is made of the instructions in regard to exemplary damages.

At one place in the oral charge of the judge to the jury, which covered the issues generally, this occurred: "'On the

other hand, if you find there was negligence on the part of the road or its employees, and no negligence on the part of the plaintiff, you will find punitive or exemplary damages; that, as to amount, is governed by the same rule—that is, your sound judgment and discretion.'

"Here objection was interposed to this instruction by attorney for the defendant, whereupon attorney for plaintiff arose and asked the court to instruct the jury that the negligence on the part of the defendant, in order to support punitive damages must be wanton, willful and gross. Thereupon the court said: "Yes, that is true," and, turning to the jury, said: "Yes, gentlemen of the jury, before you can find punitive damages in any amount, you must first find that the negligence of the defendant, if any, was gross, wanton and willful; that is, the kind of negligence of the employees of the railroad company inflicting the injury in violation of its rules."

As above seen, the trial judge, evidently through oversight, left out the necessary elements of exemplary damages, but promptly corrected the error when his attention was called to the oversight. Although the latter part of his explanation lacks clearness, if it be taken in connection with his whole charge, the jury could not have been misled, for the instructions as to exemplary damages were full and explicit.

Judgment is affirmed.

RIDDICK, J., (dissenting.) I am not able to concur in that part of the opinion which upholds the judgment for exemplary damages. The main facts in the case, as they appear to me, are as follows: S. W. Kirby, for whose injury and death damages are sought in this case, was an assistant watchman employed by the railway company and on the day he was killed was in charge of its bridge across White River near Augusta, Arkansas. It was his duty, when signalled by boats desiring to pass the bridge, to open the draw for them to pass through. The regulations under which he acted required that before unlocking the draw he should place red flags about 100 feet from each end of the bridge to notify those in charge of trains approaching the bridge that the draw was open or about to be opened. On the day of the accident, a boat blew a signal to open the draw, and Kirby commenced to open it without first putting out the flags in front of

each end of the bridge, as the regulations required. He unlocked the west end of the draw, and then went to the east end of the draw and began to unlock that when a freight train signaled its approach from the west. From the west end of the bridge the track curved south, and trains coming from that direction could not see signals from the center of the bridge plainly until they arrived within about two hundred yards of the end of the bridge. After giving the signal it was the duty of the employees in charge of the train to get the train under control and to bring it to a stop at a post called the stop post, which was about fifty yards from the end of the bridge, unless they received a signal from the bridge watchman to go over the bridge. There was a rise in the track as it approached the bridge from the west. This grade made it inconvenient to stop heavy trains at that place, and a custom had grown up among engineers of freight trains not to bring such trains to a full stop before being signalled but to slow up, and if no danger signals were seen to go over the bridge without stopping. When the train that caused the injury approached, the engineer in charge gave the signal of its approach and slackened its speed to some extent, but the engineer, not seeing the danger signals, did not bring the train to a full stop before reaching the bridge. When Kirby, the watchman, heard the train signal, knowing that no flags were out to indicate danger, and that the engineer, unless flagged, might attempt to pass the bridge, he ran from the east end of the draw span where he was at work to the west end thereof to signal the approaching train. It is not shown whether this bridge was floored so that one could run at full speed on it or not, but, remembering that when the train gave the signal of its approach it was not much if any over four hundred yards away from the bridge, that Kirby, being at the east end of the draw span of the bridge, had to go 270 feet or 90 yards to reach the west end of the span and had to stop on the way to get a flag from a small house in the center of the bridge with which to signal the train—remembering these things, it seems certain that, if the train as claimed by plaintiff was approaching at the rate of 20 miles an hour, it must have gone four or five times the distance that Kirby traveled. When he reached the west end of the draw, the train must have been several hundred yards

nearer the bridge than it was at the time the signal of its approach was given, and it could not have been very far from the bridge. For this or some other reason the engineer did not discover the condition of the bridge until it was too late to stop the train before reaching the bridge. Just at the west end of the bridge there was a small platform built on the side of the track called a "jigger." This platform was about fifty feet west of the draw span of the bridge. If Kirby had reached this place, he would have been safe. But he went no further west than the end of the draw span. After flagging the train from that point and seeing that it was not going to stop, he ran back towards the center of the draw span, probably to seek safety in the small house built on the bridge there. Before the train reached the west end of the bridge, the engineer and fireman had observed the signals given by Kirby, and saw also that the west end of the draw span was unlocked, and were no doubt doing all they could to stop the engine and train. Knowing that there was great danger in remaining on the engine under such circumstances, the fireman jumped from the engine to the "jigger" platform at the end of the bridge. But, despite the danger to which he was exposed, the engineer remained on his engine. Notwithstanding his efforts to stop it, the engine went on the bridge and mounted the draw span of the bridge, but some of the cars were derailed by the fact that the span had been unlocked and was higher than the connecting span. The engine ran to within thirty or forty feet of the center of this span, and before it was stopped struck Kirby and knocked him into the river, causing his death.

The evidence, I think, justified a finding against the company for actual damages, but "the element of wilfulness or conscious indifference to consequences from which malice may be inferred" is lacking, and for that reason the case is not one for exemplary damages. *Railway* v. *Hall,* 53 Ark. 7.

A mere error of judgment as to the result of doing an act or the omission to do an act, having no evil purpose or intent or consciousness of probable injury, may constitute negligence, but can not rise to a degree of wanton negligence or willful wrong. *Birmingham Ry. & El. Co.* v. *Bowers,* 110 Ala. 329.

The Supreme Court of the United States, in a case where the

plaintiff sought to recover exemplary damages on the ground that the defendant was guilty of gross negligence, referred to a remark of Baron Rolfe, afterwards Lord Cranworth, to the effect that "gross negligence is ordinary negligence with a vituperative epithet," and said: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted." *Milwaukee & St. P. Ry. Co.* v. *Arms,* 91 U. S. 489.

There are many other well-considered cases that support the rule that the mere fact that a defendant had been guilty of negligence, whether gross or not, does not justify the imposition of exemplary damages unless the circumstances were such as to raise the inference of malice or to show that the injury was wilfully inflicted. *Ry.* v. *Hall,* 53 Ark. 7; *Scott* v. *Donald,* 165 U. S. 58; *Magrane* v. *Railway,* 183 Mo. 119; *Alabama G. S. Ry. Co.* v. *Moorer,* 116 Ala. 642, 9 Am. & Eng. Enc. R. Cases, N. S. 742.

The case of *Railway* v. *Hall,* above cited, and which is also quoted in the majority opinion, declares that there must be an element of wilfulness or that the circumstances must be such as that malice may be inferred. But what is there in this case to show wilfulness or from which malice can be inferred? The idea that the engineer of this train approaching a bridge across a deep navigable river, with the central span of this bridge fixed so that it could turn on hinges and admit the passage of boats, intentionally disregarded the signal of the watchman to stop, that he did this knowing that the signal meant that the draw span was unlocked and unsafe for the train; that, knowing these things, he ran his train on the bridge wilfully or with conscious indifference to the danger incurred, is about as unreasonable a supposition as could well be imagined. The evi-

dence of all the witnesses shows that when Kirby came out of the small house on the bridge where he went to get a flag he began waving the flag as he went towards the west end of the draw span. He must have been waving this flag when first seen by the engineer and fireman, and until they saw him they had no reason to believe that running the train on the bridge would result in injury either to him or themselves. Up to that time there could not have been any wilfulness or anything indicating malice. They both testify that, so soon as he was seen, the engineer applied the emergency brake and tried to stop the train. It ought to require strong evidence to show to the contrary, for when the engineer saw that signal he knew that it meant that the draw span was unlocked, and that, unless the train was stopped, a wreck was certain, and that the whole train might be thrown in the river. It is quite unreasonable to believe that with this knowledge he made no effort to stop the train, unless he was paralyzed by the appalling danger that confronted him. But there is really no evidence to contradict his statement that he at once on observing the signal tried to stop the train. It is true certain witnesses testified that the train did not slacken its speed for sometime after it was flagged by Kirby. The engineer explained that the reason why he could not check the train more quickly was that he had applied the air brakes before he got in sight of the bridge, but, not seeing any danger signal, he had released the brakes just before he saw Kirby. That, on seeing Kirby waving the red flag, he at once applied the emergency brakes and sanded the track, but that, the air having been used, the brakes would not at once give the full amount of pressure. This is a reasonable explanation, which is not contradicted; but, if we disregard that entirely, the fact that the speed of the train was not checked may show that the engineer and fireman were not keeping a lookout, it may show that the engineer did not exercise due skill in handling the train, but that is a very different matter from showing that he intentionally ran his train on the bridge after seeing the signal and knowing that the draw span was unlocked, and that the danger to the train and himself was imminent. The moment that he saw Kirby waiving the red flag, he must have recognized the great peril to himself as well as to Kirby if the train was not stopped.

To find that the engineer wilfully put the life of Kirby in danger is to find that he wilfully exposed himself to great and imminent peril for no reason whatever, but the evidence shows nothing of the kind. Negligence, I admit, is shown, but to my mind the circumstances all rebut the idea that the injury was wilfully inflicted, or that there was anything wanton or wilful in the conduct of the engineer. For that reason I am convinced that exemplary damages ought not to be allowed.

WOOD, J., concurs in dissenting opinion.

ON REHEARING.

Opinion delivered November 4, 1907.

HILL, C. J. 1. Counsel have forcibly re-argued this case and presented, strongly fortified by argument, the dissenting opinion of the late Mr. Justice RIDDICK. That is one of the strong opinions of a strong man. The point of difference between it and the opinion of the majority of the court is in the view taken of the evidence, and not in the law. The writer of that opinion and the judge who agreed with him in it were convinced that Kirby was not standing in plain view, waving his flag at the end of the draw, when the train came in sight. If the majority could see the facts that way, there would be no escaping the conclusion stated in the opinion of Mr. Justice RIDDICK.

There was a conflict in the testimony. Which was the truth cannot be known here. The jury has accepted that version which placed Kirby at the end of the draw, waving his flag in plain view when the train came in sight, some thousand feet distant. If that be taken as an established fact, and the verdict settled it, then, as the majority see it, there can be no escaping the sequence, which was that there was a "conscious indifference to consequences from which malice may be inferred." It is no answer to say that this version must not be accepted because the engineer would not recklessly run into an open bridge to his own certain destruction, for it was not visibly opened. The partially raised rails, only a few inches above the others, could not possibly have been seen by the engineer until he was on the bridge, if then. So far as appearances went, he was merely refusing to

obey a stop signal, and to his eye the bridge was ready for his train.

Counsel for appellant have presented inconsistencies and contradictions in the testimony of the four witnesses who place Kirby at that point. Each of them saw the accident from a different place. Each has told the story as differently viewed; and it is to be expected that there would be inconsistencies and contradictions in such testimony. But as to the essential fact—that before the train came in sight Kirby was standing on the west end of the draw waving his flag—there is nothing to contradict the testimony of any one of them, and nothing that the court can see which weakens the force of their respective statements as to this fact.

2. Counsel insist that there should be a reversal for the error in the oral instruction, and say that the erroneous instruction cannot be cured by a correct one. But the erroneous instruction was so quickly withdrawn, and the correct instruction substituted immediately upon attention being called to the error, that the court is unable to see that any prejudice could possibly have resulted.

Another error is called to the attention of the court in this oral charge of the judge, and that is, that he told the jury if the requisite elements were present "you will find punitive or exemplary damages," instead of saying that they were *authorized* to find, etc. It is true that exemplary damages are not required to be given in any case; merely that certain facts may authorize a jury to award them in their discretion. 2 Thompson on Trials, § 625; 1 Sedgwick on Damages, § 387.

This error occurred in the paragraph of the oral charge that has heretofore been noticed as erroneous. Objection being made to this paragraph by the defendant's attorney, the plaintiff's attorney at once saw that the court had erroneously left out the elements of grossness, wantonness and wilfullness required, and called the court's attention to it; and the court at once accepted the correction, and turned to the jury and said: "Yes, gentlemen of the jury, before you can find punitive damages in any amount, you must find first that the negligence of the defendant, if any, was gross, wanton and wilful."

This was a correct instruction, and was given in place of the paragraph which had just been objected to, which contained the objectionable phrase now complained of, as well as the objectionable phrase heretofore complained of. Evidently, the objection was taken to the absence of the gross, wanton and wilful factors, and that was what the court inserted; and his attention was not called to the fact that he had said, "will find," instead of "may find." The objection to this part of the charge by defendant's attorney was as follows: "Defendant at the time objected and excepted to that part of the court's oral charge to the jury upon the question of punitive or exemplary damages, to the effect that if there was negligence upon the part of defendant and no negligence upon the part of the deceased, the jury might find punitive or exemplary damages."

Thus it is seen that the defendant's attorney at the time construed this as a mere authorization to find exemplary damages, and not as direction to do so. It must be borne in mind that this was a general statement unnecessarily explanatory of the instructions which had been given, one of which correctly stated that such damages might be added if the jury thought proper under the circumstances.

The court has given unusual attention to this case, both upon its first consideration and now upon this consideration, because it has recognized that it presented a difficult question of fact, and one upon which the minds of the judges of the court have drawn different conclusions. But the majority is of the opinion that the conclusion heretofore reached was the correct one, and the motion for rehearing is denied.

BOARD OF IMPROVEMENT DISTRICT NO. 5 v. OFFENHAUSER. 84 257 f90 39

Opinion delivered November 5, 1907.

1. IMPROVEMENT DISTRICT—ASSESSMENT—BURDEN OF PROOF.—In an attack upon an assessment in an improvement district the burden of proof is upon those attacking the validity of such assessment. (Page 262.)

2. SAME—SUFFICIENCY OF EVIDENCE.—The burden of proving that a majority in value of property owners in an improvement district did not sign a petition for the improvement is not sustained by testimony of the clerk that he examined the deed records and found no conveyances of real property in the district to certain persons whose names appear in the petition. (Page 263.)

3. SAME—PETITION—SIGNATURE BY HUSBAND OF LANDOWNER.—Ratification of her husband's signature is sufficient to constitute a married woman who owned property within a proposed improvement district a signer to a petition for the creation of such district. (Page 263.)

4. SAME—PETITION—SIGNATURE BY VENDOR.—One who held the title to land which he had contracted to sell on condition that the purchaser should approve the title is the owner and entitled to sign a petition for an improvement district if no deed was executed nor possession given nor any part of the price paid. (Page 263.)

5. SAME—PETITION—SIGNATURE BY ATTORNEY.—In an attack upon an assessment in an improvement district a signature to the petition for its creation by one as agent and attorney of the landowner will not be treated as invalid because his power of attorney was not in writing and recorded, as the burden is upon those attacking the assessment to prove that the names of the property owners were not signed by authority. (Page 263.)

6. SAME—PETITION—RIGHT OF HOMESTEADER TO SIGN.—The wives of the owners of homesteads within a proposed improvement district are not required to sign the petition for the improvement. (Page 264.)

7. SAME—COST OF IMPROVEMENT.—Kirby's Digest, § 5683, providing that "no single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in said district as shown by the last assessment," contemplates the last assessment made by the assessor as equalized by the board of equalization. (Page 265.)

8. SAME—NOTICE OF FILING OF ASSESSMENT.—Under Kirby's Digest, §§ 5677-9, 5683-4, providing that, immediately upon the filing of the assessment in an improvement district, the city clerk shall insert in some newspaper a notice of the filing thereof, stating the date of filing, and that any interested person may, within ten days from the giving of such notice, appeal to the city council with regard to the assessment of his property, and impowering the council to pass an ordinance assessing the cost of the improvement upon the real property in the district, *held* that it was sufficient if the city council waited ten days after publication of such notice before passing the ordinance assessing the cost of the improvement. (Page 266.)

9. SAME—ADJOINING PROPERTY—"Property adjoining the locality to be af-

fected," within the meaning of Const. 1874, art. 19, § 27, is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally. (Page 267.)

10. SAME—CONCLUSIVENESS OF ACTION OF COUNCIL.—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. (Page 267.)

11. SAME.—When an improvement district has been regularly created by the city council, and the boundaries fixed, the question of ascertainment of benefits and assessment of taxes becomes one for the board of assessors, whose action is conclusive upon the property owner unless set aside in the manner provided by law. (Page 268.)

12. SAME—DAY IN COURT.—Kirby's Digest, § 5677-9, providing that notice shall be given of the filing of an assessment for the cost of an improvement and that the owner may appeal to the city council therefrom, and § 5685, providing that the ordinance levying the assessment shall be published and that proceedings to correct or invalidate such assessment shall be begun within thirty days, afford to property owners reasonable opportunity to be heard with reference to an assessment for a local improvement. (Page 268.)

13. SAME.—The action of a city council in including within the territorial limits of an improvement district for building a sewer property which was already connected with a sewer in another improvement district did not amount to such a fraud or demonstrable mistake as would warrant the courts in declaring such action to be void. (Page 268.)

14. SAME—RIGHT OF LAND OWNER TO OFFSET IMPROVEMENTS.—Under Kirby's Digest, § 5689, providing that if the owner of taxable property within an improvement district has improved his property in such manner that his improvement may profitably be made a part of the general improvement, the board of improvement shall appraise the value thereof and allow it as a setoff against the assessment against his property, a property owner in a sewer district who had previously connected his property in an adjoining sewer district is not entitled to set off the value of such connection against assessments upon his property in the former district. (Page 269.)

Appeal from Miller Chancery Court; *James D. Shaver,* Chancellor; reversed.

Frank S. Quinn, for appellant.

1. There is no evidence to support the finding that there was an ordinance requiring property owners within 300 feet of a

sewer to connect, and that defendants connected. The amounts paid were voluntary contributions for their own private benefit. But the ordinance is in conflict with Kirby's Digest, § 5726, and void.

2. The burden of proof is on appellees. 68 Ark. 376.

3. The power of a city to build sewers is not affected by the fact that parties charged with a special tax for constructing sewer already have a sewer built. Cooley on Tax (3 Ed.), 1175; Hamilton on Spec. Assess. (1907), p. 586, § 608, etc.; 45 Kan. 296; 25 Pac. 605.

4. The setoff was erroneously allowed by the court. Setoffs are not allowed against taxes. Cooley, Tax. (3 Ed.), 20; 25 Am. & Eng. Enc. Law (2 Ed.), 504; 50 Ark. 384; Kirby's Digest, § 5689. Appellees do not bring themselves within the provisions of this last section.

5. Appellees are estopped. 59 Ark. 344; 2 Cooley on Tax. (3 Ed.), 1516; Hamilton, Sp. Assess. § 728.

6. Questions as to the assessment are cut off, not being raised within thirty days. Kirby's Digest, § § 5667, 5685; 67 Ark. 30; 69 *Id.* 68; 71 *Id.* 28.

7. The formation of taxing districts and levying assessments are matters of legislative discretion, and the action of a legislative body in determining such things is not subject to review by the courts. They are based on the theory of special benefits to property assessed. 52 Ark. 107; 68 *Id.* 376; 14 L. R. A. 655, note; Const. art. 19, § 27.

To city councils is delegated the authority to determine what is "property adjoining the locality to be affected." 52 Ark. 107. Their action cannot be attacked except for fraud or demonstrable mistake. 70 Ark. 451; 81 Ark. 208; 100 N. Y. 585; 125 U. S. 345. See also 81 Ark. 80; 81 Ark. 562; 181 U. S. 324.

8. A credit allowed on an assessment would break the rule of uniformity. Const. 1874; 77 Ark. 383; 48 *Id.* 370; 44 Vt. 186.

Pratt P. Bacon, for appellees.

1. The ordinance is void because not signed by a majority in value of the owners. Where one of two joint owners sign, only half should be counted. 69 Ark. 74. Pope should have

signed to bind the Earnest property. 69 Ark. 74. The power of attorney to Hays did not authorize him to sign for Mrs. Weed. *Ib.* There were two Gallaghers; and as only one signed, there is no presumption that it was Mrs. F. D. M. Gallagher who signed. 59 Ark. 159. The signatures of Scott and Buchanan and the property represented by them should be rejected; no authority to sign for their wives is shown. 54 N. W. 680; 88 N. W. 141; 69 Ark. 68. Piper and Hill signed *on conditions.* 54 N. W. 680. Striking off these, less than a majority in value signed.

2. Wives must sign petition where homesteads are involved. Kirby's Digest, § 3901; 31 S. W. 52.

3. The cost of the improvement exceeds twenty per cent., and ordinance void. Kirby's Digest, § 5683; 55 Ark. 148; 71 *Id.* 11; 81 Ark. 208.

4. Appellees had no notice of the filing. Kirby's Digest, § 5678, 4925; 3 Am. & Eng. Enc. (2 Ed.), 309, note 10; 130 U. S. 184; 21 Pick. 64.

5. Appellees not subject to a second special assessment. They were already in District No. 2, and thus would be required to pay in two districts—double taxation. This would avoid the whole act. Kirby's Digest, § § 5722, 5723, 5725, 5726; art. 2, § 2, Const. They were not required to begin proceedings within the thirty days under § 5685. This statute cannot be made to apply unless specially pleaded. 80 Ark. 181, 72. On subject of second special assessment, see 53 N. E. 877; 25 Pac. 610. These statutes must be *strictly* complied with. 59 Ark. 356; 71 *Id.* 561. The improvement in District 5 was not a real, appreciable benefit, or as distinguished from the benefit to be received by the community. 5 Pac. 789; 68 Ark. 380.

6. The credit was properly allowed. Kirby's Digest, § 5689.

McCULLOCH, J. This is a suit in chancery instituted by the Board of Improvement of Improvement District No. 5 of the city of Texarkana against the owners of certain real property in the district to enforce the collection of special assessments levied thereon.

The property owners defended against the assessments on the several grounds discussed herein, and the court rendered a

final decree in their favor dismissing the complaint for want of equity, from which decree the plaintiff prosecuted this appeal.

1. It is first contended by the appellees that the petition to the city council praying that the improvement be made was not signed by a majority in value of the owners of real property in the district, and that for this reason the assessments sought to be enforced are illegal and void.

In considering this phase of the case, it is important to inquire in the beginning where the burden of proof lies, whether upon the Board of Improvement or upon those who attack the validity of the assessments. It has never been decided by this court where the burden lies in a case of this kind to show whether or not the petition for the improvement was signed by a majority of the owners of property affected. The court has decided, however, that the burden was upon those attacking the validity of assessments to show that the city ordinance levying the same was not duly passed, and in the opinion of the court, after referring to the sections of the statute (Kirby's Digest, § § 5691, 5692) providing that in a suit instituted by the board of improvement to enforce payment of assessments it shall not be necessary to state more than the fact of assessment and non-payment thereof, nor to exhibit with the complaint any copy of ordinance or other document or paper connected with the assessment, etc., said that it is manifest that the Legislature intended "to make the few allegations of the complaint a *prima facie* case, that is, if not controverted in the pleading and by proof, to be sufficient to authorize the decree of condemnation and foreclosure." *Kansas City, P. & G. Ry. Co.* v. *Waterworks Imp. Dist.*, 68 Ark. 376.

The court has held in levee district and drainage district cases that regularity of the proceedings in forming the districts and in levying assessments will be presumed, in absence of evidence to the contrary. *Stiewel* v. *Fencing Dist.*, 71 Ark. 17; *Ritter* v. *Drainage Dist.*, 78 Ark. 580; *Overstreet* v. *Levee Dist.*, 80 Ark. 462; *Jonesboro, L. C. & E. Rd. Co.* v. *St. Francis Levee Dist.*, 80 Ark. 316; *Driver* v. *Moore*, 81 Ark. 80.

We think these cases fully establish the principle that the burden, in a controversy of this kind, is on the attacking party to show that the assessments have not been legally levied.

Now, keeping in mind the rule casting upon appellees the burden of showing that the petition for the improvement did not contain a majority in value of the real property in the district, let us see how they have borne the burden.

The certificate of the county clerk shows that, according to the last preceding assessment of the county assessor on file, the real property in the district was valued at $145,310

To this add the value, as shown by the agreed statement of fact, of church property omitted from the county assessor's list 2,000

Total $147,310

One-half .....$ 73,665

It is agreed that the signatures to the petition represent the sum of $83,790 in value of said property, but appellees attempt by other testimony to show that this amount should be reduced. They introduce the county clerk, who testifies that he had examined the deed records and found no conveyances of real property in the district to certain parties whose names appear on the petition, but that did not prove that the parties did not own land in the district. Registry of a deed is not necessary to pass title to the property described therein, except as against subsequent purchaser without notice of the conveyance.

It is also shown that the names of three married women who owned property in the district, of the assessed value of $2,300, were signed to the petition by their respective husbands. There was further proof, however, that they ratified the signatures. This was sufficient to constitute them signers of the petition.

H. V. Earnest, who signed the petition, owned a lot valued at $400, but a few weeks before the filing of the petition with the city council had entered into an oral agreement for the sale of the lot to G. G. Pope. The agreement for sale was on condition that the purchaser should approve the title, and no deed was executed nor possession given nor any part of the price paid until after the petition had been filed and acted on by the city council. Earnest was the owner at the time the petition was filed, and he had the right to sign for the property.

Another name appearing on the petition is sought to be excluded because it was signed by the agent and attorney of the

owner. It is contended that the signature was not valid because the power of attorney was not in writing and recorded. The burden was on appellees to show that the names of the property owners were not signed by authority. A petition of this kind is not a conveyance of real property or a writing which affects real estate, within the meaning of the statute (Kirby's Digest, § 753) requiring letters of attorney containing power to execute such an instrument to be "acknowledged or proved and certified and recorded with any deed that such agent or attorney shall make."

It is agreed that real property of the aggregate value of $27,330 constituted the homesteads of the several owners who were married men, and that the respective wives of said owners did not sign the petition for improvement. That, it is contended by counsel for appellees, rendered the signatures of the owners of the several homesteads ineffectual for the purpose of counting this property on the petition. The petition is not an instrument which falls within the meaning of the homestead statute (Kirby's Digest, § 5901) requiring the wife's signature and acknowledgment. The Constitution and statute only require that a petition for improvement shall express the consent of the owners of real property in the district. The wife of the owner of a homestead is not the owner in this sense.

Certain other signatures to the petition are challenged on other grounds; but, as the exclusion of the property those persons are purported to represent will not affect the question under consideration, it is not important to discuss the points on which these signatures are sought to be excluded.

It can therefore be seen that the petition contained the signature of a majority in value of the owners of real property in the district, according to the assessment on file in the county clerk's office and after adding to the assessment the value of church property not assessed.

The agreed statement of facts recites that the board of assessors for the improvement district added to the assessment list (of the assessor) "all new buildings and other improvements then being made upon said real property and which was not contained in the county assessments, which new buildings they valued and assessed at $5,500. Counsel for appellant say that this

amount should be added to the assessment in determining whether or not the petition contains a majority in value of the property owners. Even if we add that sum, it would not increase the aggregate value of property in the district so much that the petition would not contain the signatures of a majority. This would increase the total assessment of value to $152,860, and the petition contains the signatures of property owners representing in value $83,790.

Moreover, the statement of facts does not show that these additional improvements and buildings, the value of which was assessed by the board, were added to the property when the petition was presented to the city council. The value of the property according to the last assessment at the time of presentation of the petition must be considered in determining whether or not the petition contains a majority of the property owned. Improvements made thereafter can not be considered.

We do not deem it necessary to decide in this case whether or not the last assessment made by the county assessor must be accepted as conclusive evidence of the value of real property in the district, or whether it is only *prima facie* evidence of such value and the true value may be shown by other evidence. Inasmuch as we find, under the proof and agreed statement of facts in this case, that the petition does contain a majority of the owners in value of the property, we refrain from expressing an opinion on the question just mentioned.

2. The next defense is that the assessments are void because the cost of the improvement exceeded twenty per centum of the assessed value of real property within the district. The agreed statement of facts recites that the value of real property in the district, according to the assessment made by the county assessor, as certified by the county clerk from the last assessment lists on file in his office, was $145,310; and that the board of improvement of the district reported to the city council that the estimated cost of the improvement would be $29,890. It is also shown that the board of equalization of the county increased the assessed valuation of real property in the district from $145,310, the valuation fixed by the county assessor, to $151,730. This was done before the estimated cost of the improvement was reported to the city council, and, of course, before the ordinance

was passed levying the assessments to pay for the improvement. The statute provides that "no single improvement shall be undertaken which alone exceeds in cost twenty per centum of the value of the real property in such district as shown by the last county assessment." Kirby's Digest, § 5683. Now, "the last county assessment" would include valuation added or increased by the county board of equalization, and, as the valuation was thus increased before the board of improvement reported the estimated cost of improvement and before the city council passed the ordinance levying the assessments to pay for the improvements, the increased valuation must be considered in determining whether or not the cost of the improvement exceeded in value twenty per centum of the valuation of the property. That was the "last county assessment" at the time the ordinance was passed, and must determine the value of the property in the district at the time.

3. The assessment is also attacked on the alleged ground that notice of the filing of the assessment was not given as required by law. The assessment list was filed by the board of assessors of the district with the city clerk on October 10, 1905, and on the same day the clerk caused a notice in the form prescribed by law of such filing in a newspaper published in the city of Texarkana. The ordinance levying the assessments on the real property of the district was introduced in the city council on October 24, and was duly passed by the council on November 11, 1905.

The statute provides that immediately upon the filing of the assessment the city clerk shall insert in some newspaper a notice of the filing thereof, stating the date of filing; and further provides that "any person whose real property is embraced in said assessment may at any time within ten days from the giving of such notice file with the city clerk in writing his notice of appeal from the action of said board in making said assessment of his property, which appeal shall be heard and disposed of at the next regular meeting of the city council," etc. Kirby's Digest, §§ 5677, 5678, 5679. The city council is impowered by statute to pass an ordinance in the form prescribed, assessing the cost of the improvement upon the real property in the district. Kirby's Digest, §§ 5683, 5684.

It is contended that, in order for the ordinance to be valid, the notice must have been published for a full week, and that ten days must have thereafter elapsed before the introduction of the ordinance.

Pretermitting any discussion of the question whether the city council must, before passing the ordinance, await the expiration of the time given for the property assessed to appeal to the council from the assessment of the board of assessors and have their appeal heard, it is sufficient to say that the notice was duly given in this instance and the council waited sufficient length of time before permitting the introduction of the ordinance and passing it. Ten days elapsed from the date of publication of the notice until the ordinance was introduced.

4. The property of appellees is situated within the territorial limits of this district (No. 5), and is within three hundred feet of a sewer constructed in another improvement district (No. 2) in the city of Texarkana. The sewer in district No. 2 was completed and paid for before the organization of district No. 5; and before the organization of the last-named district. The city council passed an ordinance requiring all persons owning property within three hundred feet of any sewer in the city to pay three and one-half per centum of the assessed value of their property to said district and connect the same with such sewer. Appellees or their grantors paid four and one-half per centum of the value of their property to the treasurer of district No. 2, and connected their premises with the sewer in that district. These facts are pleaded as a defense against the assessments levied in district No. 5, and it is argued that this property received no benefit from the improvement in district No. 5, and is not liable for assessments.

This court, speaking through Mr. Justice SANDELS, in the case of *Little Rock* v. *Katzenstein,* 52 Ark. 107, laid down the following propositions as established by authority: "First. That property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally.

"Second. That the action of the city council in includ-

ing 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 same principle is recognized with reference to the power of the Legislature in creating improvement districts outside of cities and towns, in the recent cases of *Coffman* v. *Drainage District,* 83 Ark. 54, and *St. Louis S. W. Railway Co.* v. *Red River Levee District,* 81 Ark. 562. This court also expressed the same views, in substance, in *Lenon* v. *Brodie,* 81 Ark. 208, wherein the following language of Judge Cooley is quoted with approval:

"It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits and defeated by satisfying a 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 (3d Ed.), pp. 1207, 1208.

When an improvement district has been regularly created by the city council, and the boundaries fixed, the question of ascertainment of benefits and assessment of taxes to pay for the improvement becomes one for the board of assessors provided for by statute, and the action of the board is conclusive upon the property owner unless set aside in the manner provided by law. *Driver* v. *Moore, supra.*

The statute provides, as already pointed out, that notice shall be given of the filing of the assessment with the city clerk, and that the property owners may within ten days appeal to the city council from the action of the board of assessors in fixing the assessments. The statute also provides that the ordinance of the city council levying the assessments shall be published, and that "all persons who shall fail to begin legal proceedings within thirty days after such publication for the purpose of correcting or invalidating such assessments shall be forever barred and precluded." Kirby's Digest, § 5685.

These statutes provide reasonable opportunities for prop-

erty owners to be heard with reference to the assessments made upon their property and afford them "a day in court" to be heard upon these matters affecting their rights. If they fail to avail themselves of these opportunities, they cannot afterwards be heard to complain that the assessments are unfair or unequal.

It cannot be said that the action of the city council in including the property of appellees within the territorial limits of the improvement district, notwithstanding the fact that they had already been permitted or required to connect their property with the sewer in an adjoining district and pay assessments to that district, amounted to such a "fraud or demonstrable mistake," using the language of Judge SANDELS, in *Little Rock* v. *Katzenstein, supra,* as would warrant the court in declaring the action of the city council in so doing void.

5. Appellees, by way of setoff against the enforcement of these assessments, invoke the benefit of the following statute:

"If, in the construction of sidewalks or making other improvements, any owner of taxable property in the district shall be found to have improved his own property in such manner that his improvement may be profitably made a part of the general improvement of the kind in the district, being also as good as that required by the system determined upon by said board, the board of improvement shall appraise the value of the improvement made by the owner, and shall allow its value as a setoff against the assessment against his property. And, in case the owner who has made such improvements shall be found to have failed to come up to the required standard, the board may allow him the value of the materials thereof, so far as the same may be profitably used in perfecting the system aforesaid, as a setoff against the assessment against his property thus improved. In such cases the board shall issue to the owner a certificate showing the amount of the setoff allowed, which certificate shall be received by the collector in lieu of money for the amount named therein charged against said property." Kirby's Digest, § 5689.

In the first place, the connection made by appellees of their premises with the sewer in another district was not and could not have become "a part of the general improvement of the

kind in the district," so as to entitle the owners to setoff the value thereof against assessments.

In the next place, appellees have not pursued the method pointed out by the statute for obtaining the benefit of the setoff.

On the whole case, we conclude that no defense against the enforcement of the assessments has been shown, and that the chancellor erred in dismissing the complaint. The decree is therefore reversed, and the cause remanded with directions to enter a decree in favor of the plaintiff in accordance with the prayer of the complaint.

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

Opinion delivered November 4, 1907.

1. RAILROAD—NEGLIGENCE—PROXIMATE CAUSE.—The fact that defendant's train was being run at an extraordinary and unusual rate of speed through an incorporated town will not render defendant liable for killing plaintiff's intestate if there was nothing to show that the killing would not have occurred if the rate of speed had been moderated. (Page 275.)
2. SAME—FAILURE TO SIGNAL.—A railroad company is not liable for the accidental killing of a person upon its track because those in charge of the train did not give signals to apprise deceased of the approach of the train if he knew that the train was approaching. (Page 275.)
3. SAME—STAKES ALONG TRACK.—A railroad company is not liable for an injury to a traveler upon its track who stumbled on a stake which was properly there and fell in front of a train and was killed, as his stumbling was not one of the things which would reasonably be expected to occur. (Page 275.)
4. SAME—CONTRIBUTORY NEGLIGENCE.—One who attempted to cross a railroad track immediately in front of a train of whose approach he is aware and was killed was guilty of such contributory negligence as will debar his intestate from recovering for the negligence of the railroad company. (Page 276.)

Appeal from Mississippi Circuit Court; *Frank Smith*, Judge; reversed.

STATEMENT BY THE COURT.

Rowena Ferrell, as administratrix of the estate of her deceased husband, Lou M. Ferrell, brought this action against the St. Louis & San Francisco Railroad Company for damages for the alleged negligent killing of said Ferrell by a train of the appellant company, and recovered a verdict of $4,000 for the benefit of his widow and children. Judgment was rendered thereon, and the defendant company has appealed.

The case is refreshingly free from conflicting evidence. The testimony as to the death of Mr. Ferrell comes from disinterested witnesses, who were his companions at the time. Taking that testimony most strongly in favor of the plaintiff, the following facts appear:

Osceola is divided into two sections, known as Old Town and New Town. Hale Avenue connects the two sections. The two leading hotels of the town are situated on Hale Avenue. one on the east and one on the west of the railroad tracks, which cross Hale avenue at right angles. There were two tracks leading from Hale avenue to the depot, the main track and on the west thereof a passing track; and, further south, a house or commercial track joined the main track on the east side and ran on south of the station. Where this accident occurred, there were the three tracks, which will be referred to as the "main line," "west track," and "east track."

The main line was raised about twelve inches above the east and west tracks, and in order to do this work grade stakes were driven one hundred feet apart on each side of the main track. They were left there for the purpose of bringing the level of the main line to the grade as indicated by these stakes, and the work was still being done for that purpose by the section hands, not by the regular construction gang, which had left there before this time. It was essential that the stakes remain until the track had become settled to the required elevation, in order that the section hands might properly do the work; and they were reset when it became necessary, and when they were knocked down they were replaced. These stakes were about one inch thick, about two inches wide, and at this point about twelve inches above the level of the ground, reaching to the level of the

top rail, and were set about twelve inches from the ends of the ties.

In the spring of 1904 the station at Osceola was moved to a point in a field, about 1,500 feet south of Hale Avenue, and on the east side of the main line. From that time until the time of the death of Mr. Ferrell, in December, the railroad tracks from Hale Avenue to the depot had been constantly used by the public, particularly the traveling public, especially those stopping at the hotels. This was due to several reasons. No good street or walk way had been built to the depot, and the railroad tracks were a little raised above the surrounding country, and were covered with sand, making a much better walk than any other route. It may be assumed that the use of these tracks from Hale Avenue to the depot was so common and well-known to the railroad company that the public was impliedly licensed to use that route at the time that Mr. Ferrell and his companions were using it.

Messrs. Ferrell, Bell, Merrell, Noonan and Speck were attending court at Osceola, and desired to go to their homes south of there, and went to take the train which passed through Osceola going south about seven o'clock the night of December 10, 1904.

They started from their hotel to walk to the station by way of the tracks. Messrs. Merrell, Speck and Noonan were in advance of the main line, and Messrs. Bell and Ferrell were walking together on the west track. These gentlemen were walking leisurely and engaged in conversation. They thought they were in ample time for their train.

When they were about a third of the way from Hale Avenue to the station, they heard a train coming, which they supposed to be the passenger, but which proved to be a through freight, which did not stop at Osceola. It was going at a speed variously estimated from 25 to 40 miles an hour.

In order to catch their train, they commenced running, hoping to reach the station before the train would leave there. The three gentlemen in front turned from the main track to the west track, and ran for some distance until the train passed them. None of them saw the accident.

Messrs. Bell and Ferrell ran for some distance along the

west track where they had been walking. Mr. Bell outran Mr. Ferrell, but was only a short distance ahead of him. Mr. Bell thought they had better get on the east side, as that was the side the station was on. He crossed over from the west track to the east track, crossing the main line diagonally as he ran. He called to Ferrell to come across to that side. He continued to run a short distance, and then hearing the roaring of the train behind him he turned to look, and just as he did so saw Mr. Ferrell with outstretched arms falling before the train. Mr. Ferrell had evidently stumbled on one of the grading stakes, as was demonstrated by examination next day. Mr. Bell could not tell whether the train struck Mr. Ferrell before he fell to the ground or not. The glare from the headlight just enabled him to catch a glimpse of Mr. Ferrell in the act of falling with outstretched arms, in a position as if having stumbled over some obstruction.

L. F. Parker, W. F. Evans and *W. J. Orr,* for appellant.

1. Under the pleadings and proof in this case, appellee ought not to recover because, by the undisputed evidence, it is shown that Ferrell's own negligence contributed to the injury, and there is neither allegation nor proof that his peril was discovered or could have been discovered in time to have avoided the injury. 26 Ark. 3; 33 S. W. 1054; 16 S. W. 169; 49 Ark. 106; 34 S. W. 882; 46 Ark. 513; 39 S. W. 62; 88 S. W. 824; 103 S. W. 725; 49 Ark. 257; 36 Ark. 374; 62 Ark. 245; 57 Ark. 461; 102 S. W. 369; 47 Ark. 497; 45 246; 54 Ark. 431; 69 Ark. 134; 64 Ark. 364; 35 S. W. 216; 34 S. W. 545. That it is negligence *per se* for an adult person in full possession of his senses to attempt to cross a railroad track immediately in front of a rapidly moving train is too well established to need citation of authorities.

2. If it was negligence on the part of the appellant to maintain the grading stakes along the track, which is not conceded, appellant is not aided, because of the deceased's contributory negligence. But there was no negligence in placing and maintaining the stakes along the track. 84 Pac. 140; 67 N. E. 376; 2 Thompson, Neg. § § 1713, 1705; 3 Elliott on Railroads, § 1250; 14 Fed. 855.

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

Appellant knew that the people were accustomed to use, and were practically forced to use, its tracks in going to and from its depot, and impliedly invited such use.

At a time when one of its passenger trains was due, when it was chargeable with notice that many people would be walking along its road bed, it ran this freight train through immediately in front of the passenger train, without ringing a bell or sounding a whistle, or slackening its speed and with no lookout kept at the time by its engineer and fireman. Under this state of facts appellant is liable, notwithstanding the contributory negligence of Ferrell. 2 Cooley on Torts, 3 Ed. 1442; 33 Ill. App. 479; 53 Ill. App. 478; 152 Fed. 134; 13 Wash. 525. Under the proof Ferrell was a licensee by implied invitation, and those in charge of appellant's train were required to anticipate his presence on the track and to use reasonable precautions to prevent injury to him. 94 Fed. 321; 74 Fed. 350; 2 Thompson, Neg. 2 Ed. 1726; 76 Wis. 542; 15 S. W. (Ky.), 665; 88 S. W. (Tex.), 192; 19 S. W. (Mo.), 1114; 104 Fed. 119; 99 N. C. 298; 30 W. Va. 229; 74 Fed 285; 90 Tex. 314; 104 Fed. 741; 14 Ore. 551; 89 S. W. 24; 113 Pa. St. 162; 16 Utah, 42; 92 N. Y. 289; 94 Va. 449; 79 Ill. App. 22.

2. While ordinarily a railway company has the right to place grading stakes along its right of way and between its tracks, and it is not negligence on its part to so place them, yet if it places or leaves them where it has impliedly licensed the public to go, and where they become, by reason of this license and use, a source of danger to the public, this is negligence on the part of the company. 105 Cal. 388; 103 La. 649; 80 Mich. 390; 104 Fed. 119; 89 S. W. 863; 102 U. S. 577; 77 Ark. 566; 46 Ark. 182; 100 S. W. 901.

HILL, C. J., (after stating facts.) The complaint in this case is predicated upon the following charges of negligence:

First, that the train was running through the corporate limits of Osceola at an extraordinary and unusual rate of speed.

Second, that those in charge of the train did not give signals by sounding the whistle or ringing the bell to apprise deceased of the approach of the train.

Third, that the train operatives were not keeping a constant

lookout, as required by law, for persons and property upon the tracks.

Fourth, the presence of the stake upon which Mr. Ferrell stumbled.

1. The rate of speed was shown to be from 25 to 40 miles an hour, as variously estimated. There was no evidence that this was contrary to municipal law of the town of Osceola. But if it be conceded that it was negligent to run the train at this rate of speed at that place where the public was accustomed to walk, that would not help plaintiff's case, for such rate of speed was not the proximate cause of the death of Mr. Ferrell. Had this train been running four miles an hour, instead of forty, the result would have been the same if the other facts in evidence had been present; and there is nothing to indicate that the other facts would not have been present had the rate of speed been moderated.

2. The evidence establishes that the usual signals for the station and crossing were given. One of the witnesses says he did not hear them. There were no special signals given on account of the presence of these gentlemen on the tracks. The object of signals is to notify people of the coming of the train. Where they have that knowledge otherwise, signals cease to be factors.

3. There is no evidence of a failure to keep a lookout. The plaintiff relied upon deductions from the train failing to stop or give special signals to these gentlemen on the track. But there is nothing in the evidence to warrant such deductions. If a lookout was being kept, the engineer and fireman would have seen a party of gentlemen running down the west track. They were in perfect safety, and it is evident from the testimony of Mr. Bell that the time when he crossed the main line and the time when Mr. Ferrell attempted to cross it was so shortly before the passage of the train that nothing could have been done in the way of checking or stopping it. A careful watch, or a failure to watch, could not have influenced the result.

4. No negligence of the company could be predicated upon the presence of the stake between the tracks. The stakes were as rightfully there as the ties. They were being used for the proper construction and maintenance of the road. Had Mr. Ferrell stumbled over the end of a tie, there would have been just

as much room to argue that it was negligence to have an exposed tie where the public walked. The public who made use of the railroad track as a public way assumed the risks incident to its use as a railroad track.

MR. Justice RIDDICK, in the case of *Perdue* v. *Railway Company,* 82 Ark. 172, said for the court: "The law exacts of the railway companies whose tracks are laid along or across public streets that they shall use reasonable care and diligence in constructing and maintaining such tracks, so that the public which has also the right to use the streets may not be injured. But, while they are responsible for injuries to travellers caused by their negligence, they are not insurers of the safety of travellers, and are not bound to provide against everything that may happen on the highway, but only for such things as ordinarily exist or such as may reasonably be expected to occur." This principle excludes the imputation of negligence against the company for permitting the stake to be between the tracks, because stumbling over it was only one of the things which may happen on a highway, not one which would be reasonably expected to occur.

The above statement of the principle is more favorable to the plaintiff than she was entitled to in this case, as the place of injury was not a public road, but merely a railroad track which the public was for the time being licensed to use for its convenience.

5. But, even if the railroad company was guilty of negligence in any of the particulars charged, yet the contributory negligence of Mr. Ferrell would defeat the action. He was twelve inches from the ends of the cross ties when he stumbled and fell in front of the moving train. He knew the train was coming. He had a good and safe place to travel on the west track; but for some reason he left that route, and was either running too near the main track for safety; or else, which is more probable, he was trying to follow his companion across to the east side, on which the depot was located. He would probably have safely crossed, as his companion did, had it not been that he unfortunately stumbled and met his death.

This is a stronger case of contributory negligence than was before the court in *Burns* v. *St. Louis S. W. Ry. Co.,* 76 Ark. 10,

in which the court declared that the facts therein, as a matter of law, showed contributory negligence.

The circuit court erred in submitting the case to the jury.

Reversed and remanded.

NEFF v. ELDER.

Opinion delivered November 4, 1907.

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1. JUDICIAL SALE—MISTAKE IN ADVERTISEMENT.—A mistake in advertising a comissioner's sale to take place on June 1, 1093, instead of June 1, 1903, was an irregularity which could not have been misleading, and was cured by confirmation. (Page 281.)
2. LIS PENDENS—NOTICE.—Subsequent purchasers of land are charged with notice of the pendency of a suit affecting it against its owner. (Page 282.)
3. SAME—PRIOR MORTGAGE.—One who held a prior mortgage upon land was not affected with notice of a suit to enforce an equitable vendor's lien thereon, and his assignees were protected, even though the suit was pending at the time the debt and mortgage were assigned to them. (Page 282.)
4. SALE OF LAND—VENDOR'S LIEN—NOTICE.—A vendor's lien upon land, not expressed upon the face of the deed, is not enforceable against subsequent purchasers without actual notice. (Page 282.)
5. SUBROGATION—DISCHARGE OF VALID LIEN.—A purchaser of land whose money was used in discharging a valid mortgage lien thereon, upon failure of his title, will be subrogated to such lien as against the intervening rights of another. (Page 283.)
6. MERGER—WHEN DOCTRINE INAPPLICABLE.—The doctrine that a mortgage lien is merged with the legal title when they are united in the same person has no application where other rights have intervened between the acquisition of the lien and the title. (Page 283.)
7. EQUITY—EXHIBITS AS EVIDENCE.—In equity written instruments exhibited with the pleadings and referred to therein are presumed to have been considered by the chancellor. (Page 283.)
8. TENANTS IN COMMON—NOTICE.—When several persons are jointly pursuing the common purpose of acquiring title to land by purchase as tenants in common, notice to one concerning the condition of the title is notice to all. (Page 284.)

9. SUBROGATION—TIME OF ENFORCING.—A purchaser of a defective title to land who was entitled to subrogation by reason of having discharged a valid mortgage lien which was not barred at the time of such discharge may bring his action to enforce his right to subrogation within a reasonable time after discovery of the defect in his title. (Page 284.)

Appeal from Fulton Chancery Court; *George T. Humphries,* Chancellor; reversed.

STATEMENT BY THE COURT.

This is an appeal from a decree of the Fulton Chancery Court, dismissing for want of equity the complaint of J. T. Neff filed against B. F. Elder, J. E. Ford and H. H. Simon. The prayer of the complaint is to set aside a certain conveyance to the defendants by a commissioner in chancery or to have the plaintiff subrogated to the lien of a mortgage on the real estate in controversy, which mortgage the plaintiff alleges that he paid off.

On October 4, 1898, G. W. Lane and wife, being the owners of certain lots in the town of Mammoth Spring, Arkansas (the lots in controversy being of the number), conveyed the same to one Frank Curtis by warranty deed reciting a cash consideration of $1,000 paid. The evidence shows that the real consideration for the conveyance was a conveyance by Curtis to Lane and his wife of certain lands in Illinois owned by Curtis.

On July 13, 1899, Curtis and his wife executed to one A. L. Pixley a mortgage on the lots in controversy to secure the payment of a note for the sum of $810.34 due and payable on October 13, 1899, with interest. This mortgage was duly acknowledged, and was filed for record the day succeeding its execution. The note secured by the mortgage was assigned, so the complaint alleges, by the mortgagee, A. L. Pixley, to one A. J. Robinson, who in turn assigned it, as collateral security, to defendant Simons.

On February 9, 1900, Curtis and wife executed to said Robinson a deed conveying to the latter their equity of redemption in the lots in controversy; and on September 13, 1901, Robinson conveyed the lots to plaintiff, J. T. Neff, for a con-

sideration of $2,000 paid at the time. Robinson informed Neff at the time of the negotiation for the conveyance that he held the Pixley mortgage on the lots for $810.34, and would satisfy the same out of the money paid him for the lots, which he subsequently did and sent the note and mortgage to Neff marked satisfied. He also indorsed satisfaction on the record of the mortgage. The mortgage was at that time held by a bank as collateral security. Possession was taken by Neff pursuant to his deed of conveyance.

On August 7, 1899, Lane and wife commenced suit in the chancery court of Fulton County against Curtis and wife to recover the amount of $244.19 and interest thereon alleged to have been paid by those plaintiffs (Lane and wife) in discharging a certain lien for taxes and other things on the Illinois property conveyed by them to Curtis. They alleged in their complaint that Curtis had agreed, as a part of the consideration of the conveyance from Lane and wife to him of the Arkansas property, to discharge these liens on the Illinois property, and they asserted a vendor's lien on the Arkansas property as a part of such consideration.

Neither the mortgagee, nor the assignee of the mortgage debt, nor the subsequent purchaser Robinson, nor Neff, were made parties to that suit. A decree was duly rendered in that suit at the February term, 1903, in favor of the plaintiffs therein, Lane and his wife, against Curtis for recovery of $326, and a lien was declared on the real estate described in the conveyance from Lane to Curtis, and the commissioner of the court was ordered to make sale thereof to satisfy the decree.

The two lots in controversy were sold by the commissioner at public outcry to defendants, Elder, Ford and Simons, on May 7, 1903, for the sum of $328, and at the next term of the court the sale was confirmed. They subsequently took possession of the property from Neff's tenant, he being absent from the State.

The complaint alleges that the sale by the commissioner was irregular and void on account of an irregularity in the advertisement, and that the defendants conspired together to purchase the property at the reduced price of $328, when it was worth $3,000.

Defendants Elder and Ford filed their joint answer, denying

all the allegations of the complaint; and defendant Simons filed a separate answer, disclaiming any interest in the subject-matter of the litigation and alleging that he had conveyed his interest in the lots to his co-defendants, Elder and Ford.

The plaintiff at a subsequent term presented his petition to be allowed to file a bill of review against the decree of the court in the Lane suit confirming the sale to defendants, and the court refused to allow the bill of review to be filed. The bill of review set forth in attack upon the commissioner's sale the same matter as that alleged in the main action.

C. E. Elmore, P. H. Crenshaw and *Campbell & Stevenson,* for appellant.

1. On the amended complaint plaintiff was entitled to be subrogated to the lien of the Pixley mortgage. Neff was not a party to Lane *v.* Curtis, and not bound by the decree and sale. Kirby's Digest, § 5396, 4438; 17 Ark. 203; 23 *Id.* 336; 25 *Id.* 365; 20 *Id.* 629; 123 Atl. Rep. 291; 39 Ark. 205; 59 *Id.* 15. The doctrine of merger has no application. 37 Ark. 132, 144; 63 *Id.* 625; 1 Jones on Mort. (4 Ed.), § 848, 870, 874. When a person furnishes money with which a mortgage is paid off, and the security becomes valueless, or under an agreement to convey the land, he is entitled to be subrogated to the lien of the mortgage paid off with his funds. 72 Miss. 1050 (30 L. R. A. 829); 75 Wisc. 191; 6 L. R. A. 61; 73 Miss. 787; 32 L. R. A. 631; 68 Ark. 369, 375; 68 *Id.* 449.

2. It was error to deny leave to file the bill of review. 33 Ark. 161; 21 *Id.* 528; 32 *Id.* 753. The publication of notices of judicial sales must set forth "the time and place of sale" in the published notice. Kirby's Digest, § 3275. Where the advertisement of sale describes the land defectively or ambiguously, the sale is void. 60 Ark. 487; 59 *Id.* 460; 73 *Id.* 37, 42.

Sam H. Davidson and *R. B. Maxey,* for appellees.

1. An exhibit is not evidence nor part of the pleadings. The title deeds or next best evidence must be read. 37 Ark. 542.

2. A purchase *pendente lite* and while property is *in custodia legis* is utterly void. 11 Ark. 411. The purchaser takes nothing, even if he pays full value without notice of *lis pendens.* 12 Ark. 421; 16 *Id.* 175; 11 *Id.* 411. He is affected by all the

equities attaching to the subject-matter. 30 Ark. 249; 31 *Id.* 491. The decree binds privies, and *pendente lite* purchasers are privies. 34 Ark. 291; 57 *Id.* 97; 57 *Id.* 227; 50 *Id.* 551.

There was no evidence of fraud on the part of appellees in the sale or confirmation, and the court could presume none. 53 Ark. 113. The decree became final at the end of the term. 33 Ark. 454. The confirmation was not affected by a right acquired by purchaser *pendente lite.* 56 Ark. 194. A subsequent purchaser or incumbrancer can only acquire title by paying off note for purchase money. 16 Ark. 145. Neff purchased while vendor was endeavoring to enforce his lien by suit. A vendor has a lien against vendee and heirs, and privies, and also against all subsequent purchasers with notice, etc. 18 Ark. 142; 21 *Id.* 202. A confirmation of a sale raises a presumption of regularity in same which will prevail where evidence is conflicting. 75 Ark. 9. See 29 Ark. 307. The Robinson deed is not in the case at all. It was wrongfully recorded. The word "consideration" is omitted from the acknowledgment. 46 Ark. 58; 33 Id. 600.

2. The so-called bill of review is not entitled to consideration for any purpose. 80 Ark. 583; 26 Id. 600; 22 Wall. U. S. 532; 57 Miss. 465; 17 Ark. 45; 2 Tenn. Chy. 699; Fletcher, Eq. Pl. & Pr. § 921; 32 Ark. 753. Leave must be obtained. Fletcher, Eq. Pl. & Pr. § 937; 36 Ark. 532. None but parties and privies can file bill of review, and all parties to the original decree are, in general, necessary parties. 100 U. S. 605; 95 *Id.* 391; 1 Lea (Tenn.), 232; 88 Ill. 207. The bill will not lie for an assignee. 95 U. S. 391; 83 Va. 242; 89 *Id.* 524.

3. Plaintiff barred by laches and limitation. Kirby's Digest, § 5399, 5069.

McCULLOCH, J., (after stating the facts). 1. The chancellor was right in refusing to allow the bill of review to be filed or to decree a cancellation of the sale to appellees, Elder, Ford and Simons. No grounds were shown for such relief. The only irregularity shown in the sale was a mistake in the commissioner's advertisement of sale wherein the date was given as June 1, 1093, instead of 1903. This was a trivial irregularity in the notice, and no one could have been misled by the mistake.

It was cured by the confirmation of the court. No proof was adduced tending to show collusion between the purchasers at the sale to stifle competition.

The suit was commenced by Lane and wife before the alienation of the property by Curtis (except his mortgage to Pixley, which will be hereafter discussed in this opinion), and subsequent purchasers from him were charged with the notice of the pendency of the suit.

2. Is the appellant Neff entitled to subrogation to the lien of the Curtis mortgage? This mortgage was executed prior to the commencement of the Lane suit against Curtis, and neither the mortgagee, Pixley, nor the assignee thereof, was chargeable with notice of the pendency of that suit. The mortgage being good as to Pixley, his assignees are protected, even though the suit was pending at the time of the several transfers of the debt and mortgage.

The alleged vendor's lien of Lane and wife which was not expressed in the face of their deed, if it can be held that they had lien at all, even against the grantor Curtis, was not available against subsequent purchasers without actual notice. *Scott* v. *Orbison*, 21 Ark. 202; *Holman* v. *Patterson*, 29 Ark. 357.

The evidence shows that appellant purchased this property from Robinson, and paid the price of $2,000 for it without any notice of the pendency of the Lane suit, or of the assertion by the Lanes of any lien on the land. It was agreed between appellant and Robinson that the Curtis mortgage should be satisfied out of the purchase price paid by appellant. This was done, and the mortgage and note were delivered to appellant. The mortgage was then a valid and subsisting lien in the bank, which held it as collateral security by assignment either from Simons or Robinson, and appellant's money was used in discharging the lien. He is, we think, entitled to be subrogated to the mortgage lien. 2 Story, Eq. Jur. § 1237; Sheldon on Subrogation, § 30; *Chaffe* v. *Oliver*, 39 Ark. 531; *Goldsmith* v. *Stewart*, 45 Ark. 149; *Neel* v. *Carson*, 47 Ark. 421; *Meher* v. *Cole*, 50 Ark. 361; *Wyman* v. *Johnson*, 68 Ark. 369; *Union Mort. B. & T. Co.* v. *Peters*, 72 Miss. 1058, 30 L. R. A. 829.

One of the earliest applications of the principle in this country was made by Judge Story in the case of *Bright* v. *Boyd*,

1 Story, 478, and the language of that learned judge is peculiarly applicable here. "There is," he said, "still another broad principle of the Roman law which is applicable to the present case. It is that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him."

Applications of this doctrine bearing close analogy to the facts of the present case are found in *Chaffe* v. *Oliver,* 39 Ark. 531, and *Wyman* v. *Johnson,* 68 Ark. 369, where lenders of money on defective mortgages for the purpose of discharging prior valid mortgages upon the property, for which purpose the money was used, were held to be entitled to subrogation to the right of the prior mortgagees. In one of those cases the last mortgage was defective by reason of an informal certificate to the wife's acknowledgment, and in the other case the mortgagors had no title to the premises nor authority to execute the mortgage.

The doctrine of merger of the mortgage lien with the legal title when they are united in the same person has no application in a case of this kind when the principles of equity demand that they be treated as separate. *Cohn* v. *Hoffman,* 45 Ark. 376; *Bemis* v. *First National Bank,* 63 Ark. 625; *Smith* v. *Roberts,* 91 N. Y. 475.

"It is a general rule that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee, so as to prevent his setting up his mortgage to defeat an intermediate title, unless such appears to have been the intention of the parties and justice requires it; and such intention will not be presumed where the mortgagee's interest requires that the mortgage should remain in force." 1 Jones on Mort. § 870.

Learned counsel for the appellees contend that there is no evidence in the record of the existence of the mortgage or the terms thereof, but in this they are mistaken. A copy of the mortgage was exhibited with the complaint and referred to therein. The decree does not recite that it was read in evidence, but as it was exhibited with the complaint the chancellor is presumed to have considered it with the complaint. While writ-

ten instruments exhibited with the complaint in cases at law are not presumed to have been introduced in evidence, a different rule prevails in equity cases where the whole record is before the chancellor. The plaintiff testified concerning the existence of the mortgage, and in his deposition referred to the copy exhibited with his complaint. Witness Robinson, whose deposition was introduced by the defendants, also testified concerning the mortgage, and stated that he indorsed satisfaction thereon and delivered it to the plaintiff. This method of proving the existence of the mortgage was not proper, but no objection was raised to it at the time, and it is too late now to question the competency of the evidence.

Counsel also contend that plaintiff is not entitled to subrogation because satisfaction of the mortgage was indorsed on the record before the purchase by the defendant at the commissioner's sale. The defendants had notice of the facts concerning the purchase by plaintiff, and cannot claim innocence of knowledge concerning the plaintiff's rights. The plaintiff testified that at the time of his purchase he talked to Simons, one of the defendants, concerning it, and that the latter knew of the existence of the morgage, and claimed to be the holder of it. He must have known that plaintiff's money, paid to Robinson, was used in discharging the mortgage debt. The knowledge of Simon is chargeable to his co-purchasers. It is unnecessary to say whether, ordinarily, the notice to one tenant in common is notice to all; but when persons are jointly pursuing the common purpose of acquiring title to land by purchase as tenants in common, notice to one concerning the condition of the title is notice to all. *Steele* v. *Robertson,* 75 Ark. 228.

3. The only question remaining to be determined is whether or not appellant's rights are barred by the statute of limitation, which is pleaded by the defendants. The note secured by the mortgage fell due on October 13, 1899, and the amended complaint praying for subrogation under the mortgage was filed on April 5, 1905, more than five years thereafter.

The statute provides that "in suits to foreclose or enforce mortgages or deeds of trust it shall be sufficient defense that

they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given." Kirby's Digest, § 5399.

This statute does not apply to a suit of this kind brought to enforce the right of subrogation under the mortgage, when the mortgage debt was not barred at the time the payment which is the basis of the claim of subrogation was made. Under such circumstances the person entitled to subrogation may bring his action within a reasonable time after notice of the defect in his title. The situation of one entitled, under those circumstances, to subrogation may be likened to that of one who has suffered a wrong by fraud, the enforcement of whose rights would, but for the fraud, have been barred by limitation. Under such circumstances the enforcement of the right must be brought within a reasonable time after the discovery of the fraud.

The decree is reversed, and the cause remanded with directions to enter a decree in favor of the plaintiff declaring a lien on the lots in controversy for the amount paid in discharge of the mortgage executed by Curtis and wife to Pixley.

VALUE v. STATE.

Opinion delivered November 4, 1907.

BRIBERY—INDICTMENT—SUFFICIENCY OF EVIDENCE.—Under an indictment of a school director for receiving "fifteen dollars, lawful money of the United States," to influence him to employ a certain person as school teacher, a conviction will not be sustained upon proof that he received five dollars for the purpose named, without showing what kind of money was received or that it was lawful "money of the United States."

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

Nixon & Shaw, for appellant.

Having charged the corrupt use of "silver and paper money," it devolved upon the State to prove the corrupt use

of one or the other. 68 Ark. 583; 60 Ark. 141; 58 Ark. 242; 71 Ark. 415; 62 Ark. 538.

William F. Kirby, Attorney General, and *Dan'l Taylor,* Assistant, for appellee.

There is a fatal variance between the allegations and the proof in this, that the indictment alleges the acceptance and receipt by appellant of "fifteen dollars, lawful money of the United States, paper money and silver money," etc., whereas the proof shows that he received "five dollars," without showing that it was either paper or silver money or money of the United States. 71 Ark. 415; 62 Ark. 538; 60 Ark. 141; 37 Ark. 443; *Id.* 445.

McCULLOCH, J. The defendant, Robert Value, appeals from a judgment of conviction for the crime of bribery under an indictment charging him, while being a school director of a certain district in Jefferson County, with having received a bribe of "fifteen dollars, lawful money of the United States," quoting from the indictment, "paper money and silver money of the value of fifteen dollars, to influence him, the said Robert Value, as such school director, to give his consent, support, influence and vote to the employment of said Geneva Lucas as a teacher," etc. The evidence adduced at the trial tended to show that the defendant received a bribe of five dollars, which was paid to him in money for the purpose named in the indictment; but there was no proof of the kind of money. The witnesses merely state that five dollars were paid to the defendant. This is relied on by counsel as a fatal defect in the proof, and is urged as grounds for reversal of the judgment. The Attorney General confesses error on this ground.

It has been held by this court that it is unnecessary in an indictment for larceny of money to describe it as "money of the United States," but that, having alleged it was money of that kind, it must be proved as alleged. *Marshall* v. *State,* 71 Ark. 415. The same degree of certainty in the proof has been held to be necessary under indictments for embezzlement, for obtaining property under false pretenses and for burglary. *Starchman* v. *State,* 62 Ark. 538; *Wilburn* v. *State,* 60 Ark. 141; *Treadway* v. *State,* 37 Ark. 443.

In *Blackwell* v. *State,* 36 Ark. 178, involving an indictment

for unlawful sale of liquor within three miles of an incorporated institution of learning, it was held unnecessary to allege the fact of the incorporation of the institution; but, having so alleged, the State must prove it.

It is not essential, in an indictment for offering or receiving a bribe, to set forth a particular description of the money or other thing of value offered or received. *Leeper* v. *State,* 29 Tex. App. 154; *Watson* v. *State,* 39 Ohio St. 123; McClain on Crim. Law, § § 901-2. All that is necessary in that respect is that it should be described in general terms; but it is essential to the validity of the indictment that it should name the inducement for the official misconduct, for that is a part of the offense, and must be set forth in the indictment. 5 Cyc. p. 1043; *People* v. *Ward,* 110 Cal, 369; *State* v. *Howard,* 66 Minn. 309; *State* v. *Stephenson,* 83 Ind. 246; *United States* v. *Kessel,* 62 Fed. 57.

"It is necessary," says the Supreme Court of Minnesota in the case just cited, "to allege directly, and not by way of recital or argument, the official character or capacity of the person to whom the offer was made, * * * the name of the thing offered (if known), the fact that it was of value and that it was offered with intent to influence the official action of such person." *State* v. *Howard, supra.*

Now, it follows from what we have said, and from the authorities cited, that it was unnecessary to allege in the indictment that the money paid to the defendant was "lawful money of the United States, paper money and silver money;" but, having been so alleged, it must be proved.

Mr. Clark in his work on Criminal Procedure, p. 182, lays down the following rule, which seems to be fully sustained by the authorities, with reference to what may or may not be rejected as surplusage: "Care must always be taken to distinguish between averments which are either wholly foreign and immaterial, or which, though not wholly foreign, can be stricken out without destroying the accusation, and averments which, though they might have been omitted, enter into the description of the offense. If the whole averment may be rejected without injury to the pleading, it may be rejected; but it is otherwise with averments of essential circumstances stated with unnecessary particularity. No allegation, though it may have been un-

necessary, can be rejected as surplusage if it is descriptive of the identity of that which is legally essential to the charge. The application of the rule may often seem to defeat the ends of justice, but on the whole, the rule is a salutary one, and is too firmly established to be shaken or disregarded in particular cases."

In the crime of offering or receiving a bribe, the identity of the thing offered or received is the inducement for the unlawful act, and is a part of the crime itself. The allegation concerning the identity of the thing offered or received cannot be wholly rejected, but it falls within the rule laid down above, and must be sustained by proof.

We are therefore of the opinion that the proof fails to sustain the allegation of the indictment, and for this reason the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

HILL, C. J., (dissenting). The indictment in this case charges that the defendant was bribed with "paper money and silver money of the value of $15.00." The State proves that he was bribed with $5.00, without proving the kind of money. The Attorney General confesses error, and the majority of the court sustain that confession, and I dissent.

It was unnecessary to allege the kind or quantity of money or thing of value used as a bribe. It was merely necessary to allege that some money or thing of value was used as a bribe. *Leeper* v. *State*, 29 Tex. Cr. App. 154; *Watson* v. *State*, 29 Ohio St. 123. This is conceded in the majority opinion.

The question then narrows to whether the unnecessary allegation as to the kind of money is required to be proved. The rule as to what is surplusage and what is material is stated by Mr. Clark in the quotation followed in the majority opinion, and is stated more clearly in the Encyclopaedia of Pleading & Practice as follows:

"Where the offense is charged with unnecessary minuteness or particularity, all the facts alleged which are descriptive of the offense must be proved with the minuteness and particularity alleged, because such minute details and particulars have been made essential, although, if the averments be of mere facts which might have been omitted without detriment to the indict-

ment, they may be considered as surplusage, and a variance therefrom will not be fatal." 22 Enc. Plead. & Prac. 557-8.

This allegation of the kind of money used as a bribe might have been omitted without detriment to the indictment, and therefore its presence in the indictment is a mere surplusage, and a variance from such surplusage in the indictment and the proof is not fatal.

If the rule is properly applied, then the variance here is not material, and such has been the holding in every bribery case in the United States where a variance is claimed upon an unnecessary allegation, as here; in all cases the variances in proof from unnecessary matter in indictment have been held immaterial. *State* v. *Meysenburg,* 71 S. W. 229; *Diggs* v. *State,* 49 Ala. 311; *Commonwealth* v. *Donovan,* 170 Mass. 228.

And on a similar question a variance was held immaterial in a strong opinion in *Johnson* v. *People,* 84 Pac. 819, where the authorities on the subject are fully reviewed.

This case will be the first bribery case following a rule which should be "more honored in the breach than in observance." Even if the rule invoked is applied, then the variance, while erroneous, is not prejudicial error, according to modern judicial thought upon the subject. The modern rule on the subject of variance is thus stated: "A variance is not now regarded as material unless it is such as might mislead the defense, or might expose the accused to the danger of being put twice in jeopardy for the same offense." 3 Rice on Crim. Ev. § 121.

Again it is said: "The strict technical rules formerly governing this subject have been greatly relaxed, if not altogether abrogated, by statutory enactment or by the liberal spirit of the modern courts of criminal jurisdiction. In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense? If this be not so, then the variance is material, and the State, having failed to prove the crime in substance as it is alleged, the acquittal of the accused should be directed." Underhill on Cr. Ev. 41.

That this is the modern doctrine upon the subject is thoroughly established. 22 Enc. Plead. & Prac. 551; *Harris* v. *People,* 64 N. Y. 148; *Johnson* v. *People,* 84 Pac. 819.

The application of this rule to the case at bar would dispose of this variance as immaterial and trivial. It cannot be seriously contended that a conviction in this case would not sustain a plea of former conviction to a second prosecution for the bribery alleged here. If there could be any doubt on that subject, the Criminal Code has removed it by section 2415 of Kirby's Digest.

Certain Arkansas cases are referred to in the opinion of the majority as sustaining the conclusions reached by them. The first is *Marshall* v. *State,* 71 Ark. 415. This was a larceny case, and there is a material distinction to be made between a description of money stolen, which is the crime itself, and a description of money which is but an incident to the crime. In one case, it is the taking of the money that is the whole crime; and in the other case the taking of the money is but a step in the consummation of the crime.

The next case is *Starchman* v. *State,* 62 Ark. 538. This is a burglary case. The charge was that the defendant broke into a house with intent to steal 2,500 two-cent postage stamps. The court said that the evidence connecting the defendant with the breaking and entering the house was not very convincing, and then proceeded to discuss the weakness of the evidence, and said that it was probably unnecessary to describe the property which the burglar intended to steal with the particularity shown in the indictment; but that, having made allegations descriptive of the property and of the offense, there must be proof tending to support them, and cited *Dudney* v. *State,* 22 Ark. 251, a case arising ten years before the Criminal Code was adopted.

The next case was *Wilburn* v. *State,* 60 Ark. 141, a false pretense case. There was an allegation of a certain kind of money, and also of molasses, flour, meat and corn, obtained by reason of false pretenses; and there was a failure to prove the articles of personal property named were obtained and to identify the money secured with the minuteness named in the indictment. It was properly held that there was a variance, as the defendant may well have been misled in his defense where he was charged

with obtaining all these articles, and the proof tended to sustain some of the articles named and other articles not named, as well as a failure to prove the kind of money obtained.

The next case is that of *Treadaway* v. *State,* 37 Ark. 443. That decision was merely that an indictment for receiving money by false personification should describe the money with the same particularity as an indictment for larceny. That case does not reach to the point at issue here at all.

The last case cited is *Blackwell* v. *State,* 36 Ark. 178. In this case the indictment contained the unnecessary allegation that an academy within three miles of which whisky was sold was incorporated, and the evidence failed to prove incorporation. This decision is directly in the teeth of section 2229 of Kirby's Digest, which is as follows: "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." And also of section 2605, providing that a conviction shall only be reversed for errors of law to the defendant's prejudice appearing upon the record, such errors as are prejudicial being therein enumerated. These sections are part of the Code provisions to which Underhill referred which have caused the change from the ancient technical rules prevailing in criminal procedure, and have enabled the courts to get away from technicalities which have so retarded the proper administration of justice.

I do not think it is necessary to overrule the Marshall, Wilburn and Starchman cases, as they can be distinguished for the reasons above indicated. But if they do call for the decision in this case made by the majority, then they should be overruled, for such a decision is at war with the above quoted sections of the Criminal Code, and with many decisions of this court, as well as the weight of authority elsewhere.

For instance: A technical rule of criminal procedure, of really more merit than this one, was invoked in *Hayden* v. *State,* 55 Ark. 342, and Chief Justice COCKRILL, speaking for the court, said: "To disregard the trial then, and say there was nothing to try because without a plea there was no issue, and without an issue there could be no trial, would be to sacrifice the truth for a system of casuistry which was originally

resorted to by the courts only to avoid the bloody consequences of the enforcement of the criminal code of a prior century. The necessity for such niceties of reasoning has passed away. The statute, moreover, prescribes that a judgment of conviction for a felony shall be reversed only for an error to the defendant's prejudice appearing upon the record. Mansf. Digest, § 2454. See, too, *Cline* v. *State,* 51 Ark. 145. The defendant has made no suggestion of any prejudice resulting from the failure to make a record entry of his plea, none appears upon the record, and we are unable to conceive that any exists. Knowing, doubtless, of the formal defect in the record, he has taken the chance of an acquittal which would have barred further prosecution. The conviction will have the same effect."

In the case of *Lee* v. *State,* 73 Ark. 148, referring to the Hayden case, Mr. Justice RIDDICK said: "This was a well-considered case, and the principle announced is far-reaching; for it shows that the statute applies to all formal objections, such as the absence of a plea or a seal when the objection is made after trial, and that it forbids a reversal for such formal defects where no prejudice resulted. The purpose of the statute was to obviate the necessity of reversing judgments of conviction on account of mere errors of form which do not affect the substantial rights of the defendant."

Cases could be multiplied to this same effect; and it is a pity that one more along the same lines is not added here.

PITTMAN v. STATE.

Opinion delivered October 28, 1907.

1. CRIMINAL LAW—INSTRUCTIONS.—It was prejudicial error, in a prosecution of a minor under 18 years of age for a felony, to instruct the jury that if the defendant is convicted he will be transferred from the Penitentiary to the Reform School. (Page 293.)

2. HOMICIDE—DISCRETION AS TO REDUCTION OF PUNISHMENT.—Where appellant was convicted of manslaughter upon evidence that sustained the conviction, but error was committed by the trial court which

might have aggravated the punishment, the Supreme Court has the discretion either to remand the case for a new trial or to reduce the punishment to the minimum punishment for manslaughter. (Page 294.)

Appeal from Scott Circuit Court; *Daniel Hon,* Judge; reversed.

Youmans & Youmans, for appellant.

1. Instruction 4 given on the court's own motion was erroneous and misleading. It had a tendency to cause the jury to return a verdict for a higher grade of homicide. It induced them to surrender their conviction as to the innocence of defendant and consent to conviction under the belief his punishment would be light.

2. It is not the law. Acts 1905. § 6, p. 518.

William F. Kirby, Attorney General, and *Daniel Taylor,* Assistant, for appellee.

BATTLE, J. Tom Pitman was indicted in the Scott Circuit Court, at its February, 1907, term, for murder in the first degree for the killing of Walter Baucum on the 31st day of January, 1907. The killing occurred at a school house near Waldron, in Scott County. There was a school taught in the school house at the time. Pitman and the deceased were attending the school. Pitman was fourteen years of age, and the deceased was seventeen or eighteen. At noon in the recess of the school they became embroiled in a difficulty, which led to blows, and ended in the killing of the deceased by Pitman stabbing him with a knife. The circumstances of the killing were shown by the evidence adduced in the trial. The court instructed the jury as to what is necessary to constitute murder in the first and second degree and manslaughter and justifiable homicide; and, over the objection of the defendant, instructed them as follows: "Under the law, if you find the defendant guilty of either murder in the second degree or manslaughter, he, being under the age of eighteen years, *will be transferred from the Penitentiary to the Reform School,* but this fact should not influence the jury one way or the other in determining the guilt or innocence of the defendant." The jury found the defendant guilty of manslaughter, and assessed his punishment at three years and three months in the penitentiary. He appealed to this court.

The law fixes the punishment for murder in the second degree and manslaughter at imprisonment in the Penitentiary. The effect of the above instruction might have been to induce the jury to fix the punishment of the defendant nominally at three years and three months' imprisonment in the Penitenitary, but really so many years and months in the Reform School, to fix the punishment upon the belief he would not undergo it, but be committed to the Reform School; and the consequence might have been the increase of his punishment.

The instruction was based on section 6 of the act entitled "An act to establish a reform school for juvenile penitentiary convicts," approved April 25, 1905, a part of which is as follows:

"All convicts in the Penitentiary now, and all persons hereafter sentenced to the Penitentiary under the age of eighteen years, and all present and future Penitentiary convicts under eighteen years of age, shall be committed to a place in said Reform School by said board; provided, said persons under 18 years of age convicted of a felony may be sent to the Penitentiary if in the judgment of the trial judge such course may be expedient."

The instruction does not conform to this statute. Under the statute the disposition that will be made of the defendant, if convicted, is not determined nor intended to be known until after his conviction. He may be committed to the Reform School by the "board of commissioners to manage the Penitentiary" or may be sent by the trial judge to the Penitentiary. Under the law his punishment, if convicted of murder in the second degrees and manslaughter and justifiable homicide; and, over would be if it was known he would suffer it in the Penitentiary.

We do not decide that it would be proper to give the statute or substance of it, in any case, as an instruction to the jury. It is not necessary to do so in this case.

As it is within our discretion to reverse the judgment and remand the case for a new trial on the whole case, or reduce the punishment of appellant to the minimum punishment for manslaughter (*Vance* v. *State,* 70 Ark. 277, 286; *Simpson* v. *State,* 56 Ark. 19; *Darden* v. *State,* 73 Ark. 315), we reverse and remand.

ON REHEARING.

Opinion delivered November 23, 1907.

PER CURIAM. Appellee moves the court to grant a rehearing in this case on the ground that this court erred in reversing the judgment of the circuit court therein on account of error in an instruction. That instruction was held to be erroneous because it told the jury what disposition would be made of the appellant in the event that he was found guilty. We still adhere to that opinion for the reason given in the opinion of the court and the additional reasons given in the dissenting opinion of Justice McCULLOCH in this cause.

The majority of the judges are, however, of the opinion that the court may have given in instructions to the jury so much of section 6 of the act entitled "An act to establish a reform school for juvenile penitentiary convicts," approved April 25, 1905, as is set out in the opinion, without indicating in any manner what disposition would have been made of the appellant in the event he was convicted. In that way the objections to the instructions given would have been avoided.

Appellee, in effect, contends that the punishment should have been reduced by this court to the minimum for manslaughter, instead of remanding the cause for a new trial. The reason given for this contention is that the evidence adduced in the trial in the circuit court shows that appellant is guilty, and that the latter course would save costs. In cases where a man's life or liberty is involved the question of costs should not be considered or control. He should not be sent to the Penitentiary to save costs. It was within our discretion to reverse the judgment of the circuit court and remand the cause, instead of reducing the punishment. *Vance* v. *State,* 70 Ark. 285; *Simpson* v. *State,* 56 Ark. 19; *Darden* v. *State,* 73 Ark. 315, 321.

The fact that the evidence in the first trial was sufficient to sustain the verdict of the jury does not necessarily control our discretion. Other additional evidence may be adduced in a second trial.

Motion overruled.

McCULLOCH, J., (dissenting). I concur in the opinion expressed by this court that the trial court erred in its instruction to the jury covering the effect of a verdict of conviction. I do not think it would have been erroneous for the court in an appropriate way to have informed the jury that the defendant, if convicted, would be transferred from the Penitentiary to the Reform School unless the trial judge should otherwise order. But, if the jury is instructed at all on this point, the law must be correctly given, and it is not proper for the court to tell the jury, in advance of conviction, what the order of the count will be, for that might operate to the defendant's prejudice. If the jury is told in advance that the court will make an order vetoing the transfer of the defendant from the Penitentiary to the Reform School, that might be taken as an instruction that the defendant is considered a fitter subject for the Penitentiary than for the Reform School; and if, on the contrary, the jury is told that it is the intention of the court, in the event of a verdict of conviction, not to vote a transfer to the Reform School, that might induce infliction by the jury of a severer sentence than if it was thought that the defendant would be sentenced to the Penitentiary. Jurors are generally alert to catch the slightest intimation from the court as to its opinion on the weight of the evidence or as to the effect which the evidence has made upon the mind of the trial judge, and he should exercise the utmost care and circumspection not to say anything to the jury which might be understood as an intimation of the court's opinion upon the facts of the case.

I dissent, however, from the conclusion reached by the majority of the judges here that this case should be remanded for a new trial. The only prejudice which could possibly have resulted from the erroneous construction was to have augmented the punishment. I think all prejudice could be removed by reducing the punishment to the lowest term for the degree of homicide of which the defendant was found guilty by the jury; and I think this should be done, and the judgment affirmed.

It is the province and duty of this court only to eliminate error in the proceedings and to stop there. If the extent of the prejudicial effect of the error is apparent, so that it can be separated and eliminated from the judgment, it is the duty

of the court to do so, and not to reverse that part of the judgment which is not affected by the error. This view has often been expressed by this court, and that practice has been adopted and followed in an unbroken line of decisions in criminal cases. *Brown* v. *State,* 34 Ark. 232; *Simpson* v. *State,* 56 Ark. 8; *Routt* v. *State,* 61 Ark. 594; *Vance* v. *State,* 70 Ark. 277; *Darden* v. *State,* 73 Ark. 315; *Petty* v. *State,* 76 Ark. 515; *Howard* v. *State,* 82 Ark. 97; *Washington* v. *State,* 83 Ark. 268.

In *Simpson* v. *State, supra,* Chief Justice COCKRILL, speaking for the court, said: "The only error committed was in the excess of the punishment. In other States where statutes authorize courts to modify the judgment of the circuit courts in criminal cases, the remedy in a case like this is found, not in a new trial, but by reducing the punishment to make it appropriate to murder in the second degree. The court finds no constitutional obstacle to such a practice. * * * It is the established practice under our statute that a new trial shall not be awarded for an error not prejudicial to the prisoner."

In *Routt* v. *State, supra,* Mr. Justice RIDDICK, in delivering the opinion, said: "The fact that the defendant was found guilty of a greater crime than was warranted by the evidence does not compel us to set aside the entire conviction when it is in part clearly correct. It was to avoid such an unreasonable and costly procedure that the statute above referred to was enacted. The defendant in this case was sentenced to imprisonment for ten years, when the maximum punishment for larceny of money is imprisonment for five years. Under the statute and the authorities above cited, we will relieve the defendant from the excessive judgment, of which he has the right to complain, but affirm the conviction to the extent that it seems clearly right."

I see no reason why this salutary rule should not be followed in the present case. The defendant has been convicted of the crime of manslaughter upon evidence which this court finds sufficient, and upon instructions free from error, so far as the question of his guilt or innocence is concerned. In other words, this court finds the proceedings to be entirely free from error save as to the amount of the punishment. Then why should we not eliminate the error by reducing the punishment

to the minimum prescribed by the statute, and affirm the judgment of conviction? Why should we remand the cause for new trial when the defendant has already had a fair trial on the question of his guilt or innocence, and has been convicted? I dissent from any such course.

Mr. Justice WOOD concurs in the dissent.

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CRAIG v. MERIWETHER.

Opinion delivered November 11, 1907.

1. MORTGAGE—SALE UNDER POWER—APPRAISEMENT.—A sale of mortgaged land under a power contained in the mortgage, without first having the land appraised, as required by Kirby's Digest, § § 5416, 5417, is void. (Page 303.)
2. SAME—WAIVER OF APPRAISEMENT.—An unaccepted offer of a mortgagor to redeem from a sale of land under a power in a mortgage, which is invalid by reason of a failure to comply with the statutory requirement as to appraisement of the land, is not a ratification of the sale, and does not prevent the mortagee from taking steps to procure a sale at which a valid title may be obtained. (Page 304.)
3. SAME—RIGHTS OF MORTGAGOR'S ASSIGNEE.—An assignee of a mortgagor's equity of redemption stands in the same attitude as the mortgagor, as regards the validity of a sale by the mortgagee under a power in the mortgage made without having had the land appraised. (Page 305.)
4. SAME—WAIVER OF LIEN.—A mortgagee may sue at law on the mortgage debt without waiving his mortgage lien. (Page 306.)
5. ELECTION OF REMEDIES—WHEN NOT BINDING.—An election between inconsistent remedies is not binding if made in ignorance of material facts; nor is the knowledge of an agent imputed to his principal, since the doctrine of election is based entirely upon the idea of a conscious exercise of choice between inconsistent remedies. (Page 306.)

Appeal from Chicot Chancery Court; *Emon O. Mahoney*, Chancellor; affirmed.

STATEMENT BY THE COURT.

On January 2, 1903, Hunter M. Meriwether and his two brothers, John W. and Gilmer Meriwether, sold and conveyed to J. C. Law and J. B. Bunn certain lands in Chicot County,

Arkansas, for the sum and price of $19,200, which was not paid, but was evidenced by five promissory notes executed by Law and Bunn to said grantors. To secure the payment of these notes, Law and Bunn executed to the Meriwethers a mortgage on said lands. The mortgage provided, among other things, that if default should be made in the payment of the notes at maturity, or of any interest payment when due, or of any taxes due on said land, the entire indebtedness should immediately become due and payable at the option of the mortgagees, in which event the mortgagees, their agent or attorney, were authorized to foreclose the mortgage, by a public sale of the lands to the highest bidder for cash. Default was made in the payment of the first installment of interest, due January 1, 1904, and taxes on the land, whereupon the mortgagees immediately declared the whole debt due and executed a written power of attorney to Johnson Chapman to sell the lands, as provided in the mortgage. At a sale of the lands, on the 23d day of May, 1904, they were bid in by the mortgagees for $5,500, and a deed was a few days later executed to them by said Chapman and filed for record. No appraisement of the lands was made, and, as is shown in the agreed statement of facts, the Meriwethers were non-residents of the State, and were not aware that appraisement had not been made, nor that the law of the State required mortgaged property to be appraised before sale. They were not present at the sale, but the lands were bid in for them by another person according to instructions. The deed of Chapman to the Meriwethers is silent as to appraisement of the land.

The Meriwethers credited the notes with the sum bid at the sale of the land, and thereafter on August 5, 1904, brought an action in the circuit court of Ashley County, where Law and Bunn resided, against them to recover the balance on the notes. Afterwards Law and Bunn sold and conveyed their interest in said lands to R. E. Craig and J. C. Norman by deed reciting a consideration of five thousand dollars, and within a year from date of the foreclosure sale by Chapman they (Craig and Norman) tendered to the Meriwethers the sum of $5,500 with costs of sale and ten per cent. interest from date of sale, for the purpose of redeeming the lands from the sale.

Craig and Norman are both attorneys-at-law, and, at the

time of these transactions, Norman was attorney for Law and Bunn in relation thereto, and Craig was general attorney for Law. The Meriwethers declined the tender, and, after being advised by their attorneys in this State that the foreclosure sale was void on account of the failure to have the land appraised before sale, they dismissed their suit at law against Law and Bunn on the notes, and instituted this suit in the chancery court of Chicot County against Law and Bunn to foreclose the mortgage. Craig and Norman were also made defendants upon an allegation in the complaint that they claimed an interest in the land. Law and Bunn filed an answer disclaiming any further interest in the land, and Craig and Norman answered, setting forth the sale by Chapman under the power in the mortgage, the purchase by the Meriwethers at said sale, the conveyance of Law and Bunn to them, and their offer to redeem from the foreclosure sale. They offered to make their tender good by bringing the money into court. On final hearing of the case, the chancellor held that the failure to appraise the lands before the foreclosure sale by Chapman rendered the sale invalid, and that the plaintiffs were entitled to foreclose in equity. A decree was rendered against Law and Bunn for the full amount of the notes, with interest, and a sale of the lands by commissioner to pay the amount of the decree was ordered in accordance with the usual practice in such cases. All the defendants have appealed.

Murphy, Coleman & Lewis, for appellant, Norman.

(1) The mortgagors, or their vendees, are entitled to redeem by paying the sale price with ten per cent. interest and costs. Kirby's Digest, § 5416; 57 Ark. 198; 65 *Id.* 392; 84 Ala. 289; 64 *Id.* 576; 65 *Id.* 229; 71 *Id.* 484; 31 *Id.* 429; 29 *Id.* 544; 74 Ala. 285; 11 Am. & Eng. Enc. Law (2 Ed.) 243.

(2) The tender was sufficient. 28 Am. & Eng. Enc. Law (2 Ed.) 7, 38; 52 Ark. 146.

(3) The sale by the trustee discharged the mortgage and extinguished the lien, and left nothing to foreclose in equity. 65 Ark. 132; 63 *Id.* 397; 69 Minn. 469; 72 N. W. 707; 26 Minn. 309; 137 Ill. 453; 60 Iowa, 532; 2 Jones on Mortg. (6 Ed.) § 1876; 106 Ala. 417; 17 So. 623; 66 Ark. 573; 65 *Id.* 129; 47 Mich. 385; 17 Col. 492; 31 Am. St. 328; 81 Ill. 436; 10 Minn. 379.

(4) Plaintiffs are estopped, and can not pursue inconsistent remedies, or disaffirm to the prejudice of another that which they have affirmed. 53 Mich. 146; 71 Ark. 209; 78 *Id.* 501.

(5) Nor can they take advantage of want of appraisement. 71 Ark. 209; Willsie on Mortg. Forecl. p. 660; 40 Ark. 275; 108 N. C. 456; 24 Miss. 681; 122 Ga. 178-181; 187 Mo. 613; 91 Ala. 334; 64 Minn. 190; 8 *Id.* 338.

(6) Even though the deed to plaintiffs may have been void, this sale by their agent was valid, and vested in them the equitable title. 71 Ark. 484. But the validity of the deed is immaterial. 57 Ark. 198. A tender prevents the passing of the title.

(7) Where a vendor takes a mortgage upon land sold, he waives the equitable lien. 33 Ark. 63. An express lien is waived by foreclosure. 60 Iowa, 532.

W. S. McCain, for appellant, Craig.

1. The waiver of the right to redeem must be construed to refer only to a foreclosure sale under a decree of a court. The statute allows this right to be waived only when the sale is by judicial foreclosure. Kirby's Digest, § 5420; Acts 1879, p. 94; Acts 1883, p. 157; 49 Penn. St. 387; 28 Ark. 491; 36 *Id.* 55; 2 Freeman on Ex. § 216; 72 Am. Dec. 741 and notes.

2. The right to redeem land is a valuable property right and the subject of alienation. 4 Kent, Com. p. 441; 73 Iowa, 446; 2 Freem. on Ex. § 317; 57 Iowa, 110; 9 Hump. 726; 49 Ark. 551; 82 Iowa, 1.

3. Even though the sale by Chapman was a nullity for want of power and appraisement, plaintiffs can not take advantage of their own wrong. The statute was for the protection of the mortgagors, and they do not complain. 47 Ark. 309; 40 Kan. 224; Freeman on Ex. § 284; 17 La. Ann. 91; 40 Ark. 275; 58 *Id.* 556; 64 *Id.* 213. Nor can they occupy inconsistent positions. 50 Ark. 204; 53 *Id.* 514; 70 *Id.* 457. See also 102 U. S. 415; 36 Ark. 248; 76 *Id.* 577; 77 *Id.* 109; 64 *Id.* 639.

4. Craig and Norman were innocent purchasers. A redemption from a mortgage foreclosure sale relieves the land from the sale and any further lien. 65 Ark. 392; 1 Jones on Mortg. § 1051c; 2 Freeman on Executions, § 317; 54

Ark. 153; 2 Pom. Eq. 776. On the doctrine of estoppel, see *Ib.* § 804-811; 29 Ark. 223; 37 *Id.* 53; 33 *Id.* 468.

5. No written authority necessary where mortgagee buys at his own or agent's sale. 55 Ark. 272.

T. M. Hooker, June P. Wooten and *Baldy Vinson,* for appellees.

1. Where there is no valid appraisement, the sale is absolutely void. 55 Ark. 268; 21 S. W. 469; 70 Ark. 490; *Ib.* 309. An agent can not sell without an instrument of writing of as high dignity as a deed or conveyance. 71 Ark. 486; Kirby's Digest, § § 753, 3666; 55 Ark. 326. Status of mortgagee under void sale unchanged. 55 Ark. 236; 7 L. R. An. 273. If sale void, no estoppel. 69 L. R. An. 143; Bigelow on Estop. 338; 53 Ark. 359; 100 U. S. 564; 125 Mass. 469; 140 *Id.* 63; 25 Minn. 305; S. & W. Trial of Title to Land, § 843; Bisph. on Eq. § § 282, 288-9, 290, etc.; Freeman, Void Judicial Sales, § 48.

2. A deed to third parties from mortgagor, after condition broken and sale under a power, does not carry the right of redemption. Section 5111, Sand. & Hill's Digest; 70 Ala. 58; 54 Ala. 317; 46 Miss. 13; 3 Pick. 492; 2 Met. 29; 17 Ohio, 482. The right of redemption is purely a statutory one; a *privilege* only to the *mortgagor.* 54 Ala. 317; 74 *Id.* 285; 84 *Id.* 298; 132 *Id.* 657; 57 Iowa, 110; 21 Ark. 319; 52 *Id.* 132; 49 *Id.* 551; 43 *Id.* 54; 44 *Id.* 17; 41 *Id.* 436; 112 U. S. 609; 28 L. R. A. 837; 49 Ark. 325; 60 Ala. 243; 70 *Id.* 46; 2 Freeman on Ex. § 317. See also 57 Ark. 201; 66 *Id.* 141; 21 *Id.* 319; 65 *Id.* 129; 43 *Id.* 54; 67 Tex. 542; 123 Mass. 519. The privilege not transferable. 44 Ark. 17; 41 *Id.* 436; 49 *Id.* 325; 112 U. S. 603.

3. The statutory right of redemption may be waived, being only a privilege. 21 Ark. 105; *Ib.* 319; 52 *Id.* 132; 65 *Id.* 129; 47 Minn. 434.

4. There was no legal tender. 53 Minn. 23; 50 N. Y. (5 Sickels), 550. The full amount should have been tendered, without conditions. Hunt on Tender, § § 186, 337; 26 Iowa, 114; 3 Strobh. 25; 83 Mich. 301; 53 Minn. 23; 4 Wis. 329; 33 Me. 67; Jones on Mortgages, § § 896, 958; 65 Ark. 392.

5. He who asks equity must do equity. 116 N. C. 1; 33 L. R. An. 231, 235.

R. E. Craig, pro se, in reply.

Ignorance can not be heard in equity. Plaintiffs estopped, (1) by inconsistent attitude (32 Ark. 345; 36 *Id.* 96; 35 *Id.* 376; 1 Am. St. 628, note; 59 *Id.* 434; Bigelow on Estop. 548); (2) by election (15 Cyc. 262-VII; 84 Am. St. 937; 35 *Id.* 17); (3) by estoppel *in pais* (16 Cyc. 785 B; 9 Am. St. 587; 5 *Id.* 285; 32 *Id.* 784).

McCULLOCH, J., (after stating the facts.) Many questions are ably argued by counsel as to the validity of the tender said to have been made to the Meriwethers to redeem from the foreclosure sale, the right of the mortgagors to assign their statutory right or privilege of redemption after sale, whether it is merely a personal privilege and not assignable, and whether or not the mortgagors were bound by the clause in the mortgage waiving their statutory right of redemption after sale; but the conclusion which we have reached renders it unnecessary for us to discuss these questions. The case is disposed of on other grounds.

The statute governing the foreclosure of mortgages declares that "at all sales of personal and real property under mortgages and deeds of trust in this State, such property shall not sell for less than two-thirds of the appraised value thereof. Provided, if the property shall not sell at first offering for two-thirds of the amount of the appraisement, then, * * * in case of real property, another offering may be made in twelve months thereafter, at which offering the sale shall be to the highest bidder without reference to the appraisement." Kirby's Digest, § 5416.

The statute also prescribes that "when such sales are to be made, the mortgagee, trustee or other person authorized to make the same shall, before the day fixed therefor, apply to some justice of the peace in the county in which the property is held or situated for the appointment of appraisers." Kirby's Digest, § 5417.

These provisions of the statute were not complied with. No attempt was made to comply with them.

It has been said by this court that "the right to foreclose a mortgage at private sale is derived from the power conferred by the mortgage, and, independently of it, does not exist. The

instrument creating such a power determines its extent, as well as the manner and conditions of the exercise; and those relying upon such a sale must show that it was made in obedience to this power." *Stallings* v. *Thomas,* 55 Ark. 326.

To this statement of the law may be added that when foreclosure sales of land under mortgages pursuant to power therein conferred are regulated by statute, a sale not in conformity with the statute is invalid, and will not cut off the equity of redemption. Kerr's Supp. to Wiltsie on Mort. For. p. 1181; *Pierce* v. *Grimley,* 77 Mich. 273.

In *Ellenbogen* v. *Griffey,* 55 Ark. 268, and in *Kelley* v. *Graham,* 70 Ark. 490, this court held that a failure to comply with this statute with reference to foreclosure sales of land under mortgages rendered the sale void. In those cases the mortgagors were seeking to avoid the sale.

The statute imposes conditions upon the exercise of the power of sale contained in a mortgage of deed of trust, viz., that the property shall first be appraised, and that at the sale it shall bring two-thirds of the appraised values. It impliedly commands the mortgagee or trustee not to proceed with the sale until these conditions are performed, and no valid sale can be made until they are performed. The statute regulating probate sales of land contains substantially the same provisions, and this court has held that the omission to comply with the statute can not be taken advantage of after confirmation by the court—that the confirmation cures all such defects, (*Bell* v. *Green,* 38 Ark. 78); but that rule can not be applied to violations of the statute regulating proceedings *in pais* for foreclosure of mortgages. As we have already said, that statute must be complied with; else the sale is invalid.

It is urged by counsel for appellants that the provisions of the statute are solely for the benefit of the mortgagors, that they may waive compliance with its provisions, and that the mortgagors in this instance, by offering to redeem from the sale, did waive the omission and ratify the sale. Counsel cite *Dailey* v. *Abbott,* 40 Ark. 276, as sustaining their contention. That case does not, however, decide any such thing. It involved an effort on the part of the mortgagor to redeem from a sale under mortgage by paying the amount of the debt secured

and to charge the purchaser with rents and waste. The complaint alleged that the sale was made without appraisement, but the question of the validity of the sale was not important, inasmuch as the purchase price exceeded the amount of the debt secured. The controversy arose solely over the amount of rents and profits and damages for waste.

We express no opinion on the question whether or not the mortgagor can in any manner before the sale waive the provisions of the statute and authorize a sale to the highest bidder without appraisement. That is not the case before us, and we need not decide it. What we have to consider is whether or not an unaccepted offer of a mortgagor to redeem from a sale which is invalid by reason of failure to comply with the statutory provision concerning appraisement ratifies and validates the sale and prevents the mortgagee from taking steps to procure a sale at which a valid title may be obtained.

We hold that a sale under the power in the mortgage without complying with the statute is invalid, that no title can be vested thereunder, and that the mortgagee, when the defect in the sale is discovered, can have another sale made, either under the power or by suit in equity. As the sale in violation of this statute did not vest the title in the purchaser, the offer to redeem gave no vitality to the sale. The title either did or did not pass by the sale. If it did not pass by the sale, certainly the offer to redeem, which was an attempt to defeat, not to confirm, the title of the purchaser, did not validate the sale. An unaccepted offer to redeem from the invalid sale did not change the rights of the parties in any respect, and left the mortgagors free to take advantage of the invalidity of the sale. And, until there had been a valid exercise of the power of sale, the power was not exhausted and could be exercised.

But it is said that, even if this be true as to Law and Bunn, appellees are, by their conduct in procuring a defective sale and purchasing the property thereat, estopped as against Craig and Norman to assert the invalidity of the sale and to seek another foreclosure.

Craig and Norman stand in no better attitude in the controversy than Law and Bunn. The mortgage executed by Law and Bunn and the deed made by Chapman to appellees were

both on record, and Craig and Norman had actual as well as constructive knowledge of them. They were therefore chargeable with full notice of all the rights of the mortgagees, and purchased only such interest and rights as Law and Bunn had. They can claim no greater rights than Law and Bunn had.

Nor were appellees estopped, on account of having instituted a suit at law against Law and Bunn, to seek a foreclosure in equity. That was not assuming an inconsistent position. They had the right to sue at law on the notes, without waiving their mortgage lien. *Whitmore* v. *Tatum*, 54 Ark. 457; *Rice* v. *Wilburn*, 31 Ark. 108. It is only where one of two or more inconsistent remedies are pursued that the election to pursue the one is an abandonment of the other.

Besides, when appellees instituted the suit at law, they did so in ignorance of a material fact concerning the matter, viz.: that there had been no appraisement of the land. They were not bound by any election made in ignorance of material facts. *White* v. *Beal & Fletcher Gro. Co.*, 65 Ark. 278; *Dudley E. Jones Co.* v. *Daniel*, 67 Ark. 206.

It is true that Chapman and the person whom he requested to bid the land for appellees were agents of appellees, and knew that there had been no appraisement; and appellees were charged with constructive knowledge of information concerning the subject-matter which came to these agents while in the performance of their respective duties. But the agency of these parties came to an end with the sale and execution of the deed. They had nothing to do with the bringing of the action, and appellees were not, by reason of constructive knowledge of material facts received through these agents, bound by any election made in actual ignorance of those facts. The binding force of an election can not be predicated upon mere imputed knowledge, for the doctrine is based entirely upon the idea of a conscious exercise of choice between two remedies which are inconsistent with each other.

Lord Chelmsford, speaking for the House of Lords in *Spread* v. *Morgan*, 11 H. L. Cas. 588, said:

"In order that a person who is put to his election should be concluded by it, two things are necessary: First, a full knowledge of the nature of the inconsistent rights, and of the

necessity of electing between them. Second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence."

We think there is nothing in the opinion in *Baker* v. *Brown Shoe Co.*, 78 Ark. 501 (relied on by counsel), which bears out the contention that an election of remedies can be based on imputed knowledge of material facts.

We are of the opinion that the decree of the chancellor is correct, and the same is affirmed.

JOHNSON v. JOHNSON.

Opinion delivered November 4, 1907.

1. INFANCY—APPEARANCE BY GUARDIAN WITHOUT PROCESS.—Where, in a suit by a widow to have dower allotted to her, a warning order was issued against certain infant defendants, who were nonresidents, but the constructive service against them proceeded no further, a decree awarding dower will be set aside, although the guardian of such defendants appeared for them. (Page 309.)
2. EQUITY—JURISDICTION TO AWARD DOWER.—The statutory remedies for the allotment of dower did not negative the original jurisdiction of courts of equity in such cases. (Page 309.)
3. STATUTE—UNITY OF SUBJECTS.—Art. 5, § 22, Const. 1868, which provided that "no act shall embrace more than one subject, which shall be embraced in its title," was sufficiently complied with if the various provisions of an act related to the general object indicated by its title. (Page 309.)
4. DOWER—ALLOTMENT—REPEAL OF STATUTE.—Kirby's Digest, § 2707, relating to the allotment of dower, was not repealed by the adoption of the Constitution of 1874, which (Sched. § 1) expressly retained all laws not in conflict with it. (Page 310.)

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

George Sibly, for appellant.

1. As disclosed by the record, there was no service on some of the minor defendants, and no one was authorized to enter their appearance. The court ought not to have proceeded until

all parties were served. 80 Ark. 351; Ky. Civ. Code § 55, notes; H. Myers, Ky. Code, 295.

2. Proceedings looking to the same end having been instituted in the probate court, which had jurisdiction, the chancery court ought not to have assumed jurisdiction until such proceedings had been finally disposed of in the probate court.

3. The act under which the chancery court proceeded, Kirby's Digest, § 2707, is contrary to the Constitution in force at the time of its enactment providing that no act shall embrace more than one subject, which shall be embraced in its title. Art. 5, § 22, Const. 1868. If not void on account of repugnancy to that Constitution, it was repealed by the later Constitution and legislation thereunder. Art. 7. Const. 1874; 80 Ark. 411.

Trimble, Robinson & Trimble, Jr., for appellee.

1. All parties were in court. Warning was issued for all nonresident defendants, upon an order made by the court, and in such case it is not necessary to indorse the warning order upon the complaint. Kirby's Digest, § 6056.

2. Chancery courts have original equitable jurisdiction over the subject of dower. 50 Ark. 39; 8 Ark. 9; 28 Ark. 20. The act of 1873 is not in conflict with the Constitution of 1874. Nothing therein either expressly or impliedly repeals it, but on the contrary art. 7, § 11, seems to contemplate its continuance in force. The act is not objectionable on the ground of plurality of subjects nor on the ground of repugnancy to the Constitution of 1868. 26 Am. & Eng. Enc. of L. 575; *Id.* 523; 69 Ark. 460; 66 Ark. 575; 78 Fed. 410; 72 Fed. 850; 42 Fed. 572; 25 Ark. 298; 29 Ark. 252.

HILL, C. J. Mrs. Fannie Louise Johnson brought suit in Lonoke Chancery Court against her step children, the administrator of her deceased husband's estate and the guardian of such children as were then minors, praying an assignment of dower in the estate of her deceased husband, A. V. Johnson.

The court found that dower could not be allotted out of the real estate without great prejudice to the widow or heirs, and that it would be most to the interest of the parties that the real estate be sold and the proceeds therof divided and dower apportioned to the widow, as provided by section 10 of

the act of 1873, which is section 2707 of Kirby's Digest. The heirs have appealed.

It appears from an examination of the record that two of the minors, to-wit, Dorotha and Anna, were not served with process, actual or constructive. There was a warning order issued for them, but there is nothing in the transcript showing that constructive service proceeded any further than this. There was an appearance by the guardian and by attorney for all the defendants. But such appearances are insufficient without service. *Gannon* v. *Moore,* 83 Ark. 196; *Nunn* v. *Robertson,* 80 Ark. 350, and the authorities cited in these two cases.

The case can not proceed by piecemeal. The decree will have to be reversed in whole in order that these minors who have not been given their day in court may guard their rights at every substantive step taken in the action. *French* v. *Vannatta,* 83 Ark. 306; *Freeman* v. *Russell,* 40 Ark. 56; *Gannon* v. *Moore,* 83 Ark. 196.

Other questions are raised in the case which it is necessary to decide, as they go to the jurisdiction of the chancery court and to the validity of section 2707, which is invoked in this proceeding.

The inherent jurisdiction of the chancery court to allot dower is attacked, and it is argued that dower is a statutory right, and statutory remedies must be pursued. It was decided as early as *Menifee* v. *Menifee,* 8 Ark. 9, that the statutory remedies for the allotment of dower did not negative and exclude courts of equity from their accustomed and appropriate jurisdiction. This was repeated in *Jones* v. *Jones,* 28 Ark. 19. In Ex parte *Hilliard,* 50 Ark. 34, Chief Justice COCKRILL, speaking for the court, said: "The original equity jurisdiction over the subject (of dower) has never been doubted."

The act of April 16, 1873, containing section 2707 of Kirby's Digest, is attacked as unconstitutional in that it offended against section 22 of art. 5 of the Constitution of 1868, which provided: "No act shall embrace more than one subject, which shall be embraced in its title." The title of the act in question was: "An act to divide the State into sixteen judicial circuits, to confer original jurisdiction in all matters pertaining to probate and administration upon circuit courts, and to fix the time for

holding said courts." This clause conferred upon the circuit courts, which were then being invested with probate jurisdiction, the power to decree a sale and division of the proceeds of the sale. This was one of the details of original probate jurisdiction then being conferred upon the circuit court. Referring to a similar clause in the Constitution of 1874, this court said: "Under this clause, the court has uniformly held that the unity of the subject of an act was preserved, and there was no violation of the Constitution, so long as the different parts of the act relate, directly or indirectly, to the same general object fairly indicated by this title; and that the unity of object must be looked for in the ultimate end, and not in the details or steps leading to the end." *State* v. *Sloan,* 66 Ark. 575.

The detail provided for in this section is sufficiently related to the general object indicated in the title to prevent it offending against this clause of the Constitution.

It is also argued that this section of the act of 1873 is repealed by the Constitution of 1874 and the legislation thereunder, and the principle announced in *Lawyer* v. *Carpenter,* 80 Ark. 411, is appealed to as sustaining this contention. The Constitution of 1874 made many changes in the jurisdiction of the courts and rearranged the circuits, but it provided in section one of the schedule that all laws not in conflict or inconsistent with it should continue in force until amended or repealed by the General Assembly. Section 10 of said act is certainly not in conflict or inconsistent with any clause in the Constitution. The general subject-matter of the act of 1873 has been touched by much subsequent legislation, but no act has assumed to cover the entire subject-matter of it as a substitute therefor, but the different acts have only reached to particular details. The principle invoked in *Lawyer* v. *Carpenter* is not applicable.

A question is raised as to whether the guardian in succession is in fact the guardian of the non-resident minors; this is a matter to be looked into on the remand.

Reversed and remanded for further proceedings not inconsistent herewith.

Mr. Justice HART, who presided in the chancery court, did not participate.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. VAUGHAN. 84 311 88 145

Opinion delivered November 4, 1907.

1. EVIDENCE—SHOULD BE CONFINED TO ISSUES.—In an action against a railroad company for failure to transport live stock promptly, it was error to permit plaintiff to prove that defendant negligently induced plaintiff to load his cattle by assuring him that they would be shipped out right away, where no such issue was raised by the pleadings. (Page 315.)

2. INSTRUCTIONS—QUESTIONS IN DISP TE.—Where the undisputed testimony showed that defendant railroad company exercised reasonable diligence in furnishing transportation facilities and in transporting cattle tendered for shipment, it was error to submit to the jury the question whether defendant was negligent in respect thereto. (Page 315.)

Appeal from Little River Circuit Court; *James D. Head,* Special Judge; reversed.

Glass, Estes & King, for appellant.

1. By the terms of the contract, no recovery can be had for the damages complained of, and the court erred in refusing the peremptory instruction for defendant, because:

(1). No negligence was proved. (2). The contract expressly released the company from liability on account of delay in shipping and in receiving after tender. 28 N. E. 208. The court should have determined the issue without a jury. 63 Ark. 331; 28 N. E. 208; 41 Ill. 73; 16 So. Rep. 300; 4 Am. Rep. 467.

2. The contract was for a valuable consideration, a reduced rate, and the court erred in its charge authorizing a recovery. 50 Ark. 397; 112 U. S., *Hart* v. *Ry. Co.;* 67 Ark. 407; 64 *Id.* 115; 29 S. W. 33; 38 S. W. 515.

3. The pleading and proof do not justify the charge of the court. 63 Ark. 331.

G. G. Pope and *Will Steel,* for appellee.

1. There was evidence of negligence, and the case was properly submitted to a jury. A carrier may contract against liability for unavoidable accidents, but not against his own or servant's negligence, nor for exemption not just and reasonable. 47 Ark. 97. When there is any evidence tending to establish

an issue, it is error to take the case from the jury. 63 Ark. 94; 77 *Id.* 556. If there is a conflict of evidence, it is error to direct a verdict. 70 Ark. 74.

2. There was only *one* rate and *one* contract of shipment, and that was the regular form limiting the liability and the regular interstate rate. The shipper had no choice, and the limitation is invalid. 99 S. W. 535; 73 *Id.* 112; 57 *Id.* 112; *Ib.* 127; 46 *Id.* 236.

3. The proof of negligence is ample to justify a verdict. 63 Ark. 331.

McCULLOCH, J. This is an action instituted against appellant to recover damages alleged to have been done to a lot of cattle shipped by the plaintiff over appellant's railroad from Ashdown, Arkansas, to Boswell, Indian Territory.

It is alleged in the complaint that the cattle were delivered to appellant's agent in good order for shipment on January 2, 1906, and that the agents of the company carelessly and negligently allowed the cattle to remain in the cars on the side track at Ashdown for an unreasonable period of time, towit, twelve hours, without food and water, and without being removed from the cars for exercise and rest, by reason of which, it is alleged, twenty of the cattle died and 276 were reduced in weight, making a total damage of $872.

Appellant answered denying all the allegations relating to negligence of its servants, and setting forth a written contract for the transportation of the cattle executed by the plaintiff in consideration of a reduced freight rate, limiting the liability of the company.

The contract set forth in the answer contains the following among other stipulations:

"1. That he (the shipper) will load, unload and when necessary reload said stock, feed and water and attend to the same at his own expense and risk, while the same are in the cars of the company, or of any connecting lines, or while in any stock yards of the company or any connecting line, and, in the event of any unusual delay or detention of said stock while on said trip from any cause whatever, the shipper agrees to accept, as full compensation for all loss or damages sustained in consequence of such delay, the amount, if anything, actually expended by him or

them in the purchase of food and water therefor, and that neither the company nor any connecting line or lines over which said freight may pass shall be responsible for any loss, damage or injury which may happen to said freight, or be sustained by it while being loaded or unloaded."

"4. For the consideration aforesaid, it is expressly agreed that the live stock covered by this contract is not to be transported within any specified time, nor delivered at any particular hour, nor in season for any particular market; that neither the company nor any connecting lines shall be responsible for any delay caused by storm, failure of machinery or cars, or from obstructions of track from any cause."

"7. For the consideration aforesaid, the shipper agrees to release and does hereby release the company from any and all liability for or on account of delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after tender of delivery, and for breach of any alleged contract to furnish cars at any particular time."

It appears from the evidence that the cattle were loaded in cars at Lockesburg, Arkansas, and transported over other roads to Ashdown for shipment over appellant's road to Boswell, Indian Territory. The cars reached Ashdown over the Kansas City Southern Railroad about seven o'clock in the evening. The contract was signed up immediately, and the cars were then switched by the crew of the Kansas City Southern train to the transfer track, where they remained all night and were taken away about 5:30 o'clock the next morning by an engine sent from Hugo, a division station 88 miles from Ashdown, which was about six hours run. There was no engine or train at Ashdown from the time of the arrival of plaintiff's cattle until they were taken away by the engine from Hugo next morning.

The trainmaster at Hugo testified, giving the following undisputed evidence concerning the movement of trains: "The motive power that pulled the stock involved in this suit came from Hugo. It was taken out of Hugo for the purpose of running a special train to take these cars. No other engine or train at any other point nearer than Hugo could have been sent here for the stock. We had no means of moving the stock, except by sending an engine from Hugo to Ashdown to move them. The

train sheet shows that the train that pulled these cattle left Hugo at 11 o'clock, and arrived at Ashdown in the morning. It did not go any further east, but picked up the cars and left Ashdown at 5:35 the same morning. The train was run through to Boswell, and reached there at 1:10 the afternoon of January 3d. There was no train or engine in or out of Ashdown from 6:45 on the afternoon of January 2, 1906, until the train that got to Ashdown from Hugo at 5 in the morning reached here. The train picked up a dead engine at Ft. Towson and brought it to Ashdown. That engine went dead at 6:55 in the afternoon. That is, it leaked badly, and had to be killed. That train was destined to go to Ashdown, but didn't get there. It was picked up the next morning and towed here by the special train. There was nothing available to move these cars, except to run the train from Hugo. I got the notice about nine o'clock. It takes about two hours to get a crew together. They have to have time to get down to the engine and train and make preparation to leave. We had to send a fireman, engineer and conductor. The train would not have come here that night if the call had not been made for the movement of these cattle."

CROSS-EXAMINATION.

"There are about 15 engines in use on the line between Hugo and Ashdown. Two work east of Ashdown, a passenger engine and a freight engine. It is about thirty-two miles to Hope from here. The freight engine that was used at Hope did work between Hope and Ashdown, and if we had used it we would have had to run the engine to Boswell and back in order to take out the local train which it pulled. If the freight engine at Hope had been used, the regular card time of the trains could not have been observed. The local train would have been tied up as a consequence."

The plaintiff was allowed to testify, over defendant's objection, that the agent told him, when he went to get the cattle billed out, that the cattle would be shipped out "right away," and later said he thought they would get out about 10 o'clock that night.

The following instructions were given at plaintiff's request and over the objection of defendant:

"1. You are instructed that if you believe from a preponderance of the evidence that the defendant induced the plaintiff to deliver to defendant his cattle under the representation that an engine would arrive within a very short time to take said cattle out, and that, relying upon such representations, the plaintiff made the contract of carriage, and did deliver his said cattle to the defendant, and defendant allowed said cattle to remain loaded in the cars, without being shipped out, for an unreasonable length of time, and by reason of such unreasonable delay they were injured thereby, then defendant would be liable to plaintiff for any such injuries so occasioned.

"2. It is the duty of common carriers to furnish sufficient facilities for the reasonably prompt transportation of goods or stock tendered for carriage, and they are liable for any negligent delay in furnishing such facilities."

Under the pleadings and proof in the case it was erroneous to give either of these instructions.

The complaint contained no allegations of negligence on the part of appellant's servants in inducing the plaintiff to load his cattle in expectation of a train at an early hour to take them away or at any particular time. No such issue was brought into the case by the pleadings, and it was error to permit proof to be introduced upon it, over the objection of defendant, or to submit it to the jury. Nor was there any proof which warranted the submission of the question of negligent failure on the part of appellant to furnish facilities for transportation of the cattle. The undisputed testimony shows affirmatively that appellant's servants exercised reasonable diligence in furnishing facilities and in transporting the cattle to the destination after delivery to it. The law does not require railroads to keep engines and cars at stations at all times to move freight offered for shipment. It would be unreasonable to require that. All that the law requires is that reasonable care and diligence be exercised in furnishing facilities, and in transporting freight. 2 Hutchinson on Carriers, § 652 *et seq.;* Moore on Carriers, p. 104; *Chicago, R. I. & T. Ry. Co.* v. *Kapp,* Tex. Civ. App., 83 S. W. 233.

Reversed and remanded for a new trial.

TOWNSEND v. PENROSE.

84 316
89 116

Opinion delivered October 21, 1907.

1. EQUITY—ORAL EVIDENCE—RIGHT TO EXCLUDE.—Where the chancery court, in the exercise of its discretion, in the plaintiff's absence, went into the trial of a cause in which the defendant asked affirmative relief, and heard defendant's oral evidence, and granted the relief asked by him, and thereafter on the same day plaintiff appeared and asked that the decree be set aside and a rehearing granted, they were not entitled to demand that the defendant's oral evidence, taken in open court and filed as part of the record, be excluded because they were absent when this was taken. (Page 318.)
2. ADVERSE POSSESSION—CERTIFICATE OF PURCHASE AS COLOR OF TITLE.—A certificate of purchase at tax sale is not color of title within Kirby's Digest, § 5057, providing that "unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto.". (Page 319.)
3. TAX SALE—FAILURE TO KEEP RECORD.—A sale of land for nonpayment of taxes is void where the county clerk failed to keep a record of the tax sales as required by Kirby's Digest, § 7092. (Page 320.)
4. SAME—FAILURE TO RECORD DELINQUENT LIST.—Failure of the county clerk to record the list of delinquent lands, as required by Kirby's Digest, § 7086, before the day of sale invalidates all sales made by the collector on such day. (Page 320.)
5. APPEAL—OBJECTION NOT RAISED BELOW.—The objection cannot be made upon appeal for the first time that the complaint was indefinite; it should have been raised by a motion in the trial court to make the complaint more specific. (Page 321.)

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

Oldfield & Cole, for appellants.

1. Statutes of limitation must be specially pleaded, and the case brought within them by proof. 19 Ark. 16; Wood on Lim. § 7. Defendant's case as to the 80-acre tract rests solely upon his own testimony; and since that testimony was taken at the first submission in the absence of appellant's counsel, it was improperly admitted at the second hearing, and the plea of limitation must fail.

2. As to the other lands, the proof fails to establish seven years payments of taxes under color of title. The deeds in proof constitute the only color of title, and they were all executed within seven years.

J. F. Summers, for appellee.

1. It was within the discretion of the chancellor to admit the testimony of appellee taken at the first hearing. Since appellants, if prejudiced or surprised thereby, could have moved for a continuance, they will not now be heard to complain.

2. The deeds and certificates of purchase constitute color of title for the requisite time. 24 Ark. 472; 30 Ark. 733; 71 Ark. 386. The certified copy of the record of tax receipts show that taxes were paid for seven years within the meaning of the law. 74 Ark. 302.

3. The question as to whether a proper list of delinquent lands sold to individuals was made by the clerk is not raised by the pleadings, and testimony tending to prove that he failed to make such record was inadmissible. 24 Ark. 371; 41 Ark. 393; 46 Ark. 103; *Id.* 133; 73 Ark. 221.

McCULLOCH, J. This is a suit in equity instituted by appellants against appellee to quiet title to several tracts of land in Woodruff County, aggregating 400 acres. They deraign title from the Government, alleging in their complaint that the lands are unimproved and uninclosed, and seek to cancel appellee's adverse claim as a cloud upon their title. Appellee asserts title to the lands under several tax sales in June, 1896, for the taxes of the previous year. He exhibits with his answer five tax deeds executed by the county clerk pursuant to the aforesaid sales, one dated June 18, 1898, conveying the north half of the southwest quarter of section 36, township 7 north, range 1 west; and the other four dated August 25, 1899, and January 30, 1900, conveying the other four tracts, aggregating three hundred and twenty acres.

This action was commenced on June 6, 1905. Appellee also pleads the two-years statute under the tax deed dated June 18, 1898, as to the tract embraced in that deed; and as to the other tracts pleads the payment of taxes for seven years in succession under color of title. His answer contains a prayer for

the quieting of his title. Appellants then filed a reply stating that "said lands were not sold for the taxes for said year 1895, nor for the taxes of any other year, and that the clerk of the county court of said county had no authority in law to issue any deed therefor, and that any deeds which he may have executed are wholly null and void."

The case was heard by the court on the morning of December 4, 1906, in the absence of the plaintiffs and their solicitors, and defendant was permitted to introduce the oral testimony of the defendant, William Penrose, which was reduced to writing in open court and filed as a part of the record. A decree was then entered in favor of the defendant dismissing the complaint for want of equity and quieting defendant's title to the lands in controversy. During the afternoon of the same day plaintiffs' solicitors appeared, and the court on their motion set aside the decree, and the case was re-submitted, and a decree was again entered in favor of the defendant to the same effect as the former one.

The defendant was permitted, over the objection of plaintiffs, to read in evidence the testimony of defendant taken during the forenoon, and the plaintiffs excepted to this ruling.

Inasmuch as the testimony of witness Penrose was the only evidence introduced tending to establish his possession of the land described in the first-mentioned deed, it is important to inquire whether or not the chancellor erred in permitting it to be read. Counsel for appellants urged this as ground for reversal of that part of the decree affecting the tract in question. It should be noted that appellants did not request the court to give them an opportunity to cross-examine the witness, but contented themselves with an exception to the introduction of the evidence which had already been taken in open court, reduced to writing, and filed as a part of the record. This evidence had then become, by order of the court, a part of the record in the case. The effect of the last order of the court was to set aside the former decree and submission of the case and to allow the plaintiffs to be heard. The trial had commenced in the forenoon, and the proceeding in the afternoon was a continuation of that which had now already been commenced. There is nothing in the record to show that the chancellor abused his dis-

cretion in causing the trial to proceed in the absence of the plaintiffs. If they failed to appear when the case was regularly called, he could have dismissed the complaint for want of prosecution, but the defendant prayed for affirmative relief, and was entitled to a hearing on his plea. Whether or not it would have been error to refuse the plaintiffs an opportunity to cross-examine the witness, we do not feel called upon, in the present state of the record, to decide.

Statutory provisions concerning the taking of depositions and exceptions thereto have no application to the taking of oral testimony at the trial of causes in chancery. When testimony is thus taken at the trial of causes in chancery in the absence of one of the parties, the regularity of the proceedings in that respect is dependent solely upon the question whether or not the court is rightfully proceeding with the trial of the cause. For, if the court can rightfully permit the trial to proceed, it may permit the introduction of oral testimony. Now, as we have already said, there is nothing in the record to show that the court committed any error in allowing the trial to proceed in the absence of the plaintiffs, and its action in setting aside the decree so as to allow the plaintiffs to present their side was a matter of grace which did not give them the right to demand that oral testimony regularly taken in open court and filed as a part of the record be excluded because they were absent when it was taken.

The testimony establishes the fact that the defendant has had actual possession of the said north half of the southwest quarter of section 36 under tax deed for a period of more than two years before the commencement of the action, and the decree in his favor as to that tract is affirmed.

The other tracts stand in a different attitude. These tracts were unimproved and uninclosed, and the defendant paid taxes thereon for seven years in succession, part of that time under certificates of purchase at tax sale and the remainder of the period under the tax deed. The payments made under the certificates of purchase must be taken into account to make the seven years requisite payments, and the question arises whether or not such certificates of purchase amount to color of title, within the meaning of the statute which provides that "unimproved

and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto." Kirby's Digest, § 5057.

This court, in *White* v. *Stokes,* 67 Ark. 184, and in *Beasley* v. *Equitable Securities Co.,* 72 Ark. 601, defined the words "color of title" as "that which in appearance is title, but which in reality is no title; that is, that which in appearance purports to vest title, but in reality is no title." And the court in these last-mentioned cases held that, those words having received judicial interpretation, they were presumed to have been used by the Legislature in that sense in a statute, when there is nothing to indicate a contrary intent. Citing Sutherland on Statutory Construction, § 255; Black on Interpretation of Laws, pp. 130, 131; Endlich on Interpretation of Statutes, § 367.

A certificate of purchase at tax sale does not fall within the definition just stated. It is not the appearance of title, nor does it "in appearance purport to vest title." The deed executed pursuant to the statute is the sole evidence of title under a tax sale. Kirby's Digest, § 7104; *Stephens* v. *Holmes,* 26 Ark. 48.

The Supreme Court of Illinois holds, under a somewhat similar statute, that a certificate of purchase at tax sale does not constitute color of title. *Harrell* v. *Enterprise Savings Bank,* 183 Ill. 538. See also *McKeighan* v. *Hopkins,* 14 Neb. 361.

There is language in the opinion in *Worthen* v. *Fletcher,* 71 Ark. 386, to the contrary, but it is *dictum,* as the reversal of that case was based upon the failure of the proof to establish actual possession of the particular tract. We hold that a certificate of purchase at tax sale does not constitute color of title within the meaning of the statute, and the language used in *Worthen* v. *Fletcher, supra,* expressing a contrary view is now disapproved.

The tax sale under which appellee claims title is void for two reasons. The clerk failed to keep a record of the tax sales in compliance with the statute. Kirby's Digest, § 7092; *Quertermous* v. *Walls,* 70 Ark. 328. The clerk also failed to make and certify a record, before the day of sale, of the list of delinquent lands and notice of sale as required by statute. Kirby's Digest, § 7086; *Logan* v. *Eastern Ark. Land Co.,* 68 Ark. 248; *Hunt* v. *Gardner,* 74 Ark. 583. Either of these defects in the proceedings is sufficient to avoid the sale.

Counsel for appellee contends that neither of these defects was properly raised in the pleadings. The only record kept by the clerk was introduced in evidence, and it shows that it was not certified in accordance with the requirements of the statute. The pleadings were sufficient to raise the question. Appellants in their pleadings attacked the validity of the tax sales in general terms, but no effort was made by appellee to have them make the attack more specific, and it is too late now to question the sufficiency of the pleadings. The decree, as to all the lands in controversy except said north half of southwest quarter of section 36 is reversed, and the cause is remanded with directions to enter a decree in favor of appellants as to these tracts, subject, however, to a lien in appellee's favor for all taxes ascertained to have been paid on the lands by him.

ON RE-HEARING.

Opinion delivered November 23, 1907.

McCULLOCH, J. Our attention is directed to proof in the record that appellee was in actual occupancy, under his tax deed, of some of the lands in controversy other than the north half of southwest quarter of section 36, for more than two years before the commencement of this suit. We find on examination of the transcript that this is true as to the southeast quarter of northwest quarter, and the southwest quarter of the southwest quarter of section thirty-six. These two tracts were embraced in separate tax deeds, and the evidence is undisputed that appellee enclosed them, with others, as a pasture two or three years before the commencement of this suit, and that his possession was continuous up to the date of the decree. The testimony as to the boundaries of the pasture is too vague and uncertain to warrant a finding that any part of the other tracts now in controversy was enclosed therein. It is doubtful whether appellee's reference, in his original brief, to this proof was sufficient to bring it to our notice. We did not, in fact, notice or consider it before, but accepted as true the statement in appellant's abstract that these lands were unimproved and unoccupied.

In the interest of complete justice, however, we have concluded that appellee sufficiently complied with the rules for us to correct the error which we fell into concerning the two tracts of land described above. We are of the opinion that the appellee is entitled to a rehearing, and that the decree of the chancellor should be affirmed as to the southeast quarter of the northwest and the southwest quarter southwest quarter of 36, as well as the north half of the southwest quarter of said section 36; but that as to the other tracts in controversy (the east half of southwest quarter, section 35 and the southeast quarter of section 35) our former decision was correct, and that as to them the reversal with direction to enter a decree in favor of appellant should stand. It is so ordered.

JENTZSCH v. JENTZSCH.

Opinion delivered November 11, 1907.

HUSBAND AND WIFE—ADVANCEMENT.—Where a lot of land was paid for jointly by husband and wife, and the husband caused the deed to be made to the wife, it will be presumed that he intended to make a gift to her, unless the circumstances showed otherwise.

Appeal from Saline Chancery Court; *Alphonso Curl,* Chancellor; reversed.

W. L. Cooper and *Mehaffy, Williams & Armistead,* for appellant.

The legal title being in appellant, and the evidence conflicting as to whether or not she or her husband paid for the two lots, with the preponderance in her favor, it was error to divide the property between them. The case is controlled by 76 Ark. 389.

W. R. Donham, for appellee.

The wife may hold as trustee for the husband, and the presumption of a gift or advancement to the wife may be rebutted by proof. The intent of the parties controls. 40 Ark. 62; 54 Ark. 499; 45 Ark. 484; 71 Ark. 373.

HILL, C. J. This is an appeal from so much of a divorce decree as divided the title to lots 2 and 3 of Moore's Addition to the town of Benton between husband and wife.

They acquired three lots during coverture:

Lot 9, block 56, of Allen's Addition, the deed being made in the name of husband and wife jointly. Both sides concede the correctness of that deed.

And lots 2 and 3, by separate deeds, were purchased and, as found by the chancellor, were paid for by the joint earnings of both parties.

The evidence undisputably establishes the fact that the husband caused the deeds to said lots 2 and 3, block 2, Moore's Addition, to be made from the vendor, Moore, to Mrs. Jentzsch.

Had the property been paid for by the earnings of the husband alone, and he had caused the deed to be made in the name of the wife, there would have been no trust created, but it would have been a gift, unless the circumstances showed otherwise; and there is nothing to show otherwise here. This has long been settled by many decisions in this State, the last of which is *O'Hair* v. *O'Hair*, 76 Ark. 389.

Judgment reversed, and cause remanded with directions to enter decree in conformity herewith.

WESTERN UNION TELEGRAPH COMPANY *v.* WOODARD.

84 323
185 268

Opinion delivered November 11, 1907.

1. APPEAL—HARMLESS ERROR.—The admission of incompetent evidence which tended to prove admitted facts was not prejudicial. (Page 325.)
2. TELEGRAPH COMPANIES—RIGHT OF ADDRESSEE TO RECOVER.—The addressee of a telegram is entitled to recover damages resulting from a failure to deliver such telegram. (Page 325.)
3. SAME—RECOVERY OF DAMAGES FOR MENTAL ANGUISH.—Where a telegram was sent to a person in this State from a State which permits a recovery by the addressee of damages for mental anguish in case of its non-delivery, and the telegram was not delivered, the addressee is entitled to recover for any mental anguish suffered by him, whether the negligence complained of occurred in this State or the State from which the message was sent. (Page 326.)

4. CONTINUANCE—ABSENCE OF WITNESSES.—An application for a continuance upon the ground that the applicant had not ascertained the whereabouts of certain witnesses in time to have their testimony taken was insufficient if it failed to show why the witnesses were not located earlier. (Page 329.)

Appeal from Arkansas Circuit Court; *Eugene Lankford,* Judge; affirmed.

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

1. Plaintiff being the addressee, no contractual relations existed between him and the appellant. His right to recover is therefore based on tort, and none is shown.

2. If the burden was upon appellant to show where the negligence occurred, then it was abuse of discretion to deny its application for a continuance. 21 Ark. 460; 60 Ark. 564.

3. It was error to allow the witness Woodard to testify as to conversations had with the sending operator after the message had been sent. They were hearsay and inadmissible. 57 Ark. 287; 49 Ark. 207; 34 Ark. 451; 29 Ark. 512; 14 Ark. 86.

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

1. The right of the addressee is based, not upon privity of contract, but upon the public duty which a telegraph company owes to any person beneficially interested in the message. 77 Ark. 531; 79 Ark. 448. And the addressee may recover, under laws of the State, where the message is delivered or sent. 86 S. W. 982; 93 S. W. 34; 51 S. E. 119; 4 Current Law, 1165.

2. No sufficient showing of diligence having been shown, the application for continuance was properly refused. Moreover, the evidence for which the continuance was sought was immaterial; and it is shown that there were various routes by which the message could have been transmitted, and the fact that there was "trouble with the wires at St. Louis" was no defense. 2 Shear. & Redf. on Neg. 5 Ed. § 540.

3. Woodard's conversation with the operator was properly admitted, being a part of the *res gestae.* 74 S. W. 560.

HILL, C. J. R. S. Woodard brought suit against the Western Union Telegraph Company for negligence in the transmis-

sion and delivery of a telegram from his father notifying him of the death of his sister, alleging that the failure to transmit and deliver the telegram to him prevented him from attending the funeral of his sister, thereby occasioning him mental distress. He recovered judgment, and the telegraph company has appealed.

The message was sent from Fayetteville, Tennessee, to Stuttgart, Arkansas. There was evidence that it was received by the operator at Fayetteville, Tennessee, and by him forwarded to Nashville, Tennessee, there to be transmitted to St. Louis, and from there to be transmitted either through Pine Bluff, Arkansas, to Stuttgart, or direct to Stuttgart, according to the hours in which it was received at St. Louis.

It was not received at Stuttgart, and there is no evidence where it was lost in transit. The answer alleged that the failure to transmit was due to troubles with the wires between St. Louis and Stuttgart, and that by the exertion of diligence it had been unable to transmit it; but there was no evidence to sustain this allegation.

There were statements of the operator at Fayetteville, Tennessee, as to the transmission of the telegram to Nashville, and its receipt there and its failure to reach Stuttgart, and other declarations of the agent that were outside the issues. These declarations were inadmissible. 2 Wigmore on Evidence, § 1078.

The facts contained in these declarations are not material; and, besides, the company in its answer admitted that the telegram was duly received in St. Louis, and not transmitted to Stuttgart. Therefore, this incompetent evidence had no bearing upon any of the real issues of the case.

2. It is insisted that there can be no recovery in this case because there were no contractual relations between the company and the plaintiff, as he was the addressee of the telegram. This is the English rule upon the subject, and there are a few cases in America that have followed the English courts. But the great weight of authority—in fact, almost all of the American authorities—are against the rule. It has become so thoroughly established that it is called the "American doctrine" on the subejct to allow the addressee of the telegram to recover for damages flowing from a failure to deliver or correctly deliver

the telegram sent him. Joyce on Elec. Law, § § 107-8; 21 Enc. Plead. & Prac. 509; Thompson on Law of Elec. 422-7; Jones on Tel. & Tel. Companies, § § 472-7.

This court early aligned itself with the American decisions. *Western Union Tel. Co.* v. *Short,* 53 Ark. 434. Recently it reiterated the right of the addressee to recover under the mental anguish statute. *Western Union Tel. Co.* v. *Ford,* 77 Ark. 531.

While the right to recover by the addressee is almost universally recognized in America, yet the grounds of recovery are variously sustained; some of the courts holding that the contract of the sender inures to the benefit of the addressee, and others holding that it is an action of tort, and others holding that it is a breach of public duty. Jones on Tel. & Tel. Companies, 476-482; Thompson on Law of Elec, § 427; Joyce on Elec. Law, § 1013.

3. It is said that it is not shown that this telegram ever reached Arkansas, but that on the contrary it is made distinctly to appear that it did not reach either the Pine Bluff or Stuttgart office, and they were the offices through which it would have reached the State. It is argued therefrom that no tort occurred and no negligence is shown to have been committed in Arkansas, and that consequently no action can be maintained here.

A somewhat similar question was presented in the Ford case, *supra.* A message was sent from Missouri, where the law does not authorize recovery of damages for mental anguish. But the evidence in that case showed that the telegram was transmitted to Arkansas, and that the negligence occurred in this State. The court did not go beyond that point in determining the principle controlling it.

In the case of *Arkansas & La. Ry. Co.* v. *Lee,* 79 Ark. 448, it was contended that there should be no recovery on account of a negligent delivery in Louisiana, where the law does not permit recovery for mental anguish. But the facts in that case showed the negligence was in Arkansas in the transmission from Nashville to Hope by the railroad company, and from Hope to Shreveport by the telegraph company. The court held that the negligence was in the transmission here, not in Louisiana; and did not go beyond the facts in determining what would have

been the effect, had there been negligence in delivery in Louisiana.

Therefore, this case presents a different phase of the question that has heretofore been before the court. The question is simplified by the fact that in Tennessee, the State from which this telegram was sent, mental anguish is a recoverable element. *Wadsworth* v. *Western Union Telegraph Co.,* 86 Tenn. 695; *Telegraph Co.* v. *Mellon,* 96 Tenn. 66; *Gray* v. *Telegraph Co.,* 108 Tenn. 39.

As will be seen by the above-cited cases, Tennessee was one of the States which sustained such recovery by judicial construction, and such actions are not dependable upon statute, as they are in Arkansas. But the statutory action is intended to place in force in this State substantially what is known as the "mental anguish doctrine" in States where it prevails by judicial construction. *Western Union Tel. Co.* v. *Hollingsworth,* 83 Ark. 39.

Mr. Wharton, in his work on Conflict of Laws, says: "The general rule seems to be that a contract made in one State or country for the transmission of a telegram from a point in that State or country to a point in another is governed by the law of the State or country in which the contract is made and from which the telegram is sent, rather than by that of the State in which it is received. * * * The rule prevailing in the State from which the telegram was sent, permitting a recovery of damages for mental anguish, has been applied, though the rule was otherwise in the State in which the telegram was to be delivered. (Citing many cases.)

"Some cases, however, apparently assume that the performance of the contract is the delivery of the telegram, and that the transmission is merely a means of enabling the telegraph company to perform; and they therefore refer the contract to the law of the place of delivery as the sole place of performance. Assuming, however, that the former rule is the correct one, it does not apply to matters that relate to the remedy, as distinguished from the substantive contract, and therefore does not operate to relieve a contract from the effect of the statute, which is remedial rather than substantive, of the State in which the telegram was to be sent delivered, if the action is brought in that

State. Nor does the general rule prevent the application of the law of the State in which the telegram was to be delivered when the action is brought in that State and does not rest upon the contract, but upon a statute rendering the company liable for a breach of its statutory duty, independently of contract." Wharton on Conflict of Laws, pp. 1082-5.

Applying this principle here, it is not material in this case which view is generally taken as to the action, whether *ex delicto, ex contractu* or statutory; for the action must be sustained by reason of the Tennessee contract. It is held in Tennessee that the addressee recovers upon the contract of the sender inuring to his benefit, and that mental anguish is a recoverable element in such contracts. *Wadsworth* v. *Western Union Tel. Co.,* 86 Tenn. 695; *Manier* v. *Western Union Tel. Co.,* 94 Tenn. 442; *Gray* v. *Tel. Co.,* 108 Tenn. 39.

There have been many cases before this court where different features of the relation between parties and the telegraph company were considered, and the principles here involved more or less touched upon. See *Baltimore & O. Tel. Co.* v. *Lovejoy,* 48 Ark. 301; *Western Union Tel. Co.* v. *Ford,* 77 Ark. 331; *Western Union Tel. Co.* v. *Short,* 53 Ark. 434; *Western Union Tel. Co.* v. *Raines,* 78 Ark. 545; *Western Union Tel. Co.* v. *Hogue,* 79 Ark. 33; *Arkansas & La. Ry. Co.* v. *Lee,* 79 Ark. 448; *Western Union Tel. Co.* v. *Shenep,* 83 Ark. 476.

These cases present different phases of the subject; some dealing with the contractual features, some with the statutory elements engrafted into the relations between the telegraph companies and their patrons, and some dealing with both features. Some of the language used in these opinions may not be entirely in harmony with the language in others, but there is no conflict in the decisions themselves.

In this case, although there may be no statutory action arising in Arkansas, for the reason that no negligence has occurred actionable under the statute, yet here is a contract which, under the laws of Tennessee where it was made between the sender and the telegraph company, inured to the benefit of the addressee; and one element of the contract was the right to recover for mental anguish. That action is, under the principles heretofore quoted from Wharton (which seem fully sup-

ported by the authorities), sustainable here; and that is as far far as the court is required to go in this case.

4. The appellant also asks a reversal for the failure of the court to grant a continuance in order that it might obtain its witnesses to sustain its defense. The case was continued from the term to which it was brought to the succeeding term, six months thereafter, and it is not shown why the company did not earlier locate its witnesses. It says that it had learned of their whereabouts too late to take the testimony at that time. But such diligence is not shown on its part as would require a reversal of the discretion of the judge in refusing a continuance.

The evidence was sufficient to sustain the verdict, and there is no error.

Affirmed.

SALINE COUNTY *v.* KINKEAD.

Opinion delivered November 11, 1907.

1. STATUTES—SPECIAL AND GENERAL.—Where a special act applies in a particular case, it excludes the operation of a general act upon the same subject. (Page 330.)
2. COUNTY—VERIFICATION OF FEE BILLS.—Section 3517, Kirby's Digest, which provides the mode of verifying fee bills, excludes the operation, as to fee bills, of the general statute (Kirby's Digest, § 1453) providing the method of verifying claims against counties. (Page 330.)
3. COUNTY COURT—JURISDICTION.—The jurisdiction of a county court to determine a claim against the county does not depend upon whether the claim was verified or not. (Page 331.)
4. SAME—APPEAL—AMENDMENT.—Where a claim presented against a county was not verified in the county court, and was disallowed, and an appeal was taken to the circuit court, the latter court had the power, upon a trial *de novo,* to permit the claim to be amended so as to supply the affidavit of verification. (Page 331.)

Appeal from Saline Circuit Court; *W. H. Evans,* Judge; affirmed.

W. L. Cooper and *W. R. Donham,* for appellant.

Claims not verified until after motion to dismiss appeal was overruled. No affidavit and prayer for appeal as provided by § 1487, Kirby's Digest. No bond given. *Ib.* § 1488. The circuit court acquired no jurisdiction. It was *coram non judice.*

The fee bill was claimed under § 3818, Kirby's Digest, which requires it to be sworn to.

J. W. Westbrooke, for appellees.

No motion to strike was made, and too late to complain now. The affidavit is not jurisdictional. The case is tried *de novo* in circuit court, and an affidavit may be attached conveying the want of it below. The presumption is the claim was based on a meritorious prosecution.

HART, J. On the 11th day of April, 1906, the itemized fee bill of J. C. Kinkead and G. R. Kelley for fees due them, respectively, as justice of the peace and as sheriff in an examining trial in the case of State of Arkansas *v.* Joshua C. Holloman was filed in the Saline County Court.

On May 26, 1906, the claim was presented to the county court, and it was allowed in part and disallowed in part. Claimants appealed to the circuit court. The county judge, on behalf of Saline County, filed a motion to dismiss because the claim was not sworn to as required by statute.

The affidavits to the claim bear the date of March 12, 1907, and the case was tried in the circuit court at its March term, 1907. The circuit court allowed the claims in full, and Saline County has appealed. Section 1453 of Kirby's Digest, the general act in regard to the presentation of claims to the county court, is not applicable to this case, for the reason that there is a special statute directing the manner in which fees accruing in examining trials shall be presented. Where there is special act made to apply in particular cases, it only applies, and not the general act. *Mills* v. *Sanderson,* 68 Ark. 130.

Section 3517 of Kirby's Digest, the special act under which this claim was presented, provides, among other things, that "the justice or other officer or person to whom any fees may be due shall make out a fee bill for its cost allowed by law, which may have accrued in said case, and shall present to the county court an itemized account, duly sworn to, which shall be

examined as provided in the following section, and, if found correct, audited and allowed by the county court."

No objection was made to the fee bill by the county court because it was not properly itemized nor because it was not verified. The record shows that it was allowed in part and disallowed in part.

Whether or not there was actually an affidavit verifying the fee bill filed with it in the county court does not certainly appear, but it seems to have been taken for granted in the circuit court that there was none. It is insisted that such affidavit was necessary to give the court jurisdiction. It was no doubt competent, and, indeed, it was the duty, of the county court to have rejected this claim for the reason that it was not sworn to as required by statute. But its jurisdiction did not depend upon such verification. Section 28, art. 7, of the Constitution invests the county court with exclusive original jurisdiction in all matters relating to the disbursement of money for county purposes and in every other case that may be necessary to the local concerns of the county. Here is the source of jurisdiction.

The provisions of section 3517, *supra,* do not make the filing of the affidavit a prerequisite to the exercise of the jurisdiction. It directs that the fee bill shall be sworn to, but the neglect of the claimant to thus verify it does not oust the county court of its jurisdiction.

Section 51, art. 7, of the Constitution provides that in all cases of allowances made for or against a county an appeal shall lie to the circuit court, and that the matter shall be tried in the circuit court *de novo.* The circuit court in its discretion may permit any amendments that do not change the original cause of action. *Freeman* v. *Lazarus,* 61 Ark. 253; *Railway Co.* v. *Lindsay,* 55 Ark. 282.

In other words, it may do what the county court has the power to do—dismiss the claim for want of verification where there is no excuse for the omission, or no offer to amend by supplying the affidavit required by statute, or, as was done in this case, permit an amendment supplying the affidavit.

Judgment affirmed.

VAUGHAN v. STATE.

Opinion delivered November 11, 1907.

CARRYING PISTOL AS WEAPON—BURDEN OF PROOF.—Under an indictment for carrying a pistol not such as is used in the army of the United States, the burden is upon the State to prove that it was not such a pistol as is used in the army or navy of the United States.

Appeal from Calhoun Circuit Court; *George W. Hays,* Judge; reversed.

Thornton & Thornton, for appellant.

It was alleged that the pistol was not such as is used in either the army or navy; it was necessary both to allege and prove it. The burden is on the State. 102 S. W. 703.

William F. Kirby, Attorney General, and *Daniel Taylor,* Assistant, for appellee.

Confesses error. 19 Ark. 143; 83 Ark. 26.

WOOD, J. The appellant was indicted for carrying a pistol as follows: "The said defendant on the 16th day of July, 1906, in Calhoun County, State of Arkansas, did unlawfully carry a pistol as a weapon, said pistol being the kind that is carried in neither the army or navy of the United States, contrary to the form of the statutes and against the peace and dignity of the State."

The State proved that appellant had a pistol, in Calhoun County, in June, 1906, within a year before the indictment. There was a fuss between certain parties; and a witness saw a pistol drop out of appellant's bosom, and saw him put it back. The size of the pistol was not shown. And the State did not attempt in any way to show that the pistol was not such as is used in the army or navy. The court correctly declared the law, but the proof was not sufficient to support the verdict.

The Attorney General confesses error, the case being ruled by *McDonald* v. *State,* 83 Ark. 26.

The confession is well taken, the judgment is reversed, and the cause is remanded for a new trial.

HILL, C. J., (dissenting). This case is the first fruit of *McDonald* v. *State,* 83 Ark. 26, which has fallen here, and

is a good illustration of the result of placing upon the State the burden to prove a negative when the fact to be proved is peculiarly within the knowledge of the defendant. Here a defendant, unquestionably guilty, unquestionably in possession of a pistol as a weapon, is acquitted because no one proved that the weapon that he had was not such an one as is used in the army or navy of the United States. It would be safe to say that not one person in a thousand knows what kind of a weapon is used in the army and navy of the United States; but a defendant knows what kind of a pistol he was carrying and can readily prove it.

I refer to my dissenting opinion in the McDonald case for the reason in full for dissenting against the doctrine here applied.

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

Opinion delivered November 11, 1907.

LEVEE—EFFECT OF GRANT OF RIGHT-OF-WAY.—Where a landowner granted to a levee district a right-of-way across his land for the purpose of constructing a levee, he cannot thereafter sue the district for damages which resulted from its construction of maintenance, it was constructed and is being maintained in a skillful manner.

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

Armstrong & Gravette, for appellant.

Damages were original and contingent. Successive actions will lie, and plaintiff, was not barred by three years limitation. 52 Ark. 240; 56 *Id.* 612; 85 S. W. 654; 102 *Id.* 585; 59 Fed. 9.

H. F. Roleson, for appellee.

Cases cited are not applicable. This case falls within 62 Ark. 360. See also 52 *Id.* 240. Plaintiff was barred.

McCULLOCH, J. This is an action instituted by appellant against the Board of Directors of St. Francis Levee District to recover damages alleged to have been done to lands of appel-

lant by reason of a levee constructed and maintained through and over the same by the levee district. It is alleged in the complaint that the levee was so constructed that in time of high water it permitted water to seep through upon appellant's land, and also that the levee prevented drainage of water from this land into the Mississippi River, which was a natural drainage-way or outlet for surface water from the land. The defendant answered, denying that the levee was constructed in an unskillful or imperfect manner, and alleging, among other things, that before the construction of the levee the plaintiff had executed to defendant a deed conveying a right-of-way over and through his land for the construction and maintenance of the levee.

The case was tried before a jury, and after both sides had concluded the introduction of the evidence the court instructed the jury to return a verdict in favor of the defendant, which was done.

We are of the opinion that there was no evidence introduced which would have warranted a verdict in favor of the plaintiff, and the court did right in giving a peremptory instruction for the defendant. There is no conflict in the testimony. It wholly fails to show that the levee was constructed in an unskillful or imperfect manner. On the contrary, it showed affirmatively that the levee was constructed according to the best and most approved methods known to engineering skill, and that there had been no change in nor addition to it since. Appellant's deed of conveyance was introduced in evidence whereby he conveyed to the levee district the right-of-way over and through his lands "for the purpose of constructing any and all levees that may be built theron as a protection against overflow, with the right of obtaining from said lands any material that may be necessary in the construction of said levee and keeping the same in repair."

Plaintiff having expressly consented to the construction and maintenance of the levee and granted a right-of-way over his land for that purpose, he cannot complain of any damage to the land resulting from the construction of the levee in a skillful manner. His grant to the levee district of the right to construct the levee through his land was a waiver of any claim for damages to the land resulting from the construction and

maintenance thereof, if done in a skillful manner. Such damages are conclusively presumed to have been compensated for by the consideration paid for the conveyance.

In a similar case involving the right of a person who has conveyed a right-of-way to a railroad company to recover damages from the company for injury to his land, the court, speaking through Mr. Justice SMITH, said: "No man can maintain an action for a wrong where he has consented to the act which occasions his loss. * * * The execution of the conveyance placed the parties in the same relative situation, and gave to each precisely the same rights as if the railroad company has caused the land to be condemned for the right-of-way and had paid the award of damages. In either case the company is authorized to do whatever is lawful in the construction and management of its road; and the owner's claim for injury to the rest of his land is released, except as it arises from faulty construction." *St. Louis, I. M. & Sou. R. Co.* v. *Walbrink,* 47 Ark. 330. To the same effect see *St. Louis, I. M. & S. Ry. Co.* v. *Hanks,* 80 Ark. 417; *Bracy* v. *St. Louis, S. F. & N. O. Rd. Co.,* 79 Ark. 124.

The same rule should be applied to the grant of a right-of-way for the construction of a levee.

Judgment affirmed.

LANZER v. BUTT.

Opinion delivered November 11, 1907.

1. DEEDS—ACKNOWLEDGMENT BY MARRIED WOMAN.—A married woman's deed conveying her land must be acknowledged in the manner prescribed by law in order to carry title. (Page 337.)
2. SAME—AUTHORITY OF FOREIGN JUSTICE OF PEACE TO TAKE ACKNOWLEDGMENTS.—A justice of the peace in another State was not impowered in 1870 to take acknowledgments to deeds of land in this State. (Page 338.)
3. SAME—CURATIVE ACT.—The act of April 1, 1885, validating prior deeds having defective acknowledgments, cured a prior married woman's deed which had been acknowledged before a justice of the peace in another State. (Page 338.)

4. SAME—EFFECT OF CURATIVE ACT.—Statutes curing defective acknowledgments of deeds are as much operative against the heirs of the grantors therein as against the grantors themselves. (Page 339.)

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

STATEMENT BY THE COURT.

This is an action of ejectment, brought by Mary C. Lanzer, Elizabeth Stovall and John J. Ledbetter against Kate Butt to recover possession of the S. W. qr. sec. 22, T. 15, R. 12 E., in Mississippi County, Arkansas. Plaintiffs Mary C. Lanzer and Elizabeth Stovall claim title through their mother, Mary C. Garrison. Ledbetter deraigns title to an undivided one-half (1-2) interest from Mrs. Lanzer and Stovall by deeds.

Mary A. Garrison (mother of Mrs. Lanzer and Stovall) died in 1878, leaving surviving her Mrs. Lanzer, Mrs. Stovall and J. D. Garrison, her husband. Defendant, in her answer, admits Mary A. Garrison as having been the owner of the said land, and claims title through common source with plaintiffs, *i. e.*, through Mary A. Garrison, filing as "Exhibit A" to her answer a copy of a warranty deed from Mary A. Garrison and J. D. Garrison, her husband, to J. W. Martin, dated June 17, 1870, for the land in controversy.

Plaintiffs replied, excepting to the deed set out in "Exhibit A" to defendant's answer as a muniment of title for defendant for the reason that what purported to be the acknowledgment of Mary A. Garrison was taken by an officer not authorized, under the law then in force, to take the acknowledgment to deeds, towit, a justice of the peace in the State of Tennessee. Plaintiffs' exceptions were overruled by the court, the court holding that the curative acts of the Legislature subsequently passed cured said acknowledgment.

The cause was then submitted to the court sitting as a jury upon the pleading and documentary proof, plaintiffs admitting in open court that defendant owned whatever title J. W. Martin took under deed so defectively acknowledged. Whereupon the court rendered judgment for defendant, Katie Butt.

Plaintiffs filed their motion for new trial and to set aside the order overruling plaintiffs' exceptions to the deed of Mary

A. Garrison to James W. Martin, which motion was by the court overruled, and plaintiffs appealed to this court.

Appellants *pro se.*

1. At the time the deed was executed, a married woman, in order to convey title to real estate, must have acknowledged the execution of the deed before the proper officer and as prescribed by the law then in force. 43 Ark. 156; 15 Ark. 531; 39 Ark. 531; 33 Ark. 432.

2. A justice of the peace was not authorized to take acknowledgments. Rev. Stat. Ark. § 840; 34 Ark. 55.

3. Curative acts are not effective where, under the law, acknowledgment is necessary to pass title, but only in that class of cases where the acknowledgment is necessary only for the purpose of authentication. 46 Mo. 483; 43 Ark. 156. Nor do they affect rights vested prior to their passage. 48 Ark. 117; 62 Ark. 431; 6 Am. & Eng. Enc. of Law (2 Ed.), 956, note 4; *Id.* 955, note 2; 1 *Id.* 568, note 1.

4. Privies in blood are not estopped in this case, since the mother would not have been estopped. 34 N. Y. Sup. 836; 88 Hun, 422.

W. J. Lamb, for appellees.

If there is any defect in the acknowledgment, it is cured by the curative act approved April 1, 1885. Kirby's Digest, § 776; 43 Ark. 420; 44 Ark. 365; 45 Ark. 341; 47 Ark. 414; 50 Ark. 294. Such acts cure any defect which is within the power of the Legislature. Cases *supra.* And are valid against the owner or his heirs, even though they would not affect the title of a subsequent *bona fide* purchaser. 8 Cyc. 899. And the heirs of Mrs. Garrison have no greater rights than she had. See also 105 Fed. 293; 1 Kent. 456; 53 Ala. 54; 6 Am. & Eng. Enc. of Law (2 Ed.), 939.

WOOD, J., (after stating the facts.) The law concerning the conveyance of the real estate of married women at the time the deed in controversy was executed is as follows:

"A married woman may convey her real estate, or any part thereof, by deed of conveyance executed by herself and her husband, and acknowledged and certified in the manner hereinafter prescribed.

"The conveyance of any real estate by any married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated and the title passed by such married woman voluntarily appearing before the proper court or officer and, in the absence of her husband, declaring that she had of her own free will executed the deed or instrument in question," etc. Revised Statutes, c. 3, § § 10, 21.

The acknowledgment of a married woman's deed in the manner prescribed by law was essential to carry the title at the time this deed was executed. At that time a justice of the peace of Tennessee had no power to take acknowledgment to deeds of land in this State. *Worsham* v. *Freeman,* 34 Ark. 55. The deed was therefore void by reason of the defective acknowledgment. It did not convey any title, legal or equitable, to the grantee. *Worsham* v. *Freeman,* 34 Ark. 55; *McGehee* v. *McKenzie,* 43 Ark. 156.

Was this defective acknowledgment cured by the act of April 1, 1885? That act is as follows: "All deeds and other conveyances recorded prior to the first day of March, 1885, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceedings, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment may have been on any account defective (excepting only cases where such conveyance shall have been executed by minors and insane persons.) Provided the records of all such instruments shall be as valid as if they had been acknowledged according to law." Kirby's Digest, § 776.

The Constitution of 1868, in force at the time of the execution of the deed in controversy, did not prescribe any mode for the conveyance of the property of a married woman. The Legislature was left free to adopt any method it saw proper upon the subject. It had the power to change the law then in force or to allow it to continue. In *Cupp* v. *Welch,* 50 Ark. 294-299, we said concerning an acknowledgment: "It is only necessary because required by act of the Legislature. The Legislature, having the power to dispense with it or to prescribe the mode of acknowledgment, could by subsequent statute make the acknowledgment and record of the deed in question as valid

as if it had been acknowledged and recorded according to law, and make it *prima facie* valid to pass the estate it purports to transfer, and make it *prima facie* evidence of its recitals and the regularity and legality of the sale made by the administrator; and, having the power, has done so. *Sidway* v. *Lawson,* 63 Ark. 117.

It is undoubtedly true therefore that, if Mrs. Garrison had been living at the time of the passage of the curative acts 1883 or 1885, her deed, although void to convey her title up to that time, would have been validated by those statutes and made effectual, as against her, to convey the land in controversy as of the date when the deed was executed. Mrs. Garrison having died without making any other conveyance of the land before these curative statutes were passed, the question now is, can these statutes cure her void deed, and "breathe into it the breath of life" as against her heirs?

We have heretofore held that where the grantor, whose deed was ineffectual to convey title by reason of defective acknowledgment, again conveyed the same to a third party before the subsequent curative statute was passed, such latter conveyance was good, notwithstanding the subsequent curative statute, as against the original grantee in the defective deed of mortgage. *Shattuck* v. *Byford,* 62 Ark. 431. See also *Sidway* v. *Lawson,* 58 Ark. 117, and *McGehee* v. *McKenzie,* 43 Ark. 156. This is quite as far as we are willing to go in allowing the doctrine of "vested rights" to be invoked against curative statutes. Certainly, it can not be applied against the grantee in the original defective deed by those who are privy with the grantor in the obligations and warranties of the very deed which they seek to overcome.

Heirs are privies in blood and estate with the grantor. By the express terms of the deed, Mrs. Garrison, the grantor, contracts that her heirs "shall warrant and defend the same unto the party of the second part, his heirs and assigns, forever." The children of Mrs. Garrison can no more defeat the operation of the curative statute to cure the defective conveyance than could Mrs. Garrison herself, if she were living. Why? Because at her death they only succeeded to her rights in the land, and they had precisely the same estate in it which she had.

What estate did she have in it that she could assert against appellee after the passage of a curative statute? None whatever. Neither did they acquire any which they could assert against the appellee after the passage of the curative statutes. True, until the passage of the curative statutes curing the void deed, Mrs. Garrison, had she lived, would have had the fee simple estate. *McGehee* v. *McKenzie, supra.* And her children after her death had the same estate. Had she conveyed to a purchaser, her grantee could have asserted a vested right as against the grantee in the original defective conveyance because at that time the statute curing and making effectual such conveyance had not been passed. Likewise, her children, after her death, until the passage of the curative statute, had an estate which they could alien to a third party, and which such party could assert as a vested right against the operation of a subsequent curative statute. But their deeds to Ledbetter were executed after the curative statutes were passed.

A different doctrine in favor of the heirs in this case would be contrary to the spirit in which the curative statutes should be viewed and construed. "There are other statutes," says Judge Kent, "which, when operating retrospectively, have not incurred judicial condemnation, and to which a liberal construction for the consummation of the just and beneficient purposes in view, has been freely accorded. Such statutes are intended to remedy a mischief, promote public justice, correct innocent mistake into which parties may have fallen, cure irregularities or give effect to the acts and contracts of individuals fairly done and made. These are remedial statutes, conducive alike to individual and public good." See *Evans-Snider-Buel Co.* v. *McFadden,* 105 Fed. 293. Also Ex parte *Buckley,* 53 Ala. 54; 6 Am. & Eng. Enc. Law (2 Ed.), 939.

Judgment affirmed.

RANDOLPH v. ABBOTT.

Opinion delivered November 11, 1907.

INJUNCTION—AUTHORITY OF COUNTY JUDGE TO ISSUE.—Constitution 1874, art. 7, § 37, providing that "in the absence of the circuit judge from the county the county judge shall have power to issue orders for injunctions and other provisional writs in their counties," contemplates that a county judge may issue such writs only where an action is pending in other courts.

Certiorari to Franklin Circuit Court; *Jeptha H. Evans,* Judge; judgment quashed.

Sam R. Chew, for petitioner.

1. The county court was without jurisdiction to issue an injunction.

2. Respondent could only obtain a private road through the property in the manner laid down by the statute, and in strict compliance therewith. Kirby's Digest, § 3010; 15 Ark. 43; 13 Ark. 355.

W. W. Cotton, for respondent.

The right to a restraining order or injunction is a separate and distinct right, and the grounds therefor named in the statute. Kirby's Digest, § 3965. And when, as in this case, such grounds are admitted, respondent ought not to be required to await the slow procedure of the court in granting an order for the road before seeking relief under the injunction statute.

BATTLE, J. H. V. Abbott petitioned to the Franklin County Court for a private road through the lands owned by R. H. Randolph. Upon application of Abbott the county court directed the issue of a writ of injunction enjoining Randolph from interfering with Abbott in the use of his lands as a road. Randolph moved to dissolve the injunction, which was denied. From this order Randolph appealed to the Franklin Circuit Court, by which the order granting the injunction was affirmed. Randolph seeks to set aside the judgment of affirmance in this court by writ of certiorari.

Injunctions are matters of chancery cognizance. County courts have no power to grant them. It is true that the Con-

stitution of this State provides that "in the absence of the circuit judge from the county the county judge shall have power to issue orders for injunctions and other provisional writs in their counties, returnable to the court having jurisdiction, provided that either party may have such order reviewed by any superior judge in vacation in such manner as shall be provided by law." Art. 7, § 37, Const. 1874. In no cases is the county court granted such power, and the county judge has such power only in cases and to the extent authorized by the Constitution, which is in actions pending in other courts. The county court having no jurisdiction, the circuit court acquired none by appeal.

The judgment of affirmance of the circuit court is quashed.

BERGER v. HOUGHTON.

Opinion delivered November 11, 1907.

1. APPEAL—PROVINCE OF BILL OF EXCEPTIONS.—The office of a bill of exceptions is to bring on the record such matters as are not already parts of the record in the case. (Page 343.)
2. SAME—PRESUMPTION.—Doubts which arise from the bill of exceptions as to its true contents by reason of its confused shape in the record must be resolved against the appellant and in support of the judgment appealed from. (Page 343.)

Appeal from Craighead Circuit Court; *Frank Smith,* Judge; affirmed.

T. H. Caraway, for appellant.

Sureties can not recover against a bankrupt after his discharge, even though they paid the debt afterwards. Acts Cong. 1898, § 63, subd. 1, and § 57, subd. 1; 26 Ark. 231, overruling 6 Ark. 241; 10 Ala. 589; 7 How. 117; 88 N. W. 351.

Charles D. Frierson, for appellees.

The contingent claim of a surety is not provable, and the debt was not discharged. 121 Fed. 699. The transcript fails to state that the evidence was all the evidence adduced. 17 Ark.

327. The bill of exceptions shows conclusively that it did not. 44 Ark. 74; 42 *Id.* 29.

McCULLOCH, J. This case was tried before the circuit judge sitting as a jury, and it is contended by appellants that the evidence adduced does not warrant the finding in favor of appellees.

The state of the record does not justify us in reversing the judgment. There is no bill of exceptions in the record.

The transcript begins with copies of the pleadings; then follow, in the order named, what purports to be an agreed statement of facts signed by the attorneys, a copy of the note sued on, an order of discharge in bankruptcy, a petition in bankruptcy, order of the court noting the filing of defendant's answer, judgment of the court, order of court overruling motion for new trial, the motion for new trial, and a certificate of the trial judge to the effect that the court overruled the motion for new trial, and that defendants excepted thereto and were allowed sixty days in which to file their bill of exceptions. The certificate concludes as follows: "Whereupon the defendants tender this their bill of exceptions, which is signed and sealed by the court, and ordered to be made a part of the record herein." There is no caption or anything else to show where the so-called bill of exceptions begins nor what it contains. We can not presume that the judgment of the court and other record entries which are preceded by the other papers recited above, were included in the bill of exceptions, as those proceedings find no proper place in a bill of exceptions. The office of a bill of exceptions is to bring on the record such matters as are not already parts of the record in the case. *Overton* v. *Lohmann,* 67 Ark. 464; *Ashley* v. *Stoddard,* 26 Ark. 653; *Anthony* v. *Brooks,* 31 Ark. 725; *Randolph* v. *McCain,* 34 Ark. 696; *Kirksey* v. *Cole,* 47 Ark. 504.

If we were to treat the copy of the judgment of the court which appears in the transcript as a part of the bill of exceptions, we should be compelled to dismiss the appeal, as the record entries must be certified by the clerk, and not by the trial judge. *London* v. *Hutchens,* 80 Ark. 410. All doubts arising from the bill of exceptions as to its true contents by reason of its confused shape in the record must be resolved against the appellant

and in support of the judgment appealed from. *Overton* v. *Lohmann, supra.*

Judgment affirmed.

SHELL v. STATE.

Opinion delivered November 11, 1907.

ROBBERY—SUFFICIENCY OF EVIDENCE.—Proof that the person alleged to have been robbed came running into a crowd and related that he had just been robbed, coupled with evidence that the watch was soon afterwards found in defendant's possession, and the fact that defendant confessed his guilt at the time he was arrested, is sufficient to support a conviction of robbery.

Appeal from Clark Circuit Court; *Jacob M. Carter,* Judge; affirmed.

McMillan & McMillan, for appellant.

Proof of ownership is always material—none here. 58 Ark. 38; 67 *Id.* 154. *Corpus delicti* not proved, and the so-called confession was extra-judicial, and there was no proof outside the confession. There must be corroboration. 1 Gr. Ev. § 217; Kirby's Digest, § 2385; 43 Ark. 367; 73 *Id.* 411; 9 Bush, 149; 77 Ark. 126.

William F. Kirby, Attorney General, *Daniel Taylor,* for appellee.

There was sufficient evidence to establish *corpus delicti.* The free and voluntary confession, with the statement and conduct of the person robbed, is suffiicent.

HART, J. Appellant was indicted, tried and convicted of the crime of robbery. The indictment was returned at the January term, 1907, and the trial was had at the August term, 1907, of the Clark Circuit Court.

The State introduced the following testimony.

A. W. Wilson: 'I was foreman of the grand jury last January. We returned an indictment against John Shell, charg-

ing him with robbing a man whose name to us was unknown. We made an effort to find out his name."

John Overton: "I have been a constable and a justice of the peace; but I held no official position in last December. Sometime last November there was a crowd standing in front of the Penn Lumber Company store, and there was a young negro that looked to be about nineteen years old came running up into the crowd and said he had been robbed. The constable, who was standing there, asked, 'Who did it?' and he said he did not know. We got a warrant and went down to Dave Harris's, and found John Shell there in bed. We got him up; and this negro boy said he was one of those who had robbed him. I asked John what he knew about it; and he said he did not know anything. I told the constable to go down to the depot and wait for me, and I would be there in a few minutes. This all occurred in the presence of the defendant. I looked in the bed that he got out of, and ran my hand under the spread and found the watch in the bed. I asked the defendant if he knew anything about the watch, and he said he did not know anything about it. I asked him where he got the watch, and he said John ——— took the watch away from this negro boy and sold it to him. I turned the watch over to the justice of the peace, and went back after John———; I got him and brought him up there, and after he found out that John had owned up to it he says: 'Well, I don't care. I just as soon be in jail as to be here. I will tell you just how it was. I threw the gun down on the negro, and told him to hand the watch up; and he broke and run; and this defendant caught him and took the watch away from him.' The defendant was present at the time." Witness continuing: "This was a free and voluntary statement on his part. I just asked John, the defendant, if he knew anything about the watch, and he said he knew nothing about it; and after I found the watch he owned up to it. The negro boy who was robbed was also standing in the crowd when these statements were made. He identified the watch in the presence of the defendant." Cross-examination. "I didn't see the robbery. The fellow that got robbed came up and told it. I don't know whether the watch belonged to the negro that was robbed or not; but he gave me a description of it before I went down there."

Bob McClelland: "We arrested John Shell while he was sleeping on the bed with the watch right under him and took him to the depot. After we got to the depot they told how they got it. The other negro said he held the gun on the negro, and the defendant took the watch off of him. This was stated in the presence of the defendant." Cross-examination. "No threats were made nor inducements offered to obtain these statements. Seemed to be a pretty good watch; it was silver, and with the chain I suppose it was worth ten or twelve dollars. The party said it was worth twenty-five dollars. I don't know whether he owned it or not. I don't know whether he was actually robbed or not, except what these defendants told me, but he identified the watch and both of them that night. He said they were the men. They were present when he said they were the men, and they never denied it."

The defendant introduced no testimony. The defendant insists that the evidence does not warrant a conviction, basing his argument upon the ground that the jury could not convict upon the extra-judicial confession alone. There was other evidence conducing to prove him guilty of the offense alleged.

The person alleged to be robbed did not testify at the trial, but the witnesses for the State, without objection on the part of the defendant, testified that he came running into the crowd and excitedly exclaimed that he had just been robbed. This, together with the fact that the watch was soon afterwards found in the possession of the defendant, and that the defendant denied knowing anything about it, taken in connection with the confession of the defendant at the time he was arrested, is sufficient to prove the body of the crime, as well as the connection of the defendant with it. *Meisenheimer* v. *State,* 73 Ark. 407; *Boykin* v. *State,* 34 Ark. 443; 24 Am. & Eng. Enc. of Law, 1006.

Affirmed.

SALINE COUNTY v. HUGHES.

84 347
189 57
190 420

Opinion delivered November 11, 1907.

1. TAXATION—ASSESSMENT—POWERS OF BOARD OF EQUALIZATION.—After a county board of equalization has finally adjourned, it cannot meet and correct errors which it made in performing its functions. (Page 348.)
2. SAME—VALIDITY OF GROSS INCREASE OF VALUATION.—In equalizing the values of numerous items of personal property, a gross increase by the board of equalization in the aggregate valuation of the property, without specifying the items which are increased, is erroneous. (Page 348.)

Appeal from Saline Circuit Court; *W. H. Evans,* Judge; affirmed.

W. R. Donham and *W. L. Cooper,* for appellant.

It is the duty of the county clerk, and not of the board, to keep the journal of its proceedings. Kirby's Digest, § 7005. His error in failing to keep the journal accurately was a misprision only, which could not invalidate the action of the board. If the board believed that the whole assessment was too low, it could properly make a uniform increase of the assessment.

Appellee, *pro se.*

It is the duty of a board of equalization in raising an assessment to specify the article or articles against which the increase is assessed.

HILL, C. J. The personal property of John L. Hughes was assessed for the year 1906 as follows: 4 horses, $195; 1 cattle, $15; 3 mules, $300; 2 carriages, $50; 1 watch, $50; goods and merchandise, $8,000; moneys and credits, $7,500; total, $16,110.

The board of equalization on the 9th of September made the following order in regard to the personal property of said Hughes: "J. L. Hughes, valuation $16,110; valuation as equalized, $24,000." On the 22d day of September, 1906, the board made this order: "It is ordered that said board adjourn until board in course."

Postal card notice was sent to Hughes pursuant to the directions of section 6998, to appear on the first Monday in October before the county court to show cause, if any, why the

valuation of his property should not have been raised. On the 7th of January, 1907, Hughes filed a petition with the county court, setting forth his assessment and the attempt to increase it by $7,890, and alleged that there had been no showing whether the increase was an independent assessment or whether it was a raise in value upon assessed items, and, if so, upon what property; and other causes for the setting aside of the assessment were alleged.

On March 6, 1907, the members of the board of equalization met and erased from the records the order of September 22, regarding the final adjournment of the board, and inserted therefor an adjournment to that date; and then proceeded to add $7,890 to the item of "moneys and credits" in the aforesaid assessment.

The petition was tried in the county court, and again on appeal in the circuit court. The circuit court held that the additional assessment was invalid; and the county has appealed.

The action of the board of March 6, 1907, could have no force, for the board had long since performed its function for that year.

The statute, section 7004, gives the board authority to add to or take from the valuation of personal property as returned by the assessor, or to add other items to it upon satisfactory evidence. This is not an attempt to add other items. That is plainly shown in the original order equalizing the property and the notice of such equalization, and the subsequent action of the board in attempting to place an additional amount upon one item of the property already returned by the assessor. Therefore, the question is, whether, in equalizing the values of personal property, where there are numerous items, a gross increase is valid. There were seven separate items of personal property assessed. This increase of $7,890 may have been upon any of them. The statute prescribes 15 different items of personal property to be returned. Section 6910, Kirby's Digest, The assessments are to be based upon the value of each of these classes of property which may be owned by the taxpayer. It is contrary to the spirit of this taxing system that there should be such a thing as a gross increase in aggregate valuation. Any item which is too high or too low should be equalized

by the board; and it is not contemplated by the law that the board shall place a general increase or decrease on the assessment, but that it shall specify wherein the assessment is too high or too low. Therefore this gross increase was erroneous. The court can not patch up an assessment by evidence showing what it should have been; it must stand or fall as finally returned.

Section 7003 provides: "And if, during the time of collecting taxes upon the personal property so equalized, any obvious errors be discovered in the assessment of any personal property, * * * the owner of such property so assessed or equalized may, by application to the county court, by proper showing, at any time before the collector closes his books, have the same adjusted." The error here was an obvious error, within the meaning of the statute, and this was a proper proceeding to correct it.

Affirmed.

MITCHELL MANUFACTURING COMPANY v. KEMPNER.

'84 349
'89 110
89 313
90 28

Opinion delivered November 18, 1907.

1. REFORMATION OF INSTRUMENT—SUFFICIENCY OF EVIDENCE.—A written contract will not be reformed except upon clear and satisfactory proof that the writing fails, by reason of fraud, accident or mutual mistake in the preparation or execution thereof, to express the agreement intended to be entered into. (Page 352.)
2. SAME—SIGNING WITHOUT READING.—One who has opportunity to read a contract before signing it can not escape its obligation by showing that he signed without having read it. (Page 352.)
3. SALE OF CHATTEL—WHEN WARRANTY NOT IMPLIED.—A warranty will not be implied in a written contract of sale where the contract contains an express stipulation against such warranty. (Page 353.)
4. SAME—MISREPRESENTATION—SUFFICIENCY OF PROOF.—Although, where a vendor positively misrepresents a material fact which is peculiarly within his knowledge and of which the purchaser is ignorant, the fact that he refuses to give a warranty is not inconsistent with his liability for fraud, yet, where there is in a written contract of sale

an express stipulation against warranty, the proof of such misrepresentation must be clear and satisfactory. (Page 353.)

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

W. E. Atkinson, for appellant.

1. Appellees not entitled to reformation because: (1), They signed without reading, when no fraud was practiced to prevent it, and are bound by it. 71 Ark. 185. (2) There was no mutual mistake of the parties, if any mistake existed. 71 Ark. 614. The contracts put them on notice that they took the risk, for it is so expressly provided. The misrepresentations of the agent were clearly an afterthought, and their letters disprove their defense.

2. Mere preponderance of evidence is not sufficient to avoid a contract for fraud. It must be clear and convincing. A higher degree of evidence is exacted. 4 Wigmore, Evidence, § 2498; 39 S. W. 881; 12 Heisk. 28; 8 Humph. 233; 1 Johns. Ch. 590; 2 *Id.* 585; 121 U. S. 379; 128 *Id.* 673; 167 *Id.* 224; 37 Ark. 149; 55 *Id.* 152; 66 *Id.* 155; 72 *Id.* 72.

3. The Kempners nowhere in their correspondence intimated fraud or ignorance of contents of contract. They chose their grounds for relief, and must stand there. They are estopped from setting up different grounds. 96 U. S. 259; 61 Wis. 623; 37 Minn. 465; 9 Utah, 105.

Morris M. Cohn, for appellees.

1. The contracts were not enforceable because of fraud and misrepresentation. 32 Ga. 704; 2 Head (Tenn.), 526, 531; 54 Fed. 87; 4 C. C. A. 199; 101 N. W. 447. Fraud vitiates everything it touches, and parol evidence is always admissible to show that the execution of an instrument was procured by fraud, or that by reason thereof it does not express the intention of parties. 17 Cyc. 695, note 14; 73 Ark. 470; 83 Ark. 15; 72 Ark. 343; 35 *Id.* 483. This is so where there is no warranty. 31 Ark. 170.

2. As to what amounts to fraud, see 7 Ark. 166; 14 *Id.* 21; 38 *Id.* 334; 30 *Id.* 362.

3. Where there is fraud, equity has jurisdiction. 33 Ark. 425; 14 *Id.* 345. And will rescind contract and restrain its

enforcement. 11 Ark. 58; Pom. Eq. Jur. c. 3, § 3, par. 872 to 921, 910-921; 73 Fed. 574; 73 Cal. 452; 2 Am. St. 823; 15 Pac. 82.

4. When a merchant, in the hurry of business, known to vendor, does not read a contract, it makes the duty of dealing honestly that much the greater—he must not take advantage of it, for it would amount to a trick. 42 Ark. 362, 369-370; 38 *Id.* 334; 60 *Id.* 387; 1 Bigelow on Fraud, 526.

McCULLOCH, J. The Mitchell Manufacturing Company, an Ohio corporation, is engaged in the business of manufacturing and leasing machines called "The Silent Shoe Lace Salesman," which are designed for use in selling shoe laces. Shoe laces are placed in these machines in pairs, and the machine is operated by dropping a nickel in a slot which causes a pair of laces to be released and passed out to the operator. They are set in public places, such as hotel lobbies, barber shops, railroad waiting rooms, etc., and in this way become, as the name implies, silent shoe lace salesmen. Appellant also manufactures for sale to the lessees of machines shoe laces, each pair being inclosed in a paper wrapper or tube with the name and business of the lessee printed thereon, so as to be an advertisement of his business and wares. The machines are usually leased to retail shoe dealers, and, as is explained in the testimony, they serve, not only to advertise the business of the dealer, but help to correct the unprofitable habit which retail shoe dealers are said to indulge in giving away laces too frequently.

On April 12, 1904, appellees, Ike Kempner & Bro., who are retail merchants in the city of Little Rock, contracted with appellant in writing for the lease of five of these machines for a term of years at the rental price of $40 for each machine and pedestal, and for the purchase of 10,000 pairs of shoe laces at an agreed price. A separate contract was executed for each machine, and a printed form prepared by appellant was used. The contracts contained numerous provisions with reference to the use and care of the machines and sale of laces, and also contained a stipulation in the following words, viz.: "This machine is not guarantied against slugs, spurious coin or the weather."

Appellees refused to accept the machines and laces, after

being shipped to them pursuant to the contract and instituted this suit in equity to have said contracts reformed by striking therefrom the stipulation quoted above with reference to guaranty against "slugs, spurious coin and the weather."

It is alleged in the complaint that the agent of appellant who procured the execution of said contracts by appellees falsely represented to them that the machines would operate successfully by allowing the laces therein placed to come out in single pairs upon depositing a nickel in the slot, and that the machines were so constructed that slugs, spurious coin and other substances could not be used successfully in operating them. Reformation of the contract is sought, and also cancellation of the same, on account of a breach of the implied warranty of the machines and on account of the falsity of the alleged representations.

Appellant filed its answer and cross-complaint, denying the allegations of the complaint with reference to false representations of its agent and praying judgment against appellees for the contract price of the machines and laces.

The court decreed a cancellation of the contracts, and the defendant and cross-complainant appealed to this court.

The pleadings and proof present no grounds for reformation of the contracts. It is neither alleged nor proved that any contract was agreed upon other than the ones signed by appellees; nor that appellant's agent misrepresented the contents of the writings presented to appellees for their signature. The written contracts contained an express stipulation that the machines were "not guarantied against slugs, spurious coin or the weather;" and, until it is established that this stipulation was inserted in the contracts by fraud, accident or mutual mistake, it must be taken as a true expression of the agreement of the parties. The solemn written engagements of contracting parties cannot be reformed or amended except upon clear and satisfactory proof that the writing fails, by reason of fraud, accident or mutual mistake in the preparation or execution thereof, to express the agreement intended to be entered into. *McGuigan* v. *Gaines*, 71 Ark. 614; *Goerke* v. *Rodgers*, 75 Ark. 72; *Marquette Timber Co.* v. *Chas. T. Abeles Co.*, 81 Ark. 420.

It is not claimed by appellees that appellant's agent represented to them that the written contract contained a warranty

against the successful use of other substances than nickels in the operation of the machine; nor that it did not contain a stipulation against such warranty. They claim merely that he represented that the machines were more complete than those formerly in use, and would not respond to slugs and spurious coins. Dave Kempner, the party who executed the contracts for appellees, testified that he signed them hurriedly without having read them. This is denied by the agent, who testified that Mr. Kempner read the contracts. It is, however, unimportant whether he read them or not. He had ample opportunity to do so, and can not, when the contents were not misrepresented to him, escape the obligation of the contracts by showing that he signed without reading them. *Colonial & U. S. Mortg. Co.* v. *Jeter,* 71 Ark. 185; *Upton* v. *Tribilcock,* 91 U. S. 50.

Appellees contend for an application in this case of the principle announced in *Main* v. *Dearing,* 73 Ark. 470, and like cases, that, even where a written contract for the sale of articles contains no warranty of quality, the law will imply a warranty that the articles shall be reasonably fit for the intended use. But where the written contract between the parties contains an express stipulation against warranty, none can be implied. *J. F. Hartin Commission Co.* v. *Pelt,* 76 Ark. 177.

We must, therefore, take the contract as it is written, containing the stipulation that appellant did not guaranty the machines against the use of slugs or spurious coin. Have appellees, in the face of this express agreement absolving appellant from any warranty, made sufficient showing of false representations concerning this matter to entitle them to a discharge from the obligation of the contract? We think not.

It is said that "when the vendor positively misrepresents a material fact which is peculiarly within his own knowledge and of which the purchaser is ignorant, the fact that he refuses to give a warranty is not inconsistent with his liability for fraud." 20 Cyc. p. 60, and cases cited. Whilst this is doubtless a correct statement of the law on the subject, yet it is equally true that where there is in the written contract an express stipulation against warranty the proof of such misrepresentation must be clear and satisfactory, for the practical effect

of giving relief on account of the misrepresentation is to disregard the terms of the contract. The proof in this case is not sufficient to justify us in granting the relief. Two witnesses, Mr. Dave Kempner, one of the appellees, and the bookkeeper of the firm, testify that the agent made the representation that the machines would not permit the use of anything but nickels. The agent denies it, and in support of his denial we have the stipulations in the written contracts. Moreover, it would appear to be impossible to construct a machine of this kind which would respond only to a nickel five-cent piece of money, and not to another metallic substance of substantially the same size and weight, and it seems to us unreasonable either that a selling agent should represent such a thing to be true or that a purchaser should have credited and relied upon such a statement.

Besides, one of appellee's letters to appellant concerning the matter shows beyond dispute that they did not execute the contracts upon representation that the machines would not take substances other than nickels. After the execution of the contracts, and, before appellees decided to demand a cancellation, they wrote a letter to appellant containing the following: "Please do not ship any of the Silent Shoe Lace Salesmen until we advise you further. We have a peculiar proposition to contend with here. One of the saloons has gone out of business and has left some ten or fifteen thousand trade chips, like sample which we enclose you, throughout the city."

Now, if they were relying upon the alleged representation of the agent that the new machines were improved over the old ones in use, and would not respond to anything but nickel pieces, why the necessity of asking a temporary postponement of the shipment while these worthless trade checks were in circulation? This letter shows clearly that appellees realized all the time that the new machines could not be relied on to reject everything but nickel pieces, and that they did not want to pay for the machine and expose them while the checks were in circulation.

We think the decree is not supported by the evidence in the case, and the same is reversed and remanded with directions to enter a decree in favor of appellant in accordance with the prayer of the cross-complaint for the amounts specified in the contracts, with interest.

HART, J., disqualified.

WYATT v. SCOTT.

Opinion delivered November 18, 1907.

1. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—PRESUMPTION.— Kirby's Digest, § 5227, which provides that a husband who has custody, control and management of his wife's separate property will be presumed to be acting as her agent or trustee, but that this presumption may be rebutted by evidence establishing a sale or gift by the wife to the husband, does not require that the rebutting evidence should show a formal gift, it being sufficient if the proof shows that the wife's property was used by the husband in such manner as to preclude the idea that she expected him to account to her as agent or trustee. (Page 358.)

2. SAME—REBUTTING STATUTORY PRESUMPTION.—Evidence clearly showing that a husband received separate moneys of his wife from time to time during a number of years, and expended them for general domestic purposes for the benefit of both, is sufficient to overthrow the statutory presumption that the moneys were received by him as her agent or trustee. (Page 359.)

Appeal from Logan Chancery Court; *J. Virgil Bourland,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellants brought suit against appellee in the Logan Chancery Court, to have appellee declared a trustee of and for his wife, Martha F. Scott, during her life, and for appellants since her death, as to all lands purchased by him and the improvements made thereon, alleged to have been purchased and improved with certain moneys received by appellee from his wife; the money being the distributive share of his wife in her father's estate, some of it being the proceeds of the sale of land inherited from her father. The prayer was that judgment be rendered for the amount, and that same be declared a lien on appellee's land so purchased and improved, or else that title to the land be vested in appellants and for all proper relief, that an account be taken of the amounts of money so received, and for rents and profits.

The chancellor found the facts as follows: "That appellants are the sisters and only heirs at law of Martha F. Scott, wife of appellee, R. C. Scott; that the said Martha F. Scott died

childless and intestate in 1902; that appellee and his wife were married in 1861, and her father died in 1863; that appellee received in 1867 her distributive share of the estate of her father, amounting to about $800; that appellee's wife and her sisters partitioned the lands of her father's estate, and that the appellee sold her part of the lands in parcel during the period from 1870 to 1884 for an aggregate sum of about $1,700; that the money arising from the sale of her lands was used from time to time with the knowledge and consent of his wife, along with moneys belonging to appellee accruing from his farm and from trading, for general domestic purposes, and that she did not intend to hold the same as a charge against the appellee, and did no substantive act indicating a purpose to treat the same as a debt against her husband, the appellee; that it is not shown, or attempted to be shown, that appellee used undue influence or artifice; and that the money was used and intended to be used for their common benefit; that some of the money might have been used in the improvement of appellee's lands, but how much or when used is not known."

Upon these facts the chancellor held: "That the moneys which came to appellee's hands in 1867 became his absolutely by virtue of his marital rights, under the law then existing; that as to the money arising from the sale of lands a formal gift was not requisite; that when a wife permitted her husband to mingle her money with his and use it along from time to time through a number of years for domestic purposes and for their mutual benefit, it will be presumed to have been done without any intention to charge the husband with same; that, before appellants could be entitled to have a lien declared against the husband's lands, it would be necessary to show when and how much money was used, and what land it was invested in, and that it was wrongfully converted to such use."

John M. Parker, for appellant.

1. When a wife permits her husband to have the custody, care and management of her separate property, the presumption of law is that the husband was acting as the agent or trustee of the wife. Kirby's Digest, § 5227; Lewin on Trusts, § 778. The presumption of a gift to him, because of the control of the money by her husband, is not sufficient to overcome that created

by the statute. A gift from wife to husband must be clearly proved. 81 Ark. 147. And must be fair and reasonable, not imprudent on her part, and not unfairly procured. 20 Cyc. p. 1219; 1 Am. St. 719; 51 *Id.* 281; 34 So. 320; 73 Ga. 275; 75 Ill. 446; 39 N. J. Eq. 215.

2. Acts to protect married women are liberally construed. Const. 1868, art. 12, § 6; *Ib.* 1874, art. 9, § § 7, 8; act April 28, 1873. As there is no sufficient evidence to support a gift, the law implies a trust in the heirs, (10 Am. & Eng. Enc. of Law 1 Ed. p. 25); and the funds may be followed into any land or property invested in by the trustee. *Ib.* p. 47, 62, 21 and note; and 44 note 4, etc.

3. Parol evidence admissible. *Ib.* 26, 30, 49, and 50.

Priddy & Chambers, for appellee.

1. The property became the husband's by virtue of his marital rights. 50 Ark. 356; 39 *Id.* 434. The Constitution of 1874 could not divest marital rights acquired before its adoption.

2. No formal gift requisite—an intention sufficient. There was sufficient evidence to rebut the presumption raised by Kirby's Digest, § 5227; 10 S. W. 460; 50 W. Va. 226; 54 Md. 35; 46 N. Y. 218.

3. Where a wife permits her husband for a long period to manage her property, receive rents and profits, and expend surplus without question, a finding of a gift is warranted. 58 Am. Rep. 259; 42 *Id.* 548; 2 Tenn. Ch. Rep. 5; 36 Atl. 607; 1 McN. & G. 599; 36 Eng. Ch. Cas. 643; 92 Am. Dec. 681; 30 Ark. 79; 60 *Id.* 461

4. Kirby's Digest, § 5207, provides that separate property of married woman shall, *so long as they may choose,* be her separate estate. She can do what she pleases with it. While gifts to a husband are scrutinized closely, the object is to ascertain, and not to defeat when ascertained, the real intentions of the parties. 75 Ark. 127.

WOOD, J., (after stating the facts.) The testimony is voluminous. It would be needless to set it out and to discuss it in detail. It suffices to say that we are of the opinion that the chancellor's findings of fact are not

clearly against the weight of the evidence. In fact, the fair preponderance may be said to be in favor of the chancellor's findings.

Appellants rely upon section 5227, Kirby's Digest, as authority for having appellee declared a trustee of the money received by him from his wife, and for the sale of her land. That section is as follows: "The fact that a married woman permits her husband to have the custody, control and management of her separate property shall not of itself be sufficient evidence that she has relinquished her title to said property, but in such cases the presumption shall be that the husband is acting as the agent or trustee of the wife. This presumption may be rebutted by any evidence establishing a sale or gift by the wife to the husband of such property." By the very terms of the statute, the presumption of agency or trusteeship, which follows from the custody, control and management of the wife's property by the husband, may be overcome by evidence showing that the wife gave the property to her husband. It is unnecessary for the proof to show a formal gift, in order to overcome the statutory presumption. But a gift may be and will be inferred when the proof shows that the money was received by the husband and used with the knowledge and consent of the wife in such manner as to preclude the idea or inference that she expected him to account for same to her as agent or trustee. Chancellor Cooper in *Lishey* v. *Lishey*, 2 Tenn. Ch. 5, after citing the rulings of certain English cases, says: "The weight of authority, in accordance with these rulings, undoubtedly is that if the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband to be used by him (of course, for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him." See also *McLure* v. *Lancaster*, 58 Am. Rep. 259; *Lyon* v. *Green Bay & Minn. Ry. Co.*, 42 Wis. 548, and other authorities cited in appellee's brief. The evidence showing an intent upon the part of the wife to change the character of the holding and destroy the trust which the

law raises should be clear. See *Lishey* v. *Lishey, supra,* and cases cited.

The separate property of a married woman remains such under the law "so long as she may choose." Kirby's Digest, § 5207. She may choose not to have it remain so, as the proof tends strongly to show she did in this case. The proof is clear enough.

The appellee and his wife lived together, after the death of her father, about forty years. As early as 1867 appellee received $800 of the money of his wife for which appellants seek to hold him as trustee. This sum was his by virtue of his marital rights under the law prior to the passage of the act of April 28, 1873, for the protection of married women. From 1870 to 1884 appellee received the further sum of $1,700, as found by the chancellor. The appellee testified that the money turned over to him by his wife from time to time "was done freely and with her full consent, and with the full knowledge of what particular use he expected to make of it. I never in all my life," says he, "heard my wife say or intimate in any way that she wanted the money received from her father's estate kept separate." The testimony shows that he expended the money from time to time during all these years for general domestic purposes for the benefit of both in the usual way "to make a living with, in running the farm, and such like."

The findings of fact and conclusions of law being correct, the decree of the chancery court is in all things affirmed.

GEBHART v. MERCHANT.

84 359
89 508

Opinion delivered November 18, 1907.

1. APPEAL—CONCLUSIVENESS OF FINDING OF FACT.—A finding of fact made by the circuit judge upon conflicting evidence will not be disturbed. (Page 362.)

2. TRIAL—GENERAL AND SPECIAL FINDINGS.—The statute which provides that "when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly" (Kirby's Digest, § 6208) applies to a finding of facts made by the trial judge, as well as to verdict of juries. (Page 362.)

3. HOMESTEAD—IMPRESSMENT.—Occupancy of a dwelling house with the intention of making it a home some time in the future does not constitute an impressment upon it of the homestead character. (Page 363.)

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

C. V. Teague and *J. W. & M. House,* for appellant.

1. Under the finding of facts, the occupancy of the property by the appellant and his family was sufficient to impress the homestead character upon it. 69 Ark. 596; 22 S. W. 1033; Waples, Homestead & Ex. 187; Thompson, Homestead & Ex. § 260; 29 Ark. 280; 14 S. W. 296; 78 Ark. 481.

2. Having sold his homestead in Texas and impressed the property in question with the homestead character, appellant does not lose his homestead rights in the latter by leasing it out and going to Texas to wind up his business there, since it was his intention to return to the Arkansas property. 73 Ark. 174; 66 Ark. 382; 65 Ark. 373; Thompson, Homestead & Ex., § 254; 22 S. W. 1034; 58 N. W. 204; 38 Tex. 414; 54 Ill. 177; 58 N. W. 1101; 16 N. W. 895; 9 Am. St. Rep. 515; 19 S. W. 704; 48 N. W. 543; 7 Mich. 506.

Wood & Henderson, for appellee.

1. The court's findings were correct. The evidence is clear that appellant never changed his residence from Texas to Arkansas. The most that can be claimed for him is that he had an intention to establish residence on the property at some future time. He has no homestead rights in the property. Art. 9, § 3, Const.; 53 Ark. 182; 24 Ark. 155; 29 Ark. 280; 33 Ark. 404; 31 Ark. 466; 42 Ark. 175; 51 Ark. 84; 57 Ark. 179; 46 Ark. 43; 69 Ark. 109; 78 Ark. 481.

2. If the property was ever impressed with the homestead character, it was lost by abandonment as shown by the testimony.

McCULLOCH, J. Appellee, W. B. Merchant, sued appellant, D. L. Gebhart, in the circuit court of Garland County to recover judgment for the amount of a debt due by contract, and caused an order of general attachment to be levied on certain real estate owned by appellant in the city of Hot Springs. Appellant claimed the property as his homestead, and filed his schedule in the action, verified by affidavit, claiming it as such.

The plaintiff controverted the allegations of appellant's schedule and affidavit, putting in issue the question whether or not appellant was a resident of the State of Arkansas or had ever impressed the property with the homestead character, and upon final hearing the court denied appellant's homestead claim, sustained the attachment, and ordered the property sold to satisfy appellee's judgment. The defendant appealed.

The property in controversy was formerly owned by appellant's father, Dr. J. L. Gebhart, of Hot Springs, who occupied it for many years as his home. Appellant resided in Texas, where he owned a home. He, too, is a practicing physician, and was also the owner of an apiary. His father was in very poor health, and some time during the fall of the year proposed to him that, if he (appellant) would come to Hot Springs to live and take care of him during his illness and would occupy the place as his permanent home, he would convey it to him. He accepted his father's offer, and in December sent his wife and two children to Hot Springs. He remained in Texas for the purpose, as he explains, of disposing of his home and bees and of collecting accounts due him, but came to Hot Springs about Christmas, and remained there three or four weeks. During this time his father conveyed the property to him pursuant to promise, and about this time he sold his home in Texas. He went back to Texas about January 20th, but left his family with his father in Hot Springs. His father died on February 3d, and he was summoned back just in time to get to Hot Springs before the death occurred. He remained in Hot Springs about three weeks, and then rented out the property there, and returned to Texas, taking his family with him, where he and they have remained up to the time of the trial below. He did not move any of his furniture or other property from Texas to Arkansas, but while he and his family were in Hot Springs they occupied the property in controversy. He testified that he accepted his father's offer and sent his family to Hot Springs with intention to make that his permanent home, but remained in Texas himself to dispose of his property and wind up his business; also that after his father's death he went back to Texas with his family temporarily on account of his wife's ill health, but intended to return to Hot Springs as his per-

manent home. There was also testimony introduced by appellee as to conduct and statements of appellant which tended to show that he never intended to change his place of residence from Texas to Arkansas and never in fact took up his residence here. The evidence is such, we think, that the court could have drawn a conclusion either way as to the intention of appellant to remove to Arkansas and occupy the property as his permanent home. We would not feel at liberty to disturb a finding of the circuit judge either way on this question of fact. *Gazola* v. *Savage,* 80 Ark. 249.

The most serious question in the case, as it appears here, is whether the general findings of the trial judge sitting as a jury and the judgment of the court are consistent with the special finding of facts. It is contended by appellant that they are inconsistent, and that for this reason the judgment should be reversed with directions to the court to enter judgment in accordance with the special finding.

The statute provides that "when the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." Kirby's Digest, § 6208. This statutory provision has reference especially to verdicts of juries, but it applies also to a finding of facts made by the trial judge. The judgment of the court recites a general finding in favor of the plaintiff, and "that the claim of homestead made by the defendant, David L. Gebhart, should be denied;" and also recites the following finding of facts: "That the defendants, David L. Gebhart and Johnnie A. Gebhart, were at the time of the institution of this suit, and are still, nonresidents of the State of Arkansas; that the said defendants were at the time of the institution of this suit and the issuing of the attachment herein, and are still, residents of the State of Texas; that the defendant, David L. Gebhart, has never impressed the lot which he claims as a homestead in this action with the character of a home." The bill of exceptions shows that the defendant presented in writing a certain finding of facts for the court to declare, and that the court, after striking out the words "reside" and "residing" where they occurred and inserting in lieu thereof the words "live" and "living," declared the following finding:

"That J. L. Gebhart agreed to make a deed to the property claimed as a homestead to D. L. Gebhart, with the understanding that D. L. Gebhart should make it his home; that pursuant to said agreement D. L. Gebhart sent his family to Hot Springs, Arkansas, to live on the land, and while they were so living on the land J. L. Gebhart executed said deed; that D. L. Gebhart intended to come to Hot Springs later and reside in person on the land; that defendant's family was living on the land at the time of the death of J. L. Gebhart and prior to institution of this suit."

It is argued that the facts thus found and recited necessarily constituted an impressment of the land in controversy with the homestead character, and that upon them the court should have found generally in favor of the homestead claimant, and rendered judgment accordingly.

The court found, however, as a matter of fact that the defendant "has never impressed the lot which he claims as a homestead in this action with the character of a home." This is recited in the judgment, not as a conclusion of law, but as a finding of fact, and it must be taken as an expression of the court's special finding of facts.

Now, taking this expression of the court's finding in connection with that recited in the bill of exceptions, it is clear that the finding of facts which the court meant to express was that appellant had the intention of occupying the property in question at some future time when he had disposed of his property and business in Texas, but that he never had the present intention of occupying it as a home and place of residence. The court evidently concluded, and meant to express the conclusion, that appellant sent his family to Arkansas with the intention of taking up his residence here on the property in question in the future, but that he did not intend that his place of residence should then be in Arkansas. This did not constitute an impressment of the homestead character to the land. *Shell* v. *Young,* 78 Ark. 479; *Gibbs* v. *Adams,* 76 Ark. 575; *Tillar* v. *Bass,* 57 Ark. 179.

There is a marked difference between a present intention, manifested by some of the usual acts of personal occupancy, to occupy real estate as a homestead, and the mere occurrence of

some of the usual acts of personal occupancy without a present intention to make it the homestead. In the one case the impressment of the homestead character is complete, while in the other it is not. Thus a man may move a portion of his household furniture into a house with the present intention to make it his home, and the impressment would be complete, even though death, destruction of the house by fire or the levying of process upon the property might intervene before actual occupancy could be completed. *Gill* v. *Gill,* 69 Ark. 596.

On the other hand, the man might move his furniture into the house with only the intention to make it his home at a future time on the happening of some other contingency, and the impressment would not be complete. *Gibbs* v. *Adams, supra.* In the case just cited the wife of the homestead claimant had, under his direction, moved a part of their furniture and household goods into a house on the real estate claimed as a homestead, and Mr. Justice RIDDICK, speaking for the court, said: "The evidence makes it very doubtful as to whether Mrs. Gibbs ever had any present intention of occupying the cabin on this lot as a home. She may have formed the intention of occupying it at some future time after it had been repaired and rendered fit for a habitation, but the intention to make it her home in the future did not protect it from the attachment lien."

A majority of the court are of the opinion that the finding of facts made by the court is not inconsistent with the general finding and the judgment of the court, and that both are sustained by the evidence.

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ARKANSAS, LOUISIANA & GULF RAILWAY COMPANY *v.* KENNEDY.

Opinion delivered November 18, 1907.

1. EMINENT DOMAIN—RIGHT OF RAILROAD TO APPEAL.—Kirby's Digest, § 2954, providing that where damages from a railroad company's right-of-way has been assessed it shall be the duty of such railroad company to deposit or pay the amount assessed within thirty days after such assessment, does not prohibit the railroad company from appealing from the assessment, nor require that payment of the assess-

ment be made until the cause has been finally determined where an appeal has been taken. (Page 365.)

2. SAME—RIGHT TO SUPERSEDEAS.—Where a railroad company brought condemnation proceedings, and appealed from a judgment fixing the assessment of damages to the property, and executed a supersedeas bond, the bond will not be quashed because, after the judgment was rendered, the railroad company unlawfully took possession of the property without paying the assessment. (Page 366.)

Appeal from Ashley Circuit Court; *Thomas E. Mears,* Special Judge; motion to dismiss appeal and quash supersedeas denied.

G. W. Norman, E. A. Bolton, J. C. Norman and *E. G. Hammock,* for appellant.

Robert E. Craig, for appellee.

PER CURIAM. This is a motion to dismiss the appeal and quash the supersedeas. The suit is an ordinary condemnation proceeding, brought by the railroad company against a landowner, which proceeded to judgment. No payment was made, but an appeal was prayed and granted, and a supersedeas bond was given, and the transcript lodged here.

Appellee files an affidavit showing that the railroad company, after judgment and before appeal, took possession of the land in controversy. It is argued that under sections 2954-7, Kirby's Digest, the failure to make such payment within thirty days left nothing for the railroad company to appeal from, as all rights to take the property terminated on the expiration of the thirty days without such payment having been made.

This provision for payment within thirty days means thirty days after the assessment is finally determined; and the amount is not finally determined until the cause has been determined on appeal, when an appeal is taken. Pending the appeal, the railroad company has no right to take possession of the land. 15 Cyc. 927. There is a method prescribed by statute whereby possession may be taken on deposit being made of an amount to be determined by the circuit judge. These statutes have been construed by this court in Ex parte *Reynolds,* 52 Ark. 330; *Reynolds* v. *Ry. Co.,* 59 Ark. 171. To hold otherwise than that the thirty days for payment begins when the judgment is finally determined on appeal would be to deny the railroad company

the right to appeal; and it is settled that the Legislature can not deny the right to appeal to this court. *St. Louis & N. A. Rd. Co.* v. *Mathis,* 76 Ark. 184. If these statutes called for such construction, they would be unconstitutional; and that construction is never placed upon a statute unless too plain to be avoided. The motion to dismiss the appeal is not well taken.

As to the motion to quash supersedeas: If the right to appeal exists, then the statutes governing appeals must be read into the statutes providing for condemnation proceedings. The fact that the railroad company has unlawfully taken possession does not oust the jurisdiction of the court to determine the questions involved in the appeal. *Board Directors of St. Francis Lev. Dist.* v. *Redditt,* 79 Ark. 154.

The landowner could have prevented the railroad company from taking possession of the land. *Organ* v. *Memphis & L. R. Rd. Co.,* 51 Ark. 235, 264. While a landowner has not, since the passage of the act of 1883 (sections 2903-5 Kirby's Digest), the right to eject a railroad company when it unlawfully takes possession of his land for railroad purposes, yet he has an adequate remedy at law therefor. *McKennon* v. *Ry. Co.,* 69 Ark. 104. And he may proceed in equity to restrain it from taking possession unless the railway company pursues the statutory method of lawfully obtaining it.

It is thus seen that the landowner is amply provided with all necessary remedies against oppression by the railroad company, and there is no reason why the railroad company has not the right to appeal from an assessment of damages like any other civil proceeding. The motion to quash the supersedeas is therefore not well taken.

LUXORA BANKING COMPANY *v.* TURNER.

Opinion delivered November 18, 1907.

BILLS AND NOTES—DEMAND AND NOTICE—WAIVER.—Proof that the holder of a promissory note, at the time he bought the note, told a prior indorser that he would not release him as indorser does not establish

a waiver upon such indorser's part of demand and notice on the part of the holder.

Appeal from Mississippi Circuit Court; *Frank Smith,* Judge; affirmed.

W. J. Driver, for appellant.

1. Court erred in refusing instruction No. 3 asked by defendant. When the holder of a note fails to make due demand of payment, if the indorser afterward agreed to pay or remain liable, due demand and notice is waived, and the indorser is liable. Story on Prom. Notes, cited in 13 Ark. 401; 26 *Id.* 156. It is not necessary that an express promise should be made *in totidum verbis.* It is sufficient if the language imports or naturally implies a promise to pay. 13 Ark. 401; Greenl. on Ev. § 190.

2. Whether a waiver or not is not a matter of law, but of fact for the jury. 7 Peters, 287; 26 Ark. 156.

S. S. Semmes, for appellee.

1. The third instruction is not hypothetical, and was properly refused.

2. To excuse laches of the holder and constitute waiver of the demand and notice, the act on part of the indorser must be of such a nature as to show an unconditional agreement or promise to continue his liability. Especially is this true after maturity. 4 Am. & Eng. Enc. Law (2 Ed.), p. 466.

HART, J. On the 26th day of November, 1903, Frank Guttuso (sometimes referred to in evidence as Romeo) executed to W. B. Calhoun a promissory note for $350, payable twelve months after date with interest from date until paid at ten per cent. per annum, which note was, on the 30th day of November, 1903, indorsed by W. B. Calhoun (payee) and delivered to appellee, P. D. Turner, who in turn indorsed and delivered same to appellant, Luxora Banking Company, on the 9th day of June, 1904. On the 26th day of November, 1904, appellant, Luxora Banking Company, presented the note to the maker, demanding payment, and, upon refusal to pay, protested it for non-payment, and charged the account of appellee with the amount of said note, together with interest and protest fees. Appellee, P. D. Turner, institutes this suit to recover from appellant the amount

so charged, alleging, among other things, that appellant failed to give appellee due notice of the non-payment of said note.

This is not denied in the answer, nor does the answer set up any defense of waiver of demand and notice on the part of appellee.

Appellant's sole contention upon this appeal is that the lower court erred in refusing to give to the jury the following instruction, as requested by appellant:

"No. 3. You are instructed that, although defendant failed to make demand of payment of maker at the expiration of the three days of grace, if you further find from a preponderance of the evidence that plaintiff, as indorser of the note in controversy, thereafter agreed with defendant to pay said note or to remain liable therefor, plaintiff would be liable to defendant for the payment of said note, and you will find for defendant."

Appellant predicates his right to this instruction on the testimony of J. M. Landrum, its cashier, to the effect that he told appellee at the time he bought the note that he would not release him as indorser. This was not equivalent to a waiver on the part of appellee. *Andrews* v. *Simms*, 33 Ark. 777. The rest of Landrum's testimony on that question merely amounts to an expression of opinion on his part that appellee had agreed to remain liable on the note because he, Landrum had told him when he took the note he would not release him as indorser. We think that the instruction was abstract, without any evidence to support it, and that the court properly refused it. *Hazard* v. *White*, 26 Ark. 156; *Lary* v. *Young*, 13 Ark. 401.

Judgment affirmed.

SOUTHERN EXPRESS COMPANY *v.* HILL.

Opinion delivered November 18, 1907.

1. RECEIPT—CONCLUSIVENESS.—An express company's receipt showing that the package receipted for was marked to be carried to a certain place is only *prima facie* evidence, and may be contradicted by evidence that the package was marked to be carried elsewhere. (Page 372.)

2. CARRIER—NEGLIGENCE OF SHIPPER.—Where the uncontradicted testimony in a case shows that a package delivered to an express company to be carried to a certain place was misdirected by the sender, and thereby was lost, a verdict holding the express company liable for its loss will be set aside. (Page 373.)

Appeal from Howard Circuit Court; *W. V. Tompkins,* Special Judge; reversed.

W. C. Rodgers, for appellant.

1. The receipt is only *prima facie* evidence, and may be explained or contradicted. 5 Ark. 61; 43 *Id.* 232; 46 *Id.* 217; 58 *Id.* 181; 69 *Id.* 287; 82 Ark. 492.

2. The *prima facie* case made by the receipt was overcome by the evidence, leaving the verdict unsupported. 67 Ark. 514; 53 Ark. 96; 66 *Id.* 248; 66 *Id.* 439.

3. The box was sent to the wrong destination by direction and address of appellee's agent, and there can be no recovery. 36 Ark. 377; 48 *Id.* 106; 76 *Id.* 356; 81 Ark. 1; 3 Cal. (U. S. C. C.), 184; 3 Houst. (Del.) 233; 83 Pa. St. 22.

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

1. The burden was on appellant, and it failed to offer any testimony as to who marked the box. 77 Ark. 1.

2. The law of this case was settled on the first appeal. 81 Ark. 1.

3. There is no proof to sustain the averment in the answer that the box was marked by the appellee's agent. On this the lower court could well have directed the jury to find for plaintiff. The testimony is entirely consistent with the idea that appellant's employees marked the box, and the receipt shows conclusively that the mark was Nashville, Ark.

4. Under the opinion in first appeal (81 Ark. 1), the burden was on appellant to show that appellee or his agent marked the box "Tenn.," instead of "Ark." 77 Ark. 1. The doctrine of *prima facie* presumption only applies to party having the burden of proof. The recital in the receipt, and the evidence of appellant's agents, made an ordinary case of conflicting evidence, and the jury *specifically found* for appellee. This ended the controversy.

BATTLE, J. This is an action against the appellant for the alleged loss of certain personal property. The complaint alleges that the defendant, Southern Express Company, is engaged in carrying freight and express for hire from Memphis, Tenn., to Hope, Ark., and was so engaged on March 31, 1904. That on that day the Memphis Millinery Company delivered to defendant a box of clothing, properly consigned to J. W. Hill at Nashville, Ark., to be thence transported and delivered to the consignee. That the box contained wearing apparel of plaintiff Hill of the value of $210, and was never delivered to the plaintiff at Nashville, Ark., nor to any other person for him. That appellant refused and neglected to deliver the goods to appellee, as it contracted to do, to the damage of plaintiff in the sum of $210.

The defendant answered and denied "that on March 31, 1904, or at any other time, the Memphis Millinery Company delivered to it a box of clothing properly consigned to J. W. Hill at Nashville, Ark., to be thence carried by defendant and delivered to Hill; alleged that the box was delivered to defendant marked J. W. Hill, Nashville, Tenn.; that it was promptly transported to that place according to the address shown on the box, and that defendant made every reasonable effort to make delivery of the box at Nashville, Tenn.; alleged that the box was marked J. W. Hill, Nashville, Tenn., by Mr. T. D. Johnson, who, in addressing and shipping the box, acted for and as the agent of plaintiff Hill; * * * that in billing out goods shipments are always billed from the marks upon the freight to be carried, and that the waybill in this instance, in conformity to this custom, was duly made out to Nashville, Tenn., from the marks on the package itself placed thereon by Johnson acting for the plaintiff Hill; that the receipt is always given to the shipper, and can not be availed as a guide in billing out freight; that, in cases of a conflict between the address on the goods shipped and any papers in connection therewith, the directions on the package to be transported control; that, if the box had been marked Nashville, Ark., it would have gone there, and that it went to Nashville, Tenn., instead, by reason of the address thereon being Nashville, Tenn.; that this misdirection of the box by the agent of the plaintiff was a direct and con-

tributing cause to the box going to Nashville, Tenn., and the loss thereof."

Plaintiff's right to recovery depended upon how the box in controversy was marked. If it was marked J. W. Hill, Nashville, Tenn., without other or further directions as to how it should be shipped, of which there was no evidence, he would not be entitled to recover. How was the box marked?

J. W. Hill, in his own behalf, testified: "I live at Nashville, Arkansas. Prior to March 31, 1904, I had been living in Memphis, Tennessee, for about sixty days. On leaving there I packed my wearing apparel and left it in charge of the Memphis Millinery Company, to be expressed to me at Nashville, Arkansas. * * * I was not present when the box was received by the Express Company. I did not see it marked. I do not know what marks were on it."

T. D. Johnson, for plaintiff, testified: "I live at Memphis, Tennessee, and know the plaintiff. I delivered for J. W. Hill a box of clothing to be expressed from Memphis, Tennessee, to Nashville, Arkansas, and the agent gave me a receipt for it. * * * I am not positive whether the above-named package was marked Nashville, Arkansas, or Nashville, Tennessee."

The receipt contained this statement: "Received of Memphis Millinery Company one box, valued at.....dollars, and for which amount the charges are made by said company, marked J. W. Hill, Nashville, Arkansas."

G. W. Agee, for defendant, testified: "I am superintendent of the western division of the Southern Express Company at Memphis, Tennessee, including the business of the Memphis office; have sustained this relation to the defendant since 1887. * * * The original waybill for this particular shipment (box in controversy) is copied in an impression book—that is, an impression copy taken of it, which is the same in all repects as the original waybill—and I have examined the said billing for the said shipment, and my testimony is given upon my personal examination of the waybill, which is made for Nashville, Tennessee. I reside at Memphis, Tennessee, and can state from my personal knowledge that this box was waybilled to Nashville, Tennessee, and the correspondence concerning it shows

that it arrived there, and further correspondence that it was sold at 'old hoss sale.'"

T. J. Clunon, for defendant: "The box in controversy in this case was addressed Nashville, Tennessee. In billing out shipments the waybills are made from the address on the package. The box in controversy went to Nashville, Tennessee, because it was so marked. It was sold at 'old hoss sale' at Winchester, Tennessee, November 7, 1904. From March 30, 1904, to the time of the events of which I testify, I was waybill clerk of the Southern Express Company to September 6, 1904. * * * I saw the box in controversy after it reached Nashville, Tennessee."

J. J. Vaughan, Jr.: "The box of clothing in controversy was marked Nashville, Tennessee. Shipments by express are billed out from the address as it appears on the package to be shipped, and not by receipt. This shipment went to Nashville, Tennessee, because the box was so marked. * * * From March 30, 1904, to the time of testifying, I was assistant 'off clerk' of the defendant. * * * Mr. T. J. Clunon was present when I learned of the shipment. I had no special connection with it. I did not sign any receipt for it or see any one else do so. I merely noticed the package. I did see the box when it arrived at Nashville, Tennessee. I was connected with the Nashville, Tennessee, office."

R. A. Odom, for defendant: "The box in controversy was addressed Nashville, Tennessee. Packages are billed from the address on the shipment. This box came to Nashville, Tennessee, because it was so billed. * * * From March 30, 1904, to the time of the events of which I testify, I was receiving clerk of the defendant. * * * The package was shipped in regular course to Nashville, Tennessee."

The court, at the suggestion of the defendant, propounded the following question to the jury: "Was the box marked Nashville, Tennessee, or Nashville, Arkansas?" The jury returned the following verdict: "Was the box marked Nashville, Tennessee, or Nashville, Arkansas? Answer: Nashville, Arkansas." The verdict was also for the plaintiff, and his damages were assessed at $100.

The receipt was only *prima facie* evidence that the box in

controversy was marked Nashville, Arkansas. This evidence was contradicted by the testimony of all the witnesses who saw and remembered how the box was marked, and their testimony is corroborated by the witness Agee. There is no conflict in the testimony of witnesses in this respect. The veracity of these witnesses is unimpeached. Their testimony is consistent and reasonable. There is no reason why the appellant should ship the box to Nashville, Tennessee, when it was marked to Nashville, Arkansas, and the only reasonable explanation of the shipment to Nashville, Tennessee, was that it was so marked. The evidence clearly shows that the statement in the receipt was a mistake. The evidence was sufficient to overcome the presumption or statement in the receipt, and leaves the verdict of the jury unsupported by evidence. See *Railway* v. *Shoecraft,* 53 Ark. 96, 97; *St. Louis, I. M. & S. Ry. Co.* v. *Bragg,* 66 Ark. 248, 250; *Kansas City, Ft. S. & M. Ry. Co.* v. *King,* 66 Ark. 439, 441; *St. Louis, I. M. & S. Ry. Co.* v. *Landers;* 67 Ark. 374; *Kansas City Southern Ry. Co.* v. *Lewis,* 80 Ark. 396.

Judgment reversed and action dismissed.

SOUTHERN HOTEL COMPANY *v.* ZIMMERMAN.

Opinion delivered November 18, 1907.

AGENCY—BURDEN OF PROOF.—In a suit in which plaintiffs sought to bind defendant by a contract made by the former with an agent of the latter, it was error to put upon the defendant the burden of showing that the agent was not authorized to bind defendant.

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; reversed.

Youmans & Youmans, for appellant.

1. There is no testimony that Waller acted for appellant in making the contract except his own statement to Zimmerman. Agency can not be established by the declaration of the alleged agent. 31 Ark. 212; 33 Ark. 251; 33 Ark. 316; 44 Ark. 213; 68 Ark. 225.

2. There could be no ratification by the appellant of the acts of Waller unless it had knowledge of those acts. 64 Ark. 220; 76 Ark. 567.

Mechem & Mechem, for appellees.

BATTLE, J. G. E. Zimmerman and J. C. Jones, partners doing business under the firm name and style of Zimmerman & Company, brought an action against Southern Hotel Company, a corporation organized under the laws of Texas, to recover what they alleged was due them "for material furnished and labor performed in plastering and papering rooms on the third floor of the Haylin building, in Fort Smith," in this State. The defendant, answering, denied that it entered into any contract with plaintiffs, or that it purchased any material from them, or that they did any work or furnished any material for it or that it was indebted to plaintiffs in any sum whatever.

In the trial had in the case Zimmerman, one of the plaintiffs, testified that the labor was done and the materials were furnished under contract made by them with C. C. Waller, and under the supervision of one Furlong. Evidence was adduced by the plaintiffs for the purpose of showing that Furlong was the manager of the defendant; that the labor was performed, and the materials were furnished, for the use and benefit of defendant; and that it was responsible for the same; and evidence was adduced by the defendant to prove the opposite.

The court instructed the jury as follows: "1. Plaintiff sues the defendant for work and labor performed for $225 and material furnished, $223, under a contract with C. C. Waller, claiming that said Waller was acting for and on behalf of defendant. Defendant denies its liability, denies that any work or material was furnished to it, or any work or material was furnished for it. It is admitted that the labor was performed and the material was furnished under a contract with C. C. Waller, but denied that Waller had any authority to act for defendant, and the issue to be tried is whether he was acting for defendant, and whether his contract with plaintiffs for labor and material was ratified by defendant."

And the court, over the objections of the defendant, at the request of the plaintiffs, instructed the jury as follows: "When

one has frequently authorized his agent to do acts outside of the line of his ordinary employment, and beyond the scope of his apparent authority, or has commonly ratified such acts when done, other persons with knowledge of the facts who deal with him in reference to similar matters are justified in presuming that he is impowered by his principal to bind him in reference thereto. But the authority is not established by proof that the agent frequently so acted, unless it is also proved, or the circumstances justify the inference, that the person to be charged as principal assented to such acts."

The defendant asked and the court refused to instruct the jury as follows: "In order to recover in this case, plaintiffs must show by the preponderance of the evidence that Waller and Furlong, or Waller, or Furlong, had the authority from the Southern Hotel Company to enter into the contract for the work and material the price of which is herein sued for. The fact that Furlong is in charge of the hotel of the defendant at Ft. Smith is not sufficient of itself to authorize you to infer that such authority had been given." But modified it by adding the following: "A general authority implies his right to act for the company, but defendant may show that neither Waller nor Furlong has such authority," and gave it as modified.

The jury returned a verdict in favor of the plaintiffs for $448.91. Judgment was rendered accordingly, and the defendant appealed.

The instruction given over the objection of appellant, at the request of appellees, was abstract and misleading. There was no evidence upon which to base it. As the evidence supporting the verdict is weak and inconclusive, it was prejudicial. The modification of the instruction requested by appellant is subject to criticism. The objectionable language is: "but defendant may show that neither Waller nor Furlong has such authority." Standing alone and unexplained, it might be construed to mean that the burden was upon the appellant to show that Waller or Furlong did not have authority from appellant, if such was the fact, to do what they undertook to do. Such is not the law.

Reversed and remanded for a new trial.

LACOTTS v. QUERTERMOUS.

Opinion delivered November 18, 1907.

APPEAL—RIGHT OF COUNSEL TO WITHDRAW BRIEF.—After a litigant's brief has been filed, his counsel will not be permitted, on the day set for submission of the cause, to withdraw the brief upon the ground that the litigant refuses to reimburse counsel for the expense of printing the same.

Appeal from Arkansas Chancery Court; *John M. Elliott,* Chancellor; motion to strike brief from files denied.

H. A. Parker and *W. N. Carpenter,* for appellant.

John F. Park, H. Coleman and *Campbell & Stevenson,* for appellees.

PER CURIAM. Appellant's counsel filed a brief for him in this court, and paid the expense thereof; and it appears from a motion filed on the day of submission that the client has paid what he thinks is sufficient for the expense thereof, but has refused to pay the total expense, and has intimated that counsel was not authorized to incur this expense and prepare the brief for him. As to the latter question, there can be no doubt, from the motion and a motion of the associate counsel of appellant, that the attorney filing the brief was fully authorized to represent the appellant herein. The attorney now asks that his brief be stricken from the files, that appellant be given time in which to employ another attorney to brief his case, and that the cause be continued for that purpose; and associate counsel asks that time be granted sufficient for him to prepare a brief, should the court allow the withdrawal of the counsel.

The court can not settle disputes between attorneys and clients, and must take the record as it finds it here, and can not delay the business of the court to allow the attorney to withdraw his brief after the same has been filed according to the rules of the court. Counsel is permitted to withdraw his personal connection with the case, but is not allowed to withdraw his briefs which have been filed. His remedy against his client is for services rendered and expenses incurred, and not withdrawing here after he has prepared the case for submission.

Motion denied.

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

Opinion delivered November 18, 1907.

1. MASTER AND SERVANT—WHO ARE FELLOW SERVANTS.— A car inspector and an engine foreman, not working together for a common purpose, but working in different departments of the railway service, are not fellow servants within Kirby's Digest, § § 6658-6660. (Page 378.)
2. SAME—VIOLATION OF RULE—CONTRIBUTORY NEGLIGENCE.—Where a master promulgates a rule for the safety of his servants, and a servant is injured while in violation of that rule and on account of such violation, the court will ordinarily declare him, as a matter of law, guilty of contributory negligence. (Page 379.)
3. SAME—ABROGATION OF RULE.—Where a rule promulgated by a master for the safety of his servants has been habitually violated, and such violation is known to or acquiesced in by the master, it will be held that the rule has been abrogated. (Page 380.)
4. SAME—LIABILITY OF MASTER.—Where a car inspector, while engaged in making an inspection under a car, was injured by having the car pushed on him by a switch engine in charge of one who was not a fellow-servant, the master would not be liable unless the engineer in charge of such engine knew that the inspector was under the car, or that it was part of his duty to be there while making his inspection. (Page 380.)
5. SAME—CONTRIBUTORY NEGLIGENCE.—A master will not be liable for injuries suffered by a car inspector while engaged in making an inspection under a car if the inspector was guilty of negligence in going under the car without giving notice that he was going to place himself in such position, unless such position was known to be a part of his duty, and it was also known that he was making such inspection. (Page 380.)
6. INSTRUCTIONS—FAILING TO MAKE SPECIFIC REQUESTS.—Appellant cannot complain because the court gave merely general instructions if he failed to request that specific instructions be given. (Page 381.)
7. APPEAL—INCOMPETENT TESTIMONY—GENERAL OBJECTION.—Where the answer of a witness to a proper question was partly competent and partly incompetent, an objection to the testimony which fails to point out the incompetent testimony is insufficient. (Page 381.)

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

James Dupree sued the St. Louis, Iron Mountain & Southern Railway Company, alleging that he was employed by defendant to inspect its cars, and that while he was making an inspection under a car defendant's employees kicked several cars violently against this car, causing the same to pass over plaintiff's right arm and leg, so that plaintiff lost his right arm and suffered the partial loss of his right leg. Defendant denied negligence on its part, and alleged that defendant was negligent.

The jury returned a verdict for plaintiff in the sum of $6,000. Defendant has appealed.

T. M. Mehaffy and *J. E. Williams,* for appellant.

1. The alleged admission of the appellant's agent, Arthur, made at a time too remote to be a part of the *res gestae,* and not authorized by the company, were erroneously admitted as evidence. 52 Ark. 78; 57 Ark. 287; 61 Ark. 52; 63 Ark. 87; 67 Ark. 147; 68 Ark. 225; 19 L. R. A. 733, note; 66 Ark. 495; 70 Ark. 289; 69 Ark. 560; 80 Ark. 533; 72 Ark. 581.

2. If it be conceded that the rule for the protection of car inspectors was not enforced, appellee was, nevertheless, guilty of contributory negligence, as a matter of law, in violating a rule made for his protection, and in doing so assumed the risk of the extra hazard incident thereto. 77 Ark. 405; 85 Minn. 326; 48 Ark. 334; 98 Ill. App. 207; 79 Ark. 53; 84 Fed. 944; 15 S. W. 108; 39 S. W. 967; 154 N. Y. 474; 68 Ark. 316; 4 Thompson, Negligence, § § 4616, 4643; 94 Ga. 535; 91 N. W. 1034; 168 Mass. 579; 81 Pac. 221; 22 Col. 263; 99 Md. 471; 122 U. S. 189. A car inspector assumes the risk incident to that employment while a train is being made up in the usual and ordinary manner. White's Supp. Thompson, Negligence, § 4779; 73 S. W. 555; 160 Mass. 45; 4 Thompson, Negligence, § 4616; 78 Md. 249; 55 L. R. A. 908.

W. A. Cunningham and *Jones & Hamiter,* for appellee.

HILL, C. J. In brief, the case was this: Dupree was a car inspector, engaged in inspecting cars of the railroad company at Hoxie. Arthur was an engine foreman in charge of the engine, switching, making up and breaking up trains in the Hoxie yards. He and Dupree

were in different departments of service, and were not working together for a common purpose, and were therefore not fellow servants, within the meaning of sections 6658-60, Kirby's Digest. There were two kinds of inspection for cars, one called intermediate inspection, which was a general inspection without going into particular defects, and another called the interchange inspection. There was no interchange inspection in the Hoxie yards, and the inspections of Dupree were intermediate.

There is a conflict in the evidence as to the duties of the inspector in making an intermediate inspection. Dupree says that it was often necessary, in order to properly make it, to place his body under the cars; while others say that such action was not necessary for such inspection.

There was a rule of the company requiring inspectors to place in the daytime blue flags, and in the nighttime blue lights, at either end of the cars being inspected, and only the person placing the signals was authorized to take them up. These signals were to protect the cars during inspection from movement. There is testimony tending to show that this rule was habitually disregarded, and its habitual disregard known to the foreman in charge of Dupree's department; and, on the other hand, there is evidence that it was the proper way to protect the car during inspection.

About 9 o'clock, a dark rainy night, Dupree and his fellow inspector, Cooper, went to their duties of inspecting cars. According to Dupree's testimony, Arthur passed them with his switch engine and some cars, and was notified that they were engaged in inspecting certain cars, and Arthur told them that he was going to Hoxie crossing to do some work there. This trip and work would have required his absence for twenty or twenty-five minutes. Within five or ten minutes after he left, while Dupree was under a bad-order car, inspecting the same with his torch, the car was struck by Arthur's switch engine, causing Dupree the loss of an arm and a serious injury to his leg. A different version of the occurrence was given by Arthur.

The case was largely tried upon the question of whether or not the rule requiring the blue signals had been abrogated;

and the chief contention here is that there was error in certain modifications of instructions requested by the defendant which told the jury that Dupree assumed all the risks and hazards incident to his duties as car inspector; and if he failed to comply with the rule, and was injured while failing to comply with it, such injury was one of the assumed risks of his employment, for which he could not recover, and that he would be guilty of contributory negligence in undertaking to do this work without obeying the rule; which were modified by the court by stating that such was the law unless said rule was abrogated. The jury was instructed that the burden of showing the abrogation of the rule was upon the plaintiff, and correctly instructed what was necessary in order to show that the rule was abrogated. Where a master promulgates a rule for the safety of his servants, and a servant is injured while in violation of that rule and on account of the violation thereof, then the court will declare him, as a matter of law, guilty of contributory negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Caraway,* 77 Ark. 405, and authorities cited. But where such rule is habitually violated, and such violation is known to or acquiesced in by the master, so that it amounts to an abandonment of the rule, then evidence of such habitual violation is admissible for the purpose of repelling the inference which would otherwise be drawn from the existence of the rule itself. *St. Louis, I. M. & S. Ry. Co.* v. *Caraway, supra.*

The question of the existence or abrogation of the rule was properly submitted to the jury; and there is sufficient evidence to sustain a finding either way on that issue.

But the real question of the case was not so much the existence or abrogation of that rule as it was the negligence of Arthur in hitting the cars while Dupree was inspecting them, and the contributory negligence of Dupree in the manner in which he inspected the cars and in inspecting them without taking proper precautions for his safety while so engaged. If it was not a part of Dupree's duty to be under the car, or in other position of danger, while inspecting a car, then it would not be negligence to move the car while the inspection was in progress. If Arthur had known that Dupree was inspecting the cars, and that it was often a part of Dupree's duty to be under

a car while performing his inspection, then the company would be liable if Arthur suddenly moved the cars without notifying Dupree that he was going to do so. On the other hand, it would be contributory negligence on Dupree's part to go under a car without taking precaution by some sort of notice to a person operating a switch engine about them that he was going to place himself in such position, unless such position was known to be part of the inspector's duty, and it was also known that he was making such inspection.

There is a sharp conflict in the evidence upon these points, and no specific instruction was given upon them; but there were general instructions given as the law of negligence and contributory negligence. These issues of fact should have been sharply drawn in appropriate instructions and sent to the jury for decision. Instead of that, general instructions were given as to negligence and contributory negligence, and many specific instructions asked by the defendant, as to the law of assumed risk and contributory negligence, were given, some with proper modification as to the abrogation of the said rule.

In this state of the record, the appellant can not ask for a reversal on account of such instructions. *Western Coal & Mining Co.* v. *Jones,* 75 Ark. 76.

The admission of testimony as to certain statements made by Arthur next day is urged as erroneous. These statements would not be admissible as a part of the *res gestae;* nor as declarations of the agent, for they were not made while performing the duties of this agency. They are sought to be sustained as contradictory of his testimony. The questions asked the witness called for testimony fairly contradictory of Arthur's testimony. Part of the answers went beyond a fair contradiction; but part was competent. The fact that the answers contained more than the question called for, and that some incompetent matter was incorporated into them, does not call for reversal unless the incompetent matter was prejudicial and properly objected to. This testimony was rather loosely drawn out, and the objections to it are not as specific as they might have been, and the court fails to find that any reversible error in this respect was committed.

Affirmed.

ARKADELPHIA LUMBER COMPANY v. HENDERSON.

Opinion delivered November 18, 1907.

1. MASTER AND SERVANT—DUTY TO GIVE WARNING.—A master employing an inexperienced infant to work about a machine will be liable for a failure to warn him as to a defect in the machine or as to dangers connected with the operation thereof. (Page 387.)

2. SAME—NECESSITY OF GIVING WARNING.—Where a servant, by reason of his youth and inexperience, does not appreciate the danger incident to the service he is employed to do, it is the duty of the master to give him such instructions and caution 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, as far as it can be done with proper care on his part. (Page 388.)

3. USAGE—WHEN BINDING.—Where it was the practice for the tailer at a stave bolting machine to act as feeder during the temporary absence of the feeder, which usage was known to the foreman having supervision over both such employees, the master cannot escape liability for injuries sustained by the tailer while working in the feeder's place upon the ground that the tailer was not employed to work as feeder. (Page 388.)

4. SAME.—The element of antiquity need not be shown in order to establish a particular usage or custom of trade; all that is required being that it should have existed a sufficient length of time to have become generally known, or that it should be actually known to the party to be affected by it. (Page 389.)

5. SAME—PLEADING.—Where a complaint alleged that plaintiff was employed by defendant to work at and about a stave bolting machine, and was injured while feeding the machine by defendant's negligence in using defective machinery and in failing to instruct him as to the dangerous character of the machine, and defendant answered that plaintiff was not employed to feed the machine, but as a tailer, which position would not have brought him into contact with the machine, and that he took the feeder's place without authority, it was proper to permit plaintiff to prove that it was usual for the tailer to take the feeder's place when the latter was temporarily absent, although such usage was not pleaded. (Page 389.)

Appeal from Clark Circuit Court; *Jacob M. Carter,* Judge; affirmed.

STATEMENT BY THE COURT.

M. M. Henderson, as next friend of John Henderson, a minor, sued the Arkadelphia Lumber Company for damages on account of personal injuries sustained by him while in the employ of said Lumber Company. He alleged that he was working in the mill of the Lumber Company about its stave bolting machine, a "dangerous and deceptive machine," which was so adjusted that only a small portion of the saws therein were visible to the operator; that the chains which were carried to said saws were defective in that they were continually coming apart or unlinked, thereby necessitating the operator mending the same by reaching his hand under said machine where said saws were concealed to link the chain together. That John Henderson was ordered to work about said machine, and while feeding it one of the chains became unlinked, and in the necessary discharge of his duty he had to reach under the machine to fix the chain in order to keep it in operation; that in so doing his hand came in contact with the saws, causing the loss of his thumb and a portion of his left hand. It was further alleged that said John Henderson was inexperienced in work about machinery, and that the defendant was negligent in ordering him to work about dangerous machinery without notifying and warning him of the latent dangers of said machine, and negligent in operating said machine with defective chains.

The Lumber Company denied all the material acts of negligence alleged in the complaint, and alleged that the said John Henderson was employed to tail the bolting machine; that his duty was to pass the pieces which make staves to the stave machine as they came from the bolter, which position was not dangerous, and did not bring him in contact with the saws of any dangerous machine. It denied that he was ordered to work in the position he occupied when he was injured, and denied that it was any part of his assigned duty to feed said machine with bolts. It alleged that, while he was engaged in tailing the bolting machine, one Chivis Hand, who was employed to feed the bolter, was required to be absent, and on leaving requested Henderson to take his place until his return; that during the absence of Hand the chain became unlinked without fault or negligence

of the defendant, and that in an improper attempt to repair it Henderson was injured. That he was not employed to do this work, and that it was not known to the company that he was at work in that place until after the injury.

There was testimony on behalf of the plaintiff tending to prove that he was seventeen years old at the time he was injured, and that he was first employed, for about a week, in the yard picking up sticks, and was then employed to tail the bolter, in which capacity he had been working for about a week when he was injured. The bolter was a machine arranged upon a table about three or four feet high, containing three circular saws; and two link chains carried the bolts through. The saws revolved on one shaft. Part of the table was boxed up, and about one-third of the saws were visible above the table, and it was dark under the table. The chain usually came unlinked two or three times a day, and it was the duty and habit of the feeder to link it together in order to continue the machine in operation. In doing this his hand was brought in close proximity to the saws revolving under the table. There was a usage in the operation of this machine that when the feeder was absent therefrom either the foreman in charge of the mill or the tailer took his place and fed the machine. The foreman, Duvall, at times served as feeder; and he was present at other times when the tailer was called upon to act in that capacity, and was present at least once when John Henderson was so acting. During the week that he had been at work as tailer, he had been called upon two or three times to act in the position of feeder. He was not warned nor advised nor instructed as to the operation of said machine nor the danger of connecting the links of the chain; and his testimony indicates that he did not understand or appreciate the danger thereof. While engaged in feeding the machine, a link came unfastened, and in the attempt to fasten it Henderson lost his thumb and a part of a finger.

The Lumber Company adduced evidence tending to prove that the danger in linking said chain together was obvious and patent to any one of ordinary intelligence and understanding, and that an injury resulting from linking it together would be due to negligence on the part of the person attempting to do

so; that Henderson was employed as tailer, and it was not a part of his duty to serve as feeder; that as tailer he was not brought into contact with dangerous machinery, and that he was warned of such dangers as were attendant upon the service for which he was employed; and that it was not known to the foreman, or any one else in charge, that he was serving as feeder of the bolting machine, until after he was injured; and that it was a voluntary assumption of service for him to serve at the bolter, and due to the request of his fellow servant, Chivis Hand, calling him to that position.

The court gave instructions as requested by each side, fully and fairly presenting the different phases of all the issues. It is only necessary to set out the sixth and seventh instructions, which are as follows:

"6. You are instructed that if you believe from the evidence that it had been the usage and custom of the defendant to allow or permit the persons feeding its machine to call a co-laborer who tails the machine to take his place and discharge his duties as feeder during his temporary absence, and that it had been the habit or usage of the one feeding the machine to relink or repair the chain of said machine while in operation, and that defendant knew of such customs, usages or habits, and acquiesced in them, then the acts, custom or usage of the feeder of such machine in these respects would be deemed in law the usage or custom of the master, and the doctrine of fellow servant will not apply in this case.

"7. You are instructed that if you find from the evidence that the plaintiff, John Henderson, in taking the place of Chivis Hand, while absent temporarily, in feeding the bolting machine, was following the general habit, mode or course of procedure in vogue at the time at the defendant's stave mill, and that in doing so the said John Henderson honestly believed that he was performing his duty, or within the scope of his duty and employment; and furthermore that the said bolting machine was a dangerous machine, and that John Henderson had not been instructed as to its danger or how to perform said work with reference thereto, and by reason of his youth and inexperience he was injured, then it will be your duty to find for the plaintiff."

The court refused to give the following instructions on behalf of the Lumber Company: "The jury are instructed that the plaintiff in this action has not alleged in his complaint a special custom or usage current in the defendant's stave bolting mill, to the effect that when the feeder of said machine temporarily absents himself from said machine the boy employed to tail said machine should take his place. The court tells the jury that, in the absence of such allegation, proof of such custom or usage cannot be considered by the jury. Therefore all such proof is now withdrawn from the consideration of the jury."

The jury found a verdict for $1,000 for the plaintiff, and from the judgment entered thereon the Lumber Company has appealed. All exceptions were properly preserved and brought forward in the motion for new trial.

John H. Crawford, for appellant.

1. Under the allegations of the complaint and the proof, the court should have given a peremptory instruction for the appellant. There is no evidence that the chains were defective or that the machine was any more dangerous and deceptive than any other machine of the same kind, and there was no latent danger. In this case the servant knew the danger, which was patent, and was of sufficient age and intelligence to appreciate it. 57 Ark. 76. The negligence, if any, was that of a fellow servant. 58 Ark. 318; 46 Ark. 555. See also 39 Ark. 19.

2. The sixth and seventh instructions were erroneous. No usage and custom was pleaded. No evidence that the master had notice of the youth's inexperience. 78 Ark. 147; 80 Ark. 68.

John E. Bradley, for appellee.

1. The question of negligence, in so far as pertains to the chains in use, is settled by the jury's verdict, and there is neither allegation nor contention that the machine was any more dangerous or deceptive than others of its kind.

It is elementary that a master who employs a minor to work about dangerous machinery must give him proper instruction as to the nature and scope of his work and the dangers inci-

dent thereto; and such instruction must be such as to enable one of the youth and inexperience of the minor employed to appreciate the nature of the danger. 93 Mich. 172; 105 N. Y. 26; 48 La. An. 483; 102 Mass. 572; 60 Mich. 501; 16 Utah, 392; 1 Ind. App. 188; 165 Mass. 487; 73 Ark. 49; 58 Ark. 168; 71 Ark. 55. The servant assumes only such risks, incident to the employment, as are known to him. 77 Ark. 367.

2. Where the negligence of the master contributes to the injury, the master is liable, even though negligence of a fellow servant also contributes to the injury. 106 U. S. 700; 34 Am. St. Rep. 275; 72 Cal. 38; 86 Tex. 81; 62 Tex. 227; 58 Tex. 276; 4 L. R. A. (N. S.) 515; 2 *Id.* 647; 90 Va. 665; 65 Vt. 553; 127 Ind. 50 118 Ind. 579; 73 N. Y. 38.

3. Evidence of the custom and usage was competent and relevant, under the allegations of the answer setting up new matter, which, under the Code, are taken as denied without the filing of a reply. It was competent to show how the custom was understood and acted upon by the parties. 7 Am. & Eng. Enc. of L. (1 Ed.), 50; 77 Ark. 405; 2 Greenleaf, Ev. (13 Ed.), § 251; 69 Ark. 313.

HILL, C. J., (after stating the facts.) 1. The first contention is that the court erred in not giving the 7th instruction asked by the Lumber Company, which was a peremptory instruction to find for the defendant. The evidence adduced on behalf of the plaintiff showed that the injury was due to either a defect in the machine or to Henderson's failure to properly connect the disconnected chain to continue the machine in operation; and in either event the Lumber Company would be liable if it failed to warn him of a defect in the machine or as to the dangers connected with the operation thereof. What was said in *Bodcaw Lumber Co.* v. *Ford,* 82 Ark. 555, is equally applicable to the plaintiff's evidence here: "Being an inexperienced youth, uninformed as to the proper method of operating the machine, he was entitled to instruction as to the safe method of operating it and warning of the danger ordinarily incident to the work or by reason of any defect in the machine. The jury were therefore warranted in finding that, under the circumstances, it was the duty of the defendant either to instruct him or to

warn him not to attempt to feed the machine, and that it did neither of these things, but sent him to work there without proper warning or instructions."

2. It is wholly immaterial whether the danger was patent or latent. In *Ford* v. *Bodcaw Lumber Co.,* 73 Ark. 49, the court said: "If the danger of the 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 to avoid it, so far as it can be, before exposing him to it. (Citing authorities.) In all cases where there is a duty to warn a servant, it would be a breach of such duty to expose him to such dangers without 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 precaution, and to do the work safely, so far as it can be done with the proper care on his part. For a breach of this duty the master is liable for the damages resulting therefrom. (Citing authorities.) Of course, there is no duty to instruct when the master does not and ought not to know or take notice of the youth or inexperience of the servant."

It was said in *Davis* v. *Railway,* 53 Ark. 117: "A knowledge of facts which involve a latent danger does not imply a knowledge of the danger itself."

These principles were applied in *King-Ryder Lumber Co.* v. *Cochran,* 71 Ark. 56, where a youth of eighteen years, of fair and ordinary intelligence but inexperienced in his work, was put to work operating an edger in a saw mill, and was injured thereby, and are equally applicable to the case at bar.

3. It is insisted that Henderson was not employed to work about the dangerous machine, as he was employed as a tailer and not as a feeder; and, had he continued to work in the capacity in which he was employed, the injury would not have occurred; and that the master is not liable for his undertaking to do this work at the instance of the feeder, who, it is contended, was a fellow servant. The plaintiff has evidence showing that it was customary for the tailer or foreman to take the place of the feeder when the feeder was temporarily absent from

his machine; and, further, that Henderson as tailer was called upon to attend to the machine pursuant to this custom, and this was done once in the presence of Duvall, the foreman. If this evidence be true, then his employment as tailer included the employment as feeder during the temporary absences of the feeder from the machine. Duvall denies seeing Henderson at work feeding the bolting machine; but he does not deny knowledge of the custom of the tailer being called to take the feeder's place. This matter was sent to the jury in the 6th and 7th instructions, and there is testimony to sustain the verdict upholding the theory of plaintiff therein outlined.

4. It is said that the evidence falls short of establishing such custom or usage as would make it binding upon the parties. The principle governing particular customs or trade usages is as follows: "The elements of antiquity need not be shown in the case of a usage or custom of trades. 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." "Particular usages and customs of trade or business must be known by the party to be affected by them, or they will not be binding, unless they are so notorious, universal and well established that his knowledge of them will be conclusively presumed." 12 Cyc. 1034, 1041; *Ward Furniture Mfg. Co.* v. *Isbell,* 81 Ark. 549; *Bodcaw Lumber Co.* v. *Ford,* 82 Ark. 555; *McCarthy* v. *McArthur,* 69 Ark. 313.

These principles were reflected in the sixth and seventh instructions, and the testimony is sufficient to sustain a verdict finding such custom.

5. It is urged that the custom should not have been introduced into evidence without being pleaded, and the sixth refused instruction presented appellant's contention in that regard. The court refused it, and such refusal is alleged to be error.

The complaint alleged that Henderson was in the employ of defendant, and ordered and directed to work at and about the bolting machine, and was injured while feeding said machine; and charged negligence in the use of defective machinery and in want of instruction. The answer denied the negligence alleged and set forth that Henderson was not employed as a feeder but as a tailer, which position would not have

brought him in contact with the machine, and that he took the feeder's place without authority from the company. The Code provides that the answer may controvert any allegation of the complaint and set forth any new matter constituting a defense. This new matter is not to be answered unless it constitutes a counterclaim or setoff, when there shall be a reply thereto. All other defensive matter is considered controverted. Kirby's Digest, § § 6098, 6108, 6137.

The custom came properly into the case to meet the defensive matter alleged in the answer, which stood controverted by law, and an issue of fact thereby raised to be settled by the jury, upon evidence to be adduced sustaining or refuting the allegation. Finding no error in the case, the judgment is affirmed.

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CRAIG v. RUSSELLVILLE WATERWORKS IMPROVEMENT DISTRICT.

Opinion delivered October 21, 1907.

MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—CONSENT OF LANDOWNERS.—The act of February 18, 1907, providing for the creation of an improvement district to be a charge upon the real property of the city of Russellville, is unconstitutional in not providing that a majority in value of the owners of real property within the district shall consent to the improvement, as required by Const. 1874, art. 19, § 27.

Appeal from Pope Chancery Court; *Jordan Sellers,* Special Chancellor; reversed.

Ratcliffe & Fletcher, for appellant.

1. The act, if valid, suspends the operation of the general law in reference to the city of Russellville, and leaves it without power to establish other improvement districts of the whole or any part of the territory. It is in violation of art. 12, § 3, Const. The Legislature has no power to control the affairs of cities and towns except through general laws. 36 Ark. 166. As illustrating the difference between the power of the Legisla-

ture over counties, townships, etc., and over cities and towns, compare the case last cited with 33 Ark. 497.

2. The act is in violation of art. 19, § 27, Const. Ark.; 72 Ark. 195; 42 Ark. 87; 187 U. S. 58.

3. It is in conflict with art. 5, § 24, forbidding the suspension of any general law for the benefit of "any particular individual, corporation or association," and also conflicts with art. 12, § 2, Const., forbidding the passage of any special act conferring corporate powers, etc. 36 Ark. 166; 67 Ark. 35; 4 Kan. 114; 3 Hill, 538; 28 Mich. 228.

4. Constitutional rights of individuals are involved here, and no presumption will be indulged that the Legislature has done its duty as in other special statutes before the enactment of which the Constitution requires that notice be given. 42 Ark. 87; 36 Ark. 175.

Brooks, Hays & Martin, for appellee; *R. B. Wilson* and *J. T. Bullock*, of counsel.

1. Article 12, § 3, Constitution, refers to cities and towns only, and has no reference to improvement district. This being a suit by an improvement district, the city, as such, has no interest in it. An improvement district is not a municipality nor the agent of one. 55 Ark. 148; 69 Ark. 284.

2. Unless the Constitution in plain terms or by necessary implication prohibits the passage of the act, it is valid. 72 Ark. 126; 164 U. S. 176; 21 Ark. 40; 59 Ark. 528; 170 U. S. 55; 58 Ark. 384. Presumptions are in favor of the regularity of legislative enactments. 52 Ark. 339; 16 N. E. 193; 101 Ind. 564 Cooley, Const. Lim. (5 Ed.), § § 197, 201; 49 Ark. 231; 45 Ark. 400; 58 Ark. 407; 76 Ark. 200; 75 Ark. 120. Where one construction of a statute would render it void for conflict with the Constitution, and another would render it valid, the latter construction will be adopted. 36 Ark. 576; 69 Ark. 376.

HILL, C. J. The General Assembly passed an act, which was approved on the 18th day of February, 1907, entitled, "An act to create an Improvement District, composed of all the real estate within the corporate limits of the City of Russellville, Arkansas, and for the purpose of providing, constructing and maintaining a system of water works there and for other pur-

poses." This act declared that "all the real estate within the corporate limits of the city of Russellville, Pope County, be and the same is hereby created into an improvement district, for the purpose, under the name and with the powers hereinafter specified." In brief, it was to provide for the construction, building, establishment and maintaining for the city of Russellville of a system of water works, and giving complete authority and power to construct the improvement and charge its cost upon the realty of the district. The business and affairs of the district were to be carried on by a board of public improvement which was named in the said act, vacancies to be filled by the city council. The act provides for the construction and maintenance of an improvement substantially as if an improvement district had been created under sections 5664-5742 of Kirby's Digest, except that there is no provision in this act providing for a majority in value of the owners of real property within the district consenting to the improvement being made, as is provided in section 5667 of the general law on the subject, as a condition precedent to the construction of the improvement.

This is a suit to charge the real estate of a property owner in said district with the assessment levied pursuant to said act, and to sell his real property, or so much thereof as may be necessary, to pay the assessment and cost of suit. The district prevailed in the chancery court, and the property owner has appealed.

Passing other questions presented by the appellant, this one is preeminent: Has the General Assembly power to create improvement districts in cities and towns, and authorize them to erect public improvements by taxation on real estate, without providing by law that the contemplated improvement shall only be made when the consent of a majority in value of the property owners adjoining the locality to be affected is obtained?

Section 27 of art. 19 of the Constitution is as follows:

"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 own-

ing property adjoining the locality to be affected; but such assessments shall be made *ad valorem* and uniform."

This section is found in the miscellaneous provisions, and is connected with no preceding section. It is inserted to prevent misapprehension and remove doubt as to the power of the General Assembly to authorize assessments in towns and cities for the purpose of local improvements. *Carson* v. *St. Francis Levee District,* 59 Ark. 513; *Little Rock* v. *Board of Improvements,* 42 Ark. 152. The many restrictions on the power of the Legislature in regard to cities and towns may well have raised doubt as to this power; and the framers of the Constitution, after removing this doubt, then provided that the power should only be exercised within the limits therein mentioned, namely, such assessments must be based on the consent of the majority in value of the property owners owning property adjoining the locality to be affected, and the assessments to be *ad valorem* and uniform. This restriction only reaches to local improvements in cities and towns, and leaves the General Assembly free to exercise its sovereign will in this respect elsewhere in the State. The power to create districts for local improvements and to provide a method for taxation therein, and the breadth of that power, and the narrow scope of judicial inquiry into it, have been considered by this court in recent cases. *Carson* v. *St. Francis Levee District,* 59 Ark. 513; *St. Louis S. W. Ry. Co.* v. *Red River Levee District,* 81 Ark. 562; *Coffman* v. *Drainage Dist.,* 83 Ark. 54; *Sudberry* v. *Graves,* 83 Ark. 344.

But this is the first case which presents the exercise of this power when fettered by the constitutional limitation above quoted. The origin of these limitations upon the lawmaking power was discussed in *Crane* v. *Siloam Springs,* 67 Ark. 30. It is therein shown that this requirement for the consent of a majority in local government is a part of the heritage of the Anglo-Saxon, which has, in various forms, been imbedded in the constitutions of the different States. Mr. Justice RIDDICK, speaking for the court, said:

"The framers of that instrument by this section, which expressly recognizes the power of the Legislature to authorize assessments on real property in towns and cities, but limits them to

local improvements, and requires that they should be made only on property adjoining the locality affected, and be based upon the consent of a majority in value of the owners of such property, did not intend arbitrarily to forbid an assessment for an improvement specially benefiting the real property of the entire city, or to prevent an equitable apportionment of the tax in such case. They had, as we think, a broader purpose in view. Their object was to limit such local assessments to proper local purposes, to undertakings intended mainly for the accommodation and convenience of the inhabitants of the city or of the district upon which the tax was laid. They attempted, by the limitations imposed, to prevent unjust apportionments, to keep property from being burdened with assessments without corresponding benefit. They endeavored, as far as practicable, to protect the honest and prudent property owner against those unscrupulous persons who seek to make a private gain by the expenditure of public funds, and also against the equally dangerous class that, swayed by their imagination, see fortunes in all sorts of undertakings, and clamor for extravagant assessments and appropriations with a view to advantages which, except the expenditure they entail, often prove as evanescent as a mirage on a desert."

Clearly, this act is in violation of this prohibition of the Constitution, in spirit as well as in letter; and the only real question can be whether the prohibition is one which addresses itself solely to the legislators. There are certain constitutional limitations upon the power of the Legislature that are addressed solely to it, and obedience to them is dependent alone upon the conscience of the Legislature; and whether such limitations have been regarded or disregarded the court will not inquire. Illustrations of this class of limitations may be found where courts have declined to determine whether a special or local law should be passed instead of a general law, when the Legislature has passed a special or local law, notwithstanding the constitutional limitation that no local or special law shall be passed where a general law may apply. A long line of these cases may be found from *Boyd* v. *Bryant,* 35 Ark. 69, to *Hendricks* v. *Block,* 80 Ark. 333, applying this principle. Other illustrations are found where notice is required before a local act should be passed, or

where a fact is to be established as a prerequisite to the passage of the bill. Courts will not inquire whether such notice has been given or such fact established, as it is conclusively presumed that the Legislature did its duty in the premises. *State* v. *Sloan,* 66 Ark. 575; *State* v. *Moore,* 76 Ark. 197; *Waterman* v. *Hawkins,* 75 Ark. 120; and numerous other cases mentioned in these. Judge Cooley gives other examples of this class of limitations. Cooley on Constitutional Limitations, 257 *et seq.*

But the constitutional limitation in question does not belong to the class above mentioned. It created a vested property right in owners of real estate in cities and towns. It is a guaranty to them that their property shall not be taxed for local improvements except upon an *ad valorem* basis, and upon the consent of a majority in value of those to be affected by such improvement. Having this constitutional guaranty that their property shall not be subject to assessment except in this manner, then, until it is assessed in this manner, they have a right to object to any taxation upon it for the purpose of local improvements. This right can not be taken from them by an assumption that the Legislature ascertained that a majority desired this improvement, as this limitation created and protects a property right, and is not a mere direction to the Legislature. The right of property owners to a hearing before their property can be subjected to this tax can not be taken away by presumptions of regularity of legislative proceedings. The only way in which this constitutional requirement can be fulfilled is by the enactment of such a statute as section 5667 *et seq.* of Kirby's Digest, wherein a certain procedure is prescribed to obtain the consent of a majority in value, and a forum to determine whether such consent has been obtained. When such a plan is devised, then the local improvement may be undertaken, provided a majority in value consent thereto; and when it is determined in a forum where property owners may have their day that such majority has consented, then a legal basis is laid, and the improvement may be undertaken, with an *ad valorem* and uniform assessment levied upon the real estate in the district to pay for it. Until such plan as prescribed in the section just cited or some similar plan which likewise meets the constitutional requirements is provided, the Legislature is powerless to impose

an assessment for local improvement in cities and towns. It is not the province of the Legislature to determine whether such consent has been obtained as a basis for the improvement. Its province is to create a procedure for obtaining such consent and a forum to determine whether such consent is obtained. This is admirably provided in the existing general law on the subject.

This act fails to carry such provision, or to permit the general law to apply, and has created a district and laid a tax upon the property therein directly in violation of section 27 of article 19 of the Constitution, and it is the duty of the court to hold it to be null and void.

Judgment reversed, and cause dismissed.

MORTON v. LACY.

Opinion delivered November 25, 1907.

LEASE—CONSTRUCTION.—Under a lease which provided for the payment of a fixed rent, but stipulated that in the event of a partial overflow the lessees should, on the first day of June, notify the lessor whether they claimed damage to the crop, and that if no agreement could be made between them as to the amount of reduction in rent then the lessors should receive a certain part of the crop raised that year, *held*, that if, after the overflow and notice thereof, the parties could not, or did not, agree as to the amount of reduction, the contract fixed the amount of rent due, whether the parties did anything toward reaching an agreement or not.

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

Action by J. G. Morton and Carrie Morton against Lacy Brothers & Kimball to recover $2,000 for rent of land due upon written contract.

The plaintiffs recovered judgment for $878.35, and appealed therefrom to this court.

Pugh & Wiley, for appellants.

There was nothing before this court on the first appeal but a construction of the contract with reference to the sufficiency of notice given on the 7th of April, instead of the first of June; hence the statement of the court that "if the parties did not agree the contract fixes the rent" was *dictum* only, and ought not to be held to be the law of the case on this appeal. The contract should be construed as a whole, and effect given, if possible, to every word, and all parts thereof. Bishop on Contracts, § § 380, 381, 382 and 384; 3 Ark. 222; 23 Ark. 582. A contract will be construed most strongly against the obligor. 4 Ark. 199. And its interpretation is a question of law for the court. 2 Parsons, Cont. (8 Ed.), 492, 610; 75 Ark. 55.

Taylor & Jones, for appellees.

The facts developed in evidence are the same as on the former appeal; and, since "after the overflow and notice thereof the parties could not, or did not, agree on the amount of reduction in the rent, the contract fixes it."

McCULLOCH, J. This is an action instituted by appellants against appellants, Lacy Brothers & Kimball, to recover $2,000 alleged to be due upon written contract for rent of land.

The contract stipulated an annual rental of $2000, but provided that if an overflow prevented the making of a crop no rent should be payable. It also contained the following stipulation: "In the event of a partial overflow of said lands second parties shall notify first parties on the first day of June of such year if they claim damage to crop thereby. If no agreement can be made between the parties hereto as to amount of reduction in rent for that year on account of said damage, then first parties shall receive as rent for such year one-third of all corn, hay and other feed produced on the land, and one-fourth of the cotton and cotton seed, and shall have the use of the gin house and machinery for the year."

On the former trial of the case the plaintiffs recovered judgment for the full amount of the stipulated rent, the court having given the jury a peremptory direction to return a verdict in favor of the plaintiffs for that amount on the alleged ground that the lessees had failed to give timely notice, as provided in the contract, of damages by reason of overflow.

The defendants appealed, and this court reversed the judgment on account of the erroneous direction and remanded the case for a new trial. *Lacy* v. *Morton,* 76 Ark. 603.

On the second trial below it was conceded that there was a partial overflow, which substantially damaged the crop, and that timely notice of the claim of damage had been given.

Appellants (plaintiffs) requested the court to give several instructions to the effect that unless the defendants, after having given notice of a claim of damage, made an effort in good faith to come to an agreement with plaintiffs as to reduction of the rent they could not claim the benefit of the contract with reference to payment only of the stipulated share of the crop, and that the plaintiffs would, in that event, be entitled to recover the full amount ($2,000) of rent.

The court refused to give these instructions, but instructed the jury to return a verdict in favor of the plaintiffs for the value of one-third of the corn and one-fourth of the cotton and cotton seed produced on the lands, and for the value of the use of the gin house and machinery.

The jury returned a verdict for plaintiff for the sum of $878.35.

The instruction was correct.

This court in the opinion on the former appeal said that "if, after the overflow and notice thereof, the parties could not, or did not, agree on the amount of the reduction in rent, the contract fixes it by providing that the rent shall then be one-fourth of the cotton and one-third of the corn, hay, and other products of the land for that year."

Without stopping to consider whether, as argued by appellant's counsel, the statement in the opinion was *dictum,* we have no hesitancy in saying now, since it is the point in the case directly raised by this appeal, that it expressed a correct interpretation of the contract. It was not necessary, after the occurrence of the partial overflow—such an overflow as was sufficient to substantially injure the crop—and the giving of notice of claim of damages, for either party to attempt to bring about an agreement as to the amount of reduction of the rent. The contract in that event fixed the rent at the stipulated share of the crop unless the parties should agree upon a reduced amount

to be paid. If no agreement as to the amount was reached, the contract fixed the basis of settlement, regardless of whether the parties did anything towards reaching an agreement or not on the amount of reduction. This is a reasonable construction of the contract. It fixes the rent at the lump sum of $2,000, without stating the amount per acre, in the event of no damage by overflow; and the contracting parties, bearing in mind the fact that a hurtful overflow in that locality was not improbable and that it might not be practicable for them in the event of such contingency to agree upon a proper reduction, stipulated for a certain fair and just division of the crops produced on the leased premises in lieu of the payment of money rent, unless they should agree upon a reduction of the rent.

Judgment affirmed.

FELSBERG v. MOORE.

Opinion delivered November 25, 1907.

1. TRIAL—FAILURE TO ASK FOR SPECIFIC INSTRUCTION.—Appellant can not complain of the trial court's failure to give specific instructions upon a certain phase of the case if he made no request therefor. (Page 403.)
2. SALE OF CHATTELS—NECESSITY OF TENDER OF PURCHASE PRICE.—In an action against a vendor for failure to deliver chattels sold under a contract which stipulated that they should be paid for "as delivered," it was no defense that the vendee did not tender the purchase price in advance of delivery. (Page 404.)

Appeal from Clay Circuit Court; *L. C. Going,* Special Judge; affirmed.

STATEMENT BY THE COURT.

Appellee alleged that on or about the 1st of August, 1905, appellant agreed to sell to appellee 40,000 feet of number 2 common pine flooring, 4 inches wide, well seasoned, to be paid for as delivered at $13 per thousand; that the flooring was to be delivered at shed in rear of Barnes' building as needed. Appellee alleged breach of the contract, to his damage in the sum of $280, for which he prayed judgment.

Appellant in answer alleged that there was no definite time fixed in which the lumber should be delivered, and that within a reasonable time after the execution of the contract he offered to deliver the lumber at the contract price, and that appellee refused to accept same. He therefore denied liability. The contract is as follows:

"I hereby agree to sell to J. N. Moore 40,000 ft. No. 2 common pine flooring, four inches wide, well seasoned, to be paid as delivered at $13.00 per M., said flooring to be delivered at shed in rear of W. F. Barnes' building on West Second Street as needed.

[Signed] "Will Felsberg.

"I hereby accept the above offer.

[Signed] "J. N. Moore."

Appellee is uncertain when this contract was executed, but appellant fixes the date as the 13th day of July, 1905. On behalf of appellee, the proof tended to show that on the 13th day of July, 1905, he, in conjunction with one Barnes, began the erection of a building with concrete blocks, 88 feet 5 inch by 77 feet, two stories high. Appellee commenced the building with the expectation of completing it as soon as he could, but a number of things combined to delay in its construction, such as a failure to get the concrete and the blocks, the man employed to lay the blocks giving up his contract, and the rainy weather. Appellee expected delays, but did not foresee the things mentioned. He did not know just when he would need the lumber, and when he could get it, and that is the reason the words were put in the contract, "as needed." With reference to the time the lumber should be delivered, appellee said he wanted it as soon as he *"needed it."* It was shown on behalf of appellee that when appellant came to him and demanded that he take the lumber at once, he replied to appellant that he did not know what he had, and could not take it until he saw it, whereupon appellant said: "Get somebody to go look at it." Appellee then requested one Black, a lumber dealer, to examine the lumber for him, and see if it was No. 2 common pine flooring, and instructed him if the lumber was of the grade he (appellee) had ordered to have it sent around. Black on behalf of appellee testified that at the

request of appellee he went to the side track near the depot where the lumber was to see the lumber, that he met appellant there and informed him that he was sent there by appellee to look at the lumber, and that appellant replied that I need not mind, that he was going to unload it in his shed.

Appellee proved that the value of lumber of the kind mentioned in the contract at the time he demanded same of appellant, and when appellant refused to deliver it was $20 per thousand feet. This was some time in February or March, 1906.

On behalf of appellant the evidence tended to show that appellee said that he wanted the lumber as soon as he could get it. Appellant ordered the lumber in a few days after the contract was made, on the 26th of July. It came on the 3d and 10th of August. Appellant went to appellee when the first car came and notified appellee. He said, all right; he would see about it. The third time he told appellee if he did not take it by noon the "contract would be off." He also told appellee that he (appellee) would have to pay appellant for the lumber. Appellant denied that Black saw him about the lumber. He said that he told Bradford, his agent in charge of the lumber, that if appellee did not come by noon of a certain day to take the lumber, to hold same for appellant. He said that he told appellee that he would haul the lumber down if appellee would pay him for it. He wanted appellee to pay him for the lumber. Appellee said that he would see about it. Appellant ordered the lumber especially for appellee. It was shown that the value of lumber from August 3 to the 10 was $12.75 per thousand feet.

The court gave the following instructions:

"1. In this case the plaintiff sues the defendant and seeks to recover damages for the alleged breach of a certain contract. Plaintiff contends that he entered into a written contract with the defendant by the terms of which he purchased from the defendant 40,000 feet of No. 2 common pine flooring, four inches wide and well seasoned at $13 per thousand, to be paid for as delivered and to be delivered as needed, and the defendant failed to deliver said lumber in accordance therewith, and that by reason of said failure he has been damaged.

"2. The defendant admits the execution of alleged

contract, and that he failed to deliver said lumber in accordance therewith, but denies that his failure to do so resulted from his negligence or refusal, and says that he offered to deliver said lumber to plaintiff within a reasonable time after the date of said contract, but that plaintiff neglected and refused to receive and pay for the same.

"3. Under the terms of this contract it was contemplated by the parties that the lumber should be delivered within a reasonable time after the date of said contract.

"4. The question of what was a reasonable time in which to deliver said lumber under said contract is a question for you to determine, and in arriving at your conclusion upon this proposition you will take into consideration the question of whether or not the plaintiff told the defendant what use he intended to make of said lumber, the conduct of the parties and the other facts and circumstances connected with the case.

"5. If plaintiff told the defendant that the lumber was to be used in the construction of a certain building, then you will take into consideration what would be a reasonable time to prepare said building for the use of said lumber; and if defendant offered to deliver said lumber before the time which the parties contemplated it should be delivered, such offer does not excuse his failure to subsequently deliver said lumber within a reasonable time.

"6. If you find from the evidence that on August 8, 1905, defendant told plaintiff that unless he accepted and received said lumber before noon of that date he would consider the contract broken, and that said plaintiff did not accept and receive said lumber by the time mentioned, then, if you believe that offer was within a reasonable time after the date of the contract, you will find for the defendant.

"7. But if you find from the evidence that the defendant on August 8, 1905, demanded of the plaintiff payment for the lumber before delivery, and that, upon plaintiff's refusal to comply, he repudiated said contract, you will find for the plaintiff.

"8. If you find from the evidence that the defendant offered to deliver the lumber to the plaintiff within a reasonable

time after the contract was made, and plaintiff refused to receive same, you will find for the defendant.

"9. If you find for the plaintiff, the measure of his damages will be the difference between the contract price and the market value of said lumber at the time it should have been delivered under the contract.

"10. You are instructed that if on or about August 8, 1905, and after he had notified plaintiff that he must accept the lumber before noon, the defendant notified plaintiff that the lumber was on the car at the station, and to come or send a man to inspect it, and plaintiff at once sent a man to inspect the lumber, and this man was not permitted by defendant to inspect the lumber, then you will find for the plaintiff."

There was a verdict for appellee for $140. Judgment was entered accordingly. Motion for new trial, reserving the exceptions saved, was overruled, and this appeal taken.

J. L. Taylor and *D. Hopson,* for appellant.

1. This is an executory contract, and, if delivery of the lumber had been refused, no recovery could be had, unless plaintiff had tendered the purchase price. 6 Am. & Eng. Enc. of L. (2 Ed.), 467. Such tender is a condition precedent to maintaining an action for breach of the contract. Pomeroy on Cont., § 360; Benjamin, Sales, § 562; Tiedeman, Sales, § § 93, 207. See also 1 Beach, Mod. Law Cont., § § 413, 414.

2. The 3d and 10th instructions were erroneous. The buyer cannot demand delivery of the goods without signifying his willingness to accept, and readiness to pay the price. Benjamin, Sales, § 677.

G. B. Oliver, for appellee.

WOOD, J., (after stating the facts.) Appellant contends that there is no evidence of a willingness on the part of appellee to comply with his contract, shown by a tender of the amount of the purchase money due under the contract, or by an offer to pay same when the lumber was offered for delivery, or when it should have been delivered.

Appellant did not request specific instructions covering this phase of the case, which he presents here for the first time. He

it not therefore entitled to a reversal on that ground, even if the proof had warranted the giving of such requests. *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255; *State Mutual Ins. Co.* v. *Latourette,* 71 Ark. 242; *Newton* v. *Russian,* 74 Ark. 88; *Schenck* v. *Griffith,* 74 Ark. 557; *Williams* v. *Bennett,* 75 Ark. 312.

But, under the plain terms of the contract, appellant could not justify a failure to deliver the lumber on the ground that appellee had not tendered or offered in advance to pay the purchase price. The lumber was to be paid for "as delivered." The most that can be said of this language is that it contemplated that the delivery and payment should be concurrent acts, not that payment should precede delivery. But the uncontroverted proof is that there was no delivery in this case, and hence no tender of payment was called for. Under the most favorable view of the evidence for appellant, he was only ready, and offered to deliver, but was prevented from doing so by appellee's refusing to accept. On the other hand, the proof on behalf of appellee warranted a finding to the effect that appellant refused to allow appellee to inspect the lumber when it was offered, and, therefore prevented, by his own conduct, the acceptance of the lumber by appellee. Under these circumstances, we do not see that the question of a tender or offer to pay the purchase money was an issue in the case.

We find no error in instructions seven and ten. Indeed, the charge of the court as a whole was a full and fair presentation of the law applicable to the issues. There was ample evidence to sustain the verdict. The judgment is correct, and is affirmed.

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WILLIAMS v. BUCHANAN.

Opinion delivered November 25, 1907.

APPEAL—INCUMBENCY OF OFFICE—SUPERSEDEAS.—As it is contrary to public policy that the incumbency of a public office should be changed by the decision of an intermediate court so long as an appeal to the Supreme Court is being prosecuted in good faith, where the incum-

bent of a public office appeals from a judgment of the circuit court ousting him therefrom and tenders a supersedeas bond, the Supreme Court will grant a supersedeas staying the execution of the judgment until the hearing of the case or the further orders of the court.

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; motion to quash supersedeas denied.

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

Wood & Henderson and *Greaves & Martin,* for appellee.

PER CURIAM. This is a motion filed by appellant to discharge the supersedeas and place in force the judgment of the Garland Circuit Court purporting to oust Williams from the office of sheriff and to induct Buchanan therein, and giving judgment in favor of Buchanan for the emoluments of the office enjoyed by Williams to the date of the judgment; from which judgment Williams has appealed to this court.

Appellee contends that the judgment of the Garland Circuit Court ousting Williams from the office of sheriff cannot be superseded; and that if the judgment is capable of being superseded the conditions of the bonds are defective, and a bond should be given properly conditioned to fit the nature of the judgment.

Appellant contends that the statute (sections 2860, 2864, Kirby's Digest), pursued in this action, only authorizes a judgment finding the result of the contest, as a basis for the revocation of the commission of the officer, and does not authorize a judgment of ouster or for the emoluments of the office.

Thus it is seen that this controversy goes beyond the mere matter of supersedeas, and reaches to the nature of the judgment itself. The case should not be determined by piecemeal; and the consideration of the nature of the judgment, and, consequently, the effect of the supersedeas bond, will be postponed until the consideration of the cause on the merits. It is contrary to public policy that the incumbency of a public office should be changed by the decision of the intermediate courts, so long as an appeal is being diligently prosecuted in good faith to a final hearing in the Supreme Court.

Aside from any question of the supersedeas bond staying the transfer of the office pending the hearing of the appeal, the

judgment should be superseded until the merits of the case can be determined. Under the authority granted by article 7, § 4, of the Constitution to this court to issue writs of supersedeas, a supersedeas is hereby ordered to issue staying the execution of the judgment in question until the hearing of the case in this court or the further orders of the court.

When the court exercises this power as a matter of public policy, it is proper that the case be speeded to a hearing, and the court of its own motion hereby advances this case as one of public interest, and will set it down for hearing at an early date. Counsel on the opposing sides are requested to agree upon a date for submission as early as possible. If they fail to agree, then the court will fix a date.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* STANFORD.

Opinion delivered November 25, 1907.

1. APPEAL—CONCLUSIVENESS OF VERDICT.—A verdict based upon conflicting evidence is conclusive. (Page 408.)
2. EVIDENCE—COMPETENCY.—Where it was an issue whether a certain stopping place on a railroad was a regular or a flag station, evidence that from ten to one hundred passengers daily used the station, that hacks regularly attended the trains, and that the land upon which the station was situated had been deeded to appellant's predecessor for a station, was competent as tending to prove that the station was a regular one. (Page 408.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

Buzbee & Hicks and *George B. Pugh,* for appellant.

1. This was a flag station, and under the circumstances of this case the appellant was under no obligation to keep a comfortably heated waiting room for passengers. Compare Kirby's Digest, § 6634, with Ky. Stat. § 784. 102 Ky. 300; 2 Hutchinson on Car., § 920; 9 So. 349; 30 S. W. 1122; 46 S. E. 71.

2. It was error to permit appellee to testify that appellant, after the institution of this suit, put a stove in its waiting room at Lawrence. 1 Elliott on Ev. § 186.

Wood & Henderson, for appellee.

The evidence clearly contradicts appellant's contention that this was a mere flag station, and establishes the fact that it had long been used and recognized as a regular passenger depot. Such being the case, it was appellant's duty under the statute, and independently thereof, to furnish the facilities for the protection and comfort of its passengers required by law. Kirby's Digest, § 6634; 3 Thomp. Neg., § 2547; *Id.* § § 2678, 2683; 70 Ark. 140; 46 S. E. 71; 30 S. W. 720; 15 S. W. 43.

HILL, C. J. Stanford went from Hot Springs to Lawrence station, on the line of appellant railroad company, six miles distant from Hot Springs; and, desiring to return therefrom, went to the station five or ten minutes before time for the train to arrive. He was unable to get any information as to when the train would come, and waited an hour or two for it. It was the 20th of December, and the weather had turned cold during the day. There was a house at the station owned by the railroad company, used as a section house; and there is a controversy as to whether it was used as a station house. One of the rooms, which had been used as a negro waiting room, was open, but there was no fire therein. It was occupied by some negroes, who were waiting for the train. The room which had been used as a white waiting room was closed. Stanford and others made a fire near the station house, and tried to make themselves comfortable; but he got wet and contracted pneumonia from his exposure. The testimony connecting the pneumonia with the exposure is as definite as that in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hook,* 83 Ark. 584. In fact, this is not the ground of contention here. The question in this case is, whether the station of Lawrence was a flag station or a regular station. The court gave certain instructions as to the duty of a carrier to provide stational facilities at its stations; and certain instructions were given at the instance of the appellant presenting its contentions if Lawrence was a flag station.

Appellant begins its argument by stating: "The uncontradicted testimony in this case shows that Lawrence was a mere flag station on the road of appellant." In this the appellant errs. The testimony of Stanford (and other witnesses substantially to the same effect) is that all the regular passenger trains passing Lawrence stopped at this station regularly for the purpose of taking on and discharging passengers, and the only trains which did not stop there were the fast trains carrying guests to Hot Springs. On the other hand, the appellant has testimony tending to prove that this building was originally built as a station house, and was many years ago used as such, but that for some twenty years or more it had not been so used, and was only opened now and then for the accommodation of the people waiting for trains; and that Lawrence was only a flag station. The verdict of the jury amounts to finding that it was a regular station, and not a flag station, and the argument based on the duty, or want of duty, to furnish stational facilities at flag stations is academic.

There was testimony adduced showing that from ten to one hundred passengers were daily using the station at Lawrence; that hacks from the hotel at Potash Sulphur Springs, about a mile distant, regularly attended the trains; and that a deed to the appellant's predecessor had been made to the tract of land for a station, to be known as Lawrence station, and directing that the depot be on the north side of the railroad track. It is contended that this testimony is incompetent; that its tendency was to show that there should have been a regular station there at the time complained of, but not that there was one. The complaint alleged that there was a station building in use at Lawrence, which allegation the answer denied; and thus an issue of fact was developed in the pleadings, and it was fairly competent to introduce testimony as to the passenger business handled there, as tending to prove whether it was really a regular station or whether it was merely a flag station. While this testimony is not very material, yet it was competent as tending to prove the truth of the controversy.

Objection is also made as to Stanford testifying that, after suit was brought, the railroad company put a stove in the station house, as well as a water cooler, and that it kept water

therein. This was brought out in answer to a question asking what he knew of the station being lighted and heated prior to the occurrence in question. Immediately on this answer coming in, his counsel told him he did not want any thing after the occurrence, and to confine his answer to the question. No objection was then made to this testimony. Had the attention of the court been called to it, he would doubtless have emphasized what counsel had said, and told the jury not to consider the statements made by witness in this regard.

Judgment is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. STATE.

Opinion delivered November 25, 1907.

1. PLEADING—ANSWER—NEGATIVE PREGNANT.—Where a complaint against a railroad company alleged that the defendant is "a corporation owning and operating a line of railway," etc., an answer denying that it is a corporation owning a line of railway, etc., is insufficient to put defendant's corporate existence in issue. Page 410.)
2. RAILROADS—SIGNALS AT CROSSINGS—CONSTRUCTION OF STATUTE.—A corporation operating a railroad is "the corporation owning the railroad" within Kirby's Digest, § 6595, requiring such corporations to give signals at railroad crossings of the approach of its trains. (Page 411.)

Appeal from Saline Circuit Court; *W. H. Evans,* Special Judge; affirmed.

Buzbee & Hicks, for appellant.

The complaint alleged that the appellant was a corporation owning the railroad in question, and, this allegation being material, the burden was on the plaintiff to prove it by a preponderance of the evidence. The statute provides that the penalty shall be paid by the corporation owning the road, and, being a penal statute, must be strictly construed. Kirby's Digest, § 6595; 43 Ark. 415; 38 Ark. 519; 40 Ark. 97; 67 Ark. 357. Since the evidence fails to show ownership of the road in ap-

pellant and that appellant is a corporation, the case should be reversed. 71 Ark. 472.

Wm. F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

1. The answer stated: "It denies that it is a corporation owning and operating a line of railway running through Saline County, Arkansas." This was not sufficiently clear to put in issue its corporate existence. Kirby's Digest, § 6098; 33 Ark. 222. It is a mere negative pregnant, denying nothing distinctly and definitely. It is a nullity. Baylies, Code Pl. & Pr. 365; 72 Ark. 62; 1 Enc. Pl. & Pr. 796; 22 Cal. 164; 36 Cal. 462; 50 Cal. 610; 40 Pac. 471.

2. Notwithstanding the ambiguity of its answer, it is apparent from the course of the trial and appellant's cross-examination of witnesses that it intended only to deny ownership, and to establish that it is merely a lessee. If it be conceded that appellant is only a lessee, it is the owner of the road within the meaning of the statute. 105 Pa. 222; 64 Mo. 112; 44 Conn. 291; 79 Minn. 372; 100 S. W. 1148.

HART, J. A penalty of $200 was recovered from the Chicago, Rock Island & Pacific Railway Company in a civil action brought by the State because of a violation of section 6595 of Kirby's Digest, which reads as follows: "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go the informer and the other half to the county; and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

The defendant asks that the case be reversed because no proof of its corporate existence was offered. The State contends that the answer of the defendant was not sufficiently certain to put that fact in issue. The complaint alleged "that the defendant is a corporation owning and operating a line of rail-

way running through Saline County, Arkansas." The answer in traversing this allegation used this language: "It denies that it is a corporation owning and operating a line of railway running through Saline County, Arkansas." In this case a denial of corporate existence is a defense, and, as stated by Judge RIDDICK in the case of *J. I. Porter Lumber Co.* v. *Hill,* 72 Ark. 66: "This form of denial is ambiguous, and has been frequently condemned, both at the common law and under the Code."

The appellant also contends that it is not the owner of the railroad within the meaning of the statute. This precise question was determined in the case of *State* v. *St. Joseph, St. L. & S. F. Rd. Co.,* 46 Mo. App. 466, in which the court said: "If the defendant was at the time in the possession of and running and operating the railroad in question, it was presumptively the owner; and, in the absence of a contrary showing, the court would be authorized in holding defendant to be the owner. More than this, whether the defendant was operating this railroad as absolute owner, lessee, or otherwise, it was liable for the violation by it of the provisions of this statute. It filled the requirement of 'owner' under this statute." The Missouri statute requires the giving of the statutory signals, "under a penalty of $20 for every neglect of the provisions of this section to be paid by the corporation owning the railroad." To the same effect, see *Proctor* v. *Hann. & S. J. Rd. Co.,* 64 Mo. 112; *Camp* v. *Rogers,* 44 Conn. 291; *Parker* v. *Minneapolis & St. L. Rd. Co.,* 79 Minn. 372; *Baltimore & O. R. Co.* v. *Walker,* 45 Ohio St. 577; *Schott* v. *Harvey,* 105 Pa. 222.

This court has held that "a foreign corporation which is the lessee of a railroad in the State is liable, under the statute requiring railroads to erect stock gaps where the road passes through inclosed lands," and the reason given is that "our statutes provide that any railroad corporation of another State leasing any railroad in this State shall become subject to all the regulations and provisions of law governing railroads in this State and held liable for the violation of any such laws." *St. Louis & S. F. R. Co.* v. *Hale,* 82 Ark. 175.

In the construction of statutes, regard must be had to their various provisions, and such effect given them as the provisions

indicate they were intended to have, and as will render the statute operative. We are of the opinion that the operating corporation is the "corporation owning the railroad" within the meaning of the statute. The testimony for the State (and none was offered by the defendant) shows that the railroad in question was operated by the defendant.

Judgment affirmed.

STURDIVANT v. TOLLETTE.

Opinion delivered November 25, 1907.

1. CONSTITUTIONAL LAW—WHEN QUESTION RAISED.—A statute will not be declared unconstitutional if there is any other ground upon which a decision may rest. (Page 414.)
2. LANDLORD AND TENANT—ENTICING AWAY ANOTHER'S RENTER.—Hiring a tenant to do two or three days' work is not within the prohibition of the Acts of 1905, p. 726, providing that one who interferes with, entices away or knowingly employs another's renter before the expiration of his contract shall be liable to the other for advances made to the renter and for all damages sustained by reason thereof. (Page 414.)
3. SAME—SUFFICIENCY OF EVIDENCE.—Evidence that defendant hired plaintiff's tenant after he had left plaintiff, and that defendant subsequently promised to pay plaintiff the advances which had been made to the tenant, does not prove that defendant interfered with or enticed away the tenant or employed him knowing that he was plaintiff's renter. (Page 415.)

Appeal from Howard Circuit Court; *W. V. Tompkins,* Special Judge; reversed.

W. C. Rodgers, for appellants.

1. The act is unconstitutional. Art. 1, § 10 Const. U. S.; art. 14, § 1, *Id.;* art. 2, § § 2; 17, 18, 27, Const. (Ark.) 1874; 85 Cal. 274; 2 Ark. 291; 33 W. Va. 179; 155 Mass. 117; 115 Mo. 307; 147 Ill. 66; 41 Neb. 127; 117 Ill. 294; 186 Ill. 43; 85 Cal. 274; 63 O. St. 428; 21 Cal. 27; 2 Yerg. (Tenn.) 554; 115 Mo. 307; 109 N. Y. 389; 3 W. Va. 179; 113 Pa. St. 431; 98 N. Y. 98; 118 U. S. 356; 58 Ark. 407.

2. The evidence is entirely insufficient to sustain the allegation that appellants, or either of them, enticed away and knowingly employed Beckwith in violation of the statute.

D. B. Sain and *W. P. Feazel*, for appellee.

If an act is susceptible of two constructions, one of which is renders it unconstitutional and the other renders it valid, the court will give it the latter construction. 58 Ark. 514. The act being in force at the time the contract of employment complained of was entered into, it became a part of that contract, and was not an impairment of it. 12 Ark. 321; 15 Am. & Eng. Enc. of L. 1046. That which is forbidden, either by statute or common law, whether *malum in se* or *malum prohibitum*, can not be the foundation of a contract. 32 Ark. 631.

Since it is within the power of the Legislature to prohibit the making of contracts on Sunday, or usurious contracts, or contracts with infants, and insane persons, it is likewise within its power to prohibit one from knowingly hiring another's servant, renter or share-cropper, or interfering with or enticing him away from his employer before the expiration of his contract.

HILL, C. J. The General Assembly of 1905 amended section 5030 of Kirby's Digest so as to make it read as follows: "If any person shall interfere with, entice away, knowingly employ, or induce a laborer or renter who has contracted with another person for a specified time to leave his employer or the leased premises before the expiration of his contract without the consent of the employer or landlord, he shall, upon conviction before any justice of the peace or circuit court, be fined not less than twenty-five nor more than one hundred dollars, and in addition shall be liable to such employer or landlord for all advances made by him to such renter or laborer by virtue of his contract, whether verbal or written, with said renter or laborer, and for all damages which he may have sustained by reason thereof." Acts 1905, p. 726.

Caledonia Tollette owned a farm in Howard County, and employed Will Beckwith, a negro, in January, 1906, to make a crop thereon. He left her place about the middle of February, and rented land from W. A. J. Sturdivant, and was also employed by John Sturdivant for a few days, making some rails and posts. She had furnished Beckwith $40.52 for supplies be-

fore he left, and she sued the Sturdivants for said amount and $400 damages, basing her action on the aforesaid statute, and secured a verdict for $65. From a judgment rendered thereon the Sturdivants have appealed.

The appellants seek by this appeal to have the aforesaid act of the General Assembly declared unconstitutional; but it has long been the settled policy of this court to refuse to consider the constitutionality of an act of a co-ordinate department of the government if there be any other clear ground upon which a decision may rest. *Martin* v. *State,* 79 Ark. 236.

In pursuance of this salutary principle, the court has taken up the second argument made by the appellants, which is as to the sufficiency of the evidence to sustain the verdict.

One Saturday, about the middle of February, Caledonia Tollette and Beckwith had a violent quarrel over her alleged refusal to supply him with some coal oil, and he cursed and abused her. Whether she drove him away from her place on account of his abusive language, or whether they became reconciled, and she requested him to stay, is a matter of controversy. The following Tuesday he moved to a place owned by W. A. J. Sturdivant, called the Richard Garland place, which was rented to said Garland, but was larger than he could till, and a portion of it was rented by W. A. J. Sturdivant to Beckwith and a mortgage taken by said Sturdivant upon the crop to be grown thereon by said Beckwith.

After Beckwith moved to the Garland place, John Sturdivant hired him for two or three days' work, making rails and posts upon his place. The plaintiff adduced evidence tending to prove that John Sturdivant told her in January that he would take the negro Beckwith away from her before the first of March. There is testimony tending to prove that W. A. J. Sturdivant told her several times after the negro had rented from him that he would pay the debt which Beckwith owed her out of Beckwith's crop, upon which he had a mortgage; and there is evidence tending to prove that he also told Beckwith that he was going to pay Caledonia Tollette from said crop.

There is no connection shown between the acts of John Sturdivant and W. A. J. Sturdivant. The case against John Sturdivant rests upon his threat to take the negro away from

Caledonia Tollette and subsequently, after the negro was upon the place of his brother, employing him to do two or three days' work upon his (John's) place. When he gave the negro this few days' employment, he was not then a tenant of Caledonia Tollette, but was a renter of his brother; and it is unreasonable to connect this employment of a few days with the threat to take the negro away from her as a renter. He says he merely gave him this casual employment to enable the negro to get something to eat, as he was in need. Certainly, it is not an employment within the mischief denounced by the statute.

The case against W. A. J. Sturdivant rests solely upon his promise to pay the debt which Beckwith owed Caledonia Tollette, made after Beckwith became his tenant. There is no testimony to show that W. A. J. Sturdivant interfered with or enticed away Beckwith, or employed him knowing of his indebtedness to Caledonia Tollette, or, in fact, of his contract with her; or that he induced him to quit her employ. In fact, nothing is shown beyond the mere circumstance that he rented land to the negro, and that subsequently, upon Caledonia Tollette's insistence, he promised to pay her debt which Beckwith owed her through the mortgage which he held upon the latter's crop. This promise upon his part was not an unreasonable or unnatural one for one landlord to make to another; and whether enforceable or not is not the question in this case. It is easily referable to other reasons than that he enticed away her tenant. It was proper evidence to throw light upon the circumstances surrounding the transaction between the parties, but was wholly insufficient of itself to make out a case under the statute.

To sustain the verdict would be to accept a scintilla of evidence, instead of following the long-established rule that verdicts must have evidence legally sufficient to sustain them.

Reversed and remanded.

CRAWFORD v. McDONALD.

Opinion delivered November 25, 1907.

1. ADMINISTRATION—RECOUPMENT AGAINST CLAIM OF ADMINISTRATOR—LIMITATION.—In a suit by a vendor's administrator to foreclose a vendor's lien upon land, defendant set up a cross-complaint, alleg-

ing a breach of the covenant in the vendor's deed in that the vendor three years before executing the deed had executed to another a ten years' lease of the land. Plaintiff moved to dismiss the cross-complaint upon the ground that the claim was barred by the two years' statute of nonclaim. *Held,* that, while the defendant's counter-claim will not be allowed as a claim against the plaintiff's intestate, defendant will be allowed to recoup damages not exceeding plaintiff's claim. (Page 420.)

2. EVIDENCE—COPY OF RECORDED INSTRUMENT.—A certified copy of a recorded instrument may be introduced in evidence by a party who had not the original in his possession and did not know where it was. (Page 420.)

3. COVENANT AGAINST INCUMBRANCE—PRIOR LEASE.—The statutory covenant against incumbrances, implied by the use of the words "grant, bargain and sell" in a deed, was broken at the time the deed was executed where the grantor had previously executed a written lease of the land which had not expired. (Page 420.)

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

John H. Crawford, for appellant.

1. Appellee's defense is based upon a breach of warranty in the deed,—an independent claim, sounding in damages. It could only be sustained by presenting it, properly verified, to the administrator before commencement of suit. Kirby's Digest, § § 110, 113, 114, 119 and note; 66 Ark. 327; 48 Ark. 304.

2. It was error to admit as evidence certified copies of a lease contract from Stewart to the Long View Lumber Company, and of two deeds of trust from Stewart to Clark, without sufficient proof of the loss or inaccessibility of the originals. Kirby's Digest, § 757; 1 Greenleaf, Ev. § § 84, 558.

3. In order to charge a covenantor upon a covenant of warranty, there must be both allegation and proof of eviction. 1 Ark. 313; 40 Ark. 420. And without eviction there is no breach of covenant. 4 Ark. 462; 5 Ark. 395; 8 Ark. 368; 13 Ark. 522; 14 Ark. 309; 33 Ark. 593; 59 Ark. 629; 74 Ark. 351; 65 Ark. 498; 47 Ark. 293; 22 Am. Dec. 777. The mere existence of an outstanding paramount title to land will not authorize a recovery in an action for a breach of a covenant of warranty. 11 Cyc. 1126.

4. Where the breach of covenant goes only to a part of the land conveyed, there can be a recovery only for such proportion

of the consideration as the value of the part, the title or right of possession of which fails, bears to the value of the entire tract. 17 Am. Dec. 589; 22 *Id.* 782; 52 Wis. 684; 57 Wis. 1; 55 N. W. 765; 12 Kan. 85; 31 Wash. 618.

McMillan & McMillan, for appellee.

1. Where a deed contains the words "grant, bargain and sell," not limited by any express words in the deed, it must be construed as an express covenant against incumbrances done or suffered from the grantor, and also for the quiet enjoyment thereof against the grantor and all others. Kirby's Digest, § 731; 31 Ark. 326; 8 Ark. 371. And the grantee may assign breaches as if such covenants were expressly inserted. Kirby's Digest, § 732. In this case the covenant against incumbrances was broken as soon as made. 27 Am. St. Rep. 428; 10 *Id.* 432; 74 Ark. 350; 65 Ark. 103.

2. Proper foundation was laid for instruction of certified copy of the lease by showing that the original was not in appellee's possession, that it was not in his power to produce it, and that he did not know where it was. Kirby's Digest, § 756; 47 Ark. 42; 25 Am. Dec. (Mass.) 346.

3. There was no necessity either for allegation or proof of eviction. It is clearly shown that the Longview Lumber Company was in possession at the time the deed was delivered to appellee. The covenant of seizure is broken as soon as made where the grantor has not the possession, the right of possession and complete legal title. 74 Ark. 350; 104 S. W. 265.

4. For measure of damages in breaches of warranty, see 59 Ark. 635. In case of partial breach the vendee is entitled to set off against the purchase money due the value of the parcel of land from which he was evicted. 13 Ark. 522.

BATTLE, J. On the 24th of January, 1902, T. J. Stewart and his wife, Helen A. Stewart, for one hundred and sixty dollars (seventy-five dollars of which were paid, and for the remainder two notes for $42.50 each were executed by the purchaser to T. J. Stewart) sold and conveyed to James H. McDonald a certain tract of land, and retained a lien thereon for the unpaid purchase money. One of the notes was due on the 15th day of November, 1902, and the other on the 15th day of Novem-

ber, 1903. Both were executed on the 23d day of January, 1902, and bore "ten per cent. interest till paid." T. J. Stewart having died, J. H. Crawford, as his administrator, brought suit against James H. McDonald to foreclose the lien on the land for the unpaid purchase money.

Defendant answered and admitted the allegations of the complaint, but alleged that T. J. Stewart sold and conveyed the land to him on the 24th day of January, 1902; that he and his wife, both deceased, by the deed "covenanted with the defendant that they would forever warrant and defend the title to the land against all lawful claims whatever; that the lands were free from all liens and incumbrances of every kind and nature whatever; for the quiet enjoyment thereof against the grantors, their heirs and assigns, and from the claims or demands of all other persons." That the land at the time of making and delivery of the deed was not free from all incumbrances. That Thomas J. Stewart, December 16, 1899, executed a lease upon same to the Longview Lumber Company for 10 years, which covered stables, lots, well of water, and other improvements. That the Lumber Company transferred the lease to J. G. Clark, who was in possession of the land at the time of the conveyance to appellee, who still holds same, and refused to quit and deliver possession to appellee. That Clark has cut all the merchantable timber from the land. That the reasonable rent value of the part of premises so held by Clark is $5 per month from January 24, 1902, a period of 46 months, to appellee's damage $230.

He asks for judgment against the plaintiff for $550 for damages on account of the incumbrance and for other relief. On December 10, 1906, appellant filed his motion to dismiss the cross-complaint, as follows: That same was based upon an alleged covenant of warranty contained in a deed to appellee made by appellant's intestate. That, in order to maintain such a demand against said estate, it was necessary for the defendant within two years after the grant of letters of administration to present to him for allowance a statement of his demand, with his affidavit appended thereto, to the effect that nothing has been paid or delivered towards the satisfaction of the demand except what is credited thereon, and that the sum demanded, naming it, is justly due. That no such verified demand was ever

made or presented to appellant, as such administrator. That more than two years have passed since letters of administration were granted to plaintiff herein.

On hearing of the motion to dismiss, it was admitted that, prior to the filing of appellee's cross action, December 11, 1905, the appellee had not attached to his claim the authenticating affidavit required by the statute; that he made no affidavit, except the one attached to his answer and cross-complaint; that more than two years had passed since letters of administration were granted to plaintiff.

The deed executed by Stewart and wife to the defendant, which was admitted as evidence, contained this granting clause: "I hereby grant, bargain, sell and convey," and the following covenant: "And we hereby covenant with the said James H. McDonald and his heirs or assigns that we will forever warrant and defend the title to the said lands against all lawful claims whatever." The statutory meaning of the words "grant, bargain and sell" is not limited by any express words in the deed.

The evidence adduced at the hearing showed that T. J. Stewart on the 16th day of December, 1899, executed to Longview Lumber Company a lease of the land in controversy for ten years, which included stables, lots, wells of water, and other improvements. This lease was filed for record and recorded. Defendant testified that the original lease was not in his possession, and he did not know where it was, and it was not in his power to produce it as evidence, and offered a certified copy of the lease as evidence. The court, over the objection of the plaintiff, admitted it. The lease was transferred to J. G. Clark. He took possession of the land and a portion of the improvements, and held the same for at least thirty months. The rental value thereof for such time exceeded the amount due on defendant's notes.

It is not necessary to mention other incumbrances adduced as evidence. "The court overruled appellant's motion to dismiss, and he excepted. On the merits it found that the covenant of warranty in the deed from Stewart to McDonald had been broken, and that appellee had been damaged in a greater amount than the notes sued upon, and that appellant on that account should recover nothing in this action, and adjudged the cost

against appellant. To this decree appellant excepted and appealed."

The decree of the court as a whole is correct. It would not allow the claim of the appellee for damages as a claim against the estate or as a basis for judgment against the appellant, but as a recoupment to the extent of the claims of appellant, as a bar to the recovery of appellant against appellee. Both claims grow out of the same transaction, and it is equitable that one should be setoff against the other. He who seeks equity should do equity. The motion to dismiss was properly overruled.

The copy of the lease was admissible. Defendant testified that he did not know where the original was, and it was not within his power to produce it. The statute in such cases provides: "If it shall appear at any time that any deed or instrument, duly acknowledged or proved and recorded as prescribed by this chapter, is lost or not *within the power or control of the party wishing to use the same,* the record thereof, or a transcript of such record certified by the recorder, may be read in evidence without further proof of execution." Kirby's Digest, § 757. In this case the lease was not executed or transferred to the defendant, and was not in his possession or control, and he did not know where it was. The certified copy was properly admitted. *Scanlan* v. *Wright,* 25 Am. Dec. 346; *Eaton* v. *Campbell,* 7 Pick. 10.

The words "grant, bargain and sell," contained in the deed, not being limited by express words, were a covenant of Stewart with McDonald, his heirs and assigns, that the land was free from incumbrances done or suffered by him. Kirby's Digest, § 731. A lease is an incumbrance, within the meaning of that term as defined in *Seldon* v. *Dudley E. Jones Company,* 74 Ark. 348, 351, and the covenant was broken when the deed to McDonald was executed. See 8 Am. & Eng. Enc. of Law (2 Ed.), 129, and note 4, and cases cited. The damages occasioned by the breach of this covenant were at least equal to the amount sued for by the appellant.

As the whole of the land conveyed was covered by the lease, the rule requiring an apportionment of damages between parts of the land affected by the covenant and the remainder

of it does not apply in this case. The covenant was broken as to the entire tract of land in controversy.

Decree affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. CONGER.

Opinion delivered November 25, 1907.

RAILROAD—INJURY TO STOCK—PROXIMATE CAUSE.—Where a horse, grazing upon a railroad company's right-of-way, became frightened by the escape of steam from the engine, ran into a barbed wire fence on the right-of-way, and was injured, the owner can not recover, although the trainmen neglected to give the statutory signals on approaching a nearby crossing, as such neglect had no connection with the animal's injury.

Appeal from Greene Circuit Court; *Frank Smith,* Judge; reversed.

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

1. The burden was on the plaintiff to show that the injury occurred within one year next before the commencement of suit. 70 Ark. 598.

2. This case falls within and is controlled by the rule announced in *Railway* v. *Ferguson,* 57 Ark. 16. The construction of a wire fence on appellant's right of way near a public crossing, and the existence of a pond of water near it, do not enter into this case as elements of neglect, nor tend to show negligence on appellant's part. Failure to ring the bell or sound the whistle would not render the company liable in this case. 43 Am. & Eng. R. Cas. 510; 99 N. Y. 25.

Huddleston & Taylor, for appellee.

HILL, C. J. At the station of Marmaduke there is a public road crossing the track of the railroad company about forty yards south of the depot; and about 75 yards north of the depot is a stockguard, where a winged wire fence crosses the railroad track. Running along the east side of the track for 150 yards north of the depot is a pond of water on the right of way.

Conger's mare was grazing along the track about half way between the station and the stockguard, and was disturbed by a freight train going north. She got upon the railroad track and run along in front of the train for 30 or 40 yards when, getting near the stockguard and being frightened by the discharge of steam from the engine, she left the track, and ran into the wire fence, and was injured. Conger has recovered judgment for $50 on account thereof, from which judgment the railroad company has appealed.

Conger's testimony showed that the only whistles or signals given by the engine were for the road-crossing, and that they were not kept up the time and distance required by the statute for road crossings. When the mare was running in front of the train, the engineer turned on steam to frighten her off the track. Whether the train slowed up while in the race with the mare is a matter of dispute in the evidence. The failure to give the statutory signals for the road crossings, or the stock signal, had nothing to do with the mare running into the fence. The object of signals is to notify people and animals that the train is coming. When they have that knowledge from their senses, the signals cease to be factors. There is no causal connection between the failure to keep the bell ringing or the whistles sounding and the injury to the mare. The discharge of steam from the engine to frighten the mare from the track was proper. Had the engineer failed to do this, and the mare stayed upon the track, the company would have been liable for failure to use ordinary care to have prevented the injury.

The water pond and the winged crossing fence were matters that the company could indulge in if it desired, for they were upon its own land, and were not inherently harmful.

If precedent is needed for the result reached herein, it may be found in a full discussion of the questions involved in *Railway Company* v. *Ferguson,* 57 Ark. 16.

Judgment is reversed, and the cause dismissed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. SLAUGHTER. | 84 423 187 343

Opinion delivered November 25, 1907.

CARRIER—LIVE STOCK—LIABILITY OF INITIAL CARRIER.—A stipulation in a bill of lading of live stock that the initial carrier shall not be liable, in the event of injury or loss to said stock happening beyond its own line, is valid if based upon a reduction in rate or other valid consideration.

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

STATEMENT BY THE COURT.

The appellee by this suit seeks to recover of appellant for damages alleged to have accrued to appellee by reason of injury to two carloads of cattle caused through the negligence of appellant in transporting same from Magazine, Arkansas, to St. Louis, Missouri, under contract with appellee. The complaint specifically sets forth the alleged negligence in transporting the cattle from Magazine, Arkansas, to Ft. Smith, Arkansas, and from Ft. Smith, Arkansas, to St. Louis, Missouri, and also specifically sets forth the damages sustained, amounting in the aggregate to $525, for which judgment was prayed.

The appellant in its answer admitted the contract with appellee for the shipment of cattle, and alleged that appellant was only liable under the contract for damage done through its negligence while the cattle were in its possession, denied that any damage was done through its negligence, and set forth that the cattle were delivered to its connecting carrier, the St. Louis & San Francisco Railroad Company, at Wister, Indian Territory, in as good condition as when received by defendant at Magazine, Arkansas. The answer also denied that there was any negligence after the cattle were delivered to the connecting carrier at Wister, but alleged that appellant was not liable for such negligence, if it was shown.

The contract, as proved, was one in which the appellant undertook for a specified rate of freight to transport appellee's cattle from Magazine, Arkansas, to St. Louis, Missouri, the rate being less than the rate charged for shipments at the car-

rier's risk. On account of the "reduced rate" and other considerations, it was "mutually agreed between the parties," among other things, that "under no circumstances shall the Chicago, Rock Island & Pacific Railway Company be held liable for any injury to or loss of the stock transported hereunder, from any cause whatsoever, happening or accruing beyond its own line, and, in the event of injury to or loss of said stock, only the carrier on whose line the injury or loss actually occurs shall be liable."

On the cross-examination of appellee the following occurred:

"Q. To what railroad company were your cattle delivered at Wister, Indian Territory? A. I presume to the Frisco; I don't know. I thought the whole thing was the Rock Island system. Q. You knew it was not the regular line of the Rock Island, but you thought it was a branch of it? A. I thought the Rock Island was a branch of the Frisco. Q. But you know at Wister that your cattle were delivered to the Frisco and carried from there by them to St. Louis? A. Yes, sir."

Attorney for defendant: "I desire to move the court to exclude from the consideration of the jury all the testimony of this witness as to delays, rough treatment and injury to the cattle after they left Wister, Indian Territory, and before they reached St. Louis, on the ground, as stated in my opening, that defendant, under the contract of shipment in this case, is not liable for any damages which occurred after the cattle were delivered to the connecting carrier, St. Louis & San Francisco Railroad Company, at Wister. The court overruled defendant's motion, and the defendant excepted.

The record shows at another place the following:

"Q. State, Mr. Slaughter, whether you were unnecessarily delayed at any other point between Wister and Ft. Smith." Attorney for defendant: "To save frequent interruptions, may I not have the privilege of saving exceptions with reference to delays after leaving Wister without calling the court's attention to each separate objection?" The court: "You may; the court understands your contention. Go ahead, Mr. Slaughter."

The appellee introduced evidence tending to show negligence in the carrier from Wister to Ft. Smith, and from Ft.

Smith to St. Louis. It is conceded by appellant that it is liable, and that the judgment is correct, if it is liable for the injuries occurring on the St. Louis & San Francisco Railroad.

The court instructed the jury as follows:

"This is a contract of shipment from Magazine, Arkansas, to St. Louis, Missouri, and under it defendant is liable, under the proof here, for all damages, if any, sustained by the shipment from the acts of negligence charged in the complaint, if proved, or such of them as are proved, if any, anywhere from Magazine, Arkansas, to St. Louis, Missouri."

Appellant duly saved its exceptions, and asked the following:

"3. You are instructed that under the contract of shipment in this case the defendant is not liable for any damages which may have occurred to said cattle after they were delivered to the St. Louis & San Francisco Railroad Company at Wister, Indian Territory." This was refused, and the appellant again duly excepted.

The verdict and judgment were for appellee, and this appeal duly prosecuted.

Buzbee & Hicks, for appellant.

1. Where the contract for shipment of cattle limits the carrier's liability to damage occurring on its own line, it is not liable for damage occurring on connecting line, and the jury should be so instructed. 77 S. W. 29; *Id.* 1.

2. The court erred in instructing the jury in effect that appellee could recover for damage occurring anywhere between Magazine and St. Louis. 32 Ark. 393, and cases cited; 63 Ark. 326; 50 Ark. 397.

Priddy & Chambers, for appellee.

1. The exemption clause in the contract was merely for the purpose of fixing the liability as between the several carriers, and not in any way restricting the liability of the initial carrier to the shipper. 87 S. W. 99; 1 Hutchinson on Carriers, § 240.

2. There was no proper proof that appellant delivered the shipment to a connecting carrier—that the carrier delivering it in St. Louis was not a part of appellant's system of railroads. The court's instruction was right.

WOOD, J., (after stating the facts.) The contract itself showed that the parties to it contemplated that the cattle were to be delivered by appellant to a connecting carrier. For it expressly limits the liability to injuries occurring on its own line, and specifies that the liability of appellant "terminates upon delivery by it of said cars to its connecting carrier." The proof showed that appellee's cattle at Wister "were delivered to the Frisco, and carried from there by them to St. Louis." This evidence was at least *prima facie* proof that the Frisco was a connecting carrier, and, in the absence of any evidence to the contrary, was sufficient to warrant a finding to that effect. The court, in passing upon the evidence offered, well understood the contention of appellant that the Frisco was a connecting carrier, and the ruling indicates that the court assumed that such was the fact, without the necessity of further proof upon the subject. The court erred in giving the instruction set out in the statement, and in refusing the request asked by appellant.

The trial court, under the rule announced by this court in *Little Rock & F. S. Ry. Co.* v. *Odom,* 63 Ark. 326, should have confined the inquiry to the damage, if any, produced by the negligence of appellant, before the delivery of the cattle to the connecting carrier. See also *Taylor* v. *Little Rock, M. R. & T. R. Co.,* 32 Ark. 393; *Packard* v. *Taylor,* 35 Ark. 402; *St. Louis, I. M. & Sou. Ry. Co.* v. *Weakley,* 50 Ark. 397; *International & G. N. R. Co.* v. *Ernest & Bost,* 77 S. W. 29, 30; and *International & G. N. R. Co.* v. *Startz,* 77 S. W. 1.

Judgment reversed, and cause remanded for new trial.

GEBHART v. MERCHANT.

Opinion delivered November 25, 1907.

JUDGMENT—ASSIGNMENT—RIGHT OF ASSIGNEE.—Where the holder of a judgment assigned a half interest therein to another, and thereafter levied upon the judgment debtor's property and bought it in satisfaction of the judgment, his assignee will be entitled to hold him liable for half the property so purchased, but not to hold him liable for

one-half of the amount bid by him for the property, nor, if he failed to pay such bid, to have judgment against him for one-half thereof.

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

STATEMENT OF FACTS.

The facts are as follows: Appellee, W. B. Merchant, brought suit in the Garland Circuit Court against D. L. and Johnnie A. Gebhart upon a foreign judgment which he had obtained against them in the State of Texas. Merchant caused an attachment to issue at the time of instituting suit on said judgment, which was levied on certain real estate as the property of said D. L. and Johnnie A. Gebhart. Merchant obtained judgment against D. L. and Johnnie A. Gebhart on the 30th day of October, 1905, in said suit for the sum of $5,688.40 with interest at six per cent. per annum from October 8, 1901. The attachment was sustained, and the property ordered sold to satisfy the judgment. Merchant had assigned a half interest in the foreign judgment to J. C. Gebhart. D. L. Gebhart appealed to the Supreme Court from the judgment sustaining the attachment, but did not give a supersedeas bond and stay the execution of the judgment. The sheriff advertised the property attached to be sold on the 11th day of August, 1906, under the said judgment and order to satisfy the judgment of said court. On the 9th day of August, 1906, appellant, J. C. Gebhart, filed his petition in said case of Merchant against D. L. and Johnnie A. Gebhart, and obtained from the circuit judge in vacation an order directing the sheriff to retain in his possession any money which might be realized from said sale until the further order of the Garland Circuit Court. The sale of the attached property was duly made by the sheriff pursuant to the notice previously published, and Merchant bought it through his attorneys in satisfaction of his said judgment, to the extent of the amount bid by him for the property at the sale.

Afterwards appellant, J. C. Gebhart, on October 10, 1906, filed in said case of Merchant against D. L. and Johnnie A. Gebhart his motion or petition asking that the sheriff be required to pay over to J. C. Gebhart one-half of the amount bid by Mer-

chant for said property, or that, if Merchant had not paid the amount of his bid, then that judgment be rendered against him therefor in favor of J. C. Gebhart, and that the property bought by Merchant be sold in satisfaction thereof.

Afterwards, on the 19th day of November, 1906, the said motion or petition of J. C. Gebhart came up for hearing in said court, and Merchant demurred in short on the record to the same, and also filed his response thereto. The matter was heard on said motion or petition, demurrer, response and oral testimony, and the court denied the prayer of said petition, and dismissed the same, but directed deed to be made to Merchant and Gebhart jointly.

J. C. Gebhart excepted to the action of the court in dismissing his said application. Afterwards on the 14th day of March, 1907, J. C. Gebhart filed his motion to amend the record in said case so as to make it appear that no oral evidence was heard on his said petition, and that he had excepted to the ruling of the court and prayed an appeal, which motion was denied, in so far as the matter of having heard oral evidence was concerned, but granted as to the question of J. C. Gebhart having saved exceptions to the judgment of the court in dismissing his said petition. J. C. Gebhart then obtained an appeal from the clerk of this court.

R. G. Davies, for appellant.

Being the equitable assignee of one-half of the judgment, appellant had the right to refuse to allow appellee to appropriate his half. Appellant was entitled to his part of the proceeds, and to control its collection to the extent of his interest. 4 Ark. 616; 11 Ark. 736; *Id.* 745; 17 Ark. 248; 13 Ark. 431; 23 Ark. 169; 15 Ark. 226.

Wood & Henderson, for appellee.

WOOD, J. There is no statutory authority for the proceeding instituted by appellant. He had no legal interest in or lien upon the property attached by appellee to satisfy his foreign judgment. Sections 391 to 393, and 425 to 429 and 6012, of Kirby's Digest, giving remedies to parties having an interest in the property itself, do not apply. Appellant by virtue of the assignment to him of a half interest in the foreign judgment

had an equitable title and interest therein which would enable him to hold appellee to account in equity as a trustee for half the proceeds in money or property derived from the enforcement of the foreign judgment. *Clark* v. *Moss,* 11 Ark. 736; *Weir* v. *Pennington,* 11 Ark. 745; *Brearly* v. *Norris,* 23 Ark. 169.

Certainly, appellant had no cause of action at law against appellee as alleged in appellant's petition or motion. The lower court was correct in its ruling dismissing same. And it is difficult to see how under the circumstance appellant could get any further relief in equity. For the circuit court directed the deed to be made to appellant and appellee jointly, thus giving appellant all he was entitled to in any court.

The judgment was right, and it is affirmed.

EAST v. KEY.

84 429
88 608

Opinion delivered November 25, 1907.

1. APPEAL—PRESUMPTIONS AS TO CHANCELLOR'S FINDINGS.—The presumptions on appeal are in favor of a chancellor's findings of fact, and such findings will be sustained unless clearly contrary to the weight of evidence. (Page 430.)
2. SAME—PRESUMPTION IN ABSENCE OF EVIDENCE.—Where a decree appealed from recites that the depositions of certain parties were read as testimony in the cause, but the transcript on appeal does not contain them, it will be presumed on appeal that the chancellor's findings of fact were correct. (Page 431.)

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

STATEMENT BY THE COURT.

This bill was filed by W. G. L. Key and J. A. McMenis aganist T. M. East, Jr., on the 10th day August, 1905. The parties had been equal partners in running a saw mill under a verbal contract made about the first of January, 1904, and the partnership continued until the first of June, 1904. No period of duration was fixed in the contract of partnership.

The object of the bill was to have an accounting and an adjustment of the differences between the partners, and for damages claimed by partners against the defendant on account of the termination of the partnership.

The answer admitted the partnership, and averred that the plaintiffs were indebted to the defendant on account of the partnership business, and that the dissolution was by consent of the partners. The testimony, of which a large amount was taken, shows the partnership accounts to be complicated.

There was a decree for the plaintiff, and the defendant has appealed.

McMillan & McMillan, for appellant.

C. V. Murry, for appellee.

HART, J. (after stating the facts.) Appellants objected that the account was not referred to a master. In the case of *Bryan* v. *Morgan,* 35 Ark. 115, EAKIN, Judge, said that it was not erroneous for the chancellor to refuse a reference to a master, but that it was not good practice. In that case the chancellor refused a motion for a reference made before he had considered the testimony. He then took the account, and announced the result without making any special findings. Here the motion for a reference was not made until the chancellor had made a detailed statement of the account and transactions between the parties and reported his special findings therefrom. Upon application of the defendant the chancellor set aside the decree, made a further examination of the accounts, and made his report of the details of the business in the same manner as if done by a master upon a reference to him. His report and special findings therefrom are embodied in the recitals of the decree.

The presumptions in a case of this sort are in favor of a chancellor's findings of fact, and such findings will be sustained unless clearly contrary to the weight of evidence, and the burden is upon the appellant to show this.

It becomes the duty of appellant's counsel to eliminate from the confused mass of testimony the particular issues, separated from the items conceded to be correct. Counsel have undertaken to re-state the account in different forms. There is a conflict

in the testimony in regard to the disputed items, but after a careful review of the testimony as abstracted we are of the opinion that the special findings of the chancellor are not contrary to the weight of evidence.

Besides, the decree recites that the depositions of T. M. East, Jr., C. W. East, J. W. Sorrels and Frank Park, taken June 6, 1906, were read as testimony in the cause, but the transcript which appellant caused to be filed in this cause does not contain these depositions. This being true, the presumption is that the findings of the chancellor are correct. *Matlock* v. *Stone,* 77 Ark. 199.

Decree affirmed.

WOOD, J., concurs in the judgment for the reason that some of the depositions recited in the decree are not in the transcript.

MISSISSIPPI HOME INSURANCE COMPANY *v.* ADAMS.

Opinion delivered November 25, 1907.

1. CONTRACT—CONSTRUCTION.—Where a contract of employment of insurance agents stipulated that, in addition to a flat commission on the net premiums for business written, a contingent commission of ten per cent. should be paid on the profits of the business after deducting expenses, reinsurance, return premiums and losses for the current year, to be first computed one year from date and at the end of each year thereafter, and that the contract might be terminated by either party on giving thirty days' notice, and the contract was terminated by the insurance company before the end of the first year, the contingent commission was earned and settlement thereof was required at the termination of the contract. (Page 434.)
2. SAME.—Where a contract of employment of insurance agents by the year provided that they should receive an annual contingent commission of a certain percentage of the profits of the business after deducting the expenses, reinsurance, return premiums and losses for the current year, and that the contract might be terminated at any time on thirty days' notice, and the contract was terminated before the end of the current year, the agents are entitled to the contingent commission after deducting the expenses, reinsurance, return premiums and losses that had accrued at that time. (Page 435.)

3. SAME.—Where a contract of employment whereby the employer agreed to pay the employee a percentage of the profits fixed the basis for determining the profits, the parties will be bound thereby. (Page 435.)

4. SAME—AMBIGUITY.—In case of doubt, a contract will be construed most strongly against the party who wrote it. (Page 435.)

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

STATEMENT BY THE COURT.

The firm of Adams & Boyle, insurance agents, were employed by the appellant, a foreign corporation, to establish and conduct for appellant the business of fire insurance in this State. Under the contract appellees were general agents, with all the powers, duties, and the obligations of such. Appellees were to pay all expenses incident to the business except legal expenses in resisting losses. As compensation for its services in planting the business and conducting it, the contract provided: "Fourth: The party of the first part (appellant) agrees to pay the parties of the second part (appellees) a flat commission of thirty per cent. (30%) on the net premiums for business written in said State, meaning thereby the gross premiums, less return premiums and reinsurance; said commission to be in lieu of all expenses whatsoever, except legal expenses in resisting losses. A further contingent commission of ten per cent. (10%) is to be paid to the parties of the second part on the profits of the business after deducting all expenses, reinsurance, return premiums and losses for the current year; said contingent commission to be first computed on August 1, 1906, and at the end of each year thereafter."

There were various provisions in the contract defining the duties of the respective parties to it, unnecessary to be set forth here. The contract contained these further provisions:

"Ninth: This agreement may be terminated at any time by either party after giving thirty (30) days' written notice to the other, in which event payment of compensation as above provided shall be made, and will be in liquidation of all payments to the party of the second part by the party of the first part.

"Tenth: This agreement will take effect from date."

The contract took effect August 8, 1905. The contract was terminated on the 1st of December, 1905, after giving the notice

specified in the ninth paragraph *supra.* Appellant sued appellees for the sum of $1,010.69, which it claims appellees were due upon a settlement as per terms of the contract. Appellees denied liability. On the termination of the contract, appellees rendered a statement of their accounts with appellant as of that date, showing that the amount of the net premiums, after deducting reinsurance, commissions and three-sevenths of the amount paid for entrance fee, and certificates to agents, and losses incurred and paid, was $9,254. Appellees credited themselves with ten per cent. of this amount, as their contingent commission under the contract.

This credit of $925 contingent commission, which appellees claim, was disputed by appellant. Appellant contends that under the terms of the contract the settlement of appellees' contingent commission should be made on August 1, 1906, and it adduced proof to show that on that day the business that had been written by appellees had resulted in a loss to appellant of $1,400.64, not taking into account the unearned premiums, and that if these were deducted the loss would be $20,885.15. Appellant contends that the unearned premiums should be deducted, and that in no event, making the settlement as of August 1, 1906, was there any amount due for contingent commission.

Appellees, on the other hand, contend that their contingent commission was due on the day of the termination of the contract, that final settlement should be made on that day, and that appellant was due appellees a contingent commission on all the premiums received by appellant on business that had been written by appellees at that time after deducting 30 per cent. for flat commission, the amount paid for reinsurance, losses incurred and paid at that time, and an amount representing three-sevenths of the sum which appellees had paid for entrance and license fees, said sum being for time unexpired.

Appellees testified to the correctness of the statement of account which it had rendered in accordance with its contention. The trial court sustained appellees' contention, and rendered judgment in their favor.

The motion for a new trial contained only one ground, namely, "that judgment is contrary to the evidence." This being overruled, appellant prosecutes this appeal.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Ashley Cockrill, for appellees.

In construing the contract, the whole of it must be considered, and, if possible, effect given to every part of it. 9 Cyc. 579, 583, 587; 1 Crawford, Dig. 371. Where a contract is susceptible of two constructions, it will be construed most strongly against the party writing it. 9 Cyc. 590; 74 Ark. 45; 73 Ark. 338.

WOOD, J., (after stating the facts.) First. It is obvious from the provision of the contract, to-wit: "Said contingent commission to be first computed on August 1, 1906, and at the end of each year thereafter," that the parties to it contemplated that the contract might last more than one year. Yet the provision following this, in paragraph "ninth," shows that the parties did not make this time for the computation of the contingent commission of the essence of the contract, because in this latter provision the right to terminate the contract by either party on thirty days' notice is expressly reserved. And payment "in that event" of compensation as provided in paragraph *"fourth"* shall be made, and will be in *liquidation of all payments* to the party of the second part by the party of the first part. The last paragraph must be taken to qualify the preceding one, and the two together mean that, if the contract should continue till the first of August, 1906, and for years thereafter, the time for the computation and settlement of the amount due under the provision for a contingent commission should be the first day of August of each recurring year that the contract continued. But, if it should be terminated earlier, then the computation of the contingent commission should be made, and settlement thereof had, at the time the contract was terminated. The basis of the computation as to the amount to be paid for the part of the year while the contract is in existence is the same as if the contract had continued for the full year. The only difference is that when the contract is terminated the settlement must be made then of all that is due under it. And when the contract is ended all commissions by way of compensation are due, and the computation of the amount and the payment thereof cannot be postponed.

This is the only reasonable construction of which the contract is susceptible, when all of the terms of the two paragraphs

are considered. It is our duty, in arriving at the intention of the parties, to give force and effect to all the provisions, and every word, if possible. The language, as a whole, should, if possible, be so construed as to make the apparently conflicting provisions reasonable and consistent, and so as not to give one of the parties an unfair and unreasonable advantage over the other. 9 Cyc. 579, 583-587 and authorities cited. *Kelly* v. *Dooling,* 23 Ark. 582; *Railway* v. *Williams,* 53 Ark. 58.

It follows that the court was correct in concluding that the computation should be made and the settlement had as of the day of the termination of the contract.

Second. As we construe the contract, the amount of the contingent commission should have been computed on the following basis: Appellees should have been allowed a commission of ten per cent. on the premiums on business written by them at the time of the termination of the contract, less "expense, reinsurance, return premiums, and losses" that had accrued at that time. This would show the profits of the business at that time, and is according to the very terms of the contract. It is insisted by appellant that the amount should be still further reduced by the unearned premiums; that there could be no showing of profits unless the unearned premiums were taken into the account. But the answer to this is that by the plain terms of the contract the parties have specified that the profits are to be estimated by what remains "after deducting all expenses, reinsurance, return premiums and losses." Having undertaken to enumerate the things that should be considered, the things not mentioned can not be supplied by inference or intendment, for the very terms of the contract show that the parties had in mind the things that they intended should govern in fixing the basis for the estimate, and the mention of these necessarily excluded others not mentioned. If no mention had been made of the things to be deducted, and the contract had read that "a contingent commission of ten per cent. was to be paid the parties of the second part on the profits of the business," then it would have been a matter of proof *aliunde* as to what should be deducted in order to ascertain whether there were profits. But here the contract has fixed the definite standard; and, as appellant has written the contract, in case of doubt the words will be construed against it. 9 Cyc. 590;

Leslie v. *Bell,* 73 Ark. 338; *Allen-West Com. Co.* v. *Peoples' Bank,* 74 Ark. 41.

The burden of proof was on appellant. It adopted an erroneous theory as to the time when the contingent commission was to be computed and settled under the contract, and failed in its proof to show that appellees had received more than the contract authorized.

Judgment affirmed.

ROCK ISLAND, ARKANSAS & LOUISIANA RAILROAD COMPANY *v.* STEVENS.

Opinion delivered November 25, 1907.

1. CARRIER—NOTICE OF PASSENGER'S DESTINATION.—The fact that a passenger purchased a ticket from a station agent entitling her to be carried to a flag station is not notice to the conductor of a train that she desired to debark at that station. (Page 439.)
2. SAME—DUTY OF PASSENGER TO NOTIFY CONDUCTOR AS TO DESTINATION.—While ordinarily passengers may rely upon the conductor or some trainman ascertaining her destination in time to stop for her at a flag station, yet, where she sees that the train is crowded and the conductor is necessarily detained elsewhere, or where the distance is so short, or there are other indications that the conductor or other person in charge of the train would not obtain notice in time to stop the train, she must give him notice, or she can not complain if she is carried beyond her destination. (Page 440.)

Appeal from Union Circuit Court; *Jesse B. Moore,* Special Judge; reversed.

STATEMENT BY THE COURT.

Mrs. Stevens, then of Grayson County, Texas, on the 24th of December, 1905, was at El Dorado, and there purchased a ticket over the line of the appellant railroad company to Smith's Crossing. Her mother lived about three-quarters of a mile therefrom, and her brother was to meet her there, and he sent his conveyance there for her. Smith's Crossing is a flag station,

trains only stopping there to take on or discharge passengers on signal or notice. There was no depot, not even a platform there. It was six miles from El Dorado.

Mrs. Stevens knew it was a flag station, and not a regular station. She expected the conductor would come to her before they reached the station, and then she intended to tell him to put her off there. She was in the rear end of the rear coach of the train, and the coach was crowded. She did not observe whether the other coaches were crowded or not. The train was made up of three coaches and a baggage car.

She says that the train did not stop between El Dorado and Smith's Crossing, but slowed up at one place (the conductor says it made a stop there). There is one station between El Dorado and Smith's Crossing which is called Cargile. This station is one mile from Smith's Crossing. Mrs. Stevens expected the conductor to come through the cars there. When the train passed Cargile without her seeing the conductor, she sent her little boy to look for the conductor to notify him she wanted to get off at Smith's Crossing. She sent him twice, and a little later she started to hunt the conductor herself.

Mrs. Stevens's son, fourteen years of age, testified that after they passed Cargile his mother sent him to the next coach to find the conductor. Failing to find the conductor in the next coach, he returned to his mother, who again sent him forward to hunt him. He found him in the coach for negro passengers and delivered the message, and the conductor told him that there was no such place as Smith's Crossing. The train was either at Smith's Crossing or past it when he found the conductor.

In the meantime a gentleman, seeing Mrs. Stevens's predicament, went forward and found the conductor, and he said he would be back in a few minutes, and did then come back. When the boy failed to find the conductor, Mrs. Stevens started to look for him, and as she went forward she saw him standing in the door of the next coach, and she waited for him, and by the time he got to her the train had stopped at Upland, three and a half miles beyond Smith's Crossing. All of this seems to have occurred while the train was running from Cargile to Upland.

The conductor testified that Smith's crossing was a flag station six miles from El Dorado, and that it takes a train on

the regular schedule nineteen minutes to run from El Dorado to Smith's Crossing. That on that day in question he had a heavy load, the coaches were crowded, and people were standing in the aisles. He also had several negroes in the baggage car, who did not have room in the coach. Cargile is five miles south of El Dorado, and is a regular stop. The train stopped there probably thirty seconds or longer to put off mail and to receive mail.

In working the train, he commenced at the front end, and when he got through next to the last coach he met a party who told him there was a lady who wanted to get off at Smith's Crossing. He did not recollect the boy approaching him, and says he did not tell any one that there was no such place as Smith's Crossing. When he got back to the lady, the train was then at the depot at Upland, and he went to her and tried to make arrangements to have her conveyed back to Smith's Crossing. He also offered to make other arrangements to minimize her inconvenience; but these matters are immaterial in the view the court takes of the case.

The question was asked the conductor: "Tell the jury what the custom of the country is in the operation of passenger trains with regard to stopping at a flag station to let passengers off—is it ever done without special notice upon the part of the party desiring to alight from the train to that effect?" Objection was made to it, and the court said: "My ruling is this: If she bought a ticket and took the train, the company had notice that she wanted to get off at Smith's Crossing." Pursuant to this view of the law, all testimony contrary thereto was ruled out.

The conductor said that in the course of his duties it was not possible on that day for him to have reached Mrs. Stevens in time for him to have taken up her ticket before reaching Smith's Crossing. "There is not a conductor on earth, in commencing at the front end of the train, who could have done it." He said further that there was no such custom as a conductor passing through the train before taking up tickets in order to notify people of the arrival of the train at a flag station.

The court: "It is the duty of the conductor to find out where his passengers desire to get off his train. I have frequently seen them come through the train coming out of St. Louis and find

out if there were any passengers for nearby stations."

This is the substance of the testimony that is important in determining the appeal. The action was brought by Mrs. Stevens for being carried by her station and for damages sustained in walking back from Upland to Smith's Crossing. Judgment was recovered in the court below, and the railroad company has appealed.

Buzbee & Hicks, for appellant.

The court erred in excluding testimony offered by appellant to show that it was not the rule or custom of the company to stop its trains at flag stations except upon notice from the passenger that he desired to stop at such a station and in holding, in effect, that purchasing a ticket and boarding the train was notice to appellant that she wanted to alight the station in question. And, again, the court erred in holding that it was the duty of the conductor to go through the train and find out where the passengers wanted to get off. It is the duty of a passenger to ascertain whether or not a particular train stops at the desired destination, and, if it be a flag station, to notify employes in charge of the train, in time to make the stop. 45 Ark. 256; 47 Ark. 77; 4 Elliott on Railroads, § 1593. See also 67 Ark. 142; *Id.* 112.

Marsh & Flenniken, for appellee.

When a common carrier takes a passenger beyond his station, it is liable for all damages proximately resulting from its failure to allow the passenger to alight at proper station. 67 Ark. 125. Purchasing a ticket and boarding the train is sufficient notice to the carrier of the passenger's destination. There is no prejudicial error. The evidence sustains the verdict, and on the whole case the judgment is right. The verdict should stand, though error appear in the record. 18 Ark. 469; 26 Ark. 373; 24 Ark. 587; 24 Ark. 326; 44 Ark. 556; 19 Ark. 677; 46 Ark. 296; 46 Ark. 542.

HILL, C. J., (after stating the facts.) 1. The court said: "If she bought a ticket and took that train, the company had notice that she wanted to get off at Smith's Crossing." Pursuant to this theory, the court instructed the jury and excluded testimony offered.

In *St. Louis, I. M. & S. Ry. Co.* v. *Atchison,* 47 Ark. 74, where a station agent had sold a ticket to a passenger to a given station and told him that a train then about to leave would stop there, when in fact, according to the rules of the company, it did not, Chief Justice COCKRILL, for the court, said: "It is the duty of a passenger to ascertain whether the station of his destination is one of the stopping places of the train he wishes to board before embarking, and if he attempts to do so and is misled by an agent whose employment authorizes him to speak for the company, he has his action against the company for his misdirection; but such misdirection does not alter the duty of the conductor. He must run his train according to the regulations of the company; otherwise, in lieu of that precision and regularity which are required in the management of trains to insure safety, we should have only uncertainty, irregularity and insecurity. The station agent cannot thus legally throw upon the conductor the blind hazard of injury to his master and the passengers committed to his care."

Therefore it follows that the purchase of the ticket alone was not notice to the company that that particular train would be stopped at Smith's Crossing.

2. The court said: "It is the duty of the conductor to find out where his passengers desire to get off his train," and instructed the jury according to the above theory. In *Pence* v. *Louisville & N. R. Co.,* 64 S. W. 905, the Court of Appeals of Kentucky, in a case practically identical with the one at bar, said: "A railroad company has the right to make reasonable rules and regulations for the conduct of its business, and to designate the stations where it will receive passengers and discharge them only upon notice; and it is the duty of the holder of the ticket to a flag station, where the trains stop only on notice to the conductor, to inform him of her destination; and if such passenger fails to notify the conductor or some employee of the company of her destination, and should be carried, as in this case, seven-eighths of a mile beyond the station before giving such notice, and the conductor then offered to carry her on to the next station, which was only a mile and a half away, and send her back, and such passenger voluntarily alighted from the train, and suffered no serious inconvenience therefrom, we are of the

opinion that no cause of action is made out." And the court indicated that it was following the rule of *Gulf, C. & S. F. Ry. Co.* v. *Ryan,* 18 S. W. 866, a case similar to this, in which the Court of Appeal of Texas said:

"It was the duty of the plaintiff to have notified the officers of the train that he desired to stop at Davidson Switch, and thereby prevent being carried beyond the station. This he did not do, and the evidence fails to show the want of due diligence on the part of appellant or its employees."

In *Chattanooga, R. & C. Rd. Co.* v. *Lyon,* 89 Ga. 16, the court said: "The holder of the ticket has, ordinarily, the right to assume, when he buys it, that the company will safely land him at his destination. Accordingly, he has the right to presume the conductor will call for his ticket before reaching the station specified, and thus obtain notice of the fact that he desires to stop at such station. Of course, when the conductor takes up and examines the ticket, the information will be thus conveyed to him that he has a passenger for this station, and there will be no difficulty at all in his carrying out the contract which has been made between the company and the passenger. * * * The general rule, therefore, as to the duties of railroad companies toward passengers holding tickets for flag stations should be as we have stated; but, as already intimated, we do not think this rule should be inflexible. There may be circumstances under which a passenger for a flag station is carried beyond his destination when it would not be fair or just to attribute the fact to the company's negligence. * * * There may be other occasions when the conductor will be prevented, without fault on his part, from ascertaining in time the desire of a passenger to stop at a flag station, or when, under the circumstances, it is manifestly the duty of the passenger to see to it that the conductor has the necessary information. In cases of doubt as to which should take the initiative, the question may very properly be left to the jury."

In *Central of Ga. Ry. Co.* v. *Dorsey,* 106 Ga. 826, the court said: "We think it is the duty of the conductor of a passenger train, when the company has sold tickets to passengers, to go through the train and ascertain the station at which the passengers wish to alight; but we also think that in a case like the pres-

ent there is a corresponding duty upon the part of a passenger, when he sees that the conductor has failed to call for and take up his ticket, and is ignorant of his presence on the train and of his destination, to notify the conductor of his presence and destination, especially where the ride is a short one, and the passenger knows that the train will not stop at this station unless the conductor has notice that there is on board a passenger for that station."

Applying these principles to the case at bar, Mrs. Stevens was making a ride of six miles to a station which she knew to be a flag station, and at which she knew the train would not stop unless she notified the conductor. She seated herself in the rear of the rear coach, and knew that the coach was crowded. She did not see the conductor, and made no effort to see him until the train reached Cargile, after a ride of five miles, and when she only had one mile to go. She then made efforts to reach the conductor, who was busy with a crowded train and had not reached the rear coach; and he was not notified that she desired to get off at this station until it was passed. As indicated in the authorities quoted, ordinarily passengers may rely upon the conductor or some employee of the train ascertaining her destination in ample time to stop for her when that station is a flag station. But when she sees, as in this case, that the train is crowded, and the conductor is necessarily detained with his duties elsewhere, or where the distance is so short that he could not reasonably be expected to reach her before arriving at her station, or other indications that the conductor or other person in charge of the train would not obtain notice in time to stop the train at the desired point, then the passenger cannot longer wait for the agent of the company to take the initiative, but she must give him notice that she desires to leave the train at such flag station in time to have it stop there, or else she cannot complain if she is carried by it.

The court proceeded upon two erroneous theories, which ran throughout the trial, and which necessarily call for a reversal and for a new trial.

Reversed and remanded.

McCULLOCH, J., (dissenting.) I dissent from the rule announced in this case that plaintiff can not recover because she failed, under the circumstances described, to notify the conductor of her desire to get off at Smith's Crossing. I think that it was the duty of the conductor to ascertain whether or not he had passengers for that place, or to give passengers reasonable opportunity to notify him of that fact. He knew, of course, that the rules of the company permitted the sale of tickets for that station, and he was therefore apprised of the fact that passengers for that station might be on board the train. When he found that he could not, in the regular course of his trip through the train collecting fares, go through the entire train before reaching the flag station, he could have passed through each coach and inquired for passengers for the station, and, failing to do this, he ought to have stopped the train. In other words, he ought to have given passengers for that station a reasonable opportunity to notify him of their presence on the train or to have stopped the train at the station. The initial duty was upon him, and not upon the passenger. It seems to me too onerous a duty to put upon a passenger—especially a woman—to require her to go through a moving train, from coach to coach, for the purpose of notifying the conductor of the place of destination. Passengers are expected to remain in their seats, or at least in the coach to which they are assigned, and not to move about from coach to coach. Of course, if the plaintiff had failed, after reasonable opportunity given, to notify the conductor of her destination, then she would have been guilty of contributory negligence, and she could not recover. But no such question is presented in this case. It is admitted that the conductor never went into the coach occupied by plaintiff until after the train passed Smith's Crossing. Therefore she could not, without disregarding her own safety, have sought out the conductor to give notice of her destination.

I think the learned judge who tried the case below had the correct idea of the law concerning the duty of the carrier and so expressed it to the jury in his instructions. Of course, the remarks inadvertently made concerning the custom of railroads in regard to stopping trains at suburban stations was improper;

but it does not appear that any prejudice could have resulted to appellant from the remark. It is undisputed that the plaintiff was carried by her destination, and that the conductor gave her no reasonable opportunity to notify him of her destination. This made out a case of negligence on the part of the company. The judgment should, in my opinion, be affirmed.

FORT SMITH WAGON COMPANY v. BAKER.

Opinion delivered November 11, 1907.

1. CORPORATION—POWERS OF PRESIDENT.—The president of a business corporation has no power to enter into a contract whereby the entire *corpus* and business of the corporation is sold to another. (Page 451.)
2. SALE OF CHATTELS—INTEREST.—A vendor who was paid a sum in excess of the contract price for articles sold is liable, in a suit to recover the excess, only for interest from date of demand for such excess, and not from date of the payment. (Page 455.)

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

STATEMENT BY THE COURT.

Enterprising citizens of Ft. Smith were anxious to secure a wagon factory at their town. It had come to their notice that the plant of the South Bend Wagon Company, a corporation of Mishawaka, Indiana, was for sale. Accordingly correspondence was opened by the Commercial Club of Ft. Smith, through its secretary, with one F. A. Baker, who was president and treasurer of the Indiana corporation, looking to the purchase of the property of the South Bend Company. Baker in his correspondence submitted to the Commercial Club a list or inventory of the assets of the South Bend Company that were to be sold. This inventory was dated December 1, 1902. C. E. Speer, the president of the Commercial Club, and one Cleveland, a member thereof, some time in January, 1903, went to South Bend, Indiana,

to look over the plant, and to talk with Baker in order to "get his ideas," etc.

On their return to Ft. Smith, a meeting of the Commercial Club was had, and it was agreed that the citizens would raise a bonus for Baker, and make an effort to secure the wagon factory at Ft. Smith.

In the meantime other correspondence with the secretary of the Commercial Club and Baker followed; and the latter sent the following telegram:

"South Bend, Ind., January 25, 1903.

"C E. Speer,

"Ft. Smith, Ark.

"If deal is closed immediately, I will join new organization with two hundred thousand capital, taking fifty thousand stock and thirty-five thousand cash for my values; only ten thousand for good will in this proposition.

"F. A. BAKER."

On the same day he wrote a letter in which he says: "I am just in receipt of a letter this morning from Mr. Miller saying you return home a little disappointed regarding our values, as from observation you thought our figures a little high, but I beg to assure you that such is not the case. However, I feel disposed to make another little concession, as I believe conditions are so favorable at Ft. Smith that I can soon recover, making a gain out of what might appear to be a loss. I also wish to add in this connection that I feel very confident that you will be satisfied with my capability when you see me 'at work.' There is no doubt of my ability to handle a large factory to the entire satisfaction of the stockholders, and after my talk with you I feel that we can make a large success of this matter. In fact, I think so well of it that I do not care to take any bonds whatever, but propose to take $50,000 on stock and $35,000 in cash for my values here. It will be necessary for me to have this amount of money to *liquidate the liabilities of the old company and buy out the other stockholders.*" (Here he confirms proposition in telegram makes suggestion as to amount

of capital stock.) Then he continues: "As stated to you when here, I will close out all my interest here with the expectation of investing everything in Ft. Smith and making that my future home. It will be necessary for the matter to be settled one way or the other at once, owing to the fact that this is time of the year we contract for our season supply of materials of all kinds, so I will thank you to wire me your decision at the earliest possible moment, and if you think it advisable I will go to Ft. Smith and assist in completing the organization, and decide upon a location. Even if we get started at once, it will be probably fall before we can get the plant in operation, as there is a great deal to be done."

In a letter of January 28, 1903, Speer replies, acknowledging the telegram and letter, and, after expressing his disappointment at what he had seen at South Bend, he says: "In viewing the matter from your standpoint, it is not difficult for me to see the many sacrifices of a personal nature you would have to make, and I can not criticise you in any way for trying to get some recompense for this surrender of a lifetime association. At the same time I do not feel that those who associate themselves with you to make an effort to make a success of the enterprise here, and [which] if successful will satisfy your life's ambition, should pay any premium for these privileges. In other words, I think your plant ought *to be invoiced to the new organization for its present intrinsic value, so that the profits of the first year will not have the burden of a fictitious value to overcome.* I am telling you all this without having consulted Mr. Cleveland, whose judgment I regard as good, and who will have considerable influence on me when I see him. I had the matter up before our Commercial Club last night, and there was considerable interest shown, and I believe that a reasonable bonus for the institution can be secured." Then, after reciting certain advantages that would follow the undertaking, should they go into it with all their "ideas harmonious," he concludes: "I will write you again just as soon as I have an opportunity of talking with Mr. Cleveland. We appreciate fully the importance to you of having this matter determined at once, and

we will not delay longer than is absolutely necessary to satisfy ourselves that we are making no mistake."

The work of raising a bonus went on, and on February 23, 1903, the bonus having been secured, C. E. Speer wrote Baker the following letter: "Our bonus committee have gotten far enough along now for me to make you a definite proposition, and that is, *if you will invoice your material and machinery at its present value to the new organization,* we will give you the $10,000 bonus that our people have raised. Of course, in making inventory to the new company, they would only want to take that part of your plant that would be valuable down here. If you are satisfied, and we can arrive at an agreement along the lines I have just indicated, I think it would be a good idea for you to come down here now."

Soon after receiving the above letter, Baker went to Ft. Smith, where he and C. E. Speer, who conducted the negotiations for the Ft. Smith people, entered into the contract for the sale and purchase of the assets of the South Bend Wagon Company by the Ft. Smith Wagon Company. The terms of the contract as stated by Speer were that he bought of F. A. Baker the assets of the South Bend Wagon Company, as contained in an inventory of December 1, 1902, as a basis of the sale, and that such assets would invoice a sum, in the aggregate, in excess of $70,000. That the consideration to be paid Baker was ten thousand dollars, that had been raised as a bonus, and the price of the assets on hand, taking the inventory of December 1, 1902, as a basis for the amount on hand, and the value thereof, as per invoice of that date. That this consideration was to be paid to Baker in stock of the Ft. Smith Wagon Company factory to the amount of $40,000, the $10,000 cash bonus, and the balance of the invoice price in cash paid by the Ft. Smith Wagon Company.

As stated by Baker: "The contract was that I was to undertake to sell to a company which was to be organized here all of the movable assets of the South Bend Wagon Company of Mishawaka, Indiana, at a stipulated price of $70,000, a flat price, and in addition to that sum I was to receive $10,000 as a bonus

coming from the Commercial Club, making the total transaction $80,000."

After the contract of sale was agreed upon, the Ft. Smith Wagon Company was incorporated, F. A. Baker was made the president, and at a meeting of its directors on March 7, 1903, a resolution was adopted appointing George W. Cleveland "to go to South Bend and check in the assets of the South Bend Wagon Company, and to see that the title to said property is clear and proper transfer made."

In pursuance of this resolution, Cleveland went to South Bend, taking with him the inventory of December 1, 1902, and he and the bookkeeper of the South Bend Company went over the assets of said company, and checked the stock with the inventory, and extended the values as per the invoice book or prevailing prices of that date, making allowances for any differences that had taken place in the amount of assets on hand at the time the inventory of December 1, 1902, was taken, and the assets on hand March 16, 1903, when they were checking up the stock. They found by this method that the total value of the assets on hand March 16, 1903, was $67,257.37.

Cleveland called Baker's attention to the fact that he understood that the value of the total assets to be turned over to the Ft. Smith Wagon Company was not to be less than $70,000. Whereupon Baker informed him that his contract with the Ft. Smith Wagon Company, as he understood it, was that he was to receive a flat price of $70,000 for the assets on hand at the time they were delivered, and that it was the duty of Cleveland simply to check up the assets with the inventory to see what was on hand, that he had nothing to do with ascertaining the values. He told Cleveland, so Cleveland testified, that the difference was small, and that he would adjust the matter with the directors of the Ft. Smith Wagon Company. Upon this promise by Baker that he would adjust the matter of the difference between the $70,000 and the $67,257.37, Cleveland says he consummated the deal by paying Baker $40,000 and taking a bill of sale, which is as follows:

"This agreement witnesseth that the South Bend Wagon Company, of the city of Mishawaka, in the State of Indiana, has sold, and by these presents does hereby convey and transfer, to the Ft. Smith Wagon Company of the city of Ft. Smith, in the State of Arkansas, for and in consideration of the sum of eighty thousand dollars ($80,000) the following personal property now owned and held by said South Bend Company, towit: "All fixtures and machinery now in its factory and plant at Mishawaka, Indiana, and in use therein; all lumber, timber, iron, paint and other material of whatsoever kind now on hand, in the rough or partly or wholly finished, for use in its business of wagon manufacturer; all finished and partly finished wagons now on hand, or in process of construction, including its stock of wagons at Kansas City, Missouri, and at Kingfisher, Oklahoma; and all of its stock of wagon repairs, at the factory, in Mishawaka, and at Kansas City, Missouri, and at Kingfisher, Oklahoma; intending to convey hereby all of the stock in trade, fixtures and good will of said South Bend Wagon Company to the said Ft. Smith Wagon Company as per inventory of March 16, 1903, copy furnished. There is not included in this conveyance, nor is it intended to convey by this bill of sale, any of the notes, bills and accounts receivable belonging to said South Bend Wagon Company, nor any of the shares thereof, nor any of its real estate, nor any shares of stock held by it in any other corporation or company.

"Witness the seal of the South Bend Wagon Company and its signature by its president and treasurer and secretary thereunto duly authorized, this sixteenth day of March, 1903.

"South Bend Wagon Company,
"By F. A. Baker, Pres. and Treas.
"M. M. Baker, Secretary."

The property was received by Cleveland as the representative of the Ft. Smith Wagon Company, and by him turned over to F. A. Baker, who received it as the president of the Ft. Smith Wagon Company. From that time on till about the first of January, 1904, the plant was operated by the Ft. Smith Wagon Company at South Bend. From January to April, 1904, the assets were being moved from South Bend to Ft. Smith.

The stock of $40,000, covering balance, was issued, $33,500 to F. A. Baker, and $6,500 to Mrs. Minnie Baker, in February, 1904. It was known by Speer and Echols, two of the members of the executive committee, of whom Baker was the third, that the assets taken over by Cleveland for appellant did not amount to $70,000 so as soon as Cleveland returned and made his report. Baker says that he visited Ft. Smith often after the bill of sale was executed, and before he moved to Ft. Smith permanently in April, 1904, and had frequent talks with Speer and Echols, and that the fact that he was expected to make good the difference between the $70,000 and $67,257.37 was never mentioned to him for more than a year after the deal was closed, and when it was mentioned he contended that he was to receive a flat price of $70,000 for the assets on hand March 16, 1903. And yet suit was not directed to be brought against him until September 24, 1904.

This suit was instituted in obedience to the resolution of the directors of the Ft. Smith Wagon Company against appellee to recover for breach of contract the sum of $2,742.63 with six per cent. interest from March 16, 1903, and asking for judgment for said amount, and that same be declared a lien on the stock of Baker in the Ft. Smith Wagon Company, and that same be sold to satisfy said judgment.

The appellee presented two defenses: First, that, if there was a contract between appellant and appellee, the latter had complied with its terms, and hence there was no liability created by such contract against appellee. Second, that the contract upon which appellant sues, and which it sets up, was made by appellant with the South Bend Wagon Company, a corporation of Indiana, and not with appellee *individually*. And that therefore, if there be a liability, it is not the liability of appellee.

The court found "that the contract sued upon herein was made by and between the South Bend Wagon Company and the Ft. Smith Wagon Company, and the said F. A. Baker was not a party thereto." And upon this finding the court dismissed the action without going into the merits of the case. The plaintiff duly excepted, and prayed an appeal, which was granted. Other facts are stated in the opinion.

Read & McDonough, for appellant.

1. There is a sharp conflict in the testimony as to the terms of the contract, but the contention of plaintiff is sustained by *positive* testimony and all the circumstances and weight of reason.

2. There is no doubt as to the breach of the contract. Courts scrutinize with jealous care all transactions between directors as officers and individuals, and require them to be characterized by good faith and conscientious discharge of official duty. 127 Fed. 274; 3 Thompson on Corporations, § 4059, 4063; 79 Pac. 6; Thompson on Corporations, § 4024, and note.

Mechem & Mechem, for appellee.

1. There was no error in finding that the contract was made with the South Bend Wagon Company, and not with defendant individually.

2. A dismissal must result because the evidence fails to show a contract such as the complaint alleges and fails to show breach.

3. Appellee was not a party to contract.

WOOD, J., (after stating the facts.) Treating the questions in the order presented in briefs of the counsel:

1. The evidence disclosed that the citizens of Fort Smith were as anxious to secure the services of an experienced wagon factory man to manage the business as they were to secure the plant itself. The proposition of Baker, as per his original telegram, was to join the organization, taking $50,000 of stock himself and the $10,000 of bonus raised by the citizens was for the purpose of inducing Baker to come to Fort Smith. Baker, it appears, had impressed the members of the Commercial Club, at least the leading spirits in the enterprise, with his superior qualifications as a wagon factory manager and expert. And they were looking for such an one to place at the head of the new enterprise. The proposition of Baker was that the $10,000 of bonus were to go to him, and he evidently received it. True, the deal, as shown by Cleveland, Speer and Baker, was for the property of the South Bend Wagon Company. It did not belong to Baker individually. All understood that.

Hence Cleveland said that he took the bill of sale, because he understood that he was getting "the stuff from the South Bend Wagon Company."

While Speer at one place in his testimony says "that he was dealing with the South Bend Wagon Company, Mr. Baker being its representative," in another place he says: "We were dealing with Mr. Baker. We did not know how much stock he represented. In his statement he said he would have to have a certain amount of cash to go back and buy out the other stockholders." And in still another portion of his testimony, on redirect examination and in explanation of his statement before, he said: "Mr. Baker is the only party we had any dealings with. We had no contract with the South Bend Wagon Company as a corporation at all unless it was represented by Mr. Baker, as the South Bend Wagon Company. Mr. Baker was the only person I knew in the contract." So, taking his whole testimony together, we think it clear that Speer meant that he was dealing with Baker individually for the sale by him of property that belonged to the South Bend Wagon Company. In other words, Baker was to sell to the Ft. Smith Wagon Company property that he was to obtain in his individual right from the South Bend Wagon Company, the corporation.

We think, taking all the testimony in the record on this branch of the case, that this is the correct conclusion. The bill of sale does not conflict with this view at all. For, to avoid circuity in the transfer of the title of the South Bend Wagon Company to Baker and then to the Ft. Smith Wagon Company, the bill of sale was made direct to the Ft. Smith Wagon Company from the South Bend Wagon Company. This was legal, and certainly the most direct method of making the transfer. Nor does the fact that the $40,000 received by Baker were entered upon the books of the South Bend Company and used in the usual way conflict with this view. But we are of the opinion that the testimony of Baker himself tends to support the conclusion that in making the sale he was acting for himself individually. For when asked: "What was the contract?" he replied: "The contract was that I was to undertake to sell to a company to be organized here all of the movable assets of the

South Bend Wagon Company, of Mishawaka, Indiana, at a stipulated price of $70,000, a flat price, and in addition to that sum I was to receive $10,000 as a bonus."

The statement in his letter of January 25, 1903, towit: "It will be necessary for me to have this amount of money to liquidate the liabilities of the old company and buy out the other stockholders," shows conclusively that it was an individual transaction with Baker. For, if it had been a sale by the corporation, it would not have been necessary *for Baker to buy out the other stockholders.* This ends the controversy as to whether Baker was acting in his individual capacity or as the representative of the company, and shows that the court erred in its finding and conclusion.

The only way appellee could have successfully overcome the proof that Baker was acting in his individual capacity would have been to show that he was authorized by the corporation through its stockholders and directors to make the sale for the corporation. For, in the absence of such authority, the president of a corporation has no power to enter into a contract whereby the entire *corpus* and business of the corporation is sold to another. 4 Thompson, Corp. § 4632; *Stokes* v. *New Jersey Pottery Company,* 46 N. J. L. 237; *Hoyt* v. *Thompson,* 5 N. Y. 320; 2 Cook on Corp. § 716, note; 10 Enc. 927. See *City Electric Street Ry. Co.* v. *First National Exch. Bank,* 62 Ark. 33.

2. The court did not pass upon the question as to what were the terms of the contract; but, as the proof has been fully developed on this subject, it is our duty to render such decree as the lower court should have rendered. Both Speer and Baker agree that the inventory of December 1, 1902, was the basis of contract as to the amount of property to be delivered, and there is substantially no conflict between them that, in the final transfer, the Ft. Smith Wagon Company was to get all the assets of the South Bend Wagon Company that would be of value to the former, except real estate, stock in other companies, the notes and accounts, etc. The Ft. Smith Wagon Company was to get all the machinery and material on hand at the time the transfer was actually made that would be of value to it, and

the basis for the amount of this was to be the inventory of December 1, 1902, with such changes only as would occur in the stock by reason of having run the business in the usual way from December 1, 1902, when the inventory was made, till March 16, 1903, when the actual transfer was made. As to this there is no conflict between the parties who made the contract.

But appellant contends that it was to have the assets as shown by the inventory of December 1, 1902, with any material that had been manufactured into wagons or put in altered form, and any added assets at the price as shown by the invoice of such machinery, material, etc.; while the appellee contends that the price that was to be paid for the assets at the time of the transfer was to be the flat sum of $70,000, regardless of what the invoice of the assets on hand at the time of the transfer should show. Appellee also contends that the assets, properly inventoried and invoiced, would amount to more than $70,000; whereas appellant contends that the invoice of the assets according to the terms of the contract on the basis of the December 1, 1903, inventory, and the invoice of the articles on that inventory and those altered in form or added since, show that the value of the assets delivered to the appellant under the contract of sale was $67,237.37.

Upon these disputed questions of fact there is a sharp conflict in the evidence. Analysis of the evidence and discussion of the facts in detail would not be useful as a precedent. Our conclusion is that the fair preponderance of the evidence on these points is in favor of the contention of appellant.

We are controlled largely in this conclusion by the letter of Speer to Baker of Januay 28, 1903, in which he says: "I think your plant ought to be invoiced to the new organization *for its present intrinsic value, so that the profits of the first year will not have the burden of a fictitious value to overcome.*" And the letter of February 23, 1903, in which he makes the definite proposition: "That if you will invoice your material and machinery *at its present value* to the new organization, we will give the $10,000 bonus that our people have raised." This undoubtedly supports appellant's contention that the assets of the South Bend Wagon Company were to be sold at their invoiced price

to appellant, and not as contended by appellee for the flat sum of $70,000.

The testimony of Cleveland, the representative of appellant who was sent "to check in" the assets purchased, and the testimony of Darland, the bookkeeper of the South Bend Wagon Company, shows that the invoice taken by them on March 16, 1903, was correct as to the assets then on hand. Cleveland says that approximately everything included in the December 1, 1902, inventory was on hand at that time; that but little had been done; that it was all there, only some of the raw material was in altered form.

Darland prepared a statement of the business that had been done, showing purchase, sales, receipts and disbursements between December 1, 1902, and March 16, 1903. This, in connection with the inventory of December 1, 1902, and invoice books, enabled them to make a complete and correct invoice of the assets on hand when the transfer was consummated. And they show from these sources that the total valuation was $67,257.37.

Baker's testimony tended to show that the inventory did not include all the assets on hand, and that, even if the inventory were correct, it was not a true invoice, for the reason that there had been an advance in the value of the articles inventoried of from five to ten per cent. since the inventory of December 1, 1902. And, according to his testimony, this would more than bring the value of the assets to $70,000, even if that was to be the minimum valuation under the contract. But the testimony of Johnson, the secretary and treasurer of the Ft. Smith Wagon Company, tends to show that the invoice by Cleveland was the full value of the assets transferred. And the loss which he shows that the Ft. Smith Wagon Company sustained during the time between March 16, 1903, and January 1, 1904, when the business was operated at South Bend under the management and control of Baker, tends to corroborate his opinion. For, if there was an advance in prices, and the tendency of the market was upward, it seems unreasonable that assets, which were deemed by appellee to have been worth $70,000 or more in March, 1903, should have been worth some ten thousand less

in January, 1904, unless there had been some gross mismanagement and losses that are not shown by the proof. Moreover, the invoice of March 16, 1903, taken by Cleveland and Darland, shows that sixteen and two-third per cent. was added to the valuation of the unfinished material, and that twelve and one-fourth per cent. was added to the valuation of the finished stock to cover the possible advance in the price of such material between December 1, 1902, and March 16, 1903.

The fact that the consideration in the deed was named at $80,000 and that Cleveland paid over the $40,000 knowing that the assets invoiced only $67,257.37, and the further fact that stock to the full amount of $40,000 was issued to appellee, and Mrs. Minnie Baker, at his direction long after it was known to appellant's executive board that the assets received only amounted to $67,257.37—I say that these facts, unexplained, would tend strongly to support appellee's contention that the contract price for the assets on hand at the time of the transfer was the flat sum of $70,000. But the explanation of this by Cleveland was that he paid over the $40,000 to Baker after he had promised to adjust the matter with the board of directors. And the members of the executive board explained that the stock was issued because Baker was the president of the corporation, and they had full confidence in him, and expected him to bring the matter up for adjustment. This he failed to do, and when his attention was first called to it he claimed that he did not owe anything. Finally formal demand was made upon him, and upon his refusal to pay suit was directed to be brought against him September 24, 1904. We are of the opinion that this explanation of the payment of the $40,000 and the issuance of stock without demanding further adjustment at that time is satisfactory, and that the appellant is not precluded from maintaining the suit on that account.

But the sum due should only bear interest from the date of formal demand upon him for payment, towit: September 24, 1904. The judgment, for the error indicated, is reversed, and the chancery court is directed to enter a decree for the sum of $2,742.63 with interest at six per cent. from December 24, 1904, and to declare same a lien upon stock of appellee in appellant

corporation. And to order same sold unless judgment is satisfied according to the statute in such cases provided, and for further proceedings not inconsistent with this opinion.

BATTLE, J., dissenting.

WESTERN UNION TELEGRAPH COMPANY v. WENISKI. | 84 457 | e88 502

Opinion delivered November 25, 1907.

1. TELEGRAPH COMPANY—DAMAGES FOR MENTAL ANGUISH—EXCESSIVENESS.—A verdict allowing a sister $1,354 for a failure of a telegraph company to deliver a telegram which would have apprised her where her brother was to be buried was excessive where her only deprivation on account of non-delivery of the telegram was in not attending the brother's funeral. (Page 458.)
2. SAME—DUTY IN TRANSMISSION AND DELIVERY OF MESSAGES.—A telegraph company owes a duty in the transmission and delivery of messages only to persons of whose beneficial interest in the telegram the company receives information from the face of the telegram itself or from other sources. (Page 459.)
3. SAME—LIABILITY FOR SPECIAL DAMAGES.—A telegraph company is liable for special damages for negligent failure to transmit or deliver telegrams only where notice of the facts which give rise thereto is received either from the face of the telegram or from other sources. (Page 459.)
4. SAME—NOTICE OF SPECIAL DAMAGES.—A night operator receiving a message at night will not be charged with notice of other messages passing through the office in the day time when an entirely different force of men were at work, without proof of actual knowledge on the part of the night operator of the contents of the day messages. (Page 459.)

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

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

1. A stranger to a telegram cannot recover for special damages suffered because the telegram was not promptly de-

livered, in the absence of notice to the defendant that such stranger had an interest in the telegram, and notice of the facts that would give rise to the special damages. 26 S. W. 783; 9 Tex. App. 607; 27 S. W. 51; 29 S. W. 406; 13 S. W. 70; 20 S. W. 945; 57 Fed. 471; 107 Ky. 518; 51 Mo. App. 375.

2. Under the circumstances of this case, appellee's own negligence is sufficient to bar recovery. 140 Fed. 315; 80 Tex. 420; 88 Tex. 230; 67 S. W. 849.

3. The verdict is clearly excessive. 76 S. W. 456; 28 Tex. Civ. App. 23; 92 Tenn. 694.

Marshall & Coffman, for appellee.

1. It is almost uniformly held that telegrams similar to the three in this case, all of which are to be taken together, are sufficient to give notice of special damages, and that notice of the exact relationship is unnecessary. 123 N. C. 129; 109 N. C. 527; 124 N. C. 528; 12 S. W. 857; 47 S. W. 676; 40 S. W. 1035; 16 S. W. 25; 82 Tex. 539; 75 Tex. 537; 123 Ind. 294; 85 Tex. 580; 76 Tex. 66; 19 S. W. 898; 39 S. W. 721; 91 S. W. 312; 90 S. W. 677; 57 S. E. 725; 52 S. W. 102; 78 Ark. 551; 80 Ark. 559.

2. The question of negligence on the part of appellee was fairly submitted to the jury under the evidence and proper instructions of the court. Their verdict is conclusive on that point.

3. There is ample authority for sustaining the verdict as not excessive. 102 S. W. 366; 73 S. W. 79; 25 S. W. 722; 23 S. W. 998; 81 S. W. 1052; 10 S. W. 734; 33 S. W. 708; 60 S. W. 982; 58 S. W. 118; *Id.* 428; 48 S. W. 770; 26 S. W. 866; 16 S. W. 25.

Rose, Hemingway, Cantrell & Loughborough, for appellant in reply.

It would carry the doctrine of imputed notice to the verge of absurdity to hold that, in telegraph offices in cities the size of Toledo, Ohio, and Little Rock, Arkansas, maintaining separate day and night operators, an operator on one force would be chargeable with notice of the contents of a message sent or

received by an operator on the other force. That rule is never invoked except where it is reasonable to presume that the information obtained by the agent would be communicated to the principal. 4 Md. 231; 22 Barb. 54; 33 Beav. 178. See, also, 1 Am. & Eng. Enc. of L., 1145.

McCULLOCH, J. This is an action to recover damages alleged to have been caused by the negligent failure of defendant's employees to promptly deliver a telegram from her father in Toledo, Ohio, addressed to her sister in Little Rock, Arkansas, which was intended to inform plaintiff of the place of burial of her brother, so that she could attend. She alleged in her complaint that, by reason of being thus prevented from attending the funeral of her brother, she suffered mental anguish to her damage in the sum of two thousand dollars.

The jury awarded her the sum of $1,354, and the defendant appealed to this court.

Plaintiff's father, Valentine Weniski, and her brother, John, lived in Toledo, and she lived in Little Rock with her widowed sister, Mrs. Joe Schmelzer. John Weniski died in Toledo on December 7, 1905, and his father immediately sent the following telegram over defendant's wire to Mrs. Schmelzer: "John is dead; died at 12 A. M." This message was promptly delivered to Mrs. Schmelzer in the early part of the afternoon on the same day, and she immediately filed with employees in charge of defendant's office the following message to her father: "Shall Clara come or do you wish to bring John here? Answer at once. [Signed] Lula." Her father sent in reply the following message, addressed to Mrs. Joe Schmelzer: "If you can, come at once, Clara. [Signed] Pa." This message was not delivered at all, and damage is claimed on account of the omission. This was on Friday night, and plaintiff's brother was not buried until the following Monday. It is shown that she would have traveled from Little Rock to Toledo in about twenty-four hours.

We deem it proper to say in the outset that the assessment made by the jury of damages so grossly in excess of the amount warranted by the evidence, if the plaintiff is entitled to recover any damages at all, calls for a reversal of the judgment, regardless of any other error in the proceedings. The ele-

ment of mental anguish allowed by the statute in the assessment of damages for non-delivery of a telegram is so indeterminate in its nature that it must be left to some extent to the sound judgment of the trial jury, but there is a limit to the power and discretion of the jury in that respect, and it becomes our duty to set aside an assessment which is palpably excessive. We think the verdict in this case clearly presents such a situation.

Plaintiff's brother was a full-grown man about twenty-five years of age, and he and plaintiff had not resided together for several years. He lived with his father in Toledo, and plaintiff lived with her sister in Little Rock. Her father and his friends in Toledo looked after all necessary arrangements for the funeral, and she had no duty to discharge in that respect, so there could have been no humiliation resulting from an omission to provide such arrangements as were suitable to show proper respect for the memory of the dead. Her only deprivation on account of the failure to deliver the telegram was the melancholy pleasure of attending the funeral of her deceased brother and the satisfaction of having fully discharged her duty to the dead. It may be that such a bereavement produces mental injury, distinct from that resulting naturally from the death of a brother or other loved one, which would justify the assessment of some pecuniary compensation, but we feel sure that a far less sum than that assessed by the jury in this case would, under the circumstances shown by the evidence, be sufficient to afford full compensation to the plaintiff for her injury in this respect.

We are unwilling, therefore, to permit this verdict to stand, even if no other error was found in the record.

The defendant requested the court to give the following among other instructions to the jury, which was refused:

"5. If you find from the evidence that a message was sent from Toledo, Ohio, addressed to Mrs. Joe Schmelzer, 1000 Barber Avenue, Little Rock, reading: 'If you can, come at once, Clara,' signed 'Pa,' and that this message was not delivered through defendant's negligence; and you further find that, had said message been promptly delivered to Mrs. Schmelzer, plain-

tiff would have gone to Toledo, and would have attended the funeral of her brother, still said message does not on its face show either that plaintiff's brother would be buried in Toledo, or that the message was for the purpose of enabling plaintiff to attend his funeral; and, unless you further find that defendant was notified that this was the purpose of the message, she is not entitled to recover for any mental anguish she may have endured because she was prevented from attending her brother's funeral, and your verdict will be for the defendant."

The court erred in refusing to give this instruction.

A telegraph company owes a duty to the transmission and delivery of messages only to persons of whose beneficial interest in the telegram the company receives information from the face of the telegram itself or from other sources; and it is liable for special damages only where notice of the facts which give rise thereto is received either from the face of the telegram or from other sources. *Western Union Tel. Co.* v. *Raines,* 78 Ark. 545; *Western Union Tel. Co.* v. *Schriver,* 141 Fed. 538; *McCormick* v. *Western Union Tel. Co.,* 79 Fed. 449; *Morrow* v. *Western Union Tel. Co.,* 107 Ky. 518; *Western Union Tel. Co.* v. *Bell* (Tex.), 90 S. W. 714; *Western Union Tel. Co.* v. *Adams,* 75 Tex. 531; *Western Union Telegraph Co.* v. *Kirkpatrick.* 76 Tex. 27, 13 S. W. 70.

The message which defendant's agents failed to deliver did not on its face disclose facts leading to information of any special injury to plaintiff by reason of non-delivery; hence the jury should have been so told.

Nor could this message, which was received at defendant's office in Little Rock at night, be connected with the other messages passing through the office during the day time when an entirely different force of men were at work, without proof of actual knowledge on the part of the persons through whose hands the last message passed of the contents of the earlier messages. It would be carrying the doctrine of imputed knowledge too far to say that each agent of a telegraph company must in all cases be charged with notice of what other agents have knowledge. Of course, it would be different when both messages were handled

by the same agent or operator. In such case the company would be chargeable with information which both messages, taken tother, would afford. *Erie Tel. Co.* v. *Grimes,* 82 Tex. 89; *Herron* v. *Western Union Tel. Co.,* 90 Iowa, 129. But in a city office where there are many employees working during different hours, and where it would be impracticable to devise a system whereby each employee could be conveniently given notice of all the business which passes through the office during the day, it would be not only unreasonable but very unjust to the company to charge each employee with constructive knowledge of the contents of all messages. For all practical purposes it would be no more unreasonable to charge a night operator or agent in the Little Rock office with information of the contents of a message passing through the New York office than to charge him with information of a message known only to a day operator or agent in the same office.

There are other assignments of error; but, as those already discussed call for a reversal, it is unnecessary to pass upon others.

Reversed and remanded for a new trial.

BRANCH v. MOORE.

Opinion delivered November 25, 1907.

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1. FACTORS AND BROKERS—RIGHT TO COMMISSIONS.—Where plaintiff, a real estate broker employed by defendant to sell a tract of land, introduced a prospective buyer to defendant, and defendant thereafter revoked plaintiff's authority to sell, upon a representation that he had decided not to sell, but within a few days defendant sold the land to the person introduced to him by plaintiff, defendant is liable for plaintiff's commission. (Page 465.)
2. SAME—REVOCATION OF AGENCY.—While an agency to sell real estate may be revoked at any time before the sale, such revocation must be in good faith, and not for the purpose of depriving the agent of his compensation after appropriating his services. (Page 466.)

3. SAME—DEFENSE.—In an action by a broker to recover compensation for effecting a sale of defendant's land, it was no defense that the land constituted defendant's homestead, and that he could not lawfully sell the land without his wife's consent, as plaintiff was not seeking to enforce a contract to sell land, but to recover compensation for services rendered. (Page 466.)

Appeal from Howard Circuit Court; *W. V. Tompkins,* Special Judge; affirmed.

Sain & Sain and *W. C. Rodgers,* for appellant.

1. A married man can not contract with a broker to sell his homestead unless his wife joins in the contract. Kirby's Digest, § 3901; 60 Ark. 269. Appellee will be held to have contracted with reference to the law existing at the time of the contract. 95 S. W. 481; 73 Ark. 470; 75 Ark. 435; 76 Ark. 410; 80 Ark. 108; 177 U. S. 28; 83 U. S. 310, The contract to sell being void under the law, no rights could arise thereunder in favor of appellee. 49 Kan. 777; 66 Ia. 666; 42 Ia. 296; 55 Minn. 244; 108 N. W. 544.

2. The authority conferred upon appellee to sell was revocable at the will of appellant. 8 Wheat. 174; 46 Pa. St. 426; 43 *Id.* 212; 4 Conn. 119; 53 Pa. St. 266; 64 Ind. 548; 88 Fed. 709; 129 N. C. 403; 158 Ill. 428; 8 Col. 592; 2 Camp. 339; 66 L. R. A. 982; Clark & Skyles, Agency, § 157.

3. The contract vested in appellee no interest in the land. Where it is agreed that the broker may retain all over a certain amount he may sell the land for, such agreement conveys to him no interest in the land. 6 Conn. 559; 32 Cal. 609; 88 Mo. 297; 53 Pa. St. 212; 64 Ill. 548.

4. Appellee could not hold the land at a higher price than the purchaser was willing to pay and then claim commission. 103 Ala. 641.

J. S. Lake and *W. P. Feazel,* for appellee.

1. The contract between the owner and the broker in no wise affected the homestead, and it was not necessary that the wife join therein. Moreover, appellant, having accepted the benefit of appellee's services, can not repudiate his obligations. 64 Ark. 357; 4 Am. & Eng. Enc. of L. 975.

2. The owner can not revoke his contract with a broker without compensation for services already performed. Where no time limit is fixed in the contract, and the agent has brought the owner and purchaser together, and has placed the transaction in such condition that success is practically certain, revocation will not defeat him of his commission, even though the sale is made by the owner himself. 89 Cal. 251; 2 Wash. 34; 53 Ark. 49; 23 Fla. 203; 76 Cal. 60; 81 Ark. 96; 4 Am. & Eng. Enc. of L. 979 (b), 981.

BATTLE, J. J. H. Moore brought this action against M. Branch to recover compensation alleged to be due him on account of a sale of land made by him for the defendant, who answers and alleges that plaintiff's authority to sell the land was revoked by him before the sale, and that the plaintiff was not entitled to any compensation. The facts in the case, as shown by the evidence adduced in the trial, are substantially as follows: "The defendant owned a farm in Howard County, in this State, which constituted his homestead, and placed it in the hands of plaintiff, a real estate agent, for sale, agreeing to accept for the same the sum of $2,000 net, and to allow plaintiff to hold as compensation all for which he shall sell above that sum. Plaintiff immediately thereafter entered into negotiation with D. C. Irvin for the sale of the farm, took him to it and over it, and offered to sell it to him for $2,250, and introduced him to defendant, they being strangers before that time. Irvin said the price was too much, but expressed himself pleased with the farm, and promised to return in a day or two to further examine it. Plaintiff says that he offered it to him for $2,200, but Irvin says that he does not remember it. Plaintiff testified that in a day or two after this defendant said to him: 'You needn't put yourself to any further trouble to sell my place. I don't want to sell it now, and my wife won't sign a deed.' I said: 'All right, Uncle Mike.'" Irvin testified: "I do not know why he (defendant) claimed to have taken the land out of Mr. Moore's hands except what he said. He said his wife wouldn't sign it—the bond for title." The defendant testified: "Mr. Moore did not do anything towards selling except bring Mr. Irvin out there to look at the place. The next

morning I went back and asked Mr. Moore what he had done. He told me that he had not done anything; that the price was too high. I said: 'That is all right. I am glad of it. My wife said she wouldn't sign the deed if I sold it for $2,000.' Mr. Moore said: 'All right; I will have nothing more to do with it.' I did not have any more negotiations with him about selling the land. I told him he could drop his part and have nothing to do with the land. He said: 'All right.'" In about four days thereafter he sold the land to Irvin for $2,200. All these transactions occurred in the year 1906. Plaintiff testified that the land was in his hands during that year several times at different prices. "When he first put it in my hands, I think he said he wanted $1,400 net. This was sometime in the early part of the year 1906. He went from $1,400 to $2,000 net." This is not contradicted.

Upon these facts and evidence the court instructed the jury as follows:

"1. If you believe from the evidence that the defendant placed his land in the hands of J. H. Moore for sale, agreeing to allow him all in excess of $2,000 he sold the land for, as his compensation, and if you further believe that the plaintiff, Moore, carried the purchaser to the owner of the land and showed and priced same to him, and introduced him to the owner, and through such introduction and exertions on the part of Moore negotiations were begun between the purchaser and the owner of the land and a sale thereof was made by the owner of the land for the sum of $2,200, then Moore would be the procuring cause of said sale, and would be entitled to recover of the defendant all in excess of $2,000 said land sold for, unless you further believe that the agency was terminated in good faith before the sale.

"2. If you believe from the evidence that the defendant employed plaintiff to sell his land, and agreed to pay him therefor all in excess of $2,000 he sold the land for, defendant would not be relieved from said contract by the fact that his wife refused to sign the deed for $2,000.

"3. The court instructs the jury that, although you may believe from the evidence that Moore consented to the with-

drawal of the land from sale, still he would not be bound by such assent if it was procured through a misrepresentation on the part of Branch that Branch's wife would not sign the deed.

"4. Although Moore may have agreed with Branch that he would make no further effort or go to no further trouble to sell his land, this would not affect his right to recover in this action if the sale was the result of, or was brought about by, the previous efforts of Moore.

"5. You are instructed that if you find from the evidence that the plaintiff procured a purchaser, introduced him to the defendant, and that he, the plaintiff, was the procuring cause of the sale, then the defendant could not withdraw his land from the hands of the plaintiff and defeat the collection of the commission unless the contract between plaintiff and defendant was by mutual assent abrogated with a full understanding of all the facts."

The defendant asked the court to instruct the jury as follows: "(2) The jury are instructed that the contract in controversy could be terminated by an oral agreement between the parties. So, if you find from the evidence that the contract was verbally terminated by mutual consent, you will find for the defendant, Branch." But the court refused to give it, but amended it, and gave it as amended, as follows: "(2) The jury are instructed that the contract in controversy could be terminated by an oral agreement between the parties. So, if you find from the evidence that the contract was verbally terminated by mutual consent, with a full understanding of all the facts, your verdict should be for the defendant."

He also asked, and the court refused to give, the following instruction: "(4) The jury are instructed that the defendant, Branch, had a right to revoke the contract made with Moore for the sale of his land, and that this could be done without the surrender of the written contract." But amended it by adding the words: "But this could not be done if you believe from the evidence that Moore had procured a purchaser under the terms of his agreement;" and gave it as amended.

And the court refused to instruct the jury at the request of the defendant as follows: "(6) If the jury finds from the

evidence that Moore refused to make a sale for less than $2,250, and that Irvin refused to give this much, he would not be entitled to recover any commission, notwithstanding Branch sold the place for $2,200.

"(9) The court instructs the jury that if the plaintiff, by his words or acts, induced the defendant, Branch, to act with reference to the sale of the land otherwise than he would have done but for such acts or words on the part of the plaintiff, and thereby make a sale of the land direct and without regard to the intervention of the plaintiff, Moore; that is, if the plaintiff induced the defendant to believe that the relations between himself and Moore were terminated, and Branch acted upon such belief in making the sale direct, the plaintiff would not be entitled to recover anything.

"(10) The jury are instructed that the authority to sell conferred on Moore by the contract in controversy can be revoked at any time before a valid and binding contract for the sale of the land by the broker has been consummated."

Plaintiff recovered judgment for $200, and the defendant appealed.

The facts in *Scott* v. *Patterson*, 53 Ark. 49, and those in this case are similar. In that case the real estate broker said to the owner of the land that he had done all he could to sell the land to the prospective purchaser, and that he was unable to do so, and that he "turned her (prospective purchaser) over" to the owner; that he might sell her the land if he could. The owner finally made the sale. He testified that he had nothing to do with selling the property until the brokers declined to have anything more to do with it. In that case the court, quoting from *Tyler* v. *Parr*, 52 Mo. 249, said: "The law is well settled that in a suit by a real estate agent for the amount of his commissions it is immaterial that the owner sold the property and concluded the bargain. If, after the property is placed in agent's hands, the sale is brought about or procured by his advertisements and exertions, he will be entitled to his commissions. Or, if the agent introduces the purchaser or discloses his name to the owner, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected,

the agent is entitled to his commission, though the sale may be made by the owner."

In *Hunton* v. *Marshall,* 76 Ark. 375, it was held that "a broker who has been employed to sell real estate is entitled to his commissions where he has brought about between his principal and another negotiations which resulted in a sale, which was consummated by the principal."

If there had been no attempt to revoke the agency of appellee, he would unquestionably have been entitled to his commissions. He was authorized to sell the land for any sum exceeding $2,000, appellant agreeing to allow him as compensation for his services all received in excess of that amount. He found a purchaser, took him to the land, introduced him to appellant, they being strangers to each other, showed him the land, offered it to him for $2,250; the purchaser said the price was too high, but expressed himself as pleased with the land and promised to return and look at it again. Negotiations were approaching success, when appellant informed appellee that he need not make any further effort to sell the land, giving as a reason for reserving it from sale that his wife would not joint him in executing a deed. In about four days thereafter he continued the negotiations already begun and sold the land to the purchaser found by appellee for $2,200. The jury could have reasonably concluded from the undisputed evidence in the case that the appellee was induced by fraud to desist from the prosecution of his negotiations and finally concluded a sale. If so, he was entitled to the stipulated commissions. The mere refusal of the wife of apppellant to join in the execution of the deed would not deprive him of them if the sale was made and the purchase money received, and all of this was "the result of, or was brought about by, his previous efforts."

Appellant contends that he had the right to revoke the agency of appellee at any time before the sale. This is true, if done in good faith. But he could not do so for the purpose of depriving him of his reward and appropriating his services without compensation. He could not make the revocation a pretext for defrauding appellee. *Blumenthal* v. *Goodall,* 89 Cal. 251.

The court properly refused to instruct the jury as asked

by appellant in his ninth request. He asked the court to instruct the jury "that if the plaintiff, by his word or acts, induced the defendant, Branch, to act with reference to the sale of the land otherwise than he would have done but for such acts or words on the part of the plaintiff, and thereby make a sale of the land direct and without regard to the intervention of the plaintiff, Moore; that is, if the plaintiff induced the defendant to believe that the relations between himself and Moore were terminated, and Branch acted upon such belief in making the sale direct, the plaintiff would not be entitled to recover anything." He asked the court to so instruct the jury, regardless of the acts, words, and conduct of himself that induced the words or acts of appellee mentioned in the ninth request. There was evidence to show that such was the case. If so, they did not excuse, justify, or extenuate his own acts and words. He could not take advantage of his own fraud in misleading appellee.

Appellant contends that the land constituted his homestead, and he could not lawfully authorize the appellee to sell it without his wife joining him in executing an instrument for that purpose, but this contention is not tenable. Appellee is not seeking to enforce any contract to sell or convey the land, or any lien thereon. The land has been sold. No party is seeking to avoid the sale. Appellee is asking only for compensation for services rendered.

The instructions given by the court, construed as a whole and read in the light of the evidence, contained no prejudicial error.

Judgment affirmed.

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185 198

SHERRILL v. STATE.

Opinion delivered December 9, 1907.

1. FISH AND GAME—CONSTRUCTION OF STATUTES.—Kirby's Digest, § 3600, in so far as it relates to the placing of fish-traps in streams of the State, is repealed by § 3602, subsequently adopted, except as to certain counties exempted from the operation of the subsequent act. (Page 471.)
2. SAME—SUFFICIENCY OF INDICTMENT.—An indictment which alleged that appellant unlawfully placed a fish-trap in a certain stream and unlawfully caught fish with said trap is a sufficient charge that dedefendant constructed the trap in the stream for the purpose of catching fish, within Kirby's Digest, § 3602. (Page 472.)
3. SAME—SURPLUSAGE IN INDICTMENT.—In an indictment for unlawfully placing a fish trap in a stream allegations to the effect that the fish were not caught for family use nor for a picnic are foreign to the charge, and must be rejected as surplusage. (Page 473.)
4. SAME—EXEMPTION OF CERTAIN COUNTIES FROM STATUTE.—Kirby's Digest, § 3602, providing that it shall be unlawful to construct fish-traps in any river or creek of this State, is not void because certain counties of the State were exempted from its operation. (Page 473.)

Appeal from Garland Circuit Court; *S. W. Leslie,* Special Judge; affirmed.

C. V. Teague, for appellant.

1. If the indictment is to stand at all, it must be under § 3600, Kirby's Digest; yet appellant was tried and convicted under § 3602, *Id.* This could not properly be done. 58 N. H. 348.

2. The latter statute, § 3602, is in violation of the Constitution forbidding monopolies, and the granting of special privileges or immunities to certain persons or classes not extended to all. (Art. 2, § § 18 and 19, Const.)

William F. Kirby, Attorney General and *Dan'l Taylor,* for appellee.

1. Appellant was not misled by the omission of the words "fish trap" from the body of the indictment.

2. The conviction was had under § 3602, Kirby's Digest. The constitutionality of that act has already been upheld by this court.

McCULLOCH, J. Appellant was tried and convicted under the following indictment:

"The grand jury of Garland County, in the name and by the authority of the State of Arkansas, accuse Frank Sherrill of the crime of placing a fish trap in the Ouachita River, committed as follows, to-wit: The said Frank Sherrill, in the county and State aforesaid, on the 27th day of November, A. D. 1906, did unlawfully place and erect and cause to be placed and erected in the waters of the State of Arkansas, to-wit: Ouachita River, and then and there unlawfully did catch fish with said trap as aforesaid, said fish not then and there being caught for family use, nor for a picnic, against the peace and dignity of the State of Arkansas."

A demurrer to this indictment was overruled, and appellant excepted.

One of the statutes on this subject reads as follows:

"No person shall be allowed to place, erect or cause to be placed or erected or maintained, in any waters of this State, or in front of the mouth of any stream, slough or bayou, any seine-net, gill-net, trammel-net, set-net, bag-weir, bush-drag, *any fish-trap or dam,* or any other device or obstruction, or by any such means to take or catch any fish in the waters of this State. Provided, the prohibition of this section shall not apply to waters wholly on the premises belonging to such person or persons using such device or devices. * * * Nor shall it be unlawful for any person or persons to place traps in the unnavigable streams in this State, provided such traps do not obstruct the free passage of fish in ascending and descending such streams." Act June 26, 1897, Kirby's Digest, § 3600.

Subsequently the Legislature enacted the following statute, viz.:

"It shall be unlawful for any person, persons, or corporation, to own, control, use or construct, in any river or creek of this State, any fish-trap for the purpose of catching fish therewith. Every person or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five dollars, nor more than fifty dollars, and each violation of this act shall constitute a separate offense. Provided, that this act does not apply to the counties of Conway, Arkansas, Saline, Clay, Madison, Little River, Yell, Poinsett, Lincoln, Cleveland,

Lawrence, Union, Carroll, Grant, Pike, Izard, White, Randolph, Calhoun, Bradley, Fulton, Marion, Phillips, Dallas, Baxter, Chicot, Lonoke, Johnson, Ouachita, Independence, Sharp, Miller, Pope, Newton, Cleburne, Van Buren, Searcy, Hot Spring and Stone." Act May 25, 1901, Kirby's Digest, § 3602.

It is evident from a perusal of the indictment that it was framed to meet the provisions of the first-named statute just quoted, and to charge a violation of that statute. It will be seen, however, that the statute subsequently enacted is inconsistent with the terms of the prior one, so far as it prohibits the placing and maintenance of fish traps is concerned, hence the prior one is to that extent repealed thereby. The last statute makes it unlawful to "own, control, use or construct, in any river or creek of this State, any fish-trap for the purpose of catching fish," whether such stream be navigable or unnavigable, and whether such traps obstruct the free passage of fish or not.

The indictment cannot, therefore, be sustained under the statute with reference to which it seems to have been framed. If, however, the allegations thereof are sufficient to charge a violation of the last-named statute, which we hold was the only one in force in Garland County, there is no reason why it should be upheld.

The essential elements of an offense under the statute are that the person accused in the indictment did "own, control, use or construct, in any river or creek of this State, a fish-trap for the purpose of catching fish therewith." The indictment charges in apt words that appellant unlawfully placed and erected in the waters of Ouachita River a fish-trap and unlawfully caught fish with said trap. The precise words of the statute need not be used if words of like import are used, and all the facts which constitute the offense are stated. *Richardson* v. *State,* 77 Ark. 321. It is not alleged in the indictment in so many words that the trap was placed in the stream "for the purpose of catching fish therewith," but it is alleged that defendant placed the trap in the river and caught fish therewith. It would be putting form of expression over substance to say that such an allegation is not equivalent to charging that the trap was placed in the stream for the purpose of catching fish. Taking the whole language of the indictment together, it is

alleged with reasonable certainty that the defendant placed a fish-trap in the water of Ouachita River for the purpose of catching fish.

The allegations to the effect that the fish were not caught for family use nor for a picnic are wholly foreign to the charge, and must be rejected as surplusage.

We think that the indictment charged an offense, and that the demurrer was properly overruled.

It is conceded that the evidence was sufficient to sustain a conviction under section 3602, Kirby's Digest, and that the court submitted this case to the jury under that statute.

Counsel for appellant contend that the statute in question is void because of the exemption in favor of the counties named therein. They argue that the exemption operates in favor of the citizens of those counties, and is in violation of the Constitution, a grant to them of privileges and immunities not extended equally to all other citizens. We do not think the statute has that effect. The Legislature may, in the exercise of the police power, put into operation game and fish laws in localities where they are needed or applicable, and such laws apply in such localities to all persons equally. In counties or localities where the law does not extend all persons alike may enjoy the exemption. In other words, all persons are forbidden the use of fish traps in the counties named, and all persons, so far as the prohibitions of this act are concerned, may use them in the exempted counties.

Affirmed.

COLE v. STATE.

Opinion delivered December 9, 1907.

1. PARDON—PENDING APPEAL.—Under art. 6, § 18, Const. 1874, impowering the Governor to grant pardons after conviction, the Governor may pardon a person convicted of crime while his case is pending in the Supreme Court on appeal. (Page 474.)
2. SAME—EFFECT ON COSTS.—While a pardon of one convicted of a misdemeanor and fined absolves him from payment of the fine and takes

away the criminal character of the judgment for costs, preventing their collection through imprisonment, it leaves in force the judgment for costs, to be collected as a civil debt. (Page 474.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; appeal dismissed.

Sam Edmonson and *Rowe & Rowe,* for appellant.

The Governor has the right of pardon pending an appeal. 27 Ark. 469; 76 N. C. 231, 22 Am. Rep. 675; 27 Am. & Eng. Enc. Law, 323 and note. An appellant can always dismiss his appeal before final judgment with or without a reason.

William F. Kirby, Attorney General, and *A. A. McDonald,* Prosecuting Attorney, for appellee.

PER CURIAM. Cole was convicted in the Fort Smith District of Sebastian County for the crime of Sabbath breaking, and fined $50, and has appealed. While his appeal was pending in this court, the Acting Governor issued him a pardon, which appears to be in the usual form, pardoning and absolving him from the said judgment and from the effects and consequences thereof.

Appellant thereafter filed a motion, exhibiting said pardon in court, praying that his appeal be dismissed, and that judgment be rendered against the State for the cost of the briefs.

The Constitution gives the Governor the power "to grant reprieves, commutations of sentence and pardons after conviction; and to remit fines and forfeitures under such rules and regulations as shall be prescribed by law." Section 18, art. 6, Constitution. It has been questioned whether, when a case is pending in an appellate court on appeal, the Governor has a right, in advance of the final decision, to issue a pardon. An appeal to this court only suspends, and does not vacate, a judgment of conviction, and it cannot be said that the Governor has not the power, if he sees fit to exercise it, to pardon a criminal while the case is pending a final determination in the Supreme Court. Authority for it may be found in *State* v. *Alexander,* 76 N. C. 231, s. c. 22 Am. Rep. 675; *State* v. *Carson,* 27 Ark. 469.

The only other matter in the case is the effect of the pardon; and this was settled by the decision of this court in Ex

parte *Purcell,* 61 Ark. 17. Briefly stated, this pardon absolves Cole from the payment of the fine to the State, and takes away the criminal character of the judgment for costs, preventing its collection through imprisonment, but leaves in force the judgment of costs to be collected as a civil debt, and not subject to be enforced by imprisonment on default of payment.

The order of the court is that the appeal be dismissed at the cost of the appellant, and that the judgment of the lower court, in so far as the costs are concerned, remain in force as a debt; its character as a criminal judgment has been taken away by the pardon.

Dismissed at the cost of the appellant.

FOO LUN v. STATE.

Opinion delivered December 9, 1907.

MEDICINE—PRACTICE OF, DEFINED.—It was error to instruct the jury that the term "practicing medicine" applies to one "who undertakes to consider the nature of the ailment of a patient and to prescribe for him a remedy therefor," as the Legislature in Kirby's Digest, § 5243, has defined the meaning of that term.

Appeal from Garland Circuit Court; *S. W. Leslie,* Special Judge; reversed.

STATEMENT BY THE COURT.

The appellant was indicted in the Garland Circuit Court for practicing medicine without first having procured a certificate and license as prescribed by the statutes.

John Montgomery testified for the State: "I went up and got some medicine from defendant, paid him, and he gave me a receipt. I was requested by the Medical Board to go there to get evidence, to see whether or not he was practicing medicine. He asked me my symptoms. He has an office something like a doctor's room. This was in Garland County, Arkansas, April 8, 1907." Cross-examination: "I answered the questions he asked me. He felt my pulse, and asked me if I had pains.

I did not ask him to feel my pulse or tell him I had stomach trouble. I acted as a detective. He didn't tell me he only sold medicines, but told me to take this until Wednesday. I saw other persons in the waiting room."

The State then introduced G. J. Erickson, who testified that he was the county clerk of Garland County, and that there was no certificate of the State Board allowing appellant to practice medicine. This was all the evidence.

There was a jury trial, and a verdict of guilty.

Appellant filed a motion for a new trial, and, upon its being overruled, appealed.

C. V. Teague, for appellant.

Every material allegation in an indictment must be proved. The indictment in this case charges *repeated* prescriptions by appellant of drugs and medicines. This is material, and, not being proved, the case falls. Underhill on Crim. Ev. 42, § 32; 7 Allen (Mass.), 299.

William F. Kirby, Attorney General, and *Dan'l Taylor,* for appellee.

HART, J., (after stating the facts.) Appellant asks for a reversal of this case because the court erred in giving to the jury over his objections instruction No. 3, as follows:

"3. You are further instructed that by the term of 'practicing medicine' it is meant to charge a person who undertakes to consider the nature of the ailment of a patient and to prescribe for him a remedy therefor; and if you find from the evidence in this case that defendant examined into or in any manner considered the physical ailments as represented to him by the witness Montgomery, and prescribed or attempted to prescribe a remedy therefor, you will find him guilty."

Appellant was indicted and convicted under sections 5239 and 5241 of Kirby's Digest regulating the practice of medicine.

A number of States have passed statutes regulating the practice of medicine. In some instances the Legislatures have undertaken to define what is meant by the phrase "practice of medicine;" in others they have not. In cases where the Legislatures have not undertaken to define the meaning of the phrase,

it has been construed to be used in its ordinary and popular sense. In cases where the words "practice of medicine" have been defined by the Legislatures, the definition has been followed by the courts.

Section 5243 of Kirby's Digest provides that "any person shall be regarded as practicing medicine in any of its departments, within the meaning of this act, who shall append M. D. or M. B. to his name; or repeatedly prescribe or direct, for the use of any person or persons, any drug or medicine or other agency for the treatment, cure or relief of any bodily injury, deformity or disease." We think it was the intention of the Legislature to define the crime by the use of the language quoted.

The statute defines practicing medicine as repeatedly prescribing or directing, etc.

The court erred in giving its own meaning to these words in instruction No. 3, and in not defining them in the meaning of the statute. It was the duty of the court to give effect to the intention of the lawmakers as embodied in the statute.

Reversed and remanded.

ROBERTS v. STATE.

Opinion delivered December 9, 1907.

PUBLIC ROAD—OBSTRUCTION.—An indictment for obstructing a public road is not sustained by proof that defendant obstructed the mouth of a slough which would stop the flow of water through the slough when a certain creek situated alongside the road was up, and would thus force more water into the creek, and thereby tend to wash away the banks of the creek and cut into the road.

Appeal from Carroll Circuit Court; *J. S. Maples,* Judge; reversed.

Troy Pace, for appellant.

William F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

The verdict is not supported by the evidence. It is not sufficient to prove that something was done alongside the road

which might obstruct the road or probably would cause an obstruction.

The court erred in refusing to instruct the jury that before they could convict they must find, etc., that the defendant *had,* etc., obstructed the road by the means alleged in the information.

HILL, C. J. Roberts was indicted for obstructing a public road which ran along Keel's Creek, in Winona township, Carroll County, and was convicted, and has appealed.

The State's evidence tended to prove that he obstructed the mouth of a slough which would stop the flow through the slough when the creek is up, and thus force more water into the main channel, tending to wash away the banks of the creek and cut into the road when it rains and the creek rises.

The strength of the State's case is presented in the testimony of Mr. Clark, one of the witnesses for the State, as follows: "I have seen the obstruction in the mouth of the slough placed there by the defendant. It will keep the water from going around through the slough if the creek gets up high, and in my opinion will cause more water to run through the main channel of the creek, and will some day wash away the road. I know it will wash away the road, for it has done it before. The last time was about a year ago. It has not washed the road away since the obstruction was put in the slough, but it will take less rainfall now to make it do so."

Concede that the obstruction to the highway caused by this obstruction to the flow of the slough would be an obstruction within the statute, yet this evidence is insufficient to sustain a conviction. The obstruction to the highway has not occurred; and whether it will occur from the act in question depends on the concurrence of several natural causes, such as the amount of rainfall, the unchanged drainage outlets, the extent of this obstruction, the resisting power of the intervening soil, and other natural forces. A material diminution of the rainfall alone would upset the entire prophetic obstruction of this road. This evidence leaves the obstruction of the highway to be problematic, uncertain and conjectural. It may, and very likely will, occur. But that is insufficient to sustain a conviction.

Reversed and remanded.

STATE v. EARLES.

Opinion delivered December 9, 1907.

LIQUORS—SOLICITING ORDERS AS AGENT.—Under Acts 1907, p. 236, making it unlawful, through agents or otherwise, to solicit or receive orders for the sale of liquor in prohibition territory, evidence that defendant solicited orders for whisky in prohibition territory and afterwards delivered it there will not sustain a conviction under an indictment for soliciting and taking orders for whisky *as an agent* in prohibition territory and transmitting same to a dealer, though it would sustain a conviction of unlawfully selling liquor.

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

William F. Kirby, Attorney General and *Dan'l Taylor,* for appellee.

1. The gravamen of the offense consists in a dealer soliciting orders in prohibition territory. The allegation that the defendant unlawfully solicited and received an order from McSpadden, to-wit: three quarts of whisky, sufficiently charges the crime under the statute. The further allegation that he transmitted the order in person to the wholesale dealer, etc., is immaterial, and may be treated as surplusage. The defendant is undoubtedly guilty of selling liquor without license. 60 Ark. 312. And under the evidence the presumption is that he is a dealer in intoxicating liquors. No subterfuge will be permitted to defeat the object of the anti-liquor law. 43 Ark. 389.

2. Appellee's contention that the act is unconstitutional is without merit. 205 U. S. 93.

McCaleb & Reeder and *Morris M. Cohn,* for appellee.

1. The first section of the act is in conflict with art. 5, § 22, Const. Compare Kirby's Digest, § 5133 with act; 52 Ark. 290; 14 S. W. 1101; 31 Neb. 674; 7 Neb. 409. If the first section of the act is unconstitutional, the other sections of the act, which refer back to and depend upon it, must fall with it. 75 Ark. 542; 25 Ark. 246; 31 Ark. 701; 34 Ark. 224; 49 Ark. 110; 183 U. S. 79; 184 U. S. 540; 22 N. E. 7; 31 N. E. 921; 33 Pac. 515; 22 S. W. 1048; 59 N. W. 362; 6 Neb. 474; 55 N. W. 869.

2. The second section of the act contravenes that provision of the Constitution giving to one accused of crime the right to a trial by a jury of the county in which the crime was committed. Art. 2, § 10, Const.; 30 Ark. 41; 32 Ark. 565; 94 Ga. 766; 82 Ark. 405.

3. The third section is unconstitutional in that it imposes excessive fines and unusual punishment.

4. The act is an attempted interference with interstate commerce. The Legislature is without such power. 203 U. S. 270; 57 Ark. 24; 54 Ark. 248; 127 U. S. 640; 39 Fed. 59; 55 C. C. A. 208; 127 U. S. 411; 122 U. S. 347; 72 Fed. 850.

5. The act discriminates against citizens and corporations of this State. Such laws are invalid. 75 Ark. 542; 37 Ark. 356; 64 Ark. 83; 53 Ark. 490; 165 U. S. 150; 184 U. S. 558; art. 2, § 3; art. 2, § 18; art. 2, § 20; art. 12, § 11, Const.

McCULLOCH, J. Appellee, Walter Earles, was indicted for soliciting and receiving an order for intoxicating liquor in prohibition territory in violation of the act of April 1, 1907, which declares it to be "unlawful for any liquor dealer, firm or corporation, engaged in the sale of intoxicating liquors in this State, to in any manner, through agents, circulars, posters or newspaper advertisements, solicit orders for such sales of intoxicating liquors in any territory of this State wherein it would be unlawful to grant a license to make such sales."

Section 2 of this statute is as follows:

"Section 2. The presence of any such liquor dealer, firm or corporation, through agents or otherwise, in such prohibition territory soliciting or receiving orders from any person therein shall constitute a violation of this act, and on conviction thereof shall be fined not less than $200 nor more than $500 for each such offense. *Provided,* that the term 'agent' under this section shall mean any person who receives an order from another for intoxicating liquors in prohibition territory, and transmits the same in person, by letter, telegraph or telephone, or in any other manner, to some dealer in intoxicating liquors, who accepts and fills the same." Acts 1907, page 327.

The indictment charges that the defendant did unlawfully solicit and receive an order from W. W. McSpaddin for intoxicating liquor and transmit the same in person to R. W.

Earnhart, a wholesale liquor dealer, who accepted and filled said order.

The case was tried by consent before the court. A verdict of not guilty was rendered, and the State appealed. It is shown by indisputable testimony that the defendant solicited orders for whisky in prohibition territory, and on the same day procured the whisky from R. W. Earnheart, a distiller in Batesville, Arkansas, and delivered it in the prohibited territory to the purchaser. It was agreed at the trial, as a part of the evidence, that Earnheart was a distiller, and only sold whisky in original packages of five gallons duly stamped as required by law; that in this instance he sold the whisky to the defendant, Walter Earles, and knew no one else in the transaction.

The prosecuting attorney asked the court to declare the law to be as follows:

"4th. Under the term 'agent' of the act of April the 1st, 1907, it is not necessary to show that defendant transmitted the order to some liquor dealer who accepted and filled the same. It is sufficient to show that defendant solicited or received such order for whisky in a prohibition district, as alleged in the indictment, and afterwards delivered to the person the whisky so ordered."

We think that the court properly refused to make the declaration, and reached the correct conclusion in the case. The defendant was indicted, not as a liquor dealer soliciting orders in prohibition territory, but as an agent soliciting and taking orders for intoxicating liquors in prohibition territory and transmitting the same to a dealer. The proof, in order to sustain a conviction, must, of course, conform to the allegations of the indictment.

The undisputed evidence shows that the defendant was not acting as agent for the dealer, but that, after having solicited orders, he purchased from the dealer sufficient quantity of the liquor to fill the orders and then delivered it to the purchasers. He is clearly guilty of unlawfully selling liquor without license, and may also be guilty, as a dealer himself, of soliciting and receiving orders for intoxicating liquors in prohibition territory, but he cannot under this testimony be convicted of soliciting orders as an agent.

The statute in question makes both the liquor dealer and his agent who solicits orders in prohibition territory guilty of an offense, and it defines an "agent" to be one "who receives an order from another for intoxicating liquors in prohibition territory, and transmits the same in person, by letter, telegraph or telephone, or in any other manner, to some dealer in intoxicating liquors who *accepts and fills the same.*" It is not intended by this statute to punish a licensed dealer for merely selling liquor directly to a person who has solicited orders in prohibition territory; but it is unlawful for a licensed dealer to accept and fill an order which has been solicited and received by another person in prohibition territory and transmitted to him. Such an acceptance of the order is, under the statute, tantamount to soliciting the order in prohibition territory.

Judgment affirmed.

SLUDER v. STATE.

Opinion delivered December 9, 1907.

LIQUORS—GOOD FAITH IN SALE OF WINE.—Where the evidence showed that defendant, having the right to sell wine in packages of five gallons, sold a five-gallon keg on credit, and allowed the purchaser to carry away from a quart to a gallon until the keg was exhausted, and received money and work in payment from time to time, the question whether the transaction amounted to a sale of an original package of five gallons, or whether it was a sale of such quantities as the purchaser wanted from time to time, was for the jury.

Appeal from Johnson Circuit Court; *J. Hugh Basham,* Judge; reversed.

Cravens & Covington, for appellant.

The jury should have been instructed to acquit if the sale was made *bona fide* and in quantities not less than five gallons, although the entire quantity was not removed at the time of sale. Kirby's Digest, § § 7795, 5100.

William F. Kirby, Attorney General, and *Dan'l Taylor,* for appellee.

Error was committed in refusing to instruct the jury that the question was as to the *bona fides* of the transaction. This should have been submitted to the jury.

HILL, C. J. Sluder was indicted for selling a quart of wine within three miles of the Knoxville public school contrary to the local option order of the county court of Johnson County. The court directed the jury to find the defendant guilty, which the jury did and assessed his fine at $25, and he has appealed.

The evidence shows that the wine was made by Sluder from grapes grown upon his own premises, and he had a right, under section 5100 of Kirby's Digest, to sell the same in original packages of not less than five gallons; and the question in the case was whether he had made such sale.

The State's witness testified that he had bought a five-gallon keg from Sluder and left it with him. That he purchased on credit, and that from time to time he carried away a quart or half gallon or gallon until his keg was exhausted; and that he paid from time to time money on his purchase, and that at the time of the trial he had not made full payment. That the sums paid were not for the amount of wine received by him at the time but were credits upon his purchase of five gallons of wine; and that some of these payments were made in work, the remainder in cash. Sluder's testimony was practically to the same effect.

Whether the transaction amounted to the sale of an original package of five gallons, or whether it was really a sale of such quantities as the purchaser wanted from time to time, was fairly a jury question. What was said in *Robinson* v. *State,* 59 Ark. 341, as to whether there was a sale or loan of whisky is equally applicable here: "The law will not tolerate subterfuges of any kind; and if the defendant, under pretense of making a loan of whisky to be returned in kind, actually sold the whisky, as alleged, he should be punished. But whether he sold it or exchanged it for other liquor of the same kind, is a question of fact, and it is his right to have that question submitted to a jury, to be determined by them after a consideration of all the facts and circumstances surrounding the transaction."

In *State* v. *Brown,* 83 Ark. 44, this court held under the

facts there that the evidence established beyond question a sale, and the court should have so instructed the jury; but differentiated it from the Robinson case, as there were circumstances in it which would tend to prove a real loan, while the undisputed facts in the Brown case proved the transaction to be a sale. In the one it was a question for the jury; in the other, for the court.

This case falls within the Robinson case, and the good faith of the "five-gallon sale" should be determined by a jury.

Reversed and remanded.

McNeely v. State.

Opinion delivered December 9, 1907.

Illegal cohabitation—sufficiency of evidence.—Sexual intercourse between unmarried persons living in the same house is not a violation of the statute against illegal cohabitation if there is no evidence that they live together in like manner as respects bed and board as marks the intercourse between husband and wife.

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

Scott & Head, for appellant.

1. Having alleged that appellants were not husband and wife, the burden was on the State to prove that allegation. Not having done so, the court should have granted appellant's request for a peremptory instruction. 19 Ark. 143.

2. The proof falls far short of establishing a case of illegal cohabitation. Sexual intercourse between persons not married does not constitute the crime. There is no proof that they sustained toward each other relations similar to those of husband and wife. 36 Ark. 84; 31 Tex. 95; 32 Ark. 187; 2 So. 690.

William F. Kirby, Attorney General, and *Dan'l Taylor,* for appellee.

Battle, J. S. W. McNeely and Ella Paxton were indicted for and convicted of illegal cohabitation. The Attorney

General confesses error because the verdict is not sustained by evidence.

The statute provides that "If any man and woman cohabit together as husband and wife without being married, each of them shall be deemed guilty of a misdemeanor," etc. Kirby's Digest, § 1810. Sexual intercourse between persons not married, though living in the same house, is not sufficient to constitute the offense of cohabiting together as husband and wife, without being married. *Taylor* v. *State.* 36 Ark. 84. "If they live together in the same house in like manner as respects bed and board as marks the intercourse between husband and wife, they, in sense and meaning of the statute, cohabit as husband and wife." *Sullivan* v. *State,* 32 Ark. 191. They must "cohabit together as husband and wife," must dwell together as if conjugal relations existed between them, must deport themselves toward each other as husband and wife.

In this case there is no evidence that the defendants ate at the same table, or slept in the same room, or cohabited together as husband and wife.

The confession of error is sustained.

Reverse and remand for a new trial.

COOKSEY *v.* STATE.

Opinion delivered December 9, 1907.

RESISTING ARREST—SUFFICIENCY OF EVIDENCE.—A conviction of resisting arrest will be set aside where the evidence shows that there was no attempt to arrest defendant.

Appeal from Sevier Circuit Court; *James S. Steel,* judge; reversed.

Otis T. Wingo, for appellant.

1. The mere refusal to submit to arrest does not of itself constitute an offense, and the court should have so instructed the jury. 37 Wis. 196.

2. It was the officer's duty to exhibit his warrant for making the arrest, and upon his refusal to do so, appellant had the right to refuse to submit to arrest, and even to resist it. Kirby's Digest, § 2184.

William F. Kirby, Attorney General, and *Dan'l Taylor,* for appellee.

BATTLE, J. This prosecution was commenced before a justice of the peace by filing the following affidavit:

"State of Arkansas,

"County of Sevier.

"Comes J. J. Jackson and states that on the 14th day of June, 1905, Frank Cooksey did then and there resist arrest by refusing and obstructing the service of a warrant upon him, the said J. J. Jackson, then and there being duly sworn and acting marshal of the town of Horatio.

"J. J. Jackson.

"Subscribed and sworn to before me this 14th day of June, 1905.

[Signed] "T. S. Tribble, J. P."

and was taken to the circuit court of Sevier County by appeal. He was convicted in that court, and appealed.

The evidence against him was embraced in the testimony of the prosecuting witness, J. J. Jackson. He testified that about June, 1905, he was marshal of Horatio, and called on appellant, and demanded fifty cents scavenger fees, which he refused to pay. "I reported his refusal to the mayor. The first time I went to Mr. Cooksey, he was running a drug store, and he wouldn't pay any attention to me, but said he went to a higher court. He walked in behind the counter and pulled out a drawer, and I told him 'twas no use to get contrary, to just go down there (to the mayor's court.) He wouldn't go, and I called in a couple of men, and then I had an understanding with him that he would come down there. He went on, but didn't come to court, and the next time I saw him he was in the butcher shop, and I went in there, and told him he hadn't gone, and that he must go, and he said I couldn't carry him, and I told him he was too large for me to 'tote.' He and his brother walked off. Later in the evening he came and sat down by

the blacksmith shop, and I walked up and said to him, 'Mr. Cooksey, you must go down to the court with me,' and he said, 'All right, I will go up and appear, but I don't want you to go with me,' and I said, 'All right.' He then got up and went to court."

There was no evidence of any attempt to arrest appellant, and consequently there was no resistance or an obstruction to an arrest. The officer's effort seems to have been to persuade him to go of his own volition to court, and he finally agreed and did go.

There was no evidence to sustain the verdict of the jury.

Reverse and remand for a new trial.

MORPHEW v. STATE.

Opinion delivered December 9, 1907.

1. CRIMINAL LAW—SUFFICIENCY OF INDICTMENT.—An indictment is sufficiently certain if it enables the court to pronounce judgment on conviction according to the right of the case. (Page 489.)
2. SLANDER—SUFFICIENCY OF EVIDENCE.—Where defendant, accused of slander, related that he had taken liberties with the person of the prosecutrix, and then added that she consented to have sexual intercouse with him, and that he then left, and he was then asked whether he had intercourse with her, and replied: "Don't ask me such a question," a finding that he charged her with fornication is sustained. (Page 490.)
3. CONTINUANCE—DISCRETION OF COURT.—Where defendant, accused of slander, is shown to have charged the prosecutrix with fornication with himself, and admits at the trial that she was not guilty, it was not error to refuse to him a continuance in order to procure the testimony of a witness alleged to have seen him take liberties with the person of the prosecutrix. (Page 489.)
4. APPEAL—EVIDENCE NOT OBJECTED TO.—Appellant can not complain of the admission of incompetent evidence if he made no objection thereto. (Page 490.)

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

William F. Kirby, Attorney General, and *Daniel Taylor,* for appellee.

1. Motion for continuance properly refused. It was a matter of discretion with the trial court, which this court will not interfere with except in a case of injustice. 2 Ark. 33; 8 *Id.* 119; 13 *Id.* 720; 19 *Id.* 92; 22 *Id.* 164; 24 *Id.* 599; 26 *Id.* 323; 34 *Id.* 720; 41 *Id.* 153; 54 *Id.* 243; 57 *Id.* 165; 61 *Id.* 88; 82 Ark. 105.

2. The inadmissible testimony was harmless, and prayer number four, refused, was extremely argumentative and wholly without the province of the court in declaring the law.

HILL, C. J. Appellant, Hugh Morphew, was indicted for slander, in four counts. A demurrer was sustained to three of the counts, leaving the indictment effective only as to the second count, which charged that in a conversation with Frank Kennedy, on the 15th of November, 1906, he used language which, in its ordinary acceptation, amounted to charging that one Anna Morrow had been guilty of fornication with him. The indictment was returned on the 21st day of September. He was arrested, and gave bond on the same day; and on the 25th he filed a motion for continuance in order to enable him to obtain the testimony of a young lady living in Scott County. He alleged that this young lady saw the prosecutrix and himself together in the early part of 1905, and saw him take indecent liberties with her person, with her consent; that he did not know of this evidence until he arrived at court on the 25th of September; that he then had a subpoena issued for her, and made efforts to communicate with her over the telephone, but failed; that the facts set forth are true, and that he could prove said facts by no other witness whom he could then produce.

This motion was overruled, the cause ordered to trial on the 26th, and he was convicted, and his punishment assessed at six months' imprisonment in the State Penitentiary. He has appealed, but has not presented any brief to show wherein there was error in his trial. The court therefore turns to the motion for new trial to ascertain the errors complained of.

The first three grounds attack the sufficiency of the evidence; but there can be no doubt of its sufficiency to sustain the verdict, and it would serve no useful purpose to review it.

The next ground is an attack upon the indictment, alleging

that it does not state facts sufficient to constitute a public offense. The indictment, in plain, intelligible language, sets forth the conversation with Frank Kennedy on which the slander is predicated, and the facts alleged constitute the offense charged within the definition of section 1854 of Kirby's Digest, and is sufficiently certain to enable the court to pronounce judgment according to the right of the case. The indictment contains all the elements required by section 2228 of Kirby's Digest.

The next ground is the refusal of the trial court to grant the defendant a continuance, and this has given the court some hesitation. In the conversation for which he was convicted he described in detail certain familiarities that he had taken with the person of the prosecutrix, and then added that she consented to have sexual intercourse with him, and that he then left; and he was asked by the witness if he had had intercourse with her, and he replied: "Don't ask me such a question." Taken in connection with what he had just told the witness, his refusal to answer this question could have no other meaning than to charge that the prosecutrix had submitted her person to him, and the jury evidently so understood it. He admits on the trial that he did not have intercourse with her, but says that he did take the liberties, and admits telling of them, and denies that he charged her with fornication. The prosecutrix denied that any liberties had been taken with her, and that she had ever had intercourse with the defendant. The evidence of the young lady in Scott County would not have been admissible for any other purpose than to contradict the prosecutrix's evidence that she had not permitted liberties from him. The material question is not whether in the early part of 1905, when they were sweethearts, he took liberties with her, but is whether in November, 1906, he charged her with fornication. He admits that she was not guilty of fornication. Therefore this evidence could not be valuable as tending to prove she committed fornication, as that was not an issue. Both parties deny the fornication; and the sole question is whether he charged the prosecutrix with it. Therefore, the contradiction of the prosecutrix upon the point sought would be upon an immaterial and collateral issue, and the court can not say that it was an abuse of discretion for the trial court to refuse the continuance in order to obtain such evidence.

The next ground alleged is that the court refused to instruct a verdict for the defendant. In this the court was clearly right.

The next ground is that court refused to give instruction number 4 requested by the defendant. This instruction charged upon the weight of the evidence, and was properly denied.

The next ground is as follows: "Because the court erred in allowing defendant to be contradicted by the testimony of Morris and Brown." It is not clear just what is meant by this assignment of error. As stated, the indictment was in four counts, each of which was based upon conversations with different persons, who testified to the conversations as charged in the indictment. The testimony of these four witnesses was admitted without objection. But at the request of the defendant the court gave an instruction telling the jury that they could only consider the testimony of Frank Kennedy and Odessie Kennedy. This excluded the testimony of Brown and Morris. Just why the defendant did not ask that the testimony of Odessie Kennedy be likewise excluded is not shown. The fourth count is based upon his testimony, and it should have gone out with the first and third counts. No objection was made to it, however, and no exclusion of it was requested.

The last ground is another attack upon the indictment; but, as shown, it was sufficient.

The judgment is affirmed.

WEST v. WHITTLE.

Opinion delivered December 9, 1907.

1. CONTRACTS—RESCISSION.—While solemn contracts between men should never be disturbed on slight grounds, yet whenever a person, through age, decrepitude, affliction or disease, becomes imbecile and incapable of managing his own affairs, an unreasonable or improvident disposition of his property will be set aside in a court of chancery. (Page 492.)

2. FRAUD—EVIDENCE.—A finding that defendant fraudulently procured from plaintiff a certain deed to land will be sustained by evidence that defendant paid therefor $666 2-3 when the land was worth from $4,000 to $8,000, that defendant was plaintiff's confidential friend,

and that defendant's mental capacities were so impaired by drink that he was incapable of managing his business. (Page 493.)

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

Cravens & Covington, and *J. D. Hunt,* for appellant.

Winchester & Martin, for appellee.

HART, J. This a suit was instituted by William Whittle, Jr., as next friend of William Whittle, Sr., his father, against W. H. West to cancel a deed executed by his father to West conveying certain mineral rights to lands situated in Johnson County, Arkansas. The tract contained eighty acres, and the consideration was $666 2-3.

The chancellor found in favor of the plaintiff, cancelling the deed and ordered the consideration restored to the defendant, and a decree was entered accordingly. Defendant has appealed.

It was alleged that Whittle, Sr., had been for many years a confirmed drunkard, that he was drunk on the day the deed was executed, that West was his intimate friend and confidential adviser, that the price paid was wholly inadequate, and that plaintiff was mentally incapacitated to make a deed.

The undisputed testimony shows that Mr. Whittle, Sr., is 62 years old; that he has been a whisky drinker all his life; that for the past twenty years he has been a hard drinker; that for the last ten or fifteen years he has been an habitual drunkard; that W. H. West was his confidential friend, and for many years had collected his rents for him.

Most of the witnesses agreed that Whittle was a man of little education, but was possessed of average intelligence, and that he was honest. All agree that his intellect had been impaired by the excessive use of whisky, but the testimony is conflicting as to the extent that his mental faculties had been weakened.

There is an irreconcilable conflict in the testimony of the witnesses as to whether or not at the time he executed the deed Wm. Whittle, Sr., was competent to bind himself by deed. There was a large number of witnesses who testified on this

point. It would serve no useful purpose to abstract their testimony here. Suffice it to say that the witnesses for the plaintiff testified that he was incompetent, and the witnesses for the defendant was equally positive that he was competent, to execute the deed and transact business in general. The witnesses are equally credible, and, no doubt, equally honest in their belief, and detailed the facts and circumstances upon which their opinion was based as they presented themselves to their minds.

This is not a case where the fact of drunkenness at the time of the execution of the deed alone is relied upon to establish the mental incapacity, but it is rather one where the party, by reason of long and continued use of intoxicating liquors to excess, has become incapable of managing his business, and mentally incompetent to dispose of his property.

The rule in this class of cases is laid down in the case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, to be that "while the solemn contracts between men should never be disturbed on slight grounds, yet it may perhaps be assumed as a safe general rule that whenever a person, through age, decrepitude, affliction or disease, becomes imbecile and incapable of managing his affairs, an unreasonable or improvident disposition of his property will be set aside in a court of chancery." This rule has been repeatedly followed ever since by this court, being applied in each case as the facts warranted. *Oxford* v. *Hopson,* 73 Ark. 170; *Boggianna* v. *Anderson,* 78 Ark. 420.

In this case the testimony adduced shows that West possessed the confidence of Whittle. He collected his rents, lent him money to buy whisky with, and settlements were never had between them oftener than once a year. West knew that there was no financial necessity to cause Whittle to dispose of his land. He knew that Whittle's whole family was opposed to his disposing of either the land or the mineral rights. In this particular transaction he was careful not only to have Whittle count the money, but to have him count it in the presence of a third person. Whittle's wife had heard of the proposed trade, and came to his store the day before the deed was executed, and remonstrated with him, West, about it. West walked away from her. He paid no attention to the repeated

requests of Whittle's daughter not to lend her father money; that he was drinking it up and neglecting his family.

There was no relinquishment of dower on the part of the wife.

The testimony shows that mineral rights when prospected were worth from fifty to one hundred dollars per acre. The lands contiguous to the lands in controversy had been prospected for coal, and a vein over four feet had been located. Its general direction had been ascertained, and was known to extend through the land in controversy. A proposed spur or branch track from the railroad had been located, and the agent of the railroad company a short time before had come to see Whittle about securing a right-of-way through his land, and, finding him intoxicated, talked of leaving and returning again to see him. West with a smile remarked that he might as well trade with him; that he was always drunk. The deed was executed on the 2d day of August, and it is undisputed that on the 8th day of the month Whittle was suffering from delirium tremens to the extent he would see rats, mice and four-legged chickens on the clock, and feared that he would die. He was put under treatment for the liquor habit, and so continued for more than a year, when his deposition was taken by the defendant. He remembered making the deed, but said that he only sold a two-thirds interest. He denied that there was any clause in the deed giving the defendant right-of-way for switches to any mine that might be opened up, or the right to sink air shafts.

In the case of *Hightower* v. *Nuber,* 26 Ark. 611, the court said: "And in a court of equity, where bad faith and unconscionable acts can have no allowance or favor, the strength of mental capacity of the parties, the circumstances surrounding them, their relationship, etc., make up the grounds upon which the court can find the real influences that produced the conveyance. And when it is discovered that the party in whose favor the conveyance was made possessed an undue advantage over the grantor, and in person, or by agent, exercised an improper influence over such one, and to the advantage of the grantee, it is an act against conscience and within the cognizance of a court of equity."

The chancellor found that the whole substance of this

transaction shows a want of capacity or undue influence; and, as said in the case of *Boggianna* v. *Anderson, supra,* this kind of case is one where the chancellor's finding has persuasive authority, and is entitled to weight and consideration.

Affirmed.

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UNION SAWMILL CO. *v.* FELSENTHAL LAND & TOWNSITE CO.

Opinion delivered December 9, 1907.

APPEAL—DECREE GRANTING INJUNCTION—SUPERSEDEAS.—As the execution of a supersedeas bond does not stay so much of a decree as grants an injunction, where the justice of the case requires that the *status quo* be preserved, this court will order a stay of proceedings until the hearing of the cause on appeal.

Appeal from Union Chancery Court; *E. O. Mahoney,* Chancellor.

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

The supersedeas issued by the clerk should be quashed. A decree for a perpetual injunction can not be superseded. Kirby's Digest, § § 1216, 1222, 1218; 73 Ark. 67, 70; 77 *Id.* 580; 2 Cyc. 913-14; 10 Wall. 273; 109 U. S. 150.

Bunn & Patterson, for respondents.

PER CURIAM. The material part of the judgment in this case is as follows: "That the Union Sawmill Company is a corporation engaged in the manufacture of lumber, and for more than one year prior to the institution of this suit it had unlawfully and without right operated its log train across the said land in controversy, the property of the plaintiff, for the purpose of conveying logs to their saw mill; that said trespass has continued for some length of time, and will continue unless prevented by order of this court; and that the Union Sawmill Company should be perpetually restrained from passing over or interfering with said land in anyway.....That the defendant, the Union Sawmill Company, its agents, employees and servants, are perpetually enjoined from further entering

upon said land for any purpose whatever, except that within ninety days the said defendants, the Union Sawmill Company, can use said lands for the purpose of taking and removing its steel therefrom."

The Sawmill Company appealed to this court and filed a supersedeas bond in the statutory form, and the clerk issued a supersedeas in usual form.

Appellee now files a motion to quash the supersedeas, in so far as it stays so much of the judgment as enjoins the Sawmill Company from operating the log road as above set forth.

It is well settled that the execution of a supersedeas bond does not stay so much of a decree as grants or dissolves an injunction. 2 Cyc. 913-14 and notes; *Payne* v. *McCabe,* 37 Ark. 318. From its very nature an injunction is not such a judgment as can be stayed by a supersedeas bond. It has been the practice of this court to issue injunctions *pendente lite* or writs of supersedeas pending litigation, where the justice of the case required the *status quo* to be preserved.

The appellee's rights are fully protected by the supersedeas bond which has been filed; and the *status quo* should be preserved pending the appeal, and the bond can not do that. It is, therefore, ordered that the clerk issue a stay of proceedings under the judgment appealed from until the hearing of this case upon the merits, or until the further orders of the court.

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

Opinion delivered December 9, 1907.

RAILROAD—NEGLIGENCE IN KILLING ANIMAL—EVIDENCE.—A judgment holding defendant railway company liable for killing plaintiff's mare will be sustained by testimony of several witnesses who agreed in testifying that the mare killed belonged to plaintiff, though they differed in their description of the mare's color.

Appeal from Clay Circuit Court; *Frank Smith,* Judge; affirmed.

T. M. Mehaffy and *J. E. Williams,* for appellant.

The *allegata* and *probata* must correspond. 5 Ark. 52; *Ib.* 321; 12 *Id.* 218; 6 *Id.* 480; 8 *Id.* 500; 59 *Id.* 165; 7 *Id.* 372; 63 *Id.* 65; 22 Enc. Pl. & Pr. 552, 527. The complaint alleges the killing of a *black mare;* the proof perhaps shows plaintiff lost a *bay* or an *iron gray filly.* The variance is fatal.

HILL, C. J. Miller sued for a black mare, which he alleged was killed by a definitely described train of the appellant railroad company at Lenson Crossing. He recovered judgment, and the railroad company has appealed. The sole question is whether the evidence is sufficient to identify the black mare sued for as the animal struck by the train at the time and place alleged.

Mr. Miller did not see her killed, but testified that he last saw her when she was near the Lenson Crossing; that she was a black mare, three years old. Subsequently he stated that she had some gray or white hairs around the root of her tail, and her mother was a flea-bitten gray. He heard of the killing the day afterwards, and went to the place to see after the mare, but found that she had been burned in the night, but he did not see her, and did not identify the mare that he heard was there burned as his. Another witness described an animal which was killed at Lenson Crossing, on account of her injuries from the train, and burned, to have been a bay filly, "not very dark and not very light." This witness stated that he knew a herd of horses belonging to Mr. Miller; that the mare killed was one of that herd, which was generally reputed to be owned by Mr. Miller. He did not know the individual animals belonging to the herd, but knew the herd collectively. He said that the bay filly that was killed was about three years old. Another witness testified that he was present when the mare was killed. He describes her as a nice, large filly, iron gray, to the best of his knowledge.

Miller further testified that he had not seen his black mare since the animal was killed by the train, and she was missed from the mares in the herd with which she ran. This is all the testimony on the subject, and it is earnestly insisted that the *allegata* and *probata* do not agree. It is true that the descriptions as to color do not agree, but these facts are established:

That it was a mare about three years of age which was injured by the train, and was killed to save her suffering, and burned by the section men at the time and place alleged in the complaint; and that the mare killed was one of the herd of mares which ran together and were owned by Miller, and Miller had accounted for the balance of his bunch and not his black mare. These facts certainly tend to prove that it was his mare that was killed; whether she was a black, bay or iron gray is a matter of difference of opinion or recollection among the witnesses. But there was sufficient evidence to sustain the verdict that it was Miller's mare that was killed; and that is the sole question on this appeal.

Affirmed.

HOT SPRINGS SCHOOL DISTRICT v. SISTERS OF MERCY OF THE FEMALE ACADEMY OF LITTLE ROCK, ARKANSAS.

Opinion delivered December 9, 1907.

TAXATION—EXEMPTION OF PROPERTY USED FOR PUBLIC CHARITY.—A hospital building, with the grounds connected therewith, which is used in the operation of a public charity is not excluded from the constitutional exemption from taxation of buildings and grounds "used exclusively for public charity" merely because patients who are able to do so pay for the attention and medicine which they receive, if the profits derived therefrom are used to promote the charitable objects of the institution.

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

STATEMENT BY THE COURT.

This is an appeal from a judgment of the circuit court of Garland County, which held that the hospital buildings and grounds upon which it is situate, in the city of Hot Springs, come within the exemption of the Constitution, and are not subject to taxation.

Among the exemptions from taxation contained in the Constitution are: "Buildings and grounds and materials used ex-

clusively for public charity." Const. 1874, art. 16, § 5. The evidence shows that in the hospital there is one large room with ten or twelve beds, and four rooms with three beds in each especially for charity patients; that there are other rooms for patients who pay; that the institution is open to any worthy sick person not afflicted with a contagious or infectious disease; no one being refused on account of religious belief or inability to pay. A drug store is maintained in which prescriptions are filled and medicine furnished for those in the house. Those who are able pay for articles got at the drug store; those who are not able are furnished free. None are ever refused, whether they have money or not. A free operating room and a free clinic are maintained in the hospital, and the drug store furnishes bandages and anæsthetics, and fills prescriptions for them. The institution also maintains a school for nurses. It employs, at a salary, an educated nurse and instructor in nursing from Chicago; and also employs a number of girls who are instructed in nursing by her and by the doctors at the clinic, and who assist in nursing the patients. At the time of the trial there were eight girls in the training school, besides the teachers. None of these sisters receive any compensation. All money received from any source goes to maintain the institution. They had originally a small frame hospital, a gift to the order about twenty years ago, and they have recently erected a large and expensive building, partly through donations and partly through borrowed money; and whatever surplus money might arise from any source would go to pay this loan. No funds are diverted from that institution, and it in no sense involves an idea of profit to anyone. Whatever profit is realized from those who pay goes to the benefit of those who can not pay, and to extend and enlarge the charity done there.

The articles of association or incorporation are not in the transcript, but it is a matter of general information, and the evidence shows, that the Sisters of Mercy are a benevolent and charitable organization, to teach the young, to nurse the sick and take care of the indigent and poor. It has no aim of gain or profit, and whatever it receives from any source is expended in promoting its primary objects.

Wood & Henderson, for appellant.

The undisputed facts show that the property in controversy was not being used *exclusively* for public charity, and was not intended to be so used. It does not, therefore, come within the provisions of the Constitution exempting such property from taxation. Art. 16, § 5, Const.; 19 L. R. A. 289; 9 *Id.* 629; 50 *Id.* 191; 65 Ark. 343; 62 Ark. 481.

Greaves & Martin, and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

This institution is a public charity, and as such is exempt from taxation. 14 Allen, 556; 15 Atl. 555; 60 Fed. 365; 120 Mass. 434; 17 Atl. 455; 25 O. St. 229; 38 Am. Rep. 298; 125 Pa. 572; 18 Q. B. Div. 444; 134 Pa. 171; 58 Hun, 386; 99 Vt. 202; 98 N. Y. 121; 145 Mass. 149.

HART, J., (after stating the facts.) The judgment appealed from exempts only the ground upon which the hospital building is situate and the building thereon; and the sole question in the case is, whether or not they are used exclusively for public charity.

Appellant contends that the question is answered in its favor by the rule announced in *Brodie* v. *Fitzgerald,* 57 Ark. 445. That was a case where the rents and revenues and the property itself were used for public charity. The theory upon which framers of constitutions and lawmakers act in exempting from taxation property used purely for public charity is that the unfortunates, who are the recipients of the bounty of these public charities, would become a charge upon the State, and that by alleviating their suffering and relieving their distress the institutions or other agencies organized for the purpose of public charity in a manner assume part of the public burdens. It is well settled that no one can exempt his property from taxation simply by the exclusive use of the income for public charity; for that is a matter which appeals to his own individual spirit of benevolence. It may be given today and withheld tomorrow. But a different rule prevails where the property is directly and exclusively used for that purpose. It is not denied that the whole object of the institution of appellee is one of public charity; but appellant claims that it is not exclusively so used because pay patients are received, and because those able to pay are charged for prescriptions.

In discussing a similar case in *State* v. *Powers Hospital,* 10 Mo. App. 263, the court said: "Does the fact that this institution derives some part of its revenue from paying patients exclude it from the benefits of the constitutional exemption from taxation? We do not see upon what reasonable grounds this can be said. Suppose that the community in charge of the hospital devoted themselves partly to some kind of manual labor, shoemaking for instance, in order to raise money for the purpose of furnishing medicine and necessaries and comforts to their patients, would not this be a charitable act? If they devote themselves partly to the care of paying patients, to defray the expenses of attendance upon the poorer patients who can not pay, this is surely an act of charity. Must we hold that if the community raise money purely by begging, their purposes are purely charitable; but if they work to support themselves whilst ministering to the sick, and to support the sick to whom they administer, the character of the charity is impaired? * * * The fact of receiving money from some of the patients does not, we think, at all impair the character of the charity, so long as the money thus received is devoted altogether to the charitable object which the institution is intended to further."

In the case of *County of Hennepin* v. *Brotherhood of Gethsemane,* 27 Minn. 460, the court said: "A hospital, with the necessary grounds, free to all who are not pecuniarily able, and supported partly by private contributions and partly by fees from patients, but producing no profit, is a purely public charity."

In the case of *Penn. Hospital* v. *Delaware Co.,* 169 Pa. St. 305, the court said: "Property which is used directly for the purpose and in the operation of the charity is exempt, though it may also be used in a manner to yield some return and thereby reduce the expenses."

To the same effect, see *Sisters of Charity* v. *Township of Chatham,* 52 N. J. L. 373; *Mount Hermon Boys' School* v. *Gill,* 145 Mass. 149; *Episcopal Academy* v. *Philadelphia,* 150 Pa. St. 574.

One of the witnesses here said that she had been a member of the Sisters of Mercy for forty years, that the whole object of the order was charity, and that their whole life was devoted to it. In response to the question, "This order, the Sisters of Mercy,

what is the general work of the order, and to what do your vows pertain?" she answered, "To the poor and sick and educational." In this case the buildings were constructed and fitted for use solely as a public hospital. The members of the order receive no compensation for themselves. Their earnings and their lives are devoted to charity.

We think the property meets the constitutional requirement of being "buildings and grounds and materials used exclusively for public charity."

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY v. GULLEDGE.

Opinion delivered December 9, 1907.

1. TELEGRAPHS AND TELEPHONES—NOTICE OF SPECIAL DAMAGE.—A telegraph message addressed to plaintiff and apprising him that his brother is very sick and wants him to come immediately and wind up his business suggests on its face the near relationship of the parties, and gives notice that plaintiff would probably suffer mental anguish if the message was not promptly sent and delivered. (Page 506.)
2. SAME—DAMAGES—CONTRIBUTORY NEGLIGENCE.—Plaintiff can not recover damages for mental anguish suffered on account of the failure of defendant to deliver a telegram which would have apprised him of the serious illness of his brother in time to have reached the latter's bedside before his death if plaintiff knew the dangerous character of such illness from other sources in time to have gone to his brother's bedside before death and neglected to go there. (Page 506.)

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

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

1. Appellant was notified of his brother's condition in time to have reached his bedside while he was still conscious. The telegram in suit would have conveyed no additional information. His own negligence bars recovery. 140 Fed. 316; 80 Tex. 420; 88 Tex. 230; 67 S. W. 849; 93 Tex. 114; 33 S. W. 728; 3 S. W. 496; 36 So. 188; Joyce on Electricity, § 972; Gray on Com. by Tel. § 100.

2. In the matter of instruments used and the competency of its servants, appellant is not an insurer, but is only held to the exercise of ordinary and reasonable diligence. 79 Ark. 12; 77 Ark. 434.

3. Worry over business matters is not in contemplation of the statute. The telegram on its face discloses only a business purpose, and there is nothing therein to put appellant on notice that mental anguish might result. 78 Ark. 545; 46 N. E. 358; 54 N. E. 774; 35 S. E. 468; 37 S. E. 479; 41 S. E. 881; 47 S. E. 597; 48 S. E. 559; 50 S. E. 6; *Id.* 190; *Id.* 198; *Id.* 537; 7 S. W. 715; 22 S. W. 534; *Id.* 960; 26 S. W. 216; 28 S. W. 699; 30 S. W. 1105; *Id.* 1107; 41 S. W. 469; 73 S. W. 1043; 89 S. W. 965.

George & Butler, for appellee.

Though the message to W. T. Gulledge conveyed information that the brother was very sick, yet it did not indicate the last extremity; and the surprise and hasty departure of W. T. without discussing the situation, and his assurance that he would wire plaintiff, might lead a jury to say that he was not guilty of negligence, or, if he was negligent, that it did not contribute to his injury, as his brother was unconscious before he could have reached him. 96 Am. St. Rep. 382. Contributory negligence is generally a question of fact for the jury, and becomes a question of law only when the facts are such that all reasonable men would draw the same conclusion therefrom. 56 Atl. 674; 62 Ark. 164; 144 U. S. 408; 69 S. C. 531; 61 S. W. 548. Where there is a reasonable excuse, delay will not be held against the complainant as negligence. 63 S. W. 1076; 75 S. W. 843; 69 S. W. 427. See, also, 17 S. W. 831; 106 Am. St. Rep. 377; 57 Ark. 429; 59 Ark. 215; 46 Ark. 182. Appellant cannot complain that no instruction was given on the question of contributory negligence, having requested none, but relied on its request for peremptory instruction. 65 Ark. 416; 75 Ark. 373; 80 Ark. 178; 78 Ark. 55.

HART, J.

The complaint in this case alleges that the defendant accepted for transmission the following telegram:

"Hamburg, Arkansas, April 13, 1905.

"R. E. Gulledge, White, Ark.

"Eugene very sick; wants you. Come immediately, wind up his business.

[Signed] "Mrs. W. T. Gulledge."

That this was to be sent "collect." That plaintiff's brother lay dying at his home in Drew County, Arkansas, and said brother was possessed of large business interests, and wished plaintiff, in whom he had special confidence, to come and be intrusted with private details, and also to console him in his last illness. That through defendant's neglect said message was never delivered, and his brother was dead and buried before the plaintiff knew that he was sick. He asked for $1,000 damages.

Defendant answered, denying in detail all the allegations of the complaint, and averring that plaintiff knew of the critical illness of his brother on the 15th day of April, and that the brother did not die until the 17th of said month, so that plaintiff had ample time to reach his brother's bedside, had he so desired, and that plaintiff's brother was in practically the same condition as he was the 13th of April until within a few hours before his death.

It was admitted on the trial that the telegram in suit was delivered to defendant's agent at 12.55 P. M. on April 13, 1905, and accepted for delivery by the defendant's agent at Hamburg, Arkansas, but was never delivered to plaintiff.

At the trial the following evidence was introduced: Mrs. Annie Gulledge testified: "I am the widow of Eugene Gulledge, who died on April 17, 1905, at Luella, Arkansas, about 9 miles from Monticello, of pneumonia. He was sick one week. He was 36 years old. He had an older brother, W. T. Gulledge, and two younger than R. E. Gulledge, and a sister, Mrs. Morbin, living at Monticello. He rented 20 or 25 acres, and also hauled staves. We lived on the old home place, which had been bought by W. T. and R. E. Gulledge, and had lived there three years and a half up to the time of Eugene's death. For two years previous to that he had worked for wages for his brothers, W. T. and R E. Gulledge, at a saw mill. They paid him $40 or $50 a month. He was not able to do heavy work steadily, but when he worked he would earn from $1.50 to $2.00 a day. All the land

he owned was 120 acres, which his father had given him adjoining the old home place, on which he had cleared 15 acres. He had mortgaged this land for $250, which was owing at the time of his death. Since his death $156.25 has been paid by a sale of his horses, cattle and farm implements. I kept the household goods, two cows, four hogs and one horse. The administrator has sold all of his personal property except what I kept. W. T. Gulledge was the only one of plaintiff's brothers who was present when Eugene died. R. E. and John came after his death, but before the funeral. Mrs. Morbin was present when he died. He died about one o'clock Sunday night.

Dr. W. T. Stanley testified: "I was called to see Eugene Gulledge on April 15, 1905. He was very sick with pneumonia, and grew steadily worse, and on Sunday morning I told him he was going to die, and that if he had any business to attend to he had better attend to it. He did not regain consciousness after 11 o'clock Sunday morning. He had been unconscious at intervals before that. W. T. Gulledge arrived about two o'clock Sunday afternoon.".

R. E. Gulledge testified: "I am the plaintiff in this action, and a brother of Eugene Gulledge. I lived seven miles from him, and our relations were very close. Whenever he wanted anything, he came to me. There never had been any unkind feelings or ill will between us. I never got the telegram in the suit. The first I knew of my brother's illness was on Saturday afternoon about 2 o'clock of the 15th inst. It was at White, where we, W. T. Gulledge and I, were building a house. My brother, W. T. Gulledge, was there in his buggy; had been out to Ralls, and stayed all night. We were talking business when the man came up with the telegram. It was such a surprise we didn't have time to talk the matter over any. He got into his buggy and pulled out for Hamburg; said he could send me a message when he got there."

Q. "What was the next information you had?"

A. "I received a message Monday morning, between eight and nine o'clock that was sent from Monticello by telephone and then telegraphed to White."

Q. "What did you do then?"

A. "Hitched up and drove through the country out to

Monticello, got there at six o'clock. I learned, when I got there, he was dead."

Q. "You have stated in your complaint if that telegram was sent on the 13th at 12.25, and had been delivered to you you would have had time to go to your brother. State what your action would have been, had this telegram been sent you and delivered on the 13th or the morning of the 14th?"

A. "Well, if it had been delivered on the 13th, I could have got to my brother; could have gone to Colliston and up to Tillar."

Q. "The 14th?"

A. "I could have gone in my buggy, if it had been delivered in the morning, and could have seen him that night. I was very much grieved on account of my brother's death. I was also very much grieved not to get the telegram, for it showed that he wanted to see me about his business before he died. It was about some business that nobody else could attend to. If the message had been delivered, I could have been at his bedside 36 hours before he died, which would have been a consolation to me. Not getting there caused me mental anguish. If I had seen the message, I could have gone to him. My inability to see my brother for the purpose of business matters was not my greatest grief; that was on account of his death. When the message was delivered to W. T. Gulledge on April 15, I did not go to my brother's bedside. The message to W. T. Gulledge ran, "Eugene very low; come immediately. (Signed) Mrs. W. T. Gulledge." It was marked "delivered" at 10.50 A. M. of April 15, but I think it was about 2 o'clock when it was delivered. White is a town of about 200 or 300 population."

This was all the evidence; there was a jury trial, and a verdict for the plaintiff.

Appellant contends that the court erred in refusing to give instructions Nos. 1, 2 and 3, asked by it, as follows:

"1. You are instructed to find for the defendant.

"2. Before the plaintiff will be entitled to recover in this action any more than merely nominal damages, he must show that the defendant, or its agents, knew, when the message was received for transmission, or immediately thereafter, that mental suffering would probably result from a failure to send and deliver the message; and, since the message did not on its face

impart such information, you will find for the plaintiff merely nominal damages, unless the evidence shows that such information was given defendant, or its agent, in some other way.

"3. You are instructed that the telegram upon which this action is based is a business telegram, and upon its face gave no notice to defendant that any of the parties would probably suffer mental anguish, if it was not promptly sent and promptly delivered, and the plaintiff is entitled to recover merely nominal damage, and you will bring in your verdict for the plaintiff for one dollar."

There was no error in refusing to give instructions Nos. 2 and 3. The telegram on its face suggested the near relationship of the parties, and gave notice that plaintiff would probably suffer mental anguish if it was not promptly sent and delivered. *Western Union Telegraph Company* v. *Blackmer,* 82 Ark. 526.

Ought the court to have directed a verdict for the defendant? In this case no evidence was introduced in behalf of the defendant. The testimony for the plaintiff is undisputed. Plaintiff admits that the message, sent to his brother W. T. Gulledge, was delivered at two o'clock in the afternoon of Saturday the 15th inst., and that he read it at the time. This message apprised him of the fact that his brother was very low. No reason is given why he did not leave at once for his brother's bedside. He knew that he could have gone by train that night, or that he could drive there in ten or twelve hours. His brother did not become unconscious until eleven o'clock the next day after plaintiff received notice of his condition from reading the telegram to W. T. Gulledge. Had he left at once after receiving notice of his brother's condition, he would have reached his bedside several hours before he became unconscious. His failure to do so was the result of his own indisposition or lack of ordinary diligence on his part. *Western Union Tel. Co.* v. *Baker,* 140 Fed. 316; *Western Union Tel. Co.* v. *Matthews,* 67 S. W. 849; *Western Union Tel. Co.* v. *Hoffman,* 80 Tex. 420.

Reversed and remanded.

EARL v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Opinion delivered December 9, 1907.

1. LIMITATION—INJURY BY RAILWAY TRAIN—FRIGHT.—Kirby's Digest, § 6776, providing that an action for the killing or wounding of stock by railroad trains shall be brought "within twelve months after the killing or wounding occurred," relates only to injuries caused by actual contact or collision with railroad trains, and not to injuries to stock resulting from fright caused by the running of a train. (Page 508.)
2. RAILROAD—INJURY TO STOCK—LIABILITY.—Injuries to stock may occur, without contact or collision with running trains, as by fright, of which the proximate cause may be the negligence of the railway company in the running of its trains, in which case there would be a right to recover damages, but not under Kirby's Digest, § 6776. (Page 510.)

Appeal from Conway Circuit Court; *J. H. Basham,* Judge reversed.

W. P. Strait, for appellant.

Kirby's Digest § 6776, applies only to injuries from *running* trains. This was settled in 70 Ark. 481. The action was not barred. 14 L. R. A. 841.

Oscar L. Miles, for appellee.

BATTLE, J. This action was commenced on the 18th day of September, 1906. Plaintiff in his complaint alleged as follows: "That on or about the 15th day of April, 1905, the exact date and hour of the day being to this plaintiff unknown, and therefore cannot be alleged, and at a point about two miles east of Morrilton, on the Plummerville and Morrilton road, where the same approaches near and in close proximity and parallel to the said defendant's railroad track and right of way and at a point upon said wagon road where the plaintiff had a right to be and to have his team, and while he was driving along said road at said point in pursuance to this right, the said defendant company, by its agents and employees, on a west-bound train the exact number and character of which is unknown to plaintiff except that same was a 'pay train,' and at a time when they knew, or were in possession of such facts as would inform a reasonable person, of the danger occasioned thereby and of the probable injury to said team, did negligently and willfully, and

as this plaintiff believes and therefore alleges, for the purpose of frightening and scaring said team and causing it to do injury to itself, deliberately and purposely commenced to permit steam to escape from its engine and sound its whistle, by which negligent permitting of said steam to escape and sounding of whistle, the said team of horses, the property of plaintiff, became frightened and scared; and that, after said defendant company saw, or could have seen, this condition, and at a time when they were not required by law to make any alarm and were not approaching any crossing, continued to purposely and negligently sound said whistle and permit said steam to escape long after they had passed said plaintiff's team, by reason of which the said horses were so frightened as to cause them to rear, plunge and attempt to run away, by reason of which they were entangled in their harness, one of which was thrown to the ground and received, by reason of said fright, plunging and falling, serious wounds and injuries, all of which was the proximate and direct effect of the negligent and willful sounding of said whistle and escaping of said steam, to the plaintiff's injury and damage in the sum of one hundred and seventy five ($175) dollars."

The defendant, St. Louis, Iron Mountain and Southern Railway Company, in part answered as follows: "2. For further answer, the defendant says that, if plaintiff's horse was injured at the time and place alleged, it was an injury from the running of trains alleged; and such injury occurred more than twelve months before the filing of the suit or the bringing of the action, and, therefore, this suit is barred by the statute of limitation, which defendant proves as a defense to plaintiff's alleged cause of action."

To this paragraph of the answer plaintiff demurred, which demurrer the court overruled. To this ruling of the court the plaintiff excepted; and, electing to stand upon his demurrer, judgment was rendered in favor of the defendant, and plaintiff appealed.

The answer was based and sustained upon the following statute:

"Any person who owns stock, as aforesaid, in his own right, or who has a special ownership therein, having any such horses, mules, cattle or other stock killed or wounded by any railroad

trains running in this State, may sue the company running such trains for the damages sustained by the killing or wounding, in any court, having jurisdiction of the damages, in the county where the killing or wounding occurred, at any time within twelve months after the killing or wounding occurred, and recover such damages as the court or jury trying the case may assess." Kirby's Digest, § 6776.

A statute of Texas provides: "Each and every railroad company shall be liable to the owner for the value of all stock *killed or injured by the locomotives and cars of such railroad company* in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. If the railroad company fence in their road, they shall only then be liable in case of injury resulting from ordinary care." In construing this statute in *International & Gt. N. Rd. Company* v. *Hughes,* 68 Texas, 290, Mr. Justice Stayton, in delivering the opinion of the court, said: "This statutory liability is based on an injury caused by locomotives and cars. It certainly was never intended that such a liability should exist, even in case of contact between a locomotive or car and an animal, if the contact was by the movements of the animal while the engine or car was stationary, and, to make clear the manner in which the injury must be caused by the locomotive or car, the statute declares that it must be incurred in *running over their respective railways.* This involves the idea of contact between a running engine or car and the animal, and not an injury resulting in some indirect manner from the operation of a railway."

In construing the Texas statute he refers to similar statutes of Indiana, Missouri, and Illinois and the construction placed upon them by the courts. The statute of Indiana provides "That whenever any animal shall be killed or injured by the cars or locomotives or other carriages used on any railroad in this State, the owner thereof may sue the railroad company before a justice of the peace. "Under this statute," he says, "it has been steadily held that a railroad company was not liable for an injury which resulted from an act of the injured animal caused by fright induced by the cars, and not from actual contact between the car, locomotive or other carriage of

the railway, and the animal." *Peru & Ind. Rd.* v. *Hasket,* 10 Ind. 409; *Louisville, N. A. & C. Ry. Co.* v. *Smith,* 58 Ind. 575.

Missouri has a statute similar to the Texas statute. Under it the courts have held that a "direct or actual collision was contemplated; that when the agents of the road ran the locomotives or cars against any animal, and thereby injured it, or in any other manner it was hurt by actual contact or touch, then the company would be responsible for the penalty; otherwise not." *Lafferty* v. *Hannibal & St. Jo Rd. Co.,* 44 Mo. 291; *Croy* v. *Louisville, N. A. & C. Ry. Co.,* 19 Am. & Eng. Railroad Cases, 608.

A statute of Illinois provides, when the fences it requires to be erected by railroad corporations are not made as therein required, or when such fences are not kept in good repair, such railroad corporations shall be liable for all damages which may be done by the "agents, engines or cars" of such corporations, to cattle, horses, or other stock. It has been held that the railroad company is liable under the statute only for injuries done by the "agents, engines or cars" of the company, " and not merely caused by the act of the animal induced by fright caused by a train"—the injury must be caused by actual collision. *Schertz* v. *Indianapolis, B. & W. Ry. Co.,* 107 Ill. 577, s. c. 15 Am. & Eng. R. Cases, 523.

Construing section 6776 of Kirby's Digest according to the authorities cited, the killing and wounding therein referred to are only such as are caused by an actual contact or collision with railroad trains running in this State, and not by fright caused by a train. This we hold to be the correct construction of the statutes. But we do not mean to say that in no case can damages be recovered for injuries to animals caused by trains where there is no collision. Injuries to animals may occur without contact or collision with running trains, of which the proximate cause may be the negligence of the railway company or its employees, in which cases there would be a right to recover damages, but not under the statute.

The judgment of the court is reversed, and the cause is remanded with direction to the court to sustain the demurrer and for further proceedings.

FRANKLIN LIFE INSURANCE COMPANY v. MORRELL.

Opinion delivered December 9, 1907.

1. INSURANCE—KNOWLEDGE OF SURRENDER OF POLICY—ESTOPPEL.—Where the beneficiary of a policy of insurance knew that the assured (her husband) had surrendered the policy for a valuable consideration, and that he paid no further premiums thereon until his death, some six months later, and made no objection thereto during his life, she will be estopped, after his death, to attack the validity of the surrender upon the ground that at the time it was executed her husband's mind was unbalanced. (Page 515.)

2. SAME—CONFLICT OF LAWS.—An insurance contract executed in another State between the insurer and the insured should be construed according to the laws of that State. (Page 516.)

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

Thomas & Lee, for appellant; *McAnulty & Allen,* of counsel.

The beneficiary acquired no vested interest in the certificate.

1. The contract must be construed according to the laws of the State of Illinois, of which State the appellant, the member and the beneficiary named in the certificate were residents at the time the contract was entered into. By the terms of the contract itself the member could surrender without consent or joinder of the beneficiary. 124 Ill. 349; 198 Ill. 601; 175 Ill. 187; 126 Ill. 404; 96 Ill. 314; 51 Ill. App. 23; 71 Ark. 300; 61 Ark. 5; 55 Ark. 210; 104 Ga. 256; Story, Conflict of Laws, 8 Ed. 278A; 100 Tenn. 484; 10 Wheat. 148. The contention that the words "certificate holder" in the certificate refer to the beneficiary is at war with the language and obvious meaning of that instrument.

2. Minnie Wetzel's claim, if any, was released (a) because of her indorsement of the draft, and (b) because she authorized and ratified the surrender. She is estopped. 52 Ark. 458.

3. The certificate lapsed for failure to pay dues and assessments accruing after February 28, 1901.

4. Fritz Wetzel was mentally competent at the time of the surrender. He possessed sufficient mind to understand the

nature and effect of his act, and that is the test of mental capacity. In order to avoid a contract on account of unsoundness of mind or insanity, it must appear, not only that the party was of unsound mind or insane at the time it was made, but also that he had no reasonable perception or understanding of the nature and terms of the contract. 6 Am. & Eng. Enc. of L., (2 Ed.), 624; 19 Ark. 547; 17 Ark. 292; 109 Ill. 285.

5. Appellees have no legal status to maintain this suit. If any legal wrong was committed, the remedy belonged to the member, and not to the beneficiary. 102 Md. 683.

6. There is no proof of fraudulent representations inducing the surrender, because there is no evidence that the representations relied on were in fact untrue; because, even if untrue, they were mere expressions of opinion, predictions as to the future, and not representations as to a fact, either existing or past. 14 Am. & Eng. Enc. of L., (2 Ed.), 39; 1 Ark. 31; 6 Ark. 573; 16 Ark. 114; 164 Ill. 116.

7. To entitle one to rescind a contract for fraud, he must exercise his option within a reasonable time after discovery of the fraud. 15 Am. & Eng. Enc. of L., 161.

H. A. Parker and *Pettit & Pettit*, for appellees.

1. The point sought to be raised here that this is an Illinois contract, and must be construed under the laws of that State, was not raised in the lower court, and will not be considered on appeal. 75 Ark. 312; 74 Ark. 557; *Id.* 88; 72 Ark. 539; 64 Ark. 305; 71 Ark. 342; 72 Ark. 47; 77 Ark. 27; 71 Ark. 427.

2. Upon the proof in the case the chancellor found that the cancellation was void because of fraud, deception and misrepresentation in its procurement; because Wetzel did not have sufficient mental capacity to surrender the certificate; and further found that the widow did not consent to the cancellation. His finding of facts will not be set aside unless clearly against the preponderance of the evidence. 68 Ark. 314; 71 Ark. 134; 73 Ark. 489; 64 Ark. 627; 67 Ark. 200; 72 Ark. 67; 75 Ark. 52.

McCULLOCH, J. This is an action instituted first at law, and on motion of plaintiff transferred to equity, by Mina Wetzel, widow of Fritz Wetzel, deceased, to recover the sum of one thousand dollars alleged to be due from the defendant, Franklin Life Insurance Co., on a benefit certificate or policy of insur-

ance issued by the Franklin Life Association, a fraternal insurance society to Fritz Wetzel, one of its members, the defendant, Franklin Life Insurance Company, after the issuance of the certificate, having succeeded to the business of the former Association and assumed its contracts.

It is alleged in the complaint that, prior to the death of said Fritz Wetzel, a surrender of said benefit certificate was procured from him by defendant's agent by fraud and misrepresentation. The court was asked to set aside the act of Fritz Wetzel in surrendering the benefit certificate on account of such fraud, and also on the ground that he was of insufficient mental capacity to enter into a contract. Plaintiff tendered into court the sum of $190 paid to Wetzel for the surrender of the certificate.

Defendant filed its answer, denying the charges of fraud or of mental incapacity of said Wetzel, and also alleged that the plaintiff thoroughly understood the terms and effect of the surrender, and that she expressly consented thereto.

During the pendency of the action the plaintiff, Mrs. Wetzel, died, and the cause was revived in the name of her children, who are the appellees here. On final hearing of the cause, the court rendered a decree in favor of the plaintiffs, and the defendant has appealed.

It appears from the evidence that the Franklin Life Association was incorporated in the year 1884 under the laws of the State of Illinois as a fraternal insurance society, and that on the 21st of June, 1888, Fritz Wetzel, who then resided in the State of Illinois, became a member of said association, and the benefit certificate was issued to him in the sum of $1000, payable to his wife, Mina Wetzel, upon his death. The certificate of membership contains the following provision:

"11. The certificate holder may surrender his certificate by paying the Association all claims against said certificate, and returning the same to the secretary, and shall then be relieved from all further liabilities and payments whatsoever."

Other parts of the certificate show that by the term "certificate holder" is meant the member, and not the beneficiary.

Fritz Wetzel afterwards removed to the State of Arkansas, where he resided for a time in the town of Stuttgart. He later

removed to Clarendon, in this State, where he died on September 8, 1901. The surrender of the certificate was made on February 28, 1901, by indorsement thereon executed by Fritz Wetzel in consideration of $190, which was paid by the defendant's agent on that date by draft upon the home office in Springfield, Ill., payable to Fritz Wetzel and Mina Wetzel. The consideration paid for the surrender was the estimated amount previously paid by Wetzel as dues and assessments on his policy.

It is shown by the evidence that Fritz Wetzel addressed a letter to the defendant, dated at Stuttgart, Ark., February 4, 1901, as follows: "Dear Sirs: Please explain your method of insurance, as I cannot understand the increase on my dues every year how much will they (the dues) increase from now on, and how long will my dues be as high as they are now, and oblige, yours respect., (signed) F. Wetzel."

On the date the surrender was made, one of appellant's agents, who was employed as a solicitor and inspector, and who testified that it was his duty to "visit policy-holders, see that they were satisfied with their policy, and report to the company their condition physically, financially and morally", etc., appeared at Stuttgart and interviewed Wetzel. During the course of this interview it was proposed by the agent that, if Wetzel desired to surrender the policy, the company would, in consideration of such surrender, refund to him the estimated amount previously paid by him. This was agreed to by Wetzel in the presence of his son, who was then a man about twenty-five years old, and the surrender was duly executed by indorsement upon the certificate. The agent gave Wetzel a draft on the home office, payable to himself and wife; and subsequently this draft was presented to a local bank bearing the indorsement of Wetzel and his wife, and the amount was paid. There is testimony tending to show, and the chancellor so found, that at this time Wetzel was mentally incapable of transacting business or of executing contracts; but the evidence does not warrant a finding that appellant's agent knew of this condition of his mind, or that he was guilty of any fraud or misrepresentation of facts in procuring the execution of the surrender. The preponderance of the evidence also establishes the fact that the indorsement of the name of Mrs. Wetzel upon the draft was not made by her, but

was written by her husband, who presented the draft to the bank and received payment thereof.

Proof introduced by the plaintiff establishes the fact, however, that Mrs. Wetzel was a few days later apprised of the fact that her husband had surrendered the certificate. After the death of Wetzel his widow addressed a letter to appellant which also shows that she was informed of the surrender very soon after it was executed. The letter is in part as follows:

"I sent to you today a paper of this place publishing my husband's death. You will no doubt remember that he sold to you his policy No. 1536, which was made out in my favor. Well, since that time I have found out that my husband's mind was unbalanced when he sold it, and I can prove that by all of the doctors in Stuttgart, Ark., that treated him, and also by some of the people in that town, as well as doctors in Hot Springs, Ark., Brinkley, Ark., and in Clarendon, Ark. *We were not aware of the fact that his mind was not right when he lived in Stuttgart, and we listened to what he said and what he wanted done.*"

There can be no doubt under the proof that Mrs. Wetzel either knew at the time, or was informed immediately thereafter, that her husband had surrendered this certificate for a valuable consideration. The proof introduced on behalf of the plaintiff shows that the surrender was executed, and the negotiation leading up to it was made, in the presence of Wetzel's son at his place of business in Stuttgart, and that the son went to the home of his parents to procure the certificate.

The benefit certificate issued by the society was upon the express condition that the member should pay certain mortuary assessments and annual dues; and said certificate expressly stipulated that if said assessments and quarterly dues were not paid when due then the certificate of membership should be null and void and of no effect. No assessments or dues were paid by Wetzel after the surrender; none were offered either by him or by the beneficiary. No notice was in any manner communicated to the defendants of the mental incapacity of Wetzel until after his death. The certificate was treated by all parties as having been surrendered, and no rights were asserted thereunder until after the death of the member.

This court holds that under those circumstances Mrs. Wet-

zel was estopped to assert the invalidity of the surrender. Her acquiescence therein prevented her from asserting any rights under the certificate. It is unnecessary, for the purposes of this case, to determine whether the beneficiary had vested rights in the certificate or not.

According to the terms of the contract, however, it seems plain that she had no vested interest. The contract was executed in the State of Illinois, where the insurance society was domiciled, and where this member then resided. It was therefore an Illinois contract, and must be construed according to the laws of that State, according to which laws the beneficiary had no vested interest in the certificate. *Grand Legion* v. *Beaty*, 224 Ill. 346; *Middeke* v. *Balder*, 198 Ill. 590; *Delaney* v. *Delaney*, 175 Ill. 187; *Martin* v. *Stubbings*, 126 Ill. 387.

But, as we have already said, whether the interest of Mrs. Wetzel was vested or not, she is estopped by her acquiescence in the surrender of the certificate to assert any rights under the contract. The chancellor therefore erred in his conclusion, and his decree is reversed, and the cause dismissed.

CLARKE v. SCHOOL DISTRICT NO. 16.

Opinion delivered December 9, 1907.

1. SCHOOL DISTRICTS—POWER TO EMPLOY DIRECTOR AS CLERK.—The directors of a common school district are not authorized to employ one of their number as clerk and to pay him a salary as such. (Page 519.)
2. COUNTY TREASURER—RIGHT TO RECOVER ILLEGAL PAYMENTS.—A county treasurer who has paid school warrants illegally drawn upon him may recover such payments from the person to whom the sums were paid. (Page 520.)
3. LIMITATION OF ACTIONS—RECOVERY OF ILLEGAL PAYMENTS.—The statute of limitations begins to run against an action by a county treasurer to recover funds of the district illegally paid out by the treasurer from the time the payments were made, and the action is barred after three years. (Page 520.)
4. SCHOOL DISTRICT—PARTIES.—Where a county treasurer reimbursed a school district whose funds he had illegally paid out, the school district is not a necessary, though it is a proper, party to a suit by the treasurer to recover such illegal payments. (Page 520.)

5. LIMITATION OF ACTIONS—ACTION BY SCHOOL DISTRICTS.—The statute of limitations runs against a school district seeking to recover its funds illegally paid out by the county treasurer. (Page 520.)

Appeal from Clark Circuit Court; *Jacob M. Carter,* Judge; reversed in part.

This is an action by School District No. 16 of Clark County, and Ben Bussell, the treasurer of said county, to recover from defendant, George W. Clarke, the sum of $90, with interest, which amount was paid to defendant by Bussell, while treasurer of the county, upon six school warrants of $15 each, issued to defendant while the director of said district. The complaint alleges the dates of payment, and shows that four of them were made more than three years before this suit was brought. It alleges that the warrants were unlawfully issued for service rendered by defendant as clerk of the school district, while he was one of the directors.

The case originated in a justice's court, and was appealed to the circuit court. Defendant demurred for misjoinder of parties, and by way of answer set up that his services as clerk were reasonably worth the amounts allowed, and that the action was barred except as to the last two warrants.

The cause was tried upon the following agreed statement of facts: "That the defendant, Geo. Clarke, was a school director in School District No. 16, County of Clark, State of Arkansas; that he acted as clerk of said board of directors during his membership of same; that for his services as such clerk he drew the respective amounts and at the time as alleged in the complaint, and that he received moneys for the face value of said warrants from the said school district from its common school fund; that the money was received for his services as clerk of the board of school directors of the district and his labors in getting up and preparing the annual enumeration report, of which he performed the greater part, and on some occasions employed other parties to assist him, for which he paid, and was also assisted in part by the other directors; that said school district is an unusually large common school district, there being in it some 8 or 9 separate schools. It is admitted that Benj. Bussell was the treasurer of Clark County for and during all the time when said warrants were drawn by defendant, and that

he cashed the same out of the money belonging to the fund of said school district; that defendant has failed to refund any part of the same, although requested so to do by plaintiff, Benj. Bussell; that also since then plaintiff, Bussell, has paid of his own money back into said school fund a sum equal to the total amounts drawn from the same by defendant and without interest by said warrants as alleged in the complaint, being compelled to refund the same in order to have his account as such treasurer approved by the county commissioners of accounts for said county. It is admitted further that directors in said common school district have made it a custom to draw warrants in favor of one of their number who acted as such clerk upon said school district and has received pay for same as for similar services claimed by the defendant; that the materiality and relevancy of the above statement of facts is referred to the court."

At the request of appellee the court declared the law to be: (1) that the school directors of a common school district cannot spend the school funds for any purpose other than that for which it was raised, and that the clerk of the board of directors of a common school district is entitled to no pay for his services as clerk of the board and, that the directors, in this case, had no authority of law for issuing and delivering to defendant the warrants mentioned and described in plaintiff's complaint; (2) that the three years statute of limitation has no application, and cannot be pleaded in this case.

Defendant has appealed.

G. R. Haynie, for appellant.

1. If it be conceded that the contract under which appellant was paid for services as clerk was invalid, it is nevertheless an executed contract, and there can be no recovery. Bishop on Contracts, § § 625, 627, 636; 9 Cyc. 546; 70 L. R. A. 645; 63 Ark. 318.

2. The first four warrants were issued more than three years prior to the institution of the suit. As to them the action is barred. Kirby's Digest, § 5064; 63 Ark. 56; 19 Am. & Eng. Enc. of Law (2 Ed.), 192, and note; 3 Am. St. Rep. 266, and note.

3. The school district was improperly joined in this action. Every action must be prosecuted in the name of the real party in interest. Kirby's Digest, 5999.

4. That appellant was at the time a member of the board does not preclude him from recovering a reasonable compensation for extraordinary services rendered. He would in any event be entitled to recover on a *quantum meruit.* 58 Ark. 348; Bishop on Contracts, § 188; Lawson on Contracts, § 41.

J. E. Bradley and *Hardage & Wilson,* for appellees.

1. Appellees were not parties to any contract, and can not be concluded by an illegal contract between the appellant and his co-directors.

2. The statute of limitations can not be set up against an action of this kind. 63 Ark. 56.

3. This is not a special school district. There is therefore no provision of law for the employment of appellant as clerk of the board, nor for his compensation as such. Kirby's Digest, § 7620. See also *Id.* § 7663.

WOOD, J. The questions presented by this appeal are:

(1) Can the directors of a common school district employ one of their number as clerk of the board at a salary of $15 payable out of the school fund?

(2) If the sums are illegally paid, can the treasurer of the county, who pays warrants drawn for such amounts, recover same back from the person to whom the sums were paid?

(3) Does the statute of limitations run against the treasurer, Bussell, or the school district to recover the funds? Was the district a proper party?

Answering these in the order named:

1. We find no statute authorizing the directors of a common school district to employ one of their number as clerk and to contract to pay such clerk a salary for his services as clerk of the board. The law provides that one of the directors shall act as clerk, and prescribe various duties for him to perform. Kirby's Digest, § § 7630, 7631. But we find no express provision for his compensation, and none from which such compensation could be implied. In the absence of statutory authority expressly conferred upon the board of directors or some general provision from which such authority must be

implied, such contracts of the board with one of their number can not be upheld. It would seem, from the onerous duties required of the clerk of the board, that some provision should be made for his compensation, but, in the absence of legislation upon the subject, he must simply take the position *cum onere* and without pay.

2. Although the treasurer illegally pays the warrants for such services, he may, when his mistake is discovered, recover the same back into the treasury. The funds in his hands are trust funds belonging to the district, and he or the district may sue to recover same back into the treasury where they have been illegally paid out. There is no question of having paid money on an executed contract in the case. Neither the treasurer nor the district whose funds are in his hands are parties to any contract that was beyond the power of the directors to make.

3. The statute of limitations would run against Bussell and the district for all sums paid out by him more than three years before the institutiin of the suit. There was a liability on the party receiving the funds illegally from the treasurer immediately upon receipt of the same. And suit could have been brought and maintained for the recovery of the money at once. The statute began to run at once, and after three years effectually barred the action.

The school district, having been reimbursed by Bussell, was not a necessary party. It was not, however, an improper party, for the funds belonged to it; and, as it had been paid, it could sue for Bussell's benefit.

The statute of limitations will run against a school district, as well as a county, city or town. See *Ft. Smith* v. *McKibbin*, 41 Ark. 45; *Helena* v. *Hornor*, 58 Ark. 151. A school district is a corporation, and may sue in any of the courts of the State having competent jurisdiction. See 7541, Kirby's Digest. The State is not a party here, and the school district, in seeking to recover funds illegally paid out on the warrant of its directors, is not exercising any of the functions of the sovereign power. 19 Am. & Eng. Enc. Law, 192, note 1; *May* v. *School District*, 22 Neb. 205, 3 Am & State Rep. 266, and note.

In reality, the school district here was only a party for the benefit of Bussell, it having already been paid.

The judgment is reversed for all except $30 with interest, and as to that is affirmed.

LONGINO v. BALL-WARREN COMMISSION COMPANY.

Opinion delivered December 9, 1907.

1. CREDITOR'S BILL—LIEN BY FILING OF SUIT.—A creditor who brings a suit to cancel a fraudulent conveyance of his debtor acquires an inchoate lien on the property which is perfected on the rendition of the decree in his favor setting aside the fraudulent conveyance and ordering the property sold for satisfaction of the debt. (Page 525.)
2. MORTGAGE FORECLOSURE—JUNIOR LIENOR NECESSARY PARTY.—A junior lienor who was not made party to a suit to foreclose the prior lien is not bound by the decree, and may redeem from the prior lien, but can not demand another foreclosure and a resale of the property. (Page 525.)
3. SAME—REDEMPTION—LIABILITY FOR RENTS.—Where a senior mortgagee purchases the mortgaged premises at a foreclosure sale and takes possession thereunder, a junior lienor not a party to the foreclosure proceeding, who seeks to redeem from the mortgage, is not entitled to hold such mortgagee liable for rents, although he had purchased the mortgagor's equity of redemption before the foreclosure sale was had. (Page 526.)
4. SAME.—REDEMPTION—TENDER.—While a junior lienor will not be permitted to redeem from a foreclosure sale under the prior mortgage without tendering the amount due, the only effect of his failure to make the tender until after the suit has been brought is to render him liable for the costs accrued before the tender was made. (Page 527.)

Appeal from Columbia Chancery Court; *Emon O. Mahoney*, Chancellor; reversed.

STATEMENT BY THE COURT.

On October 23, 1893, A. J. Dennis, a debtor of appellee, Ball-Warren Commission Company, was the owner of the real estate in controversy situated in the town of Magnolia, Arkansas, and on that day conveyed it to J. M. Dennis, who on November 19, 1894, by mortgage deed conveyed it to appellant, H. A. Longino, to secure the payment of a debt of one thousand dollars. In February, 1895, appellee obtained a judgment in the circuit court of Columbia County against

A. J. Dennis for the sum of $2,071 and cost of suit, and on July 3, 1899, commenced suit in equity against A. J. Dennis and J. M. Dennis to cancel said conveyance from the former to the latter, on the ground that the same was executed for the purpose of defrauding creditors of said grantor, and to subject the said real estate thereby conveyed to the satisfaction of appellee's judgment. The chancery court rendered a final decree in that cause on October 28, 1899, cancelling said conveyance on account of fraud, and the real estate was ordered sold to pay the judgment. It was sold by a commissioner pursuant to the decree, and purchased by appellee, the sale was duly confirmed by the court, and the commissioner executed a deed to appellee pursuant to the sale. Appellant was not a party to that suit, and it is now admitted that he accepted the mortgage from J. M. Dennis without notice of the fraud, and that his mortgage was valid.

Appellant instituted suit in the chancery court against the widow and heirs at law of J. M. Dennis to foreclose his mortgage, and on August 30, 1900, a decree of foreclosure was rendered, and the real estate was subsequently sold under the decree by a commissioner of the court and purchased by appellant. The date of the commencement of the last-named suit is not disclosed, either in the pleadings or proof in the present case, but the recitals in the complaint and answer in the present suit to the effect that appellee's suit to cancel the deed was instituted in the lifetime of J. M. Dennis, and that appellant's foreclosure suit was not instituted until after the death of J. M. Dennis, establish the fact that appellant's foreclosure was not commenced until after the institution of the other suit.

Appellee was not a party to said foreclosure suit, and instituted the present suit in equity on October 1, 1901, against appellant to have an accounting of the rents and profits of the real estate received by appellant and to redeem from the mortgage. It is alleged in the complaint that appellant (defendant) had collected rents of said premises to an amount in excess of his mortgage debt and interest, and a decree against him is asked for the excess; or that, in the event it should be found that the amount collected was not sufficient to discharge the mortgage, the plaintiff (appellee) is ready to pay the balance found to be due.

It is also alleged in the complaint that appellant, at the time he accepted the mortgage, well knew of the fraudulent character of the conveyance of A. J. Dennis to J. M. Dennis, and that the mortgage was on that account invalid as against appellee's rights. Alternative relief is prayed, either for cancellation of the mortgage or for an accounting and redemption as above set forth.

Appellant filed his answer, admitting the truth of all the allegations of the complaint, except those concerning the amount of rents collected, and of his knowledge of fraud in the conveyance from A. J. Dennis to his mortgagor. He disputed the right of appellee to redeem or to have an accounting of rents on the ground that appellee had actual knowledge of the pendency of his foreclosure suit and took no steps to redeem until after the sale, and then made no tender of the amount necessary to redeem.

At the trial of the cause below appellee admitted that appellant had no knowledge of the fraud, and that his mortgage was valid. The court rendered a decree in favor of appellee establishing its right to redeem the property from appellant's mortgage upon payment of the balance due thereon, which the court found, after deducting rents collected, to be $419.52. The defendant appealed.

Stevens & Stevens, for appellant.

1. The demurrer should have been sustained. The complaint declares upon two counts, one equitable and the other legal. 1 Pomeroy, § § 376, 137; Kirby's Digest, § 5984; 30 Ark. 579; 74 Ark. 484; Kirby's Digest, § 6518; 119 U. S. 347. Story's Eq. Pl. § 281a. The complaint is also demurrable because of repugnancy and inconsistency in alleging the mortgage to appellant to be void for fraud and in declaring the right to redeem therefrom. 20 Ark. 494; 77 Ala. 563; 55 Ala. 607; 14 N. J. Eq. 114; 91 Va. 31; 18 S. W. 394; Bliss on Code Pl. § 122; *Id.* § 164; Story's Eq. Pl. § 654; *Id.* § 42, and note. The complaint shows no privity between the mortgagor and the plaintiff. 2 Jones on Mort. § 1055a; 79 Am. St. Rep. 928; 67 Ark. 328. It is further demurrable in seeking to charge appellant for rents, setting up that he bought at a sale ordered by the court, and in the prayer for redemption showing that he was a

bona fide mortgagee. He can not be made to account for rents. 2 Jones on Mort. § 118a; 17 Am. St. Rep. 364; 65 Ark. 229.

2. The common-law judgment and the decree offered in evidence are evidence of nothing, as against appellant, except that they were rendered; they are no evidence of passage of title. That could come only through a commissioner's deed. 35 Ark. 450; Kirby's Digest, § § 760, 6319, 6321, 6323.

3. Tender of the amount due under the mortgage must be made before bringing a suit to redeem. 81 U. S. 491; 57 Ark. 533; 65 Ark. 399. Appellee should have offered to pay before filing suit, or in his bill to redeem. 2 Tiffany, Real Prop. § 541; 3 Pomeroy, Eq. Jur. § 1219; 2 Jones, Mort. § 1095. Where one in his complaint offers to pay the amount due to the defendant if the latter is found not to be a fraudulent mortgage, such offer is conditional, and does not amount to a tender. 65 Ark. 392; 1 Jones, Mort. § 900.

4. A purchaser *pendente lite* is bound by the judgment or decree rendered in the suit. 30 Ark. 250; 36 Ark. 217; 29 Ark. 357; 45 Ark. 177.

5. Appellee ought not to be permitted to maintain inconsistent positions. Having persistently denied the validity of the mortgage and appellant's rights thereunder, asserting a paramount title to the lot, appellee can not claim the right to redeem. 64 Ark. 215; 32 Ark. 346.

Gaughan & Sifford, for appellee.

1. Appellee was not a party to appellant's suit to foreclose his mortgage. It owned the property, subject only to his mortgage, at the time the decree of foreclosure was rendered. Its rights were not affected by the decree nor by the sale under it. 64 Ark. 576.

2. The demurrer is without merit. Where equity takes jurisdiction of a controversy between litigants, it will determine the whole case. 77 Ark. 570.

3. The statement of the case clearly shows appellee's right to redeem. 65 Ark. 230.

4. Appellant is properly charged with rents. At the time of appellant's foreclosure, the equity of redemption was in appellee. His position was not changed from mortgagee to purchaser as against the appellee.

McCULLOCH, J., (after stating the facts.) At the time of the commencement of the foreclosure suit by appellant, the suit instituted by appellee, as a judgment creditor of A. J. Dennis, to set aside the conveyance to J. M. Dennis, appellant's mortgagor, was pending. Appellee, by the commencement of his suit to set aside the conveyance, acquired an inchoate lien on the property, which was perfected on the rendition of the decree in his favor setting aside the fraudulent conveyance and ordering the property sold for the satisfaction of his debt. *Jones* v. *Ark. Mech. & Alg'l Co.,* 38 Ark. 17; *Stix* v. *Chaytor,* 55 Ark. 117; *Doster* v. *Manistee Nat. Bank,* 67 Ark. 325; *Wallace* v. *Treakle,* 27 Grat. 487; Freeman on Judgments, § 350.

Appellee was therefore a necessary party to the foreclosure suit; and, not being a party thereto, it was not bound by the decree, and its right to redeem from the mortgage was not barred. 9 Enc. Pl. & Pr. p. 324; *Dickinson* v. *Duckworth,* 74 Ark. 138; *Turman* v. *Bell,* 54 Ark. 273; *Memphis & L. R. Rd. Co.* v. *State,* 37 Ark. 632. Its right was confined, however, strictly to that of redeeming from the mortgage. It could not demand another foreclosure and resale of the mortgaged premises. *Dickinson* v. *Duckworth, supra.*

In sustaining appellee's right to redeem from the mortgage, the chancellor was clearly correct, but the next question which arises is, whether or not appellant is chargeable with rents and profits of the property collected by him after his purchase at the foreclosure sale and before redemption by appellee.

It is well settled that a purchaser at a mortgage foreclosure sale which is defective, and therefore does not divest the title of the mortgagor, is in effect a mortgagee in possession, and is accountable as such for rents and profits of the mortgaged premises. "He is treated," reason some of the authorities, "as a bailiff of the mortgagor, and necessarily sustains the same relation to one who holds an interest in the equity by a title derived from the mortgagor." *Clark* v. *Paquette,* 67 Vt. 681. But, if the foreclosure is valid as against the mortgagor, and the purchaser at the sale takes possession of the premises, he is not deemed to be in possession under the mortgage, and can not be held accountable for rents and profits before an offer to redeem is made by a junior incumbrancer, who was not a party to the

foreclosure proceeding. *Adler-Goldman Commission Co.* v. *Herren,* 65 Ark. 229; 2 Jones on Mort. § 1118a; *Rogers* v. *Herron,* 92 Ill. 583; *Daniel* v. *Coker,* 70 Ala. 260; *Van Duyne* v. *Shann,* 41 N. J. Eq. 312; *Gaskell* v. *Viquesney,* 122 Ind. 244; *Gault* v. *Equitable Trust Co.,* 100 Ky. 578.

The possession of the purchaser, under those circumstances, is that of a purchaser, and not as mortgagee. The sole right, as we have already shown, of the subsequent purchaser or junior lienor, who has been omitted from the foreclosure proceeding, is, not to have the foreclosure sale set aside, but is to have an opportunity to redeem from the mortgage. *Dickinson* v. *Duckwirth, supra; Allen* v. *Swoope,* 64 Ark. 576.

It is conceded by counsel for appellee that this would be true if appellee was only a junior lienor, and had not acquired the mortgagor's equity of redemption by purchase of the property at the sale ordered by the chancery court to satisfy its judgment against A. J. Dennis. They contend that appellee's purchase of the mortgagor's equity of redemption before the foreclosure sale under appellant's mortgage substituted it in the place of the mortgagor, and that the foreclosure without making appellee a party to the proceeding was no foreclosure at all.

We think the case of *Adler-Goldman Commission Co.* v. *Herren, supra,* is decisive against that contention. At the time of the commencement of appellant's foreclosure suit appellee was only a lienor, though it became, before the foreclosure sale was made, the absolute owner of the equity of redemption. Appellant nevertheless purchased the title of his mortgagor, and entered into possession as purchaser, and not as mortgagee. Appellee had the right to redeem at any time from the mortgage, because it had, as lienor, been omitted from the foreclosure proceeding, but until it offered to redeem it had no right to disturb appellant's possession or call him to account for the rents and profits while in possession under his purchase. In *Adler-Goldman Commission Co.* v. *Herren, supra,* the junior mortgagors foreclosed their mortgage before the attempt to redeem from the prior lien of Herren, yet the court denied their right to require the latter to account for rents.

This is not an attempt, within the statutory period of redemption, to redeem from the foreclosure sale. The statute

giving the right of redemption from mortgage foreclosure sales under decrees of court (act May 8, 1899), having been passed subsequent to the execution of appellant's mortgage, is by its express terms excluded from operation as to mortgages executed prior thereto. If that statute was applicable to the mortgage in question, appellee could, within the prescribed period of redemption, have tendered the amount required to redeem, and then appellant would have been chargeable with rents and profits received while in possession. *Danenhauer* v. *Dawson,* 65 Ark. 129.

The only question remaining for our consideration is regarding the contention of appellant that a suit to redeem can not be instituted until after a tender of the amount due. This is true, but the tender can be made at any time, and the time of making the tender would only affect the question of cost of suit. Of course, until there has been an offer to redeem by paying the amount due, the suit can not be successfully maintained; but a court of equity should not dismiss a suit on account of the failure to make a tender, so as to require the institution of a new suit, when the plaintiff is willing and makes an offer during the pendency of the suit to pay the amount necessary to redeem. That is one of the distinctions between the right of redemption from a mortgage and the statutory right of redemption from a foreclosure sale. *Wood* v. *Holland,* 57 Ark. 198. Appellee is not entitled to recover any cost of suit incurred prior to an offer to pay the amount of the mortgage debt and interest.

The decree is reversed with directions to enter a decree establishing appellee's right to redeem from appellant's mortgage, but only on the terms indicated in this opinion.

BROADWAY *v.* SIDWAY.

Opinion delivered December 9, 1907.

1. ATTORNEY—PRESUMPTION AS TO APPEARANCE BY.—Where an attorney appears for one of the parties in a court of record, the presumption is that the appearance is authorized, and this presumption can be removed only by proof. (Page 532.)

2. JUDGMENT—RELIEF AGAINST.—Equity will not interfere to relieve against a judgment obtained without service where the judgment debtor has no meritorious defense to the action in which such judgment was obtained. (Page 532.)

3. AFTER-ACQUIRED TITLE—MORTGAGE.—Under Kirby's Digest, § 734, providing that "if any person shall convey any real estate by deed purporting to convey the same in fee simple absolute or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee," etc., a title acquired by a mortgagor after execution of the mortgage inures to the mortgagee's benefit. (Page 532.)

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

Hawthorne & Hawthorne, for appellants.

In collateral attacks upon judgments, etc., ordinarily evidence *aliunde* can not be introduced to overthrow them; but where there is fraud or mistake, it is admissible, as under § 4424, Kirby's Digest, the decree is absolutely void. 77 Ark. 383; 77 *Id.* 504; 49 *Id.* 411; 33 *Id.* 778; 50 *Id.* 459; 71 *Id.* 565. There was no notice and no service. 63 Ark. 323; 79 *Id.* 289.

The decree was regularly rendered, and no good defense was made or is now tendered. 47 Ark. 293; 55 Id. 348; 98 U. S. 56; 2 Warvelle on Vendors, § 904. It is a collateral attack. 23 Cyc. 1064; 9 Ark. 176; 54 Pac. 1027; 43 Ark. 238; 49 Pac. 320; 71 *Id.* 672; 80 Fed. 991; 137 *Id.* 198. The recitals are conclusive, and can not be overturned. 49 Ark. 397; 72 *Id.* 101; 57 *Id.* 49; 66 *Id.* 1; 61 *Id.* 474.

BATTLE, J. On the 12th day of March, 1897, the following decree was rendered by the Craighead Circuit Court, in chancery sitting:

"On this day, this cause coming on to be heard, comes the plaintiff, Leverett B. Sidway, by his attorney, E. F. Brown, and the defendants, W. P. Tyler, Mary E. Tyler, L. B. Tyler, and A. C. Broadway, by their attorneys, Lamb & Lamb, and the cause being submitted upon the complaint, exhibits and record proof introduced at the bar of the court, the court finds that the defendants, W. P. Tyler, Mary E. Tyler, and L. B. Tyler, on the 20th day of December, 1894, executed and delivered to plaintiff their promissory notes [here several notes are described],

and that there is now due plaintiff on said notes the sum of five hundred and five dollars and fifty-one cents ($505.51), for which amount judgment is rendered in favor of the plaintiff against the defendants.

"The court further finds that on said 20th day of December, 1894, said defendants, W. P. Tyler, Mary E. Tyler and E. B. Tyler, to secure the payment of the said notes executed and delivered to the plaintiff their mortgage or deed of trust, whereby they conveyed to the plaintiff the following described real estate, situated in said district and county, towit: N. E. ¼ section 6, T. 15 N., R. 3 E. P. M., containing one hundred and sixty acres, more or less, and that it was provided in said mortgage that, if default be made in the payment of the principal or interest notes, the whole should become due by the election of the plaintiff.

"The court further finds that said land was sold on the 12th day of June, 1893, for the nonpayment of taxes for the year 1892, and purchased by R. H. McKay, who thereafter obtained a tax deed from the clerk of said county dated June 20, 1895; that R. H. McKay conveyed said land to defendant, A. C. Broadway.

"It is, therefore, ordered, considered and decreed by the court that the tax deed executed and delivered to said R. H. McKay by the clerk of said county [be], and the same is hereby, cancelled, set aside and removed; that the plaintiff, Leverett B. Sidway, have and recover of and from the defendants, W. P. Tyler, Mary E. Tyler and L. B. Tyler the sum of five hundred and five dollars and fifty-one cents ($505.51), together with all costs in this suit expended, which recovery for costs is also against the defendant, A. C. Broadway; and, in default of the payment of the same within thirty days, that the clerk of this court as master in chancery proceed to sell said real estate as provided by law for the satisfaction of said mortgage. The court further finds that A. C. Broadway, one of the defendants herein, by agreement of the plaintiff, is entitled to the occupancy and rent of the land for the year 1897 up to December 1st, and that, unless he deliver possession to the plaintiff on the first day of December, 1897, a writ of possession issue directed to the sheriff of said county, commanding him to deliver possession of the premises to the plaintiff."

On the 18th day of July, 1905, Leverett B. Sidway, trustee, sought to revive by *scire facias* the foregoing decree against Longus P. Tyler, Mary E. Tyler (who succeeded to the interest of her husband, W. P. Tyler in the lands mentioned in the decree, he having died and such interest being held by them as an estate in entirety) and against A. C. Broadway, and the occupants of the land.

Longus P. Tyler and Mary E. Tyler and A. C. Broadway filed an answer and cross-complaint, in which they denied that they had any notice of the pendency of the suit in which the decree was rendered or of the decree until long after it was rendered, or that they authorized any one to appear for them in the suit; and Longus P. and Mary E. Tyler claimed to hold the land under a deed executed to them by A. C. Broadway.

"The plaintiff, Leverett B. Sidway, replied to the amended answer and cross-complaint in which he alleged that Lamb & Lamb were practicing attorneys, and that the decree which they were seeking to revive was entered by the consent of the attorneys in open court, and that they represented all the parties, and defendants were estopped from denying that the plaintiff had title to said lands, and denied that there was any fraud in procuring said decree, and alleged there was service had upon each and all the defendants."

Sometime in December, 1894, Sidway sold and conveyed the land mentioned in the decree to Longus P., Mary E. and William P. Tyler, and they executed to him their promissory notes for the purchase money, and thereafter, on or about the 20th day of December, 1894, executed a mortgage of the land to Sidway to secure the notes. The purchasers took possession of the land, and remained in possession for a long time. In fact, such possession has never been disturbed. They never offered to surrender it to Sidway. On the fourth day of September, 1895, Longus P. Tyler acquired the land by deed from Sallie E. Broadway and A. C. Broadway for himself and Mary E. and William P. Tyler, the Broadways making the deed to him. They claim to hold under R. H. McKay, who purchased at a tax sale.

It was to foreclose the mortgage that the suit in which the original decree was rendered was brought by Sidway.

Longus P. Tyler, Mary E. Tyler, and A. C. Broadway testified in behalf of the defendants, each one testifying that he or she had never been served with process in said suit, or had any notice of its pendency until long after the decree was rendered, and never authorized Lamb & Lamb or N. F. Lamb to represent him or her therein.

"N. F. Lamb testified that he was one of the firm of Lamb & Lamb. That he had no recollection of being employed in the original suit. That he had searched through his docket, and could find no record where he had been interested in the case, and at the time he had been very careful to keep a private docket of all cases in which he was interested. If he appeared in the suit, he must have been employed or thought he was employed by some one; that W. J. Lamb, his brother, had nothing to do with the suit."

E. F. Brown testified that in 1894 he was attorney for Leverett B. Sidway. That his best recollection was he instituted the suit to enforce a mortgage against W. P. Tyler, Longus P. Tyler and Mary E. Tyler, and made Mr. Broadway a party for the purpose of cancelling a tax deed, and, as he remembers now, when the case was called, Mr. Lamb conceded the tax title was void on account of excessive cost having been charged. He then took a decree cancelling the tax deed and a foreclosure of the mortgage. Mr. Lamb suggested that Mr. Broadway had a crop on the land, and he then held the matter up until December, 1897. His recollection was that the defendants filed an answer, and that during the pendency of the case the Supreme Court rendered a decision in which it held that the charge of eighty-five cents for making tax sale was excessive, and rendered the tax title void. Mr. Brown further stated that when he spoke of Mr. Lamb, an attorney, he had reference to N. F. Lamb, and that W. J. Lamb had nothing to do with the case."

The original decree which plaintiff seeks to revive was read as evidence.

The court upon hearing found that the allegations in the *scire facias* were true, and on the 12th day of March, 1897, the Craighead Circuit Court, in chancery, rendered the decree in controversy, after legal service of process upon the defendants therein; and revived the decree and appointed a commissioner to execute the same. The defendants appealed.

The burden was upon the appellants to prove that there was no service of process upon them. The record in this case shows that Lamb & Lamb appeared for them in the hearing, in the suit in which the original decree was rendered. They were attorneys, and the presumption is that their appearance was authorized, and this can be removed only by proof. (Weeks on Attorneys at Law (2 Ed.), § 199, and cases cited.) Appellants undertook to remove it by their own testimony as to facts which occurred more than eight years before they testified. Lamb, the attorney who appeared for them, does not remember appearing for them, but if he did he had authority to do so. E. F. Brown remembers that he, Lamb, did appear for them, and accounts for the cancellation of the tax deed and for the postponement of the delivery of the possession of the land until the first of December, 1897. His testimony is corroborated by the record. His statement of facts, corroborated by the record made at the time, shows that his memory is entitled to more credit in this case than that of the other witnesses. The chancellor's finding is sustained by the preponderance of the evidence.

In *State* v. *Hill,* 50 Ark. 458, it was held that equity will not interfere to relieve against a judgment obtained without service when the judgment defendant has no meritorious defense to the action in which such judgment was obtained. In this case the appellant's defense was that they purchased the land from the Broadways, who conveyed the land to them on the 4th day of September, 1895. They previously, on the 20th of December, 1894, conveyed the land by mortgage to Sidway. The statute in such cases provides: "If any person shall convey any real estate by deed purporting to convey the same in fee simple absolute or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantee at the time of the conveyance." Kirby's Digest, § 734. In this case the estate acquired by purchase from the Broadways vested in Sidway by virtue of the mortgage. *Kline* v. *Ragland,* 47 Ark. 111; *Wyman* v. *Johnson,* 68 Ark. 369; *Turman* v. *Sanford,* 69 Ark. 95. The result is they had

no valid defense to this suit, and equity will not interfere to protect them against the original decree. *State* v. *Hill, supra.*

Decree affirmed.

In re SMITH.

Opinion delivered December 9, 1907.

COUNTY EXAMINER—POWER TO REMOVE.—Kirby's Digest, § 7583, providing that "if any county examiner shall be found incompetent or shall be frequently neglectful of his duty, upon satisfactory proof the county judge shall remove him from office, and shall immediately appoint his successor," was repealed by act of May 6, 1905, § 7, providing that the Superintendent of Public Instruction is impowered "to revoke the license of any county examiner who fails or neglects to comply with the provisions of that act or to perform any other duties required of him by law."

Appeal from Ashley Circuit Court; *Henry W. Wells,* Judge; affirmed.

This was an action instituted in the county court of Ashley County to remove Barton Smith from the office of county examiner.

A petition was filed in the county court alleging Smith's incompetency, and upon testimony introduced the court removed him. He appealed to the circuit court, which held that the county court had no jurisdiction to remove a county examiner and dismissed the proceedings.

The county judge has appealed to this court.

T. E. Mears, for appellant.

1. The act of May 6, 1905, Acts 1905, p. 753, relied on by appellee as repealing the act of 1881 does not mention the act of 1881, Kirby's Digest, § 7819, and does not repeal it, unless it be by implication. 75 Ark. 443. A general affirmative statute, such as that of 1905, can not repeal a prior particular statute. 63 Ark. 397; 68 Ark. 130; 53 Ark. 471.

2. The power of circuit courts to remove officers by indictment or information applies to officers created by the con-

stitution,—elective offices. The office of county examiner is an appointive office, provided by the Legislature, and the decision of the county judge in this case was final. Art. 14, § 4, Const.; 39 Ark. 211; *Id.* 386; 40 Ark. 548; 21 Ark. 466.

George & Butler, for appellee.

1. The act of 1881, Kirby's Digest, § 7583, is unconstitutional, and the circuit courts alone have jurisdiction in cases of this nature. When, under act 14, § 9, Const., the General Assembly created the office of county examiner, it became a constitutional office, as much so as if it had been specifically named in the Constitution. Such being the case, art. 7, § 27, controls.

2. If the above act be held as constitutional, then it is submitted that it has been repealed by subsequent legislation; and if the authority to remove is not vested in the circuit courts, the power is conferred upon the Superintendent of Public Instruction. Kirby's Digest, § § 7564-5; Acts. 1905, p. 753, § § 7, 8. These acts cover the whole scope and object of the act of 1881, and necessarily repeal it. 10 Ark. 588; 27 Ark. 419; 31 Ark. 19; 46 Ark. 450; 43 Ark. 425; 47 Ark. 488; 29 Ark. 225; 2 Crawford's Digest, 857.

3. Authorities cited in support of the contention that the action of the county judge was final and not subject to review have no application. Compare the Oil Inspection Statute, § § 4063, *et seq.*, with § § 7559, *et seq.*, Kirby's Digest, and it appears that the oil inspector is a mere police officer, appointed for no stated term, while a county examiner is a county officer having a definite term of office.

WOOD, J. Several questions are presented on this appeal, but the only one we need consider is, "has the county judge power to remove from office a county examiner?"

The act of March 11, 1881, "to render more efficient some of the provisions of the school laws and for other purposes," provides, *inter alia,* that: "If any county examiner shall be found incompetent or shall be frequently neglectful of his duty, upon satisfactory proof the county judge shall remove him from office, and shall immediately appoint his successor." Kirby's Digest, § 7583.

County examiners under the law are named by the county court. They must possess "high moral character and scholastic

attainments," the latter to be ascertained by an examination conducted by the State Superintendent of Public Instruction in person, or by his representative. If the county examiner passes a satisfactory examination upon the subjects named in the law, he is licensed by the Superintendent of Public Instruction.

The law does not expressly provide that the Superintendent of Public Instruction shall issue a license to the county examiner; but that is clearly implied. For they are required, before entering upon their duties, to stand the same examinations as is required of teachers who receive first-grade licenses. Act of March 7, 1893, Kirby's Digest, § 7562. And the act of May 6, 1905, provides for a revocation of their license by the State Superintendent of Public Instruction, showing that the previous issuance of a license to them was contemplated. Upon the issuance of this license by the State Superintendent of Public Instruction, the appointment becomes complete, and he may enter upon his duties. Acts of March 11, 1883 and March 7, 1893, found in Kirby's Digest, § § 7559, 7565.

This was the law concerning the appointment, qualifications and removal of county examiners when the act of May 6, 1905, entitled "an act to improve the character of teachers in the State of Arkansas," was enacted. That act, after prescribing certain duties for county examiners and the Superintendent of Public Instruction and teachers, in addition to those already prescribed, among other things, provided as follows: Sec. 7. "The State Superintendent of Public Instruction is hereby authorized and empowered to revoke the license of any county examiner who fails or neglects to comply with the provisions of this act or who fails to perform any of the other duties required of him by law. Upon receiving notice of such revocation of the license of a county examiner, the county judge shall within twenty days appoint another examiner in accordance with the law regulating the appointment of county examiners." Sec. 8 provides: "All laws and parts of laws in conflict herewith are hereby repealed, and this act take effect and be in force from and after its passage." See Acts 1905, c. 311, p. 751.

Passing the question as to whether section 7583, Kirby's Digest, *supra,* contravenes section 27, art. 7., Const., it is certain that it is repealed by section 7 of the act of 1905 *supra,* for the

latter is inconsistent with the act of March 11, 1881, and the two can not stand together.

The provisions of the act of 1905, taken in connection with the provisions of former laws *in pari materia* and not repugnant to the act of 1905, cover the whole subject-matter of the appointment, qualifications, duties and removal for cause of the county examiners.

The act of 1905, *supra,* (the last upon the subject) in regard to the revocation of the license of the county examiner, is wholly repugnant to the act of March 11, 1881. Both acts cover the same subject, for the revocation of the license of the county examiner is *ipso facto* a removal from office, as contemplated by the act, for the county judge is required, upon receiving notice of such revocation, to appoint another examiner within twenty days. Such revocation is for a failure to comply with the provisions of the act of 1905, or for failure "to perform any of the other duties required by law." The clause quoted does not come under the rule of *ejusdem generis,* and refers only to other duties in regard to teachers' institutes and duties similar to those mentioned in the act of 1905, as contended by appellant. It was clearly the intention of the Legislature to give to the State Superintendent of Public Instruction the full power to remove county examiners for the neglect of any duty of them by law, whether similar to those commanded by the act of 1905 or not. Certainly, the Legislature could not have intended that the county examiner was subject to removal by the county judge for one cause and by the Superintendent of Public Instruction for another and different cause or the same cause. The power of removal is not vested in two functionaries having wholly distinct and separate duties to perform. It is clear to us that the Legislature intended by the act of 1905 to vest the power of removal in the State Superintendent of Public Instruction, and in so doing to take it away from the county judge, in whom it had been formerly lodged. This is in entire consonance with the rule that usually obtains, giving the power of removal to the one who really appoints, and is more in accord with one general educational system, over which the State Superintendent of Public Instruction has supervision.

The judgment of the circuit court, holding that the county

judge was without jurisdiction in the premises, is correct, and it is affirmed.

STATE *ex rel.* GOING *v.* HIGGINBOTHAM.

Opinion delivered December 9, 1907.

COUNTY OFFICERS—DIRECTOR OF LEVEE DISTRICT.—A director of the St. Francis Levee District is not a "county officer", within Kirby's Digest, § 7984, providing that a prosecuting attorney may bring an action to prevent the usurpation of a county office.

Appeal from Craighead Circuit Court; *Frank Smith*, Judge; affirmed.

The State of Arkansas, on the relation of L. C. Going, prosecuting attorney of the Second Judicial District, filed a complaint against Walter Higginbotham, alleging that, under the provisions of an act of the General Assembly, which became a law without the approval of the Governor on February 15, 1893, there was created and established the St. Francis Levee District, embracing all of the counties of Mississippi and Crittenden and parts of the counties of Craighead, Poinsett, Cross, St. Francis, Lee and Phillips; that said act provided for the creation of a board of directors, to be appointed by the Governor, to control and manage the affairs of said district, and provided that said directors should be appointed, three each from the several counties named; that in March, 1905, the Governor appointed appellee a member of said board of directors from Craighead County; that appellee is a citizen and resident of Craighead County, but does not live within the bounds of said district, in fact living more than ten miles from the western boundary of said district; that appellee, notwithstanding his disqualification to serve as an officer and director of said district, has undertaken and is now undertaking to usurp said office and to serve as an officer and member of said Board of Directors of St. Francis Levee District, contrary to section four of article nineteen of the Constitution of Arkansas. Prayer that he be ousted from office, etc.

The court sustained a demurrer to this complaint. Plaintiff appealed.

L. C. Going, Lamb & Caraway and *A. B. Shafer,* for appellant.

1. A member of the Board of Directors of St. Francis Levee District is an officer within the meaning of art. 19, § 4, Const.; 23 Am. & Eng. Enc. Law, 322; 63 Am. St. Rep. 181; 72 Am. Dec. 179; 66 N. C. 59; 127 Ind. 365; 58 Am. Dec. 429; 68 N. C. 429; 32 La. Ann. 193; 43 Tex. 41.

2. The directors are county officers, and the action was properly instituted by the prosecuting attorney. Kirby's Digest, § 7984; Acts. 1893, p. 120; *Id.* 26, § 3; *Id.* 29, § 7; 69 Ark. 436.

J. F. Gautney and *N. W. Norton,* for appellee.

1. The prosecuting attorney is not authorized to bring this action. Kirby's Digest, § 7985.

2. A levee director is not only not a county officer, but is not a civil officer at all, within the meaning of art. 19, § 4, Const. 55 Ark. 148; 3 Wall. 93; art. 5, § 13, Const.; 1 Pin. 182; 72 Ark. 94; *Id.* 230; *Id.* 180; 21 Atl. 546; 52 Wis. 628.

HILL, C. J. This is an action brought by the prosecuting attorney under section 7984 of Kirby's Digest against Higginbotham, a director of the St. Francis Levee District, seeking to have him declared ineligible to hold and keep the office of director or act as a member of said board of directors, on the ground that the said Higginbotham did not reside within the boundary of the St. Francis Levee District.

The complaint, which will be found in the statement of facts, sets forth fully the position of the appellant. In brief, the appellant contends that the directors of the St. Francis Levee District are officers within the meaning of section 4, art. 19, of the Constitution, providing that "all civil officers for the State at large shall reside within the State, and all district, county and township officers within their respective districts, counties and townships."

This case primarily involves two questions: First, is a member of the board of directors of the St. Francis Levee District a public officer? and, second, if so, is he a county officer? Before the prosecuting attorney can call for a decision of the question as to whether it is a public office, he must show that he

has a right to question the authority of the director. He has no such right unless the director is a county officer, because it is only against county officers that the prosecuting attorney is authorized under section 7984 to proceed.

Let it be conceded, without being decided, that a director of the St. Francis Levee District is a public officer within the meaning of said provision of the Constitution; still the question remains paramount, whether the prosecuting attorney can oust him. Therefore, the first duty of the court is to ascertain what is a county officer within the meaning of sec. 7984.

In the matter of Whiting, 2 Barb. 513, the court said: "There are certain officers that are very readily understood to be county officers; such as sheriffs, coroners, surrogates, etc.; for they are appointed or elected for a county, must reside in the county, and can perform their functions only within the county. So there are officers clearly and easily known, for the same reason, as city officers—such as mayor, recorder, aldermen and the like—and village officers; such as village trustees—and town officers; such as town clerk, constable, collector, etc. But there is a large number of officers, both judicial and administrative, whom it is difficult to classify under either of these demonimations." This definition of a county officer was followed *In the matter of Carpenter,* 7 Barb. 30.

The Supreme Court of Georgia said: "A county officer then is a public officer, whose duties are limited by law to a single county." *Massenburg* v. *Commissioners,* 96 Ga. 614. The Supreme Court of the United States said: "An officer of the county is one by whom the county performs its usual functions; its functions of government." *Sheboygan Co.* v. *Parker,* 3 Wall. 93.

In *Knox* v. *Los Angeles County,* 58 Cal. 59, a superintendent of irrigation for a district composed of parts of a county was held not a county officer, but an officer of the district.

Applying these principles defining a county officer, it is apparent that a member of the board of directors of the St. Francis Levee District is not a county officer, even if it be conceded that he is a public officer. He performs no functions in or for his county. He performs none of the duties pertaining to the executive or judicial departments of his county, and he

exercises none of the political functions of it. He is a member of a quasi corporation, serving as an "agency of the State government," composed of members from various counties and parts of counties constituting a large district. *Carson* v. *Levee District,* 59 Ark. 513. If he is an officer, he is an officer of that district, and not of the county; and whether this position is a public office within the meaning of the Constitution, or whether it is a mere agency of the landowners composing the district, is a question which the court will determine when a case arises which calls for a decision thereof.

Judgment affirmed.

LUCAS v. FUTRALL.

Opinion delivered December 9, 1907.

1. STATE OFFICER—POWER TO CREATE.—As Const. 1874, art. 19, § 19, makes it the duty of the Legislature to provide by law for the support of institutions for the support of the deaf and dumb and of the blind, an act creating the permanent State office of Superintendent of the School for the Blind is not within the prohibition of art. 9, § 9, of the Constitution forbidding the Legislature to create any permanent State office not expressly provided in such Constitution. (Page 546.)
2. SCHOOL FOR BLIND—TENURE OF SUPERINTENDENT.—Kirby's Digest, § 4227, providing that the Superintendent of the School for the Blind shall hold his office "during the pleasure of the trustees," is impliedly repealed by act of May 14, 1907, section 1, providing that such Superintendent "shall be elected for a term of three years" and section 6, providing that he may be discharged for causes mentioned. (Page 548.)
3. SAME—SUPERINTENDENT AS PUBLIC OFFICER.—The Superintendent of the School for the Blind, whose tenure, compensation and duties are fixed by statute, who is required to give bond, and whose duties are of a public nature, continuing and not affected by a change in the person of the incumbent, is a public officer. (Page 549.)
4. SAME—POWERS OF MEMBERS OF BOARD OF TRUSTEES.—A former Superintendent of the Blind School was not justified in holding over after the term of his successor had begun because certain persons, purporting to be a majority of the board of trustees, directed him to continue to act as Superintendent until further orders from the board, as the individual members of the board have no authority to bind the board by their individual action. (Page 550.)

5. OFFICER—RIGHT TO REMOVE.—Where an officer does not hold at pleasure but during good behavior or subject to removal for specified causes, before he can be removed there must be notice and a hearing given to him. (Page 551.)
6. EQUITY—REMEDY AT LAW.—Chancery will not give relief by ousting one improperly holding an office, as there is a plain, complete and adequate remedy at law. (Page 551.)
7. ACTION—TRANSFER OF CAUSE.—Where plaintiff erroneously sued in equity to enjoin defendant from interfering with his management of a public office, of which plaintiff was not in possession, and failed to amend his pleadings and ask that the cause be transferred to the law court, the decree of the chancellor dismissing the suit for want of jurisdiction will be affirmed. (Page 551.)

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

S. D. Lucas brought suit against T. A. Futrall, alleging that on the 5th day of June, 1907, at its regular monthly meeting, the Board of Trustees of the State Charitable Institutions of the State of Arkansas elected plaintiff Superintendent of the Arkansas School for the Blind for a term of two years, commencing the first day of October, 1907; that plaintiff gave the bond required by law; that on the last mentioned date, to-wit, October 1, 1907, the President of the Board of Trustees placed plaintiff in charge of said institution as Superintendent, and he assumed the performance of his duties as such, and continues to perform the same. That the business and affairs of said institution are carried on largely by correspondence, and that every day mail is brought to the institution, and that said mail is the property of the Superintendent, and that plaintiff is entitled to its exclusive control and custody; that the defendant is staying at the Blind School, holding himself out as Superintendent, and is exercising the functions of Superintendent; that he has been wrongfully receiving, accepting, handling and opening the mails of the institution; that these illegal and wrongful acts of defendant in attempting to exercise the functions of an office to which plaintiff was elected, and into which he was installed by the Board of Trustees, is leading to endless confusion in the affairs of the school, and is a great and irreparable injury, not only to the plaintiff, but to the public as well; that plaintiff has no adequate remedy at law.

The prayer of the complaint was that defendant be enjoined from remaining on the grounds of the Arkansas School for the Blind and from exercising or attempting to exercise any of the functions of Superintendent of said school, and from interfering with plaintiff in the exercise of his duties as Superintendent of said school, and from accepting and handling the mails of the institution, and for all other general and proper relief.

The defendant filed an answer and cross complaint, in which he alleged that the Board of Trustees elected him Superintendent of the Arkansas School for the Blind on the 4th day of April, 1906, and on the 15th day of June, 1906, installed him into office, and he thereupon entered into the discharge of the duties of the office, and has continuously performed them from that time until now, and is still doing so; he denied that plaintiff was ever at any time lawfully elected to the office, or that he was, either on October 1st or at any other time, placed in charge of the institution as Superintendent or otherwise, and denied that he ever assumed the performance of the duties or continues to perform them; denied that plaintiff was entitled to the control of the mails; admitted that defendant is staying at the Blind School and holding himself out as Superintendent, but denied that he committed any illegal or wrongful act in attempting to exercise the functions of the office; denied that his acts have led to confusion in the affairs of said school, or that any act of his is a great and irreparable injury to plaintiff and to the public.

He also made his answer a cross complaint, in which he alleged his election in 1906, and taking charge of the school in June, 1906, and alleging further, that on September 30, 1907, he received a written direction from the majority of the members of the board to retain control of the institution until the further action of the board; and says that on the 8th of October, 1907, when the board was in regular session, he was duly and lawfully elected Superintendent for two years, or during the pleasure of the board, which election he accepted; that he is in full possession and control as Superintendent; alleges that plaintiff is wrongfully, claiming to be Superintendent, and asks that he be enjoined from interfering with defendant in the management of the school.

Plaintiff introduced a certified copy of the proceedings of the Board of Trustees held on the 5th day of June, 1907, as follows:

"I, H. F. Hampton, Secretary of the Board of Trustees of the State Charitable Institutions, do hereby certify that at a regular meeting of said Board, held on the 5th day of June, 1907, the following, among other, proceedings were had:

"'For Superintendent of the School for the Blind, Mr. Braly nominated Prof. Thomas A. Futrall; Mr. Davis nominated Prof. S. D. Lucas.

"'The Secretary called the roll, and the ballot resulted as follows:

"'For Futrall, three (3)

"'For Lucas, four (4).

"'Prof. S. D. Lucas, having received a majority of the votes cast, was declared duly elected Superintendent of the Arkansas School for the Blind for a term of two years beginning October 1, 1907.'"

Plaintiff introduced a certified copy of the proceedings of the Board of Trustees of the State Charitable Institutions, showing that on June 5, 1907, he was appointed Superintendent of the School for the Blind for a term of two years beginning October 1, 1907. He testified that on October 1, 1907, he was placed in charge of the institution by Mr. Yates, president of the board; that he had been on the grounds of the institution a number of times, and had done all that he could to take possession, short of physical force and violence; that defendant declined on demand to surrender possession.

Mr. Yates, president of the board, corroborated plaintiff's testimony as to the demand for possession by plaintiff and defendant's declination.

Defendant testified that he had not been notified by the trustees to turn over the institution to plaintiff, and offered in evidence a letter to him from certain members of the Board of Trustees, as follows:

"Sept. 30th, 1907.

"Prof. T. A. Futrall, Little Rock, Ark.

"Dear Sir—We, the undersigned, duly and legally constituted members of the State Board of Charities of Arkansas,

hereby inform you that we severally and all collectively favor your retention as Superintendent of the Arkansas School for the Blind, and desire to elect you to this position at our first opportunity.

"We have endeavored to secure a meeting of the board today that we might elect you at this time, but, failing in this, we assure you that as soon as the board meets in regular session you will be re-elected by virtue of the power vested in us by sections 4227 and 4231, Kirby's Digest of the laws of Arkansas.

"We have the right, power and authority to take all the steps necessary to bring about your election, and therefore we direct that you retain control of your present status in regard to the institution, upon our assurance that you will be elected as the Superintendent of said school when the first opportunity presents itself.

Very respectfully,
"W. C. BRALY,
"A. M. DUFFIE,
"W. O. TROUTT,
"E. C. PARSONS,
"Members State Board of Charities."

Also he introduced certain evidence tending to prove that the appointment of plaintiff was rescinded on October 8, 1907, by the board.

The chancellor dismissed the bill for want of jurisdiction. Plaintiff appealed.

J. H. Harrod, for appellant.

The act provides that the Superintendent be elected for a term of two years. Act 1907, p. 785, § 1. It is undisputed that appellant was elected Superintendent by the Board of Trustees at a meeting held on June 5, 1907, his term to begin October 1, 1907. It is shown that appellant did all that could be done, without the use of force and violence, to take possession of the institution and manage it. Injunction lies to protect an incumbent of an office in the possession and exercise of the functions of that office from interference by another claimant. 69 Ark. 606.

M. P. Huddleston and *Jones & Hamiter,* for appellee.

Appellant was never in possession, and cannot invoke equitable relief. 69 Ark. 606. Appellee had legal title to the office.

The action of the four members of the Board of Trustees, on September 30, after due notice to the other members, was the action of the board, and tantamount to the discharge of appellant, and reelection of appellee. 66 N. W. 234; Kirby's Dig. § 4129; Acts 1905, p. 135. And the legality of appellee's appointment cannot be collaterally attacked. 39 La. Ann. 817; 2 So. 498.

2. The Superintendent of the School for the Blind is not an officer whose term is fixed by law, so that he cannot be removed at the pleasure of the Board. The statute provides that the superintendent and others shall hold at the pleasure of the Board, and is not repealed. Kirby's Dig. § 4227.

HILL, C. J. The Reporter will state the substance of the pleadings and evidence, and it will be seen therefrom that this is virtually a contest for the Superintendency of the Arkansas School for the Blind, under guise of a chancery proceeding brought by Lucas to enjoin Futrall from interfering with his possession of the position, and a cross complaint by Futrall asking an injunction against Lucas restraining him from interfering with his possession of the Superintendency. Each contestant alleges that he is in possession, and seeks to bring his case within the principle announced in *Rhodes* v. *Driver,* 69 Ark. 606, which is to the effect that a court of equity will not permit itself to be made a forum for the determination of disputed questions of title to public office, but will, when necessary, protect possession of an office, whether *de facto* or *de jure,* against an adverse claimant disturbing his discharge of duties.

The complaint and cross-complaint each stated an equitable cause of action. The chancellor dismissed the suit for want of jurisdiction. Futrall has not appealed, and the only question presented is upon Lucas's appeal.

The chancery court had jurisdiction; for, as stated, the allegations of either complaint or cross-complaint gave jurisdiction. But, if this position is a public office, then the case should have been dismissed for failure to establish ground for equitable relief, as the evidence failed to sustain the allegation that Lucas was in possession, unless he is shown to be entitled to other relief which will be discussed later. Not being in possession, he was not entitled to an injunction to protect his possession, and that is the only ground for injunction in such cases.

The evidence showed that Futrall was in possession of the Blind School as Superintendent; that when Lucas's term as Superintendent began, he and the President of the Board of Trustees made apt demand upon Futrall to deliver possession to him, but that Futrall refused to surrender it. Lucas spent some time in the building, some time on the grounds, a short time in the Superintendent's office, and made efforts to act as Superintendent, but the evidence indubitably establishes the fact that he did not succeed in ousting Futrall, and that Futrall continued to act as Superintendent of the institution, notwithstanding Lucas's efforts to obtain actual possession of the place and its functions. The failure of the evidence to establish the alleged possession of Lucas ends his right to an injunction, if this position be a public office. If it is not a public office, but is an employment for public service resting in contract, and there is no adequate remedy at law for relief, then it may be that equity could grant the relief prayed where the right was clear and the wrong apparent and otherwise remediless. 4 Pomeroy on Equity Jurisprudence, (3d Ed.), § § 1338, 1341, 1344, 1345.

Therefore it is necessary, in order to determine the case, to decide the exact nature of this position. The act of July 22, 1868, created the Arkansas Institute for the Education of the Blind, and directed that it should be located in the city of Little Rock or its vicinity, and vested the government of it in a board of three trustees, to be appointed by the Governor, who should reside in the city of Little Rock or its vicinity. Many of the provisions of this act, hereinafter mentioned, have been carried forward in the Digest as applicable to the present institution.

The act of March 15, 1879, changed the name of the Arkansas Institute for the Education of the Blind to the Arkansas School for the Blind, and provided that all laws and parts of laws then in force for the former institution should apply to the latter.

The Constitution of 1874, art. 19, § 19, makes it the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb and for the blind and for the treatment of the insane. As the Constitution left it to the discretion of the General Assembly to provide by law for these purposes, any act which in the judgment of the

Legislature was necessary to effectuate these purposes would have constitutional sanction. Therefore, if the Legislature saw fit to create a public office under this authority, it would not be violating section 9 of art. 19 of the Constitution, which forbids the General Assembly to create any permanent State offices not provided for in the Constitution, as the mandate to provide for the education of the blind necessarily carried with it the power to create what offices the Legislature might deem necessary to carry out the power conferred. Hence there can be no constitutional objection to this being a State office; and the question recurs, whether from its very nature it is an office or an employment.

It is difficult to draw a precise line between a public employment and a public office. It may be best not to attempt any hard and fast rule upon the subject, but rather to keep in mind the controlling principles and apply them to the individual cases as they arise.

The most frequently quoted statement of the principle is from *United States* v. *Maurice,* 2 Brock. 96, wherein Chief Justice Marshall said: "An office is defined to be 'a public charge or employment', and he who performs the duties of the office is an officer. * * * Although an office is 'an employment', it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

This was quoted with approval and applied in *Vincenheller* v. *Reagan,* 69 Ark. 460.

In *United States* v. *Hartwell,* 6 Wall. 385, it was said: "An office is a public station or employment, conferred by the appointment of government, and embrace the ideas of tenure, duration, emolument, and duties."

In *Hall* v. *Wisconsin,* 103 U. S. 5, it was said: "Where an office is created, the law usually fixes the compensation, pre-

scribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required."

Shelby v. *Alcorn,* 36 Miss. 273, contains the following: "And we apprehend that it may be stated as universally true, that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it is an officer?"

The following authorities may be consulted with profit on this subject: Mechem on Public Offices, chap. 2; Throop on Public Offices, chap. 1; 21 Am. & Eng. Enc. 322-4; *United States* v. *Maurice,* 2 Brock. 96; *United States* v. *Hartwell,* 6 Wall 385; *Hall* v. *Wisconsin,* 103 U. S. 5; *Shelby* v. *Alcorn,* 36 Miss. 273, 72 Am. Dec. pp. 179-189, where there is an extensive note reviewing the authorities; *United States* v. *Schlierholz,* 137 Fed. 616; *State* v. *Brennan,* 49 O. St. 33; *State* v. *Wilson,* 29 O. St. 347.

Turning to the case at hand: The various duties of the Superintendent are prescribed by statute (sections 4231-4232-4233-4237-4238-4240-4241.) The act of 1907 providing for the support of the Blind School also lays duties upon the Superintendent. Section 3 provides that all the teachers, officers and employees shall perform such other duties as the Superintendent may direct. Section 4 provides that the Superintendent is impowered, upon approval of the President of the Board, to purchase all supplies of an emergency nature. The Superintendent is required to give bond to the State, with surety to be approved by the Trustees, for the faithful performance of his duties. which bond shall be filed with the Auditor of State. Section 4238, Kirby's Digest.

The act of 1907 appropriates, in the first section, certain sums of money for the support and maintenance of the school for two years, and divides the appropriations into sixty-seven different items, the first of which is as follows: "To pay the salary of the Superintendent, who shall be elected for a term of two years, $1,500 per annum, three thousand dollars." In the third section it is provided: "The board of control shall have power, and is hereby directed, to discharge any officer or em-

ployee of this institution who may be guilty of insubordination, drunkenness or immoral conduct." Sec. 6 of said act reads as follows: "The Board of Trustees of the State charitable institutions shall elect all teachers, officers and employees provided for in section 1 of this act, and they shall discharge the same for failing to faithfully perform their duties and for any conduct unbecoming one holding their positions." In the 10th section it is provided that the salary of no person connected with the institution shall be increased during the period for which they have been elected or employed." Section 11 contains the usual repealing clause of all inconsistent acts. Acts 1907, p. 785.

In the act of 1868 was this provision relating to the powers of the trustees: "They shall have power to elect a superintendent, physician, matron, teachers and steward, who shall hold their office during the pleasure of the trustees, and receive an annual compensation to be fixed by such trustees, the amount thereof to be reported to the General Assembly." This is found in section 4227 of Kirby's Digest. This part of the act of 1868 is unquestionably repealed by the aforesaid provisions in the act of 1907.

It is said that these acts can stand together, and it is the duty of the trustees to remove for the causes mentioned, and yet that the Superintendent holds at their pleasure. But that is not the rule. Mr. Mechem says: "So it is frequently provided that the executive shall remove only for a specified cause or for cause generally. Where the cause is thus specified, it amounts to a prohibition to a removal for a different cause." Mechem's Public Officers, § 450.

But, aside from this reason, the later statute covers the ground of the former one wherein it fixes the tenure, ground of removal and compensation different from what they were in the former act; and, under the long-settled rule of statutory construction, this necessarily repeals the elder act to that extent.

Therefore it is seen that this position is one where the tenure is fixed by law, and removal authorized only for causes mentioned in the statute; where the compensation is fixed by law; where the duties are prescribed by law, although there may be additional ones prescribed by the board. The duties are continuing, and not affected by a change in the personnel of the incum-

bent. An official bond is required, and the position is filled by election and not by contract. The duties to be performed are of a public nature, being the control of one of the eleemosynary institutions of the State, which was established and is maintained in obedience to constitutional mandate. It is thus seen that every criterion of a public office adheres to this position, and it must be held that the Superintendency of the School for the Blind is a public office.

This leads to the remaining question, whether Lucas is entitled to the office, and, if so, can he have a remedy in this action under the prayer for general relief.

The evidence shows that certain persons, purporting to be a majority of the Board of Trustees, directed Futrall to continue to act as Superintendent, and that his possession was under that authority at the time that Lucas made demand for the possession of the office. It is well settled that individual members of a public body possessing deliberative functions have no authority to bind the body by individual action. The public "have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters intrusted to them in the session provided for by the statute." 1 Beach on Public Corporations, 275; *McCortle* v. *Bates,* 29 O. St. 419; *Texarkana* v. *Friedell,* 82 Ark. 531; *School District* v. *Bennett,* 52 Ark. 511; *Burns* v. *Thompson,* 64 Ark. 489. Therefore, the action of the individual members, even if they be a majority of the board, amounts to naught.

It is said that the board on the 8th of October, two days prior to the institution of this suit, by resolution revoked the appointment of Lucas and re-elected Futrall. The determination of this question involves two propositions: First, whether Lucas's tenure could be thus terminated; and, second, whether it was thus terminated. The second proposition involves the determination of the membership of the board, as the proceedings of the board show that the membership from one district was claimed by two gentlemen, and the attempted re-election of Futrall is dependent upon the vote of one of these contestants. But it is unnecessary for the court to go into this matter, even if it be open to question, in this collateral issue, the rights of contesting members of the board; for, as already shown, the

Superintendent does not hold subject to the pleasure of the board, but can only be removed subject to the causes mentioned in the statute.

It is thoroughly settled that where an officer does not hold at pleasure, but holds during good behavior or subject to removal for specified causes, then, before he can be removed, there must be notice and a hearing given to him. Mechem's Public Offices, § 454; 23 Amer. & Eng. Enc. 437, 438; *State* v. *Hixon,* 27 Ark. 398; *Lee* v. *Huff*, 61 Ark. 494.

There has been no notice to Lucas of any charges preferred against him, and no citation to appear before the board to answer them. The case then stands in this way: Lucas has been elected to a public office for a term of two years, with certain duties prescribed by statute and at a fixed compensation. He can only be removed from that office for the causes specified in the statute authorizing the board to remove him, and then only after notice and a hearing.

He is not in possession of his office, and asks relief of the chancery court; but it is elemental that a chancery court cannot proceed to give relief where there is a plain, complete and adequate remedy at law. Under sections 7981, 7983, 7987, 7988 of Kirby's Digest as construed in *Payne* v. *Rittman,* 66 Ark. 201, and *Whittaker* v. *Watson,* 68 Ark. 555, Lucas's remedy is an action at law in the circuit court for the recovery of his office. This being true, the suit in equity fails.

Had Lucas in this action, when his evidence failed to establish an equitable ground of interference, asked to have his pleadings recast and have the cause transferred to the law court, he would have been entitled to it. But it has not been asked; and, as the chancellor was right in refusing equitable relief, his decree is affirmed without prejudice to a suit at law.

Affirmed.

Mr. Justice HART presided in chancery court, and did not participate herein.

EMERSON v. MCNEIL.

84 552
85 469

84 552
88 451

Opinion delivered December 9, 1907.

1. MUNICIPAL ORDINANCE—DRUMMING AT TRAINS.—A town ordinance making it unlawful for any person to drum or solicit customers for any hotel, boarding house, restaurant or hack line upon the depot platform while passenger trains were stopping there is a valid exercise of the power conferred by Kirby's Digest, § 5438, conferring upon cities and towns the power to regulate drumming or soliciting persons who arrive on trains for hotels and boarding houses, though the platform is the property of the railroad company, and not of the town. (Page 553.)

2. BOND FOR COSTS—MUNICIPAL PROSECUTIONS.—Kirby's Digest, § 2476, providing that in all cases less than felony, in courts of justices of the peace and in other inferior courts, the prosecutor shall enter into bond for costs, does not apply to prosecutions for violations of municipal ordinances. (Page 554.)

3. APPEAL—FAILURE TO ABSTRACT INSTRUCTIONS.—Where appellant fails to copy in his abstract the instructions given and the prayers for instructions refused by the trial court, he will be deemed to have waived any objections taken thereto by him. (Page 555.)

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

Emerson was arrested for violating an ordinance of the town of McNeil, was convicted before the mayor, and in the circuit court on appeal, and has prosecuted this appeal. The facts sufficiently appear in the opinion of the court.

The ordinance was as follows:

ORDINANCE NO. 23.

"*An Ordinance to regulate Hotel, Hack and other Drummers:*

"SECTION 1. Be it ordained by the council of the incorporated town of McNeil, that it shall be unlawful for any person or persons drumming or soliciting customers or patronage for any hotel, boarding house, restaurant, or hack-line or passage, or for any other business, to stand upon or to occupy the gravel platform belonging to railroad company and drum or solicit customers or patronage for any hotel, boarding house, restaurant, or hack-line or passage or other business, while the passenger trains are stopping at the depot in said town of McNeil.

"SEC. 2. Every person violating this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof,

shall be fined in any sum not less than one nor more than five dollars for each offense."

Stevens & Stevens, for appellant.

1. The cause should have been dismissed for want of a bond of costs. Kirby's Digest, § 2476. A mayor's court is an inferior court. 4 Words & Phrases, p. 3580; 3 U. S. (2 Ed.), 70; 45 Ala. 103; 6 Am. Rep. 698; 51 Ala. 42; 55 *Id.* 42. The contention that this was a misdemeanor committed in the presence of an officer is not tenable, because (a) the officer had no right to arrest without a warrant. Kirby's Digest, § § 2550-1, 13 West. Rep. 471; 68 Mich. 549; 51 N. J. S. 189; and because, (b) the arrest must be immediate. 8 L. R. A. 529; 3 Wend, 384; 16 S. C. 486.

2. The demurrer should have been sustained. Kirby's Digest, § § 5438, 5461; 34 Ark. 553; 27 *Id.* 467. The town had no express power to regulate hacks. 42 L. R. A. 711; 1 Dillon, Mun. Corp. § 319; 43 L. R. A. 863. The right to "drum" for hacks is a constitutional one.

3. It was error to give instruction No. 1, and in refusing No 5. 52 Ark. 23; 34 *Id.* 553; 27 *Id.* 467. Under instructions 1, 2 and 3, the verdict should have been for defendant. 70 Ark. 12; 52 *Id.* 23.

HILL, C. J. The town of McNeil passed an ordinance making it unlawful for any person to drum or solicit customers for any hotel, boarding-house, restaurant or hack-line upon the depot platform belonging to the railroad company while passenger trains were stopping there. The ordinance will be set out in the statement.

The evidence shows that, prior to the enactment of this ordinance, there had been serious annoyance to the traveling public by hackmen and hotel porters gathering at the steps of the train coaches and importuning passengers alighting therefrom. Whether this conduct had become dangerous or a public nuisance is not certain, but it is certain that it was a serious annoyance to the traveling public and the railway employees, and to remedy the mischief the ordinance in question was passed. Trains only stop at this town from two to five minutes, and the ordinance only covers this period of time. Therefore it can not

be considered a prohibition of a lawful business and offensive to the rule announced in *Thomas* v. *Hot Springs*, 34 Ark. 553.

Section 5438 of Kirby's Digest confers upon cities and incorporated towns the power "to regulate drumming or soliciting persons who arrive on trains, or otherwise, for hotels, boarding houses, bath houses or doctors." Section 5454 impowers them "to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire, and all livery stables," and "to regulate hotels and other houses for public entertainment." Under these powers, the municipality had the right to pass the ordinance in question. *Fayetteville* v. *Carter*, 52 Ark. 301; *Hot Springs* v. *Curry*, 64 Ark. 152. And the power conferred and exercised is not obnoxious to, or an interference with, any common right, but is a proper exercise of the police power, and is universally sustained. McQuillin on Municipal Ordinances, § § 28, 184; *St. Paul* v. *Smith*, 27 Minn. 364; *Veneman* v. *Jones*, 118 Ind. 41.

The fact that the platform upon which they were forbidden to solicit customers at this interval was the property of the railroad company does not affect the power. McQuillin says: "Ordinances regulating hackmen, etc., while they are in and about landings, depots and stations, are valid, although the property of such places is not that of the city, or, strictly speaking, public property of any kind." McQuillin on Municipal Ordinances, § 28.

The deputy town marshal made affidavit charging the appellant with having violated the ordinance in question, and it was insisted in the mayor's court, in the circuit court, and here, that the action should have been dismissed because the prosecutor did not make bond for costs as required by section 2476 of Kirby's Digest. The question is, whether said section applies to actions for violations of town ordinances in municipal courts. A similar question was twice before the Supreme Court of Illinois, and each time it was held that such a statute did not apply to prosecutions for violations of municipal ordinances. *Lewiston* v. *Proctor*, 23 Ill. 533; *Quincy* v. *Ballance*, 30 Ill. 185. McQuillin says: "Violations of municipal police regulations are not usually regarded as crimes, as that term is used in our law." McQuillin on Municipal Ordinances, § 333.

The whole statute on this subject (sections 2476-80) shows that it is intended for prosecutions under the criminal laws of the State. There is nothing in its terms to support the theory that it applies to prosecutions for violations of municipal ordinances, and it can not be extended to them by analogy or construction. Violations of municipal ordinances are only *quasi* crimes, and the distinction between them and violations of the State's criminal laws may be found in McQuillin, Municipal Ordinances, § 333; 1 Dillon, Mun. Corp. (4 Ed.), 411, 412.

Appellant objects to certain instructions given, and to the refusal to give certain instructions asked by him; but he fails to set out in his abstract the instructions sought to be reviewed. As stated by Chief Justice COCKRILL in *Koch* v. *Kimberling*, 55 Ark. 547: "His exception on that score has not impressed him as being serious enough to require him to point out the error by setting out the prayers in his abstract in accordance with the rules. We therefore take it as a waiver of the objection:" See also similar applications of the same principal in *Shorter University* v. *Franklin*, 75 Ark. 571; *Carpenter* v. *Hammer*, 75 Ark. 347.

Judgment affirmed.

WATERS-PIERCE OIL COMPANY *v.* VAN ELDEREN.

Opinion delivered December 2, 1907.

ACTIONS—CONSOLIDATION—PRACTICE.—Where several causes pending before the same court involve the same questions, the court was authorized to consolidate them, and to permit a single motion for new trial and bill of exceptions to be filed; but, if separate judgments were entered, separate appeals may be taken.

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

Mehaffy & Armistead and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

Wood & Henderson, for appellees.

JOHN FLETCHER, Special Judge. This case embraces a

number of causes of action on behalf of different parties arising out of an explosion at the Turf Exchange in the city of Hot Springs on the 24th day of December, 1902. The various parties plaintiff brought separate actions against the Oil Company, and these actions were by the court, and, against the objection of the Oil Company, consolidated as authorized by the act of the Legislature, approved May 11, 1905, and were tried before a jury upon the same evidence. Separate verdicts were rendered, and separate judgments were entered against the Oil Company in favor of each plaintiff. One motion for new trial and one bill of exceptions were filed in the cases as consolidated, in which each plaintiff was named as a plaintiff against the Oil Company. A separate appeal was taken to this court from each judgment.

The appellees have filed in this court a motion to dismiss the appeals or affirm the judgments on the ground that the appeals were not properly taken and separate motions for new trial and separate bills of exceptions were not filed as to each of the plaintiffs.

The express purpose of the statute was to authorize the court to "make such orders and rules concerning the proceedings therein as may be conformable to the usages of courts for *avoiding unnecessary costs or delay in the administration of justice.*" Acts of 1905, pp. 798, 799. No possible good could have been accomplished, either to the plaintiffs or other parties to the suit, by filing separate motions for new trial or separate bills of exception. On the contrary, the record would have been unnecessarily incumbered, and the appellant put to unnecessary cost and delay.

Counsel for appellees rely upon the case of *Louisville & Nashville R. Co.* v. *Summers,* 125 Fed. 719, where it was held, under an act of Congress the same as this, that "when two separate actions depending on the same facts were consolidated and tried together for convenience only, but the verdicts and judgments were separate, it was improper to include both in a single writ of error." If it be admitted that this rule is applicable to the practice in the courts of this State, its requirements are met in this case by a separate appeal from each judgment. The motion is overruled.

In the case of *Waters-Pierce Oil Company* v. *Burrows,* 77 Ark. 74, this court sustained a verdict against the Oil Company arising out of this same explosion. Subsequently, in the case of *Waters-Pierce Oil Company* v. *Knisel,* 79 Ark. 608, where the facts were more fully developed than in the Burrows case, the court reversed a judgment against the Oil Company arising out of the same accident on the ground that the physical facts, as shown by the undisputed evidence in the case, demonstrated that the evidence upon which the plaintiff based his claim for recovery against the Oil Company was not only highly improbable but irrational, at war with the physical facts, and contrary to all human experience and common information, and therefore without probative force. There is no material difference between the evidence in that case and this. There is nothing which calls for a different conclusion in this case from that reached by the court in the Knisel case; and, as the facts seem to have been fully developed, it is ordered that this case be reversed and dismissed.

WOOD, J., disqualified and not participating.

FLOWERS v. FLOWERS.

84 557
90 368

Opinion delivered November 25, 1907.

1. DOWER—CONVEYANCE OF, BEFORE ASSIGNMENT.—A widow's right of dower in her husband's property cannot, before assignment to her in the manner provided by law, be conveyed by her to a stranger so as to confer on him rights capable of assertion in a court of law, but such conveyance is enforcible in equity. (Page 558.)

2. TRUST—ADMINISTRATOR AS TRUSTEE.—An administrator stands in a trust relation toward those interested in the estate, including the widow and heirs. (Page 558.)

3. SAME—PURCHASE BY TRUSTEE.—A trustee may buy from the beneficiary where there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances, where there is a fair consideration and no fraud or concealment, and where no advantage is taken by the trustee of information acquired by him in the character of trustee. (Page 559.)

4. WIDOW'S QUARANTINE—ASSIGNMENT.—The widow's right to hold intestate's dwelling house and farm attached until assignment of dower is a personal privilege, and not an estate in land, and cannot be transferred to another. (Page 559.)

Appeal from Garland Chancery Court; *Alphonso Curl,* Chancellor; affirmed with modification.

R. G. Davies, for appellants.

George G. Latta, for appellee.

McCULLOCH, J. Appellee, Henry Flowers, instituted this suit in equity against Josephine Flowers, the only child, Linnie Simons, the widow, and John H. Reece, the administrator of the estate of King B. Flowers, deceased, to recover and have assigned to him the dower interest of said widow in said estate which he alleged had been conveyed to him by her. He set forth in and exhibited with his complaint deeds executed to him by said widow purporting to convey her dower interest in the real estate and personal property of said decedent in consideration of the sum of $1,200.

The defendants answered, denying the execution of said conveyances and also alleging that the consideration for said deed was grossly inadequate and that the execution of said conveyance was procured by fraud, threats, misrepresentation and concealment of material facts concerning the value of decedent's estate and the interest therein of the widow.

The chancellor granted the prayer of the complaint for an allotment of dower, and the defendants appealed.

It has been settled by a decision of this court that a widow's right of dower in the property of her deceased husband can not, before assignment in the manner provided by law, be the subject of a conveyance by her to a stranger so as to confer on him any rights capable of assertion in a court of law, but that such conveyance is valid and enforcible in equity. *Weaver* v. *Rush,* 62 Ark. 51. See also 2 Scribner on Dower, § 33 *et seq.*

At the time of the execution of the conveyance in question by the widow, appellee was administrator of the deceased husband's estate. He therefore stood in a trust relation toward those interested in the estate, including the widow and heirs. *Reeder* v. *Meredith,* 78 Ark. 111, and cases cited.

This court in the case just cited quoted with approval the following rule laid down in Perry on Trusts (section 195) with reference to transactions between such trustees and the *cestui que trust:* "A trustee may buy from the *cestui que trust,* provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy; and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the action of every shadow of suspicion. * * * Any withholding of information or ignorance of the facts or of his rights on the part of the *cestui que trust,* or any inadequacy of price, will make such purchaser a constructive trustee."

Bearing in mind this stringent rule imposed upon a trustee who purchases from his *cestui que trust,* we do not find in this case any of the elements which would require that the conveyance be set aside. The evidence does not sustain the charge of threats, fraudulent misrepresentation or concealment of facts. The consideration for the conveyance was $1,200, of which the sum of $600 was paid in cash and a note for the balance was executed to the widow, and she afterward transferred the note to another person, and appellee paid it. The price paid appears to have been fairly adequate at the time, though the interest in the property was worth much more at the time of the decree.

The plaintiff asked in his complaint that he be also decreed the rents and profits of the lands since the death of King B. Flowers, and that an accounting thereof be had; and the court in the final decree awarded to plaintiff all of the right and interest of the widow "in all the rents and profits of said real estate that have accrued since the death of King B. Flowers, to the extent authorized by law." The court made no finding as to amount of such rents and profits, nor did it order an accounting to ascertain the amount thereof. We are left to conjecture, to some extent, as to what the chancellor meant by the expression "to the extent authorized by law," but we assume that he meant to hold that the plaintiff succeeded, by virtue of said conveyances, to the quarantine rights of the widow until dower should be assigned, and was therefore entitled to recover

the amount of rents and profits of the dwelling house and lands thereto attached. In this view the learned chancellor erred. We held in *Griffin* v. *Dunn,* 79 Ark. 408, that the widow's right to hold the dwelling house and farm attached until assignment of dower is a personal privilege, and not an estate in the land, and can not be transferred to another.

Inasmuch, however, as the court rendered no decree for any specific amount of rents, there is no prejudice in the erroneous ruling; but the decree, in so far as it adjudges in general terms the right of the plaintiff to recover rents and profits before the assignment of dower, is disapproved, and the decree to that extent is modified.

In all other respects the decree will be affirmed, and it is so ordered.

CENTRAL LUMBER COMPANY *v.* BRADDOCK LAND & GRANITE COMPANY.

Opinion delivered November 11, 1907.

1. MECHANICS' LIEN—MATERIALS MUST BE USED.—Under Kirby's Digest, § 4970, giving a materialman a lien for materials furnished for any building by virtue of a contract with the owner, materials furnished for a building must be actually used in it before a lien will be acquired. (Page 562.)
2. SAME—PRESUMPTION THAT MATERIALS WERE USED.—The fact that materials purchased for a building contracted for were delivered at or near where the building was to be erected, and that the building was actually completed of materials of the description of those furnished, is *prima facie* evidence of the fact that they were used in its construction, and the burden is on the owner to show that they were not so used. (Page 562.)
3. SAME—EXTENT OF OWNER'S LIABILITY.—For materials furnished and labor performed in the construction of a building under contract with the owner, he is liable in full if the contract price of the building was sufficient; otherwise he is liable to the holder of each lien only for his proportionate part of such price. (Page 563.)
4. SAME—MATERIALS FURNISHED FOR SEVERAL BUILDINGS—SINGLE CONTRACT.—Where materials were furnished and labor performed for the

construction of several buildings, each building will be liable only for the materials furnished and labor done in its construction, unless the buildings were upon the same lot or upon contiguous lots and the contract for the labor and materials was entire, in which case all such lots would be jointly liable. (Page 564.)

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

A. J. Newman, for appellant.

Appellant should have been decreed a lien for the material furnished on all the property in which it was used. Kirby's Digest, § § 4970-4994; 77 Ark. 35; 63 Ark. 367; 15 Am. & Eng. Enc. Law (1 Ed.), 73, note 3; 58 Ark. 7. It is not necessary, in order to establish the lien, to show that the materials furnished was used in any particular house, or even that they were used in the construction of any of the buildings, provided they were furnished under the contract. 76 Md. 337; 25 Md. 297.

Bradshaw, Rhoton & Helm, for appellee.

BATTLE, J. The Central Lumber Company brought this suit against the Braddock Land & Granite Company, M. E. Chappell and A. J. Good to enforce a lien for material furnished for the construction of certain houses on lots in the city of Little Rock. The Braddock Land & Granite Company was the owner of the lots. Chappell and Good contracted with it to build the houses, and purchased from the Central Lumber Company a part of the material used for that purpose, and built the houses. The Central Lumber Company alleged in its complaint that there is due it for such materials the sum of $1,710.75, and that it has a lien for that amount on the houses and the lots, which has been perfected according to the statutes in such cases made and provided. The Braddock Land & Granite Company answered and denied these allegations, but Chappell and Good, answering, admitted them.

Upon the evidence adduced by the parties, the chancery court found that the Braddock Land & Granite Company is indebted to Chappell and Good in the sum of $604.88 for the construction of the houses, and that Chappell and Good are indebted to the Central Lumber Company in the sum of $1,710.75

for materials furnished, and the Lumber Company had a lien for $619.92 on a certain part of the houses and lots on which it claims a lien, and decreed accordingly. Plaintiff appealed.

The right to the lien for the amount claimed by appellants depends upon the proper construction of the statute, which provides: "Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work upon, or furnish any material *for, any building,* erection, improvement upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this act, shall have for his work or labor done, or materials * * * furnished, a lien upon such building erection or improvement, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre; or if such building, erection or improvement be upon any lot of land in any town, city or village, then such lien shall be upon such building, erection or improvements and the lots or land upon which the same are situated," etc. Kirby's Digest, § 4970.

Statutes like this, using almost the same language, have been construed differently, some courts holding that the materials furnished for the building must be actually used in its construction or repair before it can become a lien under such statutes, while others hold that the actual use of the materials is not requisite if they are furnished for the particular building or improvement. Phillips on Mechanics' Liens (3 Ed.), § § 148-162; 2 Jones on Liens (2 Ed.), § 1329; 20 Am. & Eng. Enc. Law, 346, and cases cited.

We prefer the former construction. We think the statute was intended to enforce justice; that the party who has enhanced the value of the property by the incorporation therein of his materials or labor shall have security in the same for the amount due therefor. In this way the owner is compensated for the incumbrances, and justice is done to all parties.

In opposition to this view it has been said: "It would be unreasonable to require the materialman to follow the materials from his place of business to the building, and to make positive proof of the fact that they were actually used for the

purposes for which they were alleged to have been purchased. Such a thing is not only a matter of extreme inconvenience in all cases, but in a majority of instances must be totally impracticable." But this does not necessarily follow. The fact that the materials contracted for were delivered at or near the place where the supposed building for which they were purchased was to be erected or is in course of erection, at the place pointed out or designated by the contracting party, and the building was thereafter actually completed, and was constructed of materials of the description of those furnished, is *prima facie* evidence of the fact that they were used in its construction, and the burden would then be upon the owner, if such was not the fact, to show that they were not so used, his means of information and opportunities to know such fact being superior. Upon this subject, Brewer, J., said: "When materials are contracted for use in a proposed building, when they are delivered in pursuance of such contract, and when the building is in fact completed, and there is no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained, or that those contracted therefor were not used therein, and especially when some of the materials are shown to have actually entered into its construction, it is fair to conclude and say that such materials did in fact go into the building, and that the seller has a mechanics' lien therefor." *Rice* v. *Hodge,* 26 Kan. 164.

The evidence in this case tended to prove that appellants sold and delivered material of the value of at least $1,710.00 to be used in the construction of certain buildings, upon which it claims a lien, and that they were so used, and that there is still due therefor the sum of $1,710.00 for which it has a lien, and that the owner of the lots does not owe the contractors so much. Materials other than those furnished by the appellant were used and labor was performed in the construction of the buildings. The materialmen and laborers were entitled to be paid in full if the contract price of the building was sufficient. Each building, however, was liable only for the materials furnished and labor done in its construction, unless the labor was performed upon, and the materials were furnished for buildings upon the same or contiguous lots and under one

entire contract, in which case all such lots would be jointly liable. *Tenney* v. *Sly,* 54 Ark. 93.

In the event the liens upon the building or buildings jointly liable exceeded the contract price thereof, it or they would be liable to the holder of each lien for a proportionate part thereof and no more. In making such apportionment the amount paid by the owner to laborers and materialmen for labor performed and materials furnished under the contract to build should be taken into consideration in the same manner and to the same effect that it should be if an unsatisfied lien therefor existed. *Barton* v. *Grand Lodge of Independent Order of Odd Fellows,* 71 Ark. 35. In the case at bar it was, therefore, necessary to ascertain the aggregate amount of the labor and materials expended upon each building or buildings jointly liable, in the manner indicated, the contract price therefor, and, if it is not sufficient to pay for all such labor and materials so expended, appellant's proportionate part, and to enforce the lien for its proportion. *Long* v. *Chas. T. Abeles & Co.,* 77 Ark. 156. And to pursue this course as to all the buildings and lots on which appellant has liens, according as the same are jointly or separately liable. This was not done in this case.

The decree is reversed, and the cause is remanded for proceedings and decree consistent with this opinion, with authority to take additional evidence if necessary.

HART, J., being disqualified, did not participate.

ROBERTS v. STATE.

84 564
188 273

Opinion delivered December 16, 1907.

CRIMINAL LAW—DIRECTING VERDICT.—It was error to direct the jury to return a verdict of guilty in a prosecution for a misdemeanor which is punishable by imprisonment.

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; reversed.

STATEMENT BY THE COURT.

The only question to be determined by this appeal is whether the court, in a criminal case, where a part of the penalty is or may be imprisonment, can instruct the jury to return a verdict of guilty.

The evidence was undisputed, and, if true, showed that appellant had practiced medicine without license. Appellant was indicted for this offense under Kirby's Digest, § 5241, which fixes the punishment at "a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than ten days nor more than ninety days; or by both fine and imprisonment." The judge instructed the jury to return a verdict of guilty, which was done, and the punishment assessed at a fine of $100.

P. E. Rowe and *T. B. Pryor,* for appellant.

The punishment in this class being partly imprisonment, it was error to instruct the jury to return a verdict of guilty. 11 Fed. 471; art. 2 § 10, Const.; art. 7, § 23, *Id.*; 12 Cyc. 595.

William F. Kirby, Attorney General, and *Daniel Taylor,* Assistant, for appellee.

While the court may in a proper case, where the punishment is a fine only, direct a verdict (36 Ark. 84), it ought not to do so where the punishment is by statute fixed at fine or imprisonment or both fine and imprisonment. 64 Mo. App. 126; 113 N. C. 648. If it was erroneous to direct a verdict in this case, the verdict of the jury fixing appellant's punishment at a fine only shows that the error was harmless.

WOOD, J., (after stating the facts.) This court in *Jones* v. *State,* 15 Ark. 262, held that a defendant, who has been tried by a jury and acquitted of an offense punishable by fine only, could, upon a reversal and remand of the cause by the Supreme Court, again be put upon trial for the same offense—without violating the constitutional provision "that no person shall for the same offense be twice put in jeopardy of life or limb." Sec. 8, art. 2, Const. In *Taylor* v. *State,* 36 Ark. 84, this court held that where a defendant was tried by jury and acquitted of a misdemeanor punishable by fine only, the trial court could set

aside the verdict of the jury and again put the defendant on trial, without violating the constitutional provision above mentioned. Thus this court has recognized the power of the circuit court to set aside verdicts of acquittal in misdemeanor cases punishable by fine only.

In civil cases this court holds that where the evidence is undisputed and unimpeached, and there is no circumstance shown from which an inference against the facts testified to can be drawn, the facts may be taken as established, and a verdict directed accordingly. *Skillern* v. *Baker,* 82 Ark. 86; *American Central Ins. Co.* v. *Noe,* 75 Ark. 406; *Catlett* v. *Ry. Co.,* 57 Ark. 461. Such direction, according to the doctrine of the above cases, is not contrary to the provisions of the Constitution giving the parties in law cases the right to trial by jury (section 7, art. 2, Const.) and prohibiting judges from charging the juries with regard to matters of fact. Sec. 23, art. 7, Const. For, when the conditions exist as announced in *Skillern* v. *Baker, supra,* it then becomes a question of law, and the trial court has power to direct a verdict in accordance with the law, which is but in fact declaring the law that the jury must obey.

A majority of the court is of the opinion that it follows logically from these decisions that in a misdemeanor case, where the punishment is by fine only, the judge, having power to set aside a verdict of acquittal, would also have power to direct a verdict of guilty where the facts were undisputed, and where guilt from all the evidence was the only inference that could be drawn. This court in the case of *Stelle* v. *State,* 77 Ark. 441, where the punishment was by fine only, sustained a judgment of conviction where the trial judge directed the verdict. But the question now under consideration was not raised or discussed in that case.

In this case, however, while the verdict rendered was for fine only, the appellant was tried for an offense punishable either by fine or imprisonment. Section 5241, Kirby's Digest. We are all of the opinion that in such cases the trial judge has no power to direct a verdict. Says Mr. Bishop: "The judge is incompetent to convict one of crime, even though he acknowledge it, except on a plea of guilty. The evidence is exclusively

for the jury. However conclusive of guilt it may be, he can only tell them that, if they believe such and such to be the facts, the law demands a verdict of guilty; he can not otherwise direct such verdict." Authorities to sustain the text are cited in note. See also 12 Cyc. 595, note 15. The authorities are all practically one way, supporting the doctrine announced by Mr. Bishop. And they make no exception in cases of misdemeanor punishable by fine only.

The majority of the court is of the opinion, however, that our own court is already in line with the doctrine announced in the *Unites States* v. *Susan B. Antony,* 11 Blatch. 200, 24 Fed. Cases No. 4450, and the Michigan cases holding to the same doctrine. *People* v. *Elmer,* 109 Mich. 493; *People* v. *Newman,* 99 Mich. 148, and cases cited. And that the doctrine of these cases is founded upon the sound legal principle that where the facts are undisputed, and only one inference can be drawn from them, the question is then one of law for the court, and not of fact for the jury. But the doctrine can not apply in a case where jeopardy attaches, for the reason that in such cases, as before stated, the court is without power to set aside a verdict of acquittal or to direct a verdict either way.

Inasmuch as there might have been imprisonment in this case, it follows that the court erred in directing the verdict; and that the judgment should be reversed, and the cause remanded for new trial.

So ordered.

The writer is of the opinion that a verdict of guilty can not be directed in any criminal case.

BOYD v. GARDNER.

Opinion delivered December 23, 1907.

TAX SALE—UNAUTHENTICATED DELINQUENT LIST.—A tax sale of land is void where the list of delinquent lands was not verified by the collector nor filed by him within the time required by Kirby's Digest, § 7083.

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

STATEMENT BY THE COURT.

The complaint in this case alleges that the lands involved in this suit were purchased by appellee at a void tax sale.

Appellants ask that the tax deed issued to defendant be cancelled as a cloud upon their title.

The facts sufficiently appear in the opinion.

J. F. Summers, for appellant.

1. When the assessor fails to attach to the assessment roll the affidavit required by statute (Kirby's Digest, § 6976), a sale for taxes thereunder is void. 21 Ark. 581; 64 Ark. 436; 67 Ark. 505; 55 Ark. 81; 44 Mich. 561; 43 Ark. 243.

2. The clerk having failed to attach to the tax book the warrant required by statute (Kirby's Digest, § 7026), the collector was within authority to make sale. 30 Ark. 276; 24 Ark. 466; 19 Ark. 602; 37 Ark. 643; 43 Ark. 296.

3. The sale was void by reason of the failure of the collector to return the list of delinquent lands on or before the second Monday in May. Kirby's Digest, § 7083; 66 Ark. 422; 80 Ark. 425; 70 Ark. 326.

P. R. Andrews and *H. M. Woods,* for appellee.

1. The assessor having taken the general oath of office, and having also taken the special oath prescribed by law (Kirby's Digest, § 6956), his failure to attach the affidavit at the end of the assessment roll (*Id.* § 6976) would not render the assessment, nor a sale for the taxes, void. 46 Ark. 96; 61 Ark. 42; 55 Ark. 84; 81 Ark. 319; 51 Ark. 516; 43 Ark. 243.

2. Where the record affirmatively shows that the tax book was delivered to the collector by the proper officer, the county clerk, and that upon this book taxes were extended, and by it collections were made, the fact that the warrant required by statute, Kirby's Digest, § 7026 (although indorsed on the tax book by the clerk) was not signed, will not render invalid a sale for the taxes. Kirby's Digest, § 7028; *Id.* § 7037; 43 Ark. 302; 52 Ark. 356.

3. Where the record shows affirmatively that the delinquent list was properly advertised before the day of sale, the

fact that it was not filed on the second Monday in May will not invalidate the sale. And the failure of the collector to attach his affidavit to the list will not render the sale void, if it is affirmatively shown that the list was filed, dated and signed by the clerk and certified by him as having been returned delinquent. Cases *supra;* Black on Tax Titles, 201; 55 Ark. 192.

HART, J., (after stating the facts.) This cause was tried upon an agreed statement of facts. It shows that there was filed with the clerk what purported to be a list of lands returned delinquent. But it nowhere appears in the record that such list was filed by the collector, or that it was authenticated by him as required by section 7083 of Kirby's Digest. The purported list was not even filed within the time prescribed by section 7083.

In the case of *Quertermous* v. *Walls,* 70 Ark. 326, the court said: "The delinquent list was filed by the deputy sheriff. The law does not authorize him to file such list. The filing of the delinquent list as the law prescribed is a prerequisite to a valid forfeiture to the State for the non-payment of taxes. Without such list no notice could be published, and no sale could be had."

In the present case there was no affidavit to the purported list of delinquent real estate. The record does not disclose by whom it was filed. We have no means of knowing whether or not it was the list prepared by the collector.

This renders the sale void; and, as the case must be reversed for that reason, it is unnecessary to decide the other objections urged by appellants.

Reversed and remanded with directions to render a decree not inconsistent with this opinion.

REEVES v. STATE.

Opinion delivered December 9, 1907.

CRIMINAL LAW—EXPOSURE OF JURY TO IMPROPER INFLUENCES—BURDEN OF PROOF.—Where the court has permitted the jurors to separate in a

criminal case, and evidence has been adduced tending to show that they were exposed to improper influences, the burden is upon the defendant to show that they were improperly influenced by the exposure.

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

STATEMENT BY THE COURT.

Bud Reeves was indicted for murder in the first degree for the alleged killing of one Edmond Bratton. The trial was commenced on the 24th day of August, 1907, nine jurors having been accepted, when, at the noon hour, a recess was taken. Defendant, at the time, requested that the jurors selected be kept together under charge of an officer, but his request was denied by the court, and exceptions were saved.

Lula Poindexter, for the State, testified: "I was standing at a refreshment bar at a picnic at Pilgrim's Rest talking to Edmond Bratton, my brother-in-law, when Bud Reeves looked and saw what I was doing, and said 'Howdy.' I said 'Howdy.' He said 'he got to kiss me.' I said, 'No.' He then took my hand. I grabbed it loose, and stepped back from him towards Edmond Bratton. Edmond said to me: 'Leave him; he is nothing.' Bud Reeves stepped up to Edmond, and said: 'Don't you like it?' and Edmond said 'No;' and he replied to Edmond, 'Help yourself; you s— of a b—!' and Edmond hit him. Bud Reeves had his knife open in his hand when he stepped up to Edmond. When Edmond hit him, he cut at him. Edmond dodged, and the next time he stabbed him in the neck, and I turned away. Edmond had no weapon of any kind. The knife Reeves had was a large pocket knife. This occurred in Woodruff County, Arkansas."

The other witness for the State testified to substantially the same state of facts. Some of them did not see and hear what took place when the parties first met, but all agree that Edmond said something to defendant about his conduct with the woman, and that defendant approached him with an open knife, and that, upon Edmond striking him with his fist, defendant began cutting him with the knife, and death ensued from the wounds. That deceased was unarmed, and defend-

ant cut him with a large pocket knife. That defendant stabbed him on the head, in the back, on the shoulders and on the neck.

No evidence was introduced in behalf of the defendant.

The jury returned a verdict of murder in the second degree, and fixed his punishment at twenty-one years in the penitentiary.

O. N. Killough and *J. F. Summers,* for appellant.

1. In view of the prejudice existing against the defendant, the nine jurors selected should have been kept together during the recess of the court; and on the motion for new trial, the affidavits attached thereto clearly showing the existence of this prejudice and that free expression was given thereto in the presence and hearing of these jurors, the burden rested upon the State, which it has not discharged, to show by competent proof that the jurors had not been influenced by such expressions. 34 Ark. 341; 26 Ark. 398; 73 Ark. 501; 57 Ark. 9; 77 Ark. 418.

2. The evidence does not sustain the verdict as to the grade of the offense—does not show any motion or premeditation on the party of appellant, but on the other hand shows that deceased precipitated the affray.

3. Under the testimony the punishment is excessive. 76 Ark. 515.

William F. Kirby, Attorney General, and *Daniel Taylor,* Assistant, for appellee.

1. There was no such showing of undue influence as to cast upon the State the burden of establishing the purity of the trial.

2. The appellant had sufficient time after deceased struck him with his fist to reflect, and was not acting in self defense at the time he slew deceased. The evidence fully sustains the verdict, and the punishment is not excessive.

HART, J., (after stating the facts.) The appellant asks for a reversal upon two grounds, which are set up in his motion for a new trial.

1. He insists that the court erred in not keeping together in charge of an officer at the noon recess the nine jurors already selected to try the case, and that the jurors were subjected to improper influences. In support of that part of his motion, he

filed the affidavits of witnesses to the effect that the general topic of conversation on the street was the trial of Bud Reeves, and that the prevalent opinion was that he ought to be hanged. There was also filed the affidavit of the proprietor of a restaurant to the effect that the jurors took dinner in his house; that his house was filled with customers; that the general topic of conversation was the trial of Bud Reeves; and that the sentiment against him was frequently expressed.

The cases of *Frame* v. *State*, 73 Ark. 501, and *Vaughan* v. *State*, 57 Ark. 9, relied upon by appellant to support his contention, are not applicable to the state of facts presented in this record. It is within the discretion of the trial court to permit the jurors to separate, or to keep them together in charge of proper officers. Kirby's Digest, section 2390.

The rule announced in the cases above referred to, which were cases where the court had ordered the jury kept together, is that in criminal cases, where evidence is adduced tending to show that the jurors have been exposed to improper influences, the burden is upon the State to show that they were not in any way influenced, biased or prejudiced by such exposure, and that, in the absence of such showing by the State, the verdict will be set aside. The rule is otherwise where the court exercises its discretion in permitting the jurors to separate. In such cases the burden is upon the defendant to show that they were improperly influenced by the exposure.

In the case under consideration, the court permitted the jurors to separate, and there was no testimony adduced to show that any conversation prejudicial to the appellant was heard by the jurors. It is not sufficient to show in such a case that they might have heard remarks prejudicial to appellant.

Here the matters complained of occurred before the completion of the jury, and the appellant, without objection on his part, proceeded with the selection of other jurors, who presumably were subjected to the same influences as those complained of in the case of the jurors already chosen.

The second error complained of is that the punishment is not warranted by the testimony and is excessive.

There was but little conflict in the evidence. The jury

evidently found that appellant was the aggressor, and that the killing was the result of a vicious and depraved disposition.

Affirmed.

W. T. ADAMS MACHINE COMPANY v. CASTLEBERRY.

Opinion delivered December 23, 1907.

1. FOREIGN CORPORATION—SERVICE OF PROCESS ON AGENT.—Service of process upon a travelling salesman of a foreign corporation, having no control over the business of such corporation in the county, is not sufficient to give jurisdiction. (Page 574.)
2. PROCESS—OBJECTION—WAIVER.—Where defendant moved to quash the service of summons upon its agent, and thereafter answered, without waiving its rights under the motion, the objection to the service of process was not waived. (Page 575.)

Appeal from Scott Circuit Court; *Jeptha H. Evans,* Judge, on exchange of circuits; reversed.

STATEMENT BY THE COURT.

Suit was brought by appellee against appellant in the Scott Circuit Court to recover damages for misrepresentations made by an agent of appellant in the sale of a saw mill to appellee. A summons was duly issued, and made returnable at the next term of the court. On the 2d day of the August, 1906, term of court, to which the summons was returnable, the defendant obtained permission to appear specially for the purpose of filing a motion to quash service of summons. The order of the court (omitting the caption) is as follows:

"Comes the defendant, W. T. Adams Machine Company, by its attorney, T. N. Sanford, and asks to be permitted to appear specially for the purpose of filing motion to quash the service of the summons herein, which is by the court granted. Whereupon defendant files motion to quash service of summons herein. Motion overruled, and defendant excepts."

The grounds of the motion are as follows:

"1. Because said W. T. Adams Machine Company is a foreign corporation, and has an agent at Plummerville, Arkansas, upon whom service should be had.

"2. Because T. W. Barnes is not such an agent as service of summons can be properly had on."

The return indorsed on summons is as follows: "State of Arkansas, County of Scott: I have this 14th day of April, 1906, duly served the within by delivering a copy and stating the substance thereof to the within-named T. W. Barnes, agent of the said within named machine company, as herein commanded. (Signed) G. W. Grandstaff, Sheriff."

Appellant then, without waiving its right under its motion to quash service of summons, answered, denying the allegations of the complaint. There was a jury trial, and a verdict for appellee in the sum of two hundred dollars. Appellant filed a motion for a new trial, and one of the grounds therefor was that the court erred in overruling its motion to quash service of summons. The motion for a new trial was overruled, and the case is brought here by appeal.

T. B. Pryor, for appellant.

The motion to quash service of summons should have been sustained. 69 Ark. 429.

HART, J., (after stating the facts.) We are met at the threshold of this case by the contention that the return of service on the summons shows no sufficient service.

There is no allegation in the complaint as to whether appellant is a partnership, a foreign or domestic corporation. There is an averment, in the motion to quash service of summons, that appellant is a foreign corporation, and has an agent at Plummerville, Arkansas, upon whom service should be had, and this allegation is nowhere denied in the record. The summons was served, as shown by the return, upon "T. W. Barnes, agent." Barnes was only a traveling salesman. He had no control over the business of the corporation, and service upon him was not sufficient. *Arkansas Construction Company* v. *Mullins,* 69 Ark. 429; *Lesser Cotton Company* v. *Yates,* 69 Ark. 396.

The answer of the defendant, in the form and manner in which it was made, was not a waiver of the service of summons upon it. *Spratley* v. *La. & Ark. Ry. Co.*, 77 Ark. 412; *Union Guaranty & Trust Co.* v. *Craddock*, 59 Ark. 593; *Baskins* v. *Wylds*, 39 Ark. 347.

This view of the case renders it unnecessary to notice the other contentions made by appellant.

Judgment reversed and cause remanded, with directions to proceed in the cause; the appellant having entered his appearance by appealing in this cause.

PINDALL v. WATERMAN.
PINDALL v. SCHMIDT.

Opinion delivered December 16, 1907.

ATTORNEY AND CLIENT—EXTORTIONATE FEE—RELIEF.—Where the evidence shows that plaintiff's intestate, while greatly excited and apparently unconscious of what he was doing, employed defendants, who were attorneys, to defend him against a charge of murder, and, in consideration of such employment, conveyed to them property amounting to $7,000, retaining only $1,000, and within a few days committed suicide before his case was tried, the fee paid, in the absence of explanation, was so unreasonable, oppressive and exorbitant that equity will grant relief as to the excess.

Appeals from Desha Chancery Court; *James C. Norman*, Chancellor; affirmed.

H. M. Armistead, for appellants.

1. Equity has jurisdiction to inquire into the contracts of persons alleged to be insane, but, upon finding that the deceased was not insane, the chancellor had no jurisdiction to go further than to dismiss the bill.

2. Testimony of the alleged expert was improperly admitted. It was irrelevant because inquiry as to reasonable fees was not permissible. 33 Ark. 547. The contract of employment between attorney and client is considered as other contracts for personal services, and without regard to the relation.

14 Am. Dec. 177; 75 N. Y. Supp. 856; 83 *Id.* 539; 2 How. Pr. 261; 4 Cyc. 987. It is certain that the responsibility assumed by appellants was great, the undertaking arduous. There is nothing in the testimony to show that other services in the way of advice and preparation were not performed in addition to those rendered in the matter of the habeas corpus proceedings. By virtue of what authority did the court award a fee for services in the habeas corpus proceedings, entirely ignoring all other consideration, and alter contracts both express and fair, when no circumstances for equitable intervention are shown? This is not a case for application of the rule of *quantum meruit,* nor is the partial failure of consideration, if any, such as ought to affect the contract. 28 N. E. 872; 26 Ind. 289; 38 Ill. 65; 10 Tex. 81; 84 Ala. 502. The promise to perform the service was the consideration of the contract, and performance was not a condition on which the obligation depended. There has been no failure of consideration because the act of the obligor alone, without the concurrence or delinquency of appellants, prevented the further performance of the contract on their part. 7 J. J. Marshall (Ky.), 54. See also 42 Pac. 705; 63 S. W. 382; 93 Mo. 530; 5 Mo. App. 567.

F. M. Rogers, for appellees.

As between attorney and client, the rule is that where a contract is obtained by any undue influence of the attorney over the client, or by any fraud or imposition, or the compensation is so clearly excessive as to amount to extortion, the court will in a proper case protect the party aggrieved. 110 U. S. 42; 9 Johns. 253; 6 Am. Dec. 275; 59 Ala. 581; 31 Am. Rep. 23; 3 Am. & Eng. Enc. of L., (2d Ed.), 332; 9 L. R. A. 90, notes. The burden was upon appellant to show the fairness and equity of their dealings. 239 U. S. 560; 150 U. S. 118; 153 U. S. 216.

H. M. Armistead, for appellants in reply.

The distinction between the cases at bar and that relied on by appellees (59 Ala. 581) is this: in that case the contract was made after the relation of attorney and client had

been formed, while in these cases the contract was made before the attorneys entered upon the business of the client; no fiduciary relation had then commenced, and they could then make a valid contract for the measure of their compensation. 110 Ala. 307; 93 Wis. 381; 4 Sneed (Tenn.) 159; 143 Ill. 401; 58 S. W. 824; 170 Ill. 213.

BATTLE, J. The above suits grew out of the same facts, and involved the same principles of law and equity, and have been submitted for our consideration upon the same briefs.

The facts, as shown by the evidence adduced in these causes, are substantially as follows: J. J. Schmidt resided in Desha County, in this State. He was about sixty years old; was industrious and penurious; and acquired an estate of about the value of $8,089.60. He killed R. H. Willis, another citizen of Desha. He was arrested, charged with murder in the first degree. "Excitement was very high immediately after the killing. Mob violence was threatened and feared." He was hurried away to Arkansas City to avoid the mob. He underwent a great change on account of the trouble and excitement following the killing. Witnesses say, he seemed to be dazed and stunned, and not the same man he had been. He looked haggard and broken. His voice did not sound natural. He appeared to be in great trouble. He was nervous and excited. One witness says he impressed him as a man who did not know exactly what he was doing. He says: "After having been carried to dinner and then back to the court house for supper, he turned and went in the wrong direction. He didn't seem to know the way to the hotel." Witnesses differed as to his sanity, but the majority thought he was sane. He was imprisoned in jail. While incarcerated, E. S. Pindall and X. O. Pindall, two attorneys, presumably at his request, had an interview with him, while in the condition before stated. The result was he executed a note to E. S. Pindall for $5,000 for a fee for services to be rendered in defending Schmidt against the charge of killing Willis, and a mortgage on lot six in block seven in Evans's addition to the town of Dumas, and the southwest quarter of section 34 in township 9, south, and range four west, of the value of $5,000 which constituted all the real estate owned by Schmidt; and X. O. Pindall, associated with E. S., received for

services to be rendered in the same behalf the promissory note of the Dumas Mercantile Company for $500, and forty shares in the stock of the Bank of Dumas, of the par value of $25 each, and $500 in money, and a draft on the Dumas Mercantile Company for $500, leaving Schmidt, out of an estate of $8,089.60, $1,089.69 represented by a small amount of cash, some rent notes not due, two mares, some farming implements, a lot of household furniture, two mule colts and a saddle. For the fees so secured the Pindalls, in part performance of their contract, sued out a writ of habeas corpus, and caused Schmidt to be admitted to bail in the sum of $5,000, and his discharge from imprisonment. In two days thereafter Schmidt was found dead, hanging by the neck in his barn. He died intestate, leaving H. J. Schmidt his only son and heir surviving. Gus Waterman was appointed the administrator of his estate.

H. J. Schmidt, heir, and Gus Waterman, as administrator of J. J. Schmidt, deceased, brought suit in the Desha Chancery Court against E. S. Pindall and X. O. Pindall to set aside the note and mortgage executed to E. S. Pindall, and, among other things, state as follows:

"Plaintiffs say at the time the defendants procured said Schmidt's signature to said note and mortgage said Schmidt was not indebted to said E. S. Pindall in any sum.

"Plaintiffs say that at the time defendants procured the signature of said Schmidt to said note and mortgage said Schmidt was insane, and by reason of his insanity was incapable of entering into a valid and binding contract.

"Plaintiffs say that plaintiff H. J. Schmidt is the owner in fee simple of said land, subject to such interest as his co-plaintiff may have therein for the purpose of administration.

"Plaintiffs say that defendant E. S. Pindall is a practicing attorney at law; that at the time defendant procured said note and mortgage from said Schmidt the latter was confined in the jail of Desha County, upon a charge of murder in the first degree; that defendant claims that he was employed by said Schmidt to defend him upon said charge in all the courts to which same might be carried, and that property was delivered to him in payment for services to be rendered. Plaintiffs say that the only service which defendant rendered said Schmidt was

in appearing before the county judge of Desha County in habeas corpus proceedings by which Schmidt was granted bail in the sum of five thousand dollars; that within two days after executing said bail and being released from jail said Schmidt died, committing suicide by hanging himself.

"Plaintiffs say that by reason of the death of said Schmidt the service to be rendered which defendant claims is the consideration for which said note and mortgage were delivered to him cannot be performed, that said consideration has failed, and that defendant has not given nor can he give any consideration for said sum; that if defendant's claim that said note and mortgage were delivered to him under contract be true, defendant is not entitled to retain nor enforce same, because said contract is now impossible of performance.

"Plaintiffs further say that at the time at which defendant claims to have entered into said contract with said Schmidt the latter was insane, and by reason of his insanity could not make a valid and binding contract; that said contract is null, and that defendant acquired no lien on said property thereby."

The defendant E. S. Pindall answered in part as follows:

"The defendant denies that the note and mortgage to him was without consideration, and says that at the time it was made the defendant Schmidt employed said E. S. Pindall and X. O. Pindall to defend him on the charge of murder in the first degree, and state that this defendant, and X. O. Pindall, his co-defendant, are attorneys at law, practicing in the courts of Desha County, and in other counties of the State and in the Supreme Court of the State of Arkansas.

"Defendant denies that the said Schmidt at the time of executing the note and mortgage was insane, and therefore incapable of entering into a valid and binding contract.

"Defendant, further answering, pleads the truth of this matter to be as follows: Said Schmidt, being charged with the crime of murder in the first degree, and arrested on said charge, employed this defendant, who is an attorney at law, as stated, as one of his attorneys to defend him; that it was expressly agreed between this defendant and the said Schmidt that this defendant's retainer should be $5,000, and said Schmidt executed the note and mortgage in question as payment, and security for

payment of said sum, the contract being thereupon consummated; this defendant entered into the discharge of his employment, and has performed all the services required of him under said employment; that the note and mortgage belong to this defendant."

In this case the court found that the allegation of insanity was not sustained; that by the death of Schmidt the consideration of the note and mortgage had failed, but that E. S. Pindall had received no compensation for his services in the habeas corpus proceedings, and that such services were reasonably worth $500; that E. S. Pindall was indebted to the estate of Schmidt for the occupation of the residence of the deceased in the sum of $72, and ordered and decreed that plaintiff pay to him (E. S. Pindall) the sum of $428, and upon payment thereof that E. S. Pindall cancel the mortgage on record, and deliver the same and the note to plaintiffs.

Gus Waterman, as administrator of the estate of J. J. Schmidt, deceased, also brought a suit in the Desha Chancery Court against X. O. Pindall to enjoin him from assigning and disposing of the property delivered to him by Schmidt and the Bank of Dumas from entering upon its books any assignment of the stock transfer to the defendant, and the Dumas Mercantile Company from paying its said note, and, upon final hearing, to require the defendant to deliver to plaintiff said note, stock certificate, and five hundred dollars delivered to him by Schmidt; and for reasons for so asking made substantially the same allegations as are contained in the complaint in the suit brought by H. J. Schmidt, heir, and Gus Waterman, as administrator.

The defendant X. O. Pindall, answering, denied "that he has in his custody money and chattels belonging to the estate of J. J. Schmidt, the deceased, as alleged; denies that the title to said property was in J. J. Schmidt at the time of his death; denies that at the time the defendant procured possession of said property from the said Schmidt the said Schmidt was insane and therefore incapable of making a valid and legal contract; admits that defendant is a practicing attorney at law, and that at the time he procured said property from said Schmidt

the latter was confined in the Desha County jail on charge of murder in the first degree.

"This defendant says that he is a lawyer practicing at the bar of Desha County and other counties in the State of Arkansas, and the Supreme Court of the State of Arkansas; that the said Schmidt was charged with the commission of the crime of murder in the first degree, and arrested on said charge and incarcerated in jail; that he employed this defendant as one of his attorneys to defend him upon said charge upon an express consideration expressed in the contract at the time it was made and paid at the time, said consideration being promissory notes for $500, a certificate for forty shares in the Bank of Dumas, and $500 in money, and a draft on the Dumas Mercantile Company for $500; that this defendant has duly performed said contract upon his part, and holds nothing belonging to the estate of the said J. J. Schmidt in his hands."

In this case the court found that J. J. Schmidt, prior to his death, paid X. O. Pindall $500 in cash, and delivered to him the promissory notes and bank stock described in the complaint for services to be rendered in defending him against charges for killing Willis; that the allegation as to the insanity was not sustained by the evidence; that the performance of the contract of Schmidt and Pindall "had become impossible of performance;" and that the $500 paid Pindall in cash was full and adequate compensation for all services rendered Schmidt by him; and ordered and decreed that defendant Pindall deliver to plaintiff the notes of Dumas Mercantile Company for $500, the certificate for forty shares in the Bank of Dumas, and the note executed by Schmidt to Pindall for $500; and ordered and decreed that the Dumas Mercantile Company and the Bank of Dumas be restrained and enjoined as the plaintiff prayed for in his complaint.

Professor Page says: "Inadequacy of consideration may be found in connection with circumstances of oppression which do not amount to technical duress; and the combination may justify a finding of undue influence. Thus a transaction entered into under great mental distress, caused by domestic calamity, * * * will be relieved against in equity. The propriety of relief is especially clear if, under great mental distress due to

the death of her husband, the person seeking relief is induced by threats of violence to relinquish a legacy given her by her husband's will for an inadequate and nominal consideration. So a transaction entered into for an inadequate consideration, by taking advantage of the financial necessities of the party seeking relief, will be relieved against in equity." I Page on Contracts, § 228, and cases cited.

Mr. Freeman, in his notes to *Hough's Administrators* v. *Hunt,* 15 Am. Dec. 572, says: "There is a large class of cases in which courts of equity will rescind contracts, which are against some public policy, where an unconscientious advantage has been taken, by one of the parties, of the condition or circumstances of the other party, when there is gross inadequacy of consideration, or when there has been imposition or oppression practiced upon a person who had reposed confidence in the party who had abused it. The ground on which a court of equity affords relief in such cases is, that while there may not have been any actual fraud practiced by either party to such contract, yet there has been a constructive fraud perpetrated upon the party to the contract, who, from any cause, may not have stood upon an equal footing with the person with whom he has contracted."

In *Robinson* v. *Sharp,* 201 Ill. 86, 92, while the relation of attorney and client existed, the court did not place its judgment entirely upon that ground. The court said: "That the appellees, in entering into the agreement to pay one-half of the insurance money to the appellant, were actuated by serious apprehensions as to the possibility or probability of collecting any thing thereon must be admitted. The chancellor believed, from the proof, that such apprehensions were aroused by the appelland. That there was ground for such fear is beyond question, and there is nothing in the evidence to show that appellant had any reason to believe, or did believe, that any litigation or contention would arise to prevent, or even delay, the collection of the policies. The amount contracted was clearly oppressive and unjust, and the chancellor correctly ruled that appellees should be relieved from the obligation of the contract, and that appellant was entitled to a reasonable compensation for the service performed."

In *Kelley* v. *Caplice,* 23 Kansas, 474, the syllabus is as fol-

lows: "On June 11, 1875, C. was indebted to K. & M. in the sum of $600; at the time C. had in his possession an endowment policy issued by an insurance company, insuring his life in favor of his wife. In consideration of the satisfaction of this ndebtedness and $275, C. and his wife executed a written assignment of the policy to M., and delivered the policy and assignment to him, and thereby transferred all their right, title and interest in the policy. Afterward M. paid to the company all subsequent premiums and premium notes. The policy matured May 12, 1878. The amount due thereon was $1,477.73. K. & M. demanded this sum from the insurance company, but it refused to pay without Mrs. C.'s receipt on the back of the policy. Mrs. C. refused to sign her name unless she was paid $477.73 when the policy was collected. In compliance with this extortionate demand, K. executed to Mrs. C. his written promise to pay to her this sum on the payment of the policy, and M. guarantied the payment of the money within ten days after the policy was paid. When the policy was paid, K. & M. refused to comply with their written promise, Mrs. C. brought her action thereon, and the court gave her judgment for the full amount, interest and costs. *Held,* that as Mrs. C. availed herself of the situation in which K. & M. were placed to exact an unreasonable sum and an unconscionable bargain, she can not enforce their written promise, but may recover what is fairly due her for the inconvenience, or service in writing her signature."

The court said: "The mind revolts at the enforcement of such a promise, and as the courts, as a rule, under such circumstances seize upon the slightest act of oppression or advantage to set at naught a promise thus obtained, we are of opinion that Mrs. C. is only entitled to what may be fairly due her for writing her signature, and that she cannot recover on the agreement."

In this case Schmidt was a man about sixty years of age. He was sober, industrious and penurious, and accumulated an estate of the value of about $8,089.60. He killed a man; was charged with murder in the first degree. The excitement caused by it was very high, and mob violence was threatened and feared. He was arrested and imprisoned. On account of the excitement and trouble experienced by him, he grew haggard and worn

and at times looked dazed and unconscious of what he was doing. In this condition E. S. and X. O. Pindall, two lawyers, together visited him, presumably at his invitation, and received from him as security and payment for fees property worth about $7,000, and his note for $500, leaving property worth only $1,089.69. In a few days thereafter, to relieve himself of the troubles and excitement then torturing him, he ended his life by suicide. Property and life ceased to have any value with him, although before that time he had been penurious. While in this condition, the Pindalls received of him what, in the absence of an explanation, seems to be unreasonable, oppressive and exorbitant fees and promises to pay fees, which come within that class of transactions against which equity will relieve. No effort to explain or show that the fees were fair and reasonable was made. They alleged that they made the contracts, and have at all times been ready to perform the service they contracted to render. This is their defense. It is not sufficient.

Decrees in both cases affirmed.

ELLIS v. CAMPBELL.

Opinion delivered December 16, 1907.

PARTITION—ENFORCEMENT OF VERBAL AGREEMENT.—Where a brother and sister, during their mother's lifetime, and with her consent, made a parol partition of their deceased father's homestead, and each took possession and made permanent improvements, the agreement is taken out of the statute of frauds, and will be enforced after the mother's death.

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

STATEMENT BY THE COURT.

Appellants, father and son, brought this action, September 6, 1905, against appellee, J. H. Campbell, and wife, for the partition of two hundred acres of land in Clay County. Appellee answered with a cross-bill for the confirmation of a prior parol partition between him and his sister, Nannie, in her lifetime, she having been the wife of one of the appellants, the

mother of the other. Certain facts are undisputed. James Campbell died in 1876, the owner of the premises, which constituted his homestead. He left him surviving E. M. Campbell, his widow, and the appellee, J. H. Campbell, a son, and Nannie Campbell, a daughter. These latter were his only heirs-at-law. The daughter subsequently married Henry Mack, by whom she had no children. After his death she married the appellant Robert S. Ellis, and the appellant Robert H. Ellis was the only issue of their marriage, and consequently the sole heir of his mother. Mrs. Ellis died intestate in September, 1903; her mother, the widow of James Campbell, about a month previous.

No allotment of the widow's dower was ever made. During all the time of her widowhood from 1876 to the time of her death, August, 1903, the widow, E. M. Campbell, continued to reside on said land, a part of the time with appellee J. H. Campbell, and a part of the time with her daughter, Nannie Campbell.

Appellee contended that there had been a parol partition between him and his sister. Appellants denied this, and contended that, even if such partition had been made, it was not binding in law. The court upon the testimony adduced made the following findings and decree: "that in 1888 the brother and sister, in conjunction with the mother, and with her consent, had divided these lands in accordance with the contention of appellee, and that, after the same had been made, the parties each took possession of the respective portions of the premises so assigned to them, and since that time have been in actual, open, visible, adverse possession of their respective tracts, claiming the title, and had made valuable and lasting improvements thereon; and decreed a confirmation of the oral partition, and vested and divested title accordingly.

Moore, Spence & Dudley, for appellees.

1. Until the assignment of dower, the heirs at law were entitled to possession of no part of the real estate except by the widow's consent. No dower having been assigned, she was entitled to the rents and profits until her death; and by virtue of her homestead rights as well as dower rights she was entitled to possession of the whole tract. She could not relinquish

her homestead and dower rights by parol, but only by deed. 58 Ark. 298; 56 L. R. A. 77; 31 Ark. 145; 74 Ga. 132; 86 Mo. 544; 112 Mo. 649; Kirby's Digest, § 2654; *Id.* § 731; 60 Ark. 461.

2. There is no such possession or seizin in fact on the part of the heirs in this case as to take a parol agreement between them to divide the land and each take possession of one part to the exclusion of the other out of the statute of frauds. 44 Ark. 79; 78 Ark. 95; Tiedeman on Real Prop. § 24; *Id.* 396; 29 Me. 162; N. H. 93.

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

1. The partition as between the brother and sister was at the suggestion of the mother and by her consent. True, their possession, during the lifetime of the mother, was permissive; but there is no rule of law preventing present tenants at will, who own the reversion in fee, from agreeing amongst themselves for a present separation both of the tenancy and the reversion. Under the facts here, the court is justified in its finding and decree. 20 Ark. 615; 77 Ark. 309; Freeman on Co-tenancy and Part. (2 Ed.), § 402; 21 Am. & Eng. Enc. of L. (2 Ed.), 1139.

2. Exclusive possession, following a parol agreement for partition, takes the agreement out of the statute of fraud; likewise permanent and valuable improvements. 64 Ark. 19; 21 Ark. 110; 19 Ark. 23; 1 Ark. 391; 34 Ark. 478.

3. Co-tenants are estopped to dispute the common title. In this case neither the parties to the original partition, nor any one claiming under them, can be heard now to set up the rights of the widow as against the performance of the agreement. 21 Ark. 160; Freeman on Co-tenancy and Part. § 161; 103 Ind. 410. Nor does the fact that one of the parties to the agreement was a married woman invalidate it. 65 Fed. 742; 70 Fed. 563; 2 Clarke (Pa.), 161; 48 Pa. St. 345; 69 Tex. 395.

WOOD, J., (after stating the facts.) The findings of fact by the chancery court are in accord with the decided preponderance of the evidence. Mr. Freeman lays down the rule that "whatever effect may be conceded at law to parol partitions, it is quite certain that, when executed by taking possession thereunder, they will be recognized and enforced in equity, particu-

larly when such partition and the possession based upon it have been mutually acquiesced in by the parties for a considerable period." Freeman, Co-tenancy & Partition, § 402; 21 Am. & Eng. Enc. Law (2 Ed.), 1139. But in this case there was not only possession taken by the brother and sister, as the court found, but each made lasting and permanent improvements, and the making of improvements of that character is in and of itself such performance as takes a contract out of the statute of frauds. *Mooney* v. *Rowland,* 64 Ark. 19.

Upon the facts of this case, it certainly does not lie in the mouth of either of the children of Mrs. Campbell, or those succeeding to their rights, to repudiate the contract they had made and executed with each other.

We need not inquire whether the brother and sister had the technical right to give each other pedal possession. They made the agreement with each other concerning their reversionary interest in the property. The mother was consenting, and they each acted upon the agreement for partition by taking possession and making valuable improvements. The mother is dead, and her life estate of dower and the homestead right passed out with her death. The brother and sister and those claiming under the latter (appellants) are plainly estopped by their conduct. See *Foltz* v. *Wert,* 103 Ind. 410.

Affirmed.

FILES v. JACKSON.

Opinion delivered November 18, 1907.

1. TAX SALE—VALIDITY.—All tax sales made in the year 1873 for nonpayment of the taxes of the previous year are void. *McConnell* v. *Day,* 61 Ark. 464, followed. (Page 591.)
2. ADVERSE POSSESSION—EVIDENCE.—Evidence that plaintiff openly claimed title to land, that he cut stove wood and poles for gardening purposes from it, and that no one disputed his ownership until defendants set up title, is insufficient to prove adverse possession. (Page 592.)
3. TAXATION—VOID SALE—REIMBURSEMENT OF PURCHASER.—One who purchases from the State land forfeited for taxes is entitled to be reimbursed for the taxes paid by him, in case the tax sale is held to be void. (Page 593.)

Appeal from Ashley Chancery Court; *James C. Norman*, Chancellor; reversed in part.

STATEMENT BY THE COURT.

This is a contest in which the three contestants claim the ownership of the northwest quarter of northwest quarter of section twenty-three (23), township seventeen (17) south, range seven (7) west.

Appellant, Files, claims under a purchase from the State, November 17, 1875. Appellees claim under what is alleged to be a deed from appellant Dorman, with an assignment of dower by Mrs. Johnson, mother of Mrs. Dorman, dated November 10, 1888, and filed for record in recorder's office, Ashley County, January 31, 1889; and appellant Dorman, denying the execution of the deed to appellees, claims under an inheritance from her father, H. D. Lowe.

The facts are that H. D. Lowe died May 4, 1863, seized and possessed of the land involved in this controversy; that he made a will, which was duly probated and recorded. Under said will there were but two devisees, to-wit: Emaline T., widow, and Emma H. Lowe, daughter.

The testator bequeathed to E. T. Lowe, widow, one-third, and to Emma H. Lowe, daughter, two-thirds.

The widow was married to A. L. Johnson, July 4, 1864. Johnson is dead. The daughter was married to A. N. Moss, January 9, 1881, at the age of 19 years, and was divorced from Moss, May 10, 1892. About six months after her divorce from Moss, in 1892, she married Levi Dorman, and is still the wife of Dorman.

The land had been forfeited for non-payment of taxes, and on November 17, 1875, appellant Files bought it from the State, and the State Land Commissioner made him a deed. This deed was destroyed by fire, and appellant made proof of loss, and applied to Auditor of State and State Treasurer, and obtained proof of purchase.

Appellant, Files, brought suit in ejectment against appellees, Jackson and A. H. Wilson, on January 21, 1896. Jackson and Wilson filed answer between January 23, 1896. Case was

continued. Before the next term of court (August, 1896) Wilson died. At the August term, 1896, Wilson's death was suggested, and his heirs were made defendants. Divers and sundry pleadings were had in the circuit court, as shown by the record, until August 20, 1901, when appellant, Files, filed a petition asking that Mrs. Dorman be made a party, and that the cause be transferred to Ashley Chancery Court, which was done.

At the May term of the chancery court, May 23, 1903, Mrs. Dorman entered her appearance, and filed her separate answer. At May term, 1904, May 18, Mrs. Dorman filed amendment to her answer, and made it a cross-bill against appellees. Thus the complaint of appellants, the answer of appellees, and the answer and amendment and cross-bill bring before the court the contentions of the litigants.

Appellant, Files, claims that, under his deed from the Commissioner of State Lands, he took peaceable and quiet possession of the land, exercised ownership over it for a period of nineteen (19) years, and paid taxes on it for the years 1876 to 1888, inclusive, twelve (12) years, and also for several subsequent years, without notice of any claimant, or protest, or claim of ownership from any one; nor was he aware of any claim by any one adverse to his until latter part of year 1895, when he was informed that appellant Jackson was having a fence erected along the north line of the tract; and, having learned that Jackson and Wilson were claiming the land, and claiming to be in possession, he commenced suit January 2d, 1896.

In their answer, Jackson and Wilson claimed to be owners and in possession, and set up the statute bar of seven years.

The relative contentions and claims of the parties will appear by other facts and statements in the opinion.

There was a decree for appellees.

A. W. Files and *T. M. Hooker,* for appellants.

1. Record evidence shows that "at Auditor's sale of land forfeited for taxes, held on the 9th day of June, 1873," the land in controversy "remained forfeited to the State," etc. The presumption is, in the absence of proof to the contrary, that every

act of the officer making the sale was regular, and that the recitals of the commissioner's certificate are correct. The Commissioner of State Lands was authorized to sell. Gantt's Digest, § 3914; 58 Ark. 151; 49 Ark. 266. The deed is *prima facie* evidence of title. 45 Ark. 80; 46 Ark. 96; 50 Ark. 209; 51 Ark. 453; 52 Ark. 132; 53 Ark. 418; 59 Ark. 209; 60 Ark. 499; 7 Ark. 424; 18 Ark. 423; 15 Ark. 331.

2. If the deed was invalid, it was color of title, which has ripened into a perfect title by reason of adverse possession for more than the statutory period. 48 N. W. 407; 3 Ballard, Real Prop. § 27; 6 *Id.* § 66; 55 N. W. 962; 38 Pac. 244; 111 Ala. 589.

3. It was clearly an error in the court to refuse appellant a decree for the amount of purchase money paid for the land, together with all taxes, penalties, costs, and interest. 28 Ark. 299; 39 Ark. 196; 51 Ark. 453; 28 Ark. 304; Gantt's Dig. § 5200.

4. The deed to appellee, being a forgery, gave no color of title to him; hence there is no merit in his claim of title by adverse possession, unless such possession was open, hostile and notorious for the full statutory period, before suit was brought; and, since the suit was brought within seven years from the time the deed was recorded, the claim falls to the ground.

Geo. W. Norman, for appellees.

1. The evidence is ample to sustain the court's finding as to the execution of the deed.

2. Appellant must succeed, if at all, upon the strength of his own title, and the burden is on him to prove title in himself; and he cannot succeed on an after-acquired title. 47 Ark. 413; 65 Ark. 422; 76 Ark. 520; *Id.* 163; 65 Ark. 610; 36 Ark. 415.

3. All tax sales for the non-payment of taxes of 1872, if made in 1873, are void. 64 Ark. 579; 61 Ark. 464; 55 Ark. 551.

4. Cutting trees for fuel and rails and paying taxes do not constitute such adverse possession as would set in motion the statute of limitations. 68 Ark. 551; 57 Ark. 97; 75 Ark. 422; 43 Ark. 486; 49 Ark. 266. And there is no constructive

possession under a tax deed which is void on its face. 60 Ark. 163; 57 Ark. 523.

HART, J., (after stating the facts.) Appellant, Files, bases his claim of title upon three grounds: First. The land had been forfeited for non-payment of taxes, and on November 17, 1875, appellant, Files, purchased from the State, and the State Land Commissioner made him a deed. This deed was destroyed by fire. Appellant introduced a certificate from Commissioner of State Lands, upon which he relies for title, which recites: "At the Auditor's sale of land forfeited for taxes on the 9th day of June, 1873, the following tract of land, situated in Ashley County, remained forfeited to the State," the land in controversy.

The obvious and natural meaning of this certificate is that the land was offered for sale by the collector in 1873 for the taxes of 1872 pursuant to section 5188, Gantt's Digest, and was forfeited to the State, and that, pursuant to section 5218 of Gantt's Digest, the land was offered for sale by the Auditor and remained forfeited to the State. The Auditor, as directed by the statute, forwarded a description of the lands to the Commissioner of State Lands, who caused the same to be placed on the books of his office as vacant land. "The court takes knowledge of the fact that all tax sales for the non-payment of the taxes of 1872, if the same were made in 1873, are invalid, having been so declared by this court." *Allen* v. *Swoope*, 64 Ark. 579; *McConnell* v. *Day*, 61 Ark. 464. Hence Files's tax deed is clearly void.

Second. Appellant, Files, claims by deed from Mrs. Emma Dorman and Mrs. Emma T. Johnson, executed since the institution of this suit. It appears that on the 10th day of November, 1888, Mrs. Emma T. Johnson and Mrs. Emma Dorman, who was then Emma Moss, conveyed this land by deed to appellee T. A. Jackson and A. H. Wilson, and that the same was duly acknowledged, and was filed for record on the 31st day of January, 1889.

It is claimed that the last mentioned deed is a forgery. Mrs. Dorman says she was sick with the measles at the time it purports to have been executed, was incapable of executing it,

and did not execute it. A number of expert witnesses were introduced, who testified that the signatures to the deed, viz., Emma Moss and A. N. Moss, were written by the same person. A. N. Moss testified that Emma Moss was sick at the time the deed was executed, and that the deed was signed in her presence by J. R. Bingham, who attested the deed. Bingham testified that the deed was signed by Emma Moss in his presence, that she was not well, but that her mind was normal, and that no undue influence was used to influence her to sign the deed. On cross examination, in response to the question, "There seems to be quite a similarity in the handwriting of Emma Moss and A. H. Moss. It is not possible that one person affixed both signatures to this deed?" he answered, "I think not; I hardly know how to answer. The parties signed this deed, is my recollection."

B. B. Staton, the justice of the peace before whom the acknowledgment was taken, testified that he was present, and saw Mrs. Emma Moss sign the deed. Although she resided in the county a number of years after this time, Emma Moss never exercised any control over the land, nor has she paid or attempted to pay the taxes on it.

The chancellor found that the deed was not a forgery. The persuasive force of the chancellor's finding is not overcome by the testimony.

Third. Appellant, Files, claims title by adverse possession. He says that, soon after his purchase of the land from the State in 1875, he began cutting and using stove wood, and poles for gardening purposes from the land, and openly claimed title to it, and knew of no one that disputed his ownership until appellees set up claim of ownership. That he lived near the land until latter part of 1882, when he moved to Little Rock. That he asked his brother and some of the neighbors to prevent any one from trespassing upon the land. This was not sufficient to constitute adverse possession. In the case of *Driver* v. *Martin*, 68 Ark. 551, it was held: "Prior to the act of March 18, 1899, payment of taxes on wild and unimproved lands, in connection with fitful acts of ownership, such as cutting trees for fuel and rails, did not constitute such adverse possession as would set

the statute of limitations in motion." See *Earle Improvement Company* v. *Chatfield,* 81 Ark. 296, and Arkansas cases cited therein.

In the event of an adverse decision on his main contentions in the case, appellant, Files, claims that he is entitled to a lien for all taxes paid by him. In this he is correct. In construing the act of March 16, 1879, "to provide for the redemption of delinquent lands," the court held the act void, but said: "The court is of the opinion, however, that, under the circumstances of the case, the petitioner Bagley would have an equity to be reimbursed the amounts paid out to relieve the land from taxes. The act was short-lived, and has been since repealed. Doubtless, many purchases from the State have been made under it in good faith; and, as they have inured to the benefit of the owners, it would be inequitable that the owners should be thus relieved at the expense of those who had relied upon what they had good reason to believe was a valid act of the sovereign power. For the equitable adjustment of all such cases growing up whilst the law was supposed to be in existence, it is reasonable that those who have paid the taxes should have a lien upon the lands for the burdens discharged, not only by original purchase, but by the payment of the taxes of subsequent years." *Bagley* v. *Castile,* 42 Ark. 91; *Lester v. Richardson,* 69 Ark. 201.

This principle applies with peculiar force here. The original purchase of Files was under section 3914, Gantt's Digest, which provides that "at any time after the close of the Auditor's sale, the Commissioner of Immigration and State Lands shall sell any of the lands and town lots offered for sale by the Auditor, and not sold for want of bidders, to any person wishing to purchase the same, who shall pay the State and county tax, together with the interest, penalties and expenses due thereon."

Files only paid the State what the owner could have paid had he redeemed the lands. This and the subsequent payment of taxes inured to the owner's benefit.

The chancellor should have rendered a decree in favor of appellant Files for the $24.46 shown to have been paid by him

to the State for the purchase of the land, being the State and county tax, with interest, penalties and expenses, and also for the amount of taxes paid by him for subsequent years, with interest on same and on the amount of the original purchase at the rate of six per cent., and declared the same a lien on the land.

For this error, the cause is reversed and remanded with directions to enter a decree in accordance with this opinion.

WOOD, J., not participating.

STUCKEY v. LINDLEY.

Opinion delivered December 16, 1907.

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1. APPEAL—ERROR NOT AFFECTING APPELLANT.—Appellant cannot complain of an error which affects only a party who has not appealed. (Page 596.)

2. SAME—ERROR AS TO COSTS.—Appellant cannot complain of a trivial amount of costs imposed upon him in the court below, if he made no motion there to retax the costs. (Page 596.)

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

STATEMENT BY THE COURT.

Appellee instituted this action before a justice of the peace by filing his affidavit that Charles Hunter was indebted to him in the sum of $67.70 for some walnut logs sold by appellee to Hunter, and that the purchase money therefor was due and unpaid, and asking judgment for said sum, and that it be declared a lien on the said logs, and at the same time gave a bond to procure the issuance of the order of seizure. Appellee also filed an itemized statement of an account with Hunter, which showed a balance due from Hunter to appellee of $2.45.

Upon the affidavit which was filed the justice issued an order, directing the constable to attach and safely keep the said walnut logs, or so much thereof as would be necessary to satisfy a debt of the appellee against Hunter for $67.70 for puchase money of said walnut logs, and also to summon the

defendant (Hunter), which writ was returned duly served by the constable taking possession of the said walnut logs, and also upon defendant as an ordinary summons.

Hunter filed an answer in which he denied the indebtedness, and denied that the appellee had any right or interest in said logs in any manner whatever, or that he was entitled to any lien on the same or any part thereof.

The East St. Louis Walnut Company interpleaded, and set up that it was the absolute owner of said logs.

There was a trial in the justice of the peace court, which resulted in a judgment against both Hunter and the intervener, and an appeal of both causes was duly prosecuted to the circuit court.

On the trial of the attachment suit in the circuit court, the appellee, to sustain his cause of action, introduced the following testimony, to-wit:

J. W. Lindley, appellee, stated: "I am the plaintiff. Charles Hunter is the defendant. He was, at the beginning of this suit, indebted for $63 for logs and $2.40 on account. The $63 was due for some walnut logs. They are the same logs attached in that suit by the constable. I do not know who had possession of these logs when they were attached, but they had been sold. I understood they had been branded, and that was notice to me that they had been sold."

This was all the evidence in the case.

Whereupon Hunter requested the court to instruct the jury that there can be no lien on the logs in this case, under the pleadings and the evidence, which motion was overruled, and Hunter duly excepted.

Thereupon the court directed the jury to return the following verdict, to-wit. "We, the jury, find for the plaintiff (appellee) in the sum of $65 debt, and that $63 of it is a lien on the logs in controversy."

The motion for a new trial was filed and overruled, exceptions duly saved, time granted to file bill of exceptions, and appeal granted to Hunter.

After this cause was docketed in this court, and appellee had entered his appearance hereto, Charles Hunter, the original

appellant, died, intestate, and by agreement of parties this cause was revived in the name of M. M. Stuckey, as special administrator.

Campbell & Suits, for appellant.

Appellee is not entitled to a lien on the logs. To entitle one to a lien on property for its purchase price, the property must be in possession of the vendee, or under his control. 43 Ark. 467; 45 Ark. 136; 49 Ark. 290; 52 Ark. 450; *Id.* 458; 57 Ark. 13; 64 Ark. 132; 68 Ark. 421; 71 Ark. 346; 76 Ark. 273; 78 Ark. 569.

J. W. Phillips, for appellee.

Appellant's argument and authorities cited are based upon and applicable only to the rights of the intervener. The intervener's rights were not before the court. Only the rights of the original parties to the suit were being adjudicated. Appellant is not injured by the judgment, and it should be affirmed. 67 Ark. 604.

HART, J., (after stating the facts.) Appellant does not question the correctness of the amount of the judgment, but claims that the court erred in declaring a lien on the walnut logs attached. This only affects the intervener, and his rights are not before the court.

Appellant does not claim any interest in the logs, and was not prejudiced by the declaration of law, if erroneous. *Kelly* v. *Keith,* 77 Ark. 31.

He could only be affected by the trivial amount of costs that accrued by reason of the attachment, and that could have been reached by motion to retax the costs, instead of by appeal. *Thompson* v. *Baxter,* 76 Ark. 327.

Affirmed.

NASHVILLE LUMBER COMPANY *v.* CORBELL.

Opinion delivered December 16, 1907.

APPEAL—PRACTICE AS TO INJUNCTION AND SUPERSEDEAS.—While temporary injunctions and writs of supersedeas may be issued from the Supreme Court to preserve the *status quo* pending an appeal, where the justice of the case requires it, they will not be used for the purpose of

creating a temporary right, as to enjoin the owner of land from preventing a lumber company from laying a tramway across his land.

Appeal from Howard Chancery Court; *James D. Shaver*, Chancellor; temporary injunction denied.

J. W. Bishop, for appellant.

Sain & Sain and *W. P. Feazel*, for appellee.

PER CURIAM. This is a motion for an injunction pending appeal. The chancery court refused to enjoin Corbell and wife from preventing the lumber company from laying a tramway across their homestead, on the ground that the conveyance under which the lumber company claimed was void because the wife had not joined therein, and dissolved a temporary injunction which had been granted.

Injunctions and writs of supersedeas are issued by this court to preserve the *status quo* pending an appeal, where the justice of the case requires it, but not for the purpose of creating a temporary right. This case is the converse of *Union Sawmill Co.* v. *Felsenthal Land & Townsite Company, ante* p. 494. For the reasons there given, this application is denied.

CAGLE v. GRAY.

Opinion delivered December 16, 1907.

APPEAL—CLERK'S CERTIFICATE TO TRANSCRIPT—SURPLUSAGE.—The clerk of the chancery court is not authorized to certify that a transcript contains all the papers filed in the action named, *except certain testimony which is not on file in his office;* but so much of his certificate as relates to the testimony not on file will be treated as surplusage.

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

Motion to strike out a portion of the clerk's certificate to the record.

Vaughan & Vaughan, for appellant.

Appellee *pro se*.

PER CURIAM. The clerk's certificate is as follows:

"I, F. A. Garrett, clerk of the Pulaski Chancery Court, do hereby certify that the annexed and foregoing 34 pages of within written matter contains a true, accurate and complete transcript of all the pleadings, papers, files and entries of proceedings in the action named in the caption (except certain testimony which is not on file in my office in said cause, and which by consent of counsel is omitted from this record), as hath appeared by comparing the same with the originals thereof now on file and of record in my office," etc.

In *Beecher* v. *Beecher,* 83 Ark. 424, it was said: "It is no part of the clerk's duty to certify to oral testimony, and his certificate to it necessarily goes for naught." This certificate in a negative way reaches the same end sought to be reached by the clerk's certificate in the Beecher case, and is equally ineffectual.

The appellee files a motion to strike out so much of the clerk's certificate as goes beyond his province, but the court does not in that way exercise authority over the clerk's certificate.

The objectionable part is surplusage, and neither adds to nor takes from his certificate what is proper to be certified, and it is unnecessary to recommit it to him for a proper certificate, and the motion is overruled.

REMLEY v. MATTHEWS.

Opinion delivered December 16, 1907.

COLLECTOR—VACANCY—TENURE OF APPOINTEE.—Where a sheriff was suspended from office until a pending indictment against him should be tried, and another was appointed to act as sheriff during the time of his suspension, it was the duty of the sheriff, though suspended, to qualify as collector, and upon his failure to do so the Governor was authorized by Kirby's Digest, § § 7042, 7044, to appoint a collector who should hold until the next general election, and until his successor should be elected and qualified.

Appeal from Chicot Circuit Court; *Henry W. Wells,* Judge; reversed.

STATEMENT BY THE COURT.

This is a suit brought by C. M. Matthews agninst E. P. Remley to obtain possession of the office of collector of Chicot County. The facts are undisputed, and are as follows:

"M. C. Strong was appointed sheriff and ex-officio collector of Chicot County, Arkansas, on the 3d day of July, 1905, and served until the 20th of October, 1906, upon said date he was suspended from office by an order of the circuit court, there being eighteen indictments filed against him charging him with malfeasance in office.

"The defendant, E. P. Remley, was appointed sheriff, to fill the vacancy caused by the said suspension of M. C. Strong, by the Governor on the 20th day of October, 1906, and filed his bond, and took the oath of office, and entered upon the duties of said office. M. C. Strong did not qualify as collector.

E. P. Remley failed to make the collector's bond prior to the first Monday in December, 1906, and the county clerk certified said failure to the Governor, and E. P. Remley was appointed collector on the 7th of December, and made his bond on the 12th of December, 1906.

"M. C. Strong resigned his position as sheriff while under indictment on the 8th day of March, 1907.

"On March 9th, 1907, E. P. Remley was again appointed sheriff by the Governor of this State, and filed his bond, and qualified on the 13th of March, 1907.

"E. P. Remley filled the office of sheriff until the election and qualification of C. M. Matthews.

"The appellee, C. M. Matthews was elected sheriff at a special election held on the 15th day of April, 1907, and was commissioned on the 24th day of April, 1907, and qualified as sheriff on the 29th day of April, 1907, and demanded of E. P. Remley the office of collector of Chicot County and the books and papers thereto belonging, and was refused. The books and papers of the office of sheriff were turned over to the appellee by the appellant on the 29th day of April, 1907.

The defendant moved the court to give the following declarations of law:

"E. P. Remley is entitled to the office of collector of Chicot County, under the appointment received by him from the Governor on December 7, 1906, he having given bond within ten days after said appointment and qualified as required by law as collector of Chicot County," which declaration of law the court refused to give, to which refusal the defendant at the time excepted and asked that his exceptions be noted of record, which was then and there accordingly done.

"2. The plaintiff, C. M. Matthews is not entitled to the office of collector of Chicot County, Arkansas, by virtue of his election to the office of sheriff in April, 1907, the office of collector having previously been filled by appointing E. P. Remley," which declaration of law the court refused to give and declare to which ruling and judgment of the court the defendant at the time excepted and asked that his exceptions be noted of record, which was then and there accordingly done.

The court of its own motion gave the following declaration of law: "The plaintiff, C. M. Matthews, is entitled to the office of collector of Chicot County, by virtue of being elected sheriff under the special election in April, 1907;" and gave judgment for the possession thereof, to which ruling and judgment of the court in so declaring the law to be defendant at the time excepted, and asked that his exceptions be noted of record which was accordingly done.

Judgment was thereupon entered in favor of the plaintiff.

Defendant filed his motion for a new trial, and upon it being overruled has appealed.

E. A. Bolton, William Kirten and *N. B. Scott,* for appellant.

1. Under the Constitution as construed by this court, the offices of sheriff and collector are separate and distinct offices, notwithstanding the sheriff is ex-officio collector. Art. 7, § 46, Const.; 57 Ark. 195; 33 Ark. 396; 37 Ark. 386.

2. Unless the party who has been elected to the office of sheriff files his bond as collector by the first Monday in December, the office of collector becomes vacant, and, upon the county clerk's certificate showing the facts, it becomes the Governor's duty to appoint some competent person having the requisite

qualifications to perform the duties of collector. Kirby's Digest, § 7042. The appointee must qualify and give bond within ten days after notice of appointment. *Id.* 7043. And his term of office is fixed. *Id.* § 7044. After appointment, qualification and execution of bond, the appointee holds for the time fixed by law, and his appointment is irrevocable by any act of the executive. 1 Cranch (U. S.) 162.

J. R. Parker, for appellee.

Under art. 7, § 46, Const., the offices of sheriff and collector are held by one person, and the two offices cannot be separated except by legislative act. Remley's last commission as sheriff cancelled all former commissions; and when his commission as sheriff expired on April 29th, 1907, the collector's office expired with it as a matter of law. 2 Ark. 282; art. 7 § 50, Const.

HART, J., (after stating the facts.) M. C. Strong was suspended from office under section 7992, Kirby's Digest, which reads as follows, to-wit:

"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 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 is continued on application of the defendant."

Section 7993 provides for the removal of such officer upon conviction. It will be observed that Strong was not removed from the office of sheriff, but was only suspended pending the indictments against him.

Remley was appointed sheriff on the 20th day of October, 1906, under section 7995 of Kirby's Digest authorizing the Governor to temporarily appoint an officer in the place of the suspended officer.

This presents for our consideration the question, who was entitled to qualify as collector of the revenue of Chicot County in 1906, Strong or Remley?

In the case of *Crowell* v. *Barham,* 57 Ark. 197, COCKRILL, C. J., said: "The offices of sheriff and collector, though usually exercised by the same person, are as separate and distinct as though held by different incumbents. Ex parte *McCabe,* 33 Ark. 396; *Falconer* v. *Shores,* 37 Ark. 306. If the sheriff became collector by reason of qualifying as sheriff, there would be strong ground for contending that his general deputy was also deputy collector, as was held in the case of *People* v. *Otto,* 77 Cal. 45. But under our statute the sheriff becomes collector only when he qualifies as collector. He has the right by virtue of his office to become collector, but he may forfeit the right without forfeiting the office of sheriff. In that event the law authorizes the substitution of another in the office."

It seems clear then that Strong, and not Remley, had the right to qualify as collector; for the reason that Strong was still sheriff. He did not cease to be sheriff because of his suspension pending the indictments against him.

Strong's suspension from the office of sheriff only disabled him from discharging the duties of the office, and did not take away the office itself. Only a removal from office could do that. He was still the sheriff, and by virtue of holding that office had the right to qualify as the collector of revenue.

Strong failed to give the bond of collector within the time prescribed by law, and upon a certificate by the clerk to that effect the Governor appointed Remley to that office, pursuant to section 7042 of Kirby's Digest. This was a valid appointment; for section 46, art. 7, of the Constitution leaves the office of collector under legislative control. *Falconer* v. *Shores,* 37 Ark. 386. In that case the court said: "Upon the failure of a sheriff to give bond as collector of revenue within the time prescribed by law, the Governor is required, upon notice of such failure from the county clerk, to declare the office vacant and fill it by appointment."

We are now brought to consider the length of his term. As we have seen, appellant was appointed pursuant to section 7042 of Kirby's Digest. Section 7044 provides that he shall hold the office until the next general election, and until his successor is elected and qualified. In the case of *Alston* v. *Falconer,* 42 Ark.

114, it is held that where a person is appointed collector pursuant to the statutes *supra*, he is by law entitled to hold it until the next general election and until his successor is elected and qualified. See also *Falconer* v. *Shores, supra.*

Reversed and remanded with direction to enter judgment in accordance with this opinion.

GARDEN CITY STAVE & HEADING COMPANY *v.* SIMS.

Opinion delivered November 18, 1907.

1. TIMBER DEED—REASONABLE TIME TO REMOVE.—In the absence of something in the deed itself, or in the proof *aliunde*, showing a contrary intention, a deed to standing merchantable timber which specifies no time for its removal conveys a terminable estate in the timber, which ends when a reasonable time for the removal of such timber, after the execution of the deed, has expired. (Page 605.)
2. SAME—WHAT IS REASONABLE TIME.—One who purchases land, having notice that the timber thereon had been sold to another, will not be entitled to an injunction to restrain the latter from removing any more timber, although three years have expired since the timber was purchased, if the evidence shows that, on account of the slashy character of the land and the difficulty of procuring hands, the defendant had not had a reasonable time to remove the timber. (Page 605.)

Appeal from Monroe Chancery Court; *Jno. M. Elliott,* Judge; reversed.

STATEMENT BY THE COURT.

This is a suit by appellee to restrain appellant from removing timber from a tract of land in Monroe County, described in the complaint. Appellant and appellee claim from a common source of title.

On the 9th day of August, 1899, William Montgomery, by warranty deed, conveyed to appellant the timber of all kinds on the land mentioned in the complaint. The deed was duly acknowledged and filed for record on the 10th day of August, 1899. On the 16th day of January, 1901, the said William Montgomery conveyed said lands to appellee. This suit was

commenced on the 17th day of August, 1901. No time was specified in the deed from Montgomery to appellant in which this timber was to be removed. The court granted a temporary injunction. After all the testimony had been taken, on the 4th day of October, 1905, the court permitted appellee to file an amendment to his complaint, alleging that appellant, a corporation, had ceased to transact business in the State of Arkansas, and was insolvent, and further alleging that appellant by its conduct and representation was estopped from claiming title to the timber on the lands mentioned in the original complaint.

At the October term, 1906, the court entered its final decree restraining the appellant from cutting or removing any timber from the said lands. The other facts are sufficiently referred to in the opinion.

C. F. Greenlee, for appellant.

1. Appellee had at least constructive notice of the deed from Montgomery to appellant, for it was recorded, and thereby knew of appellant's ownership of the timber. Its right to the timber was vested, and not terminable at the will of Montgomery or his grantee. 69 Ark. 442; 57 Ark. 340.

2. Injunction will not lie to prevent a trespasser from cutting timber where there is no proof of irreparable injury to the freehold nor of the defendant's insolvency. 33 Ark. 637; 67 Ark. 413; 75 Ark. 286; 77 Ark. 527; 81 Ark. 115.

3. Where, in a contract for the sale of timber, no time is specified within which to remove it, the law gives to the purchaser a reasonable time, and such time is to be determined by the condition of the land and timber, the obstacles in the way, etc. 77 Ark. 120; 55 L. R. A. 513 and authorities cited.

Manning & Emerson, for appellee.

It is clearly shown that appellant's purchase from Montgomery was a mere subterfuge, that it had cut and removed all the timber from the land that it desired and had abandoned the claim. It is further shown that appellee was induced to buy upon the representation by appellant that it claimed no title nor further interest in the timber, that appellant was insolvent, and that appellee had no adequate remedy at law. Appellant is

estopped by the statements, representations and conduct of its officers and agents. 78 Ark. 408.

HART, J., (after stating the facts.) In the case of *Liston* v. *Chapman & Dewey Land Company*, 77 Ark. 116, it was held that "in the absence of something in the instrument itself, or in the proof *aliunde*, showing a contrary intention, a deed to standing merchantable timber which specifies no time for its removal conveys a terminable estate in the timber, which ends when a reasonable time for the removal of such timber, after the execution of the deed, has expired." In that case, the court said: "What is a reasonable time is generally a mixed question of law and fact. The facts are to be ascertained by an inquiry into the conditions of the land and timber, the obstacles opposing and the facilities favoring, and the conditions surrounding the parties at the time the contract was made."

The testimony shows that appellant's timber cutters commenced work in June, 1899, and cut continuously until about Christmas. That the land was wet and slashy, and that, on account of the rains, the land become so wet that they had to cease work until the following June.

In June, 1900, they commenced cutting again, but were not able to cut as much timber as had been cut the previous year on account of the trouble they had in getting hands. In 1901 they commenced again as soon as it got dry enough, and worked until the injunction was issued. During this time Montgomery was an employee of appellant. He knew the condition of the roads, and that the timber could only be removed with profit during certain seasons of the year. He made no objection that the time was not reasonable. Considering the obstacles in the way and the conditions surrounding the parties, we do not think a reasonable time had elapsed in which to remove the timber.

Appellee claimed that appellant is estopped to claim title in the timber on account of its representations and conduct, and bases his contention on statements made to him by Vantrain, Hooker and W. C. Fiddyment, one of the directors of the appellant company. He says that Hooker and Vantrain told him that appellant was only to have twelve months in which to re-

move the timber, and that W. C. Fiddyment advised him to purchase the land, stating that it was a bargain, and did not tell him that appellant claimed more time in which to remove the timber. Hooker says he was only the bookkeeper of appellant, and had no authority to bind it in regard to timber deals, and that he only expressed the opinion to appellee that twelve months was a reasonable time within which to remove the timber. Vantrain was not even an employee of the appellant. He had no connection in any way with the company except to contract with it in regard to cutting timber. The timber deed to appellant was on record at the time of the purchase of the land by appellee, and appellee had constructive notice of its terms. Appellant owed appellee no duty to disclose to him what additional time, if any, it would require to remove the timber.

The chancellor should have dismissed the complaint for want of equity. Reversed and remanded with direction to dismiss the complaint for want of equity.

LARIMORE v. STATE.

Opinion delivered December 9, 1907.

1. INDICTMENT OF ACCESSORY—NEGATION OF PRESENCE OF DEFENDANT.—It is unnecessary that an indictment of one as accessory before the fact to a felony should negative his presence at the perpetration of the crime. (Page 608.)
2. ACCOMPLICE—CORROBORATION.—The testimony of an accomplice implicating defendant in the commission of arson is sufficiently corroborated by evidence of another witness that a few months before the fire he overheard defendant threatening to burn the house, by evidence showing defendant's ill feeling toward the owner of the house, and by circumstances tending to show that the fire was of incendiary origin. (Page 608.)
3. INSTRUCTION—REPETITION.—It was not prejudicial error to refuse to instruct the jury that, "in order to convict on circumstantial evidence, the facts shown by it must be absolutely incompatible with the innocence of the accused upon any rational theory, and incapable, beyond any reasonable hypothesis, of any other explanation," if the

court instructed the jury to the effect that the evidence must, before a conviction can be had, be sufficient to satisfy the jury beyond a reasonable doubt of defendant's guilt. (Page 609.)

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; affirmed.

J. P. Roberts and *A. G. Leming,* for appellant.

1. The demurrer should have been sustained. Absence is necessary to constitute one an accessory before the fact. 41 Ark. 173; Kirby's Digest, § 1560; 1 Wharton, Am. Crim. Law, § 134; 21 Ark. 212. Whatever is necessary to constitute the crime must be alleged. 37 Ark. 274; Kirby's Digest, § 2227; 41 Ark. 173; 58 Ark. 390; 77 Ark. 321.

The evidence of corroboration was entirely insufficient. Corroboration is not sufficient which merely shows that the offense was committed. Kirby's Digest, § 2384; 43 Ark. 367. In arson the *corpus delicti* consists not alone of a building burned, but also of its having been wilfully fired. 76 Ala. 42; 33 Miss. 347; 29 Ga. 108. Burning by accidental causes must be satisfactorily excluded, to constitute sufficient proof of a crime committed. Cases *supra.*

William F. Kirby, Attorney General, and *Dan'l Taylor,* for appellee.

The fact that the criminality of the defendant consists in the advising or encouraging of the commission of the crime, in contradistinction to actual participation therein, is all that the law requires the indictment to allege. 58 Ark. 390.

McCULLOCH, J. Appellant was convicted under an indictment accusing him of being accessory to the crime of arson. The indictment (omitting caption) is as follows:

"The grand jury of Scott County, in the name and by the authority of the State of Arkansas, accuse the defendant, Math Larimore, of the crime of accessory before the fact of arson, committed as follows, to-wit: that Harvey DeFore and Andrew Allen in the county aforesaid, on the 2d day of October, 1904, unlawfully, wilfully, maliciously and feloniously one gin house and mill, the tenements and property of one James Sutton then and there being, did set fire to and burn, and that the said defendant, Math Larimore, in the county aforesaid on the 2d

day of October, 1904, before the said arson was committed in manner and form aforesaid, unlawfully, wilfully, maliciously and feloniously did advise and encourage the said Harvey DeFore and Andrew Allen to do and commit the said crime of arson in manner and form aforesaid, against the peace and dignity of the State of Arkansas."

Appellant filed a demurrer to the indictment, which was overruled, on the ground that it failed to allege that he was absent when the crime of arson was committed by the principals.

The statutes of the State defining accessory before the fact to the perpetration of crime are as follows:

"Sec. 1560. An accessory is he who stands by, aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime.

"Sec. 1563. All persons being present aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted and punished as such." Kirby's Digest, § § 1560, 1563.

The first of the sections just quoted was a part of the Revised Statutes, and the other section was a part of the act of December 17, 1838. These two sections, taken together, constitute persons who, being present, aid and abet in the commission of a felony principals; and those who are not present but who advise and encourage the perpetration of the crime accessories before the fact. Where the accused is indicted as accessory before the fact, it is unnecessary for the indictment to negative his presence at the perpetration of the crime. Presence at the perpetration of the crime marks the distinction, under our statute, between principals and accessories before the fact, and it is sufficient in an indictment against an accessory to allege that he advised and encouraged the perpetration of the crime, without specifically alleging that he was not present.

It is contended that the evidence is not sufficient to sustain the verdict. The prosecution relied mainly upon the testimony of one Harvey DeFore, who was an accomplice in the commission of the crime. He testified that he and one Andrew Allen set fire to Sutton's gin, and that appellant gave them coal

oil to use in setting fire to the gin and paid him $10 to do it. Milo Williams testified that about four months before the gin was burned he heard a conversation between appellant and Allen in which appellant said: "We can burn old man Sutton's gin and get all the work to do;" that Allen said "No, I would rather give $150 than to burn it," and appellant replied, "I would rather burn it myself and keep the money." Appellant and Allen owned a gin in the same locality which was operated in competition with Sutton's gin. There was also some proof of ill feeling between appellant and Sutton before the gin was burned. Sutton testified that he went to the gin about sunset (it was burned about one o'clock that night), and examined the furnace to see if it was secure against escape of fire; that he found the fire entirely burned out, and the flue damper turned down so as to shut off every particle of draft.

We think that the testimony of the accomplice, DeFore, was sufficiently corroborated, and that the evidence sustained the verdict.

Appellant also complains of the refusal of the court to give an instruction to the jury that, "in order to convict on circumstantial evidence, the facts shown by it must be absolutely incompatible with the innocence of the accused upon any rational theory, and incapable, beyond any reasonable hypothesis, of other explanation." This was not prejudicial, as the court gave another instruction saying that the evidence must, before a conviction could be had, be sufficient to satisfy the jury beyond a reasonable doubt of the defendant's guilt. It was unnecessary to give both of these instructions. *Reed* v. *State,* 54 Ark. 621.

No error is found in the proceedings, and the judgment is affirmed.

HILL, C. J., and HART, J., (dissenting.) The evidence of corroboration of the accomplice is dependent upon vague threats made from four to eight months prior to the fire that the defendant would burn the gin, and some circumstances tending to prove that the fire might have been of incendiary origin. Where the *corpus delicti* is so insufficiently proved (other than by the accomplice), and the threats were so remote in time

from the fire, we do not feel that the statute requiring corroboration is sufficiently met.

LACOTTS v. QUERTERMOUS.

Opinion delivered November 25, 1907.

1. CANCELLATION OF INSTRUMENT—DEED PROCURED BY DURESS.—A deed from a mother to her infant child will be cancelled where it was procured from the mother by the child's father through duress. (Page 614.)
2. DEED—DELIVERY.—A deed which was never delivered is not binding. (Page 614.)
3. ESTOPPEL—FAMILY SETTLEMENT.—Where an infant heir, who was also a married woman, agreed that her intestate's widow should receive a certain share of the estate in lieu of dower, and after reaching her majority accepted her share of the proceeds of a sale of the estate in accordance with such agreement, she will be held to have ratified the agreement made during minority, and to be estopped to dispute the widow's right to share in the estate as agreed. (Page 614.)

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

Appellants, pro se.

1. There is no estoppel as against an infant, and neither a married woman nor an infant is estopped by mere silence. 61 Ark. 61; 62 Ark. 319; 30 Ark. 385; 40 Ark. 26. But the plaintiff, appellee here, is estopped by reason of her failure to take steps to protect her rights as widow for ten years.

2. Appellee is further estopped, and will be held to have waived her dower rights in the Wolfe Point land, by executing a deed conveying the fee therein, without reserving her dower. 31 Ark. 110; 51 Ark. 419; 53 Ark. 107.

3. One can not avail himself of the betterment act except under color of title; and, even if the act giving the widow the option of taking a child's part had not been declared invalid, still the act was not complied with by filing relinquishment of dower within sixty days as required, and, there having been no administration, the probate court was without jurisdiction to grant such an order. Appellee was therefore without color

of title, and can not claim the benefit of betterment. 55 Ark. 369; 33 Ark. 490; 47 Ark. 62; *Id.* 28; 48 Ark. 183; 67 Ark. 184.

4. Appellee can claim no benefit by reason of the note and mortgage executed by her to B. F. Quertermous prior to her marriage to him. 64 Ark. 381.

5. Delivery of a deed to a father for a minor is sufficient. 63 Ark. 374; Tiedeman, Real Prop. § 814. Time of delivery is the date of the deed. 61 Ark. 104.

John F. Park, H. Coleman, and *Campbell & Stevenson,* for appellee.

1. Appellant, by demanding and accepting one-third of the proceeds of the Wolf Point land, was estopped to disaffirm the agreement and the probate judgment whereby appellee's dower interest therein was exchanged for the twenty-acre tract. 22 Cyc. 549; 77 Tex. 240; 14 Ia. 310; 24 Ia. 118; 19 Pa. St. 424; 53 Pa. St. 349; 45 Miss. 542; 51 Miss. 166; 42 Miss. 471; 12 Heisk. 436; 64 Ala. 411; 88 Ky. 515. Where a former infant seeks to evade responsibility for acts of affirmance creating an estoppel, done after reaching majority, the burden is upon him to show such fraud or mistake as will defeat a contract between adults. Cases *supra.*

2. That the deed of appellant to her infant child was executed under duress, the evidence is conclusive. Duress exists, and will avoid an act done under its influence, whenever by the wrongful acts of another a person is so put in fear or under compulsion that he does an act at the dictation of another which, left free to act, he would not have done. 14 Cyc. 1123, 47 L. R. A. 417; 111 Ala. 456; 64 S. W. 329. The evidence also clearly shows that there was never a delivery of the deed.

BATTLE, J. Willie I. Quertermous, insisting that the defendant, Ethel LaCotts, through whom her co-defendant and child, Ethelbert LaCotts, claims, was estopped from claiming any interest in the land in controversy, asked the court to declare the interest of the parties named in the land, and, in the event it found that the defendants had any interest, to partition it (land) between them according to their respective interests. The facts in the case are substantially as follows:

W. S. Quertermous died intestate in 1887, leaving Willie I. Quertermous, his widow, and Elizabeth Quertermous, Ethel LaCotts, born Quertermous, and W. S. Quertermous, Jr., his heirs him surviving. He died seized of two tracts of land in Arkansas County, in this State, one containing 480.50 acres, which for convenience we will call the "Wolfe Point land," and one containing twenty acres and lying near the town of DeWitt, which for convenience we will call the "20-acre tract."

All of this land, at the time of the death of the intestate, was wild and unimproved.

Mrs. Quertermous married B. F. Quertermous, the brother of her first husband. Being advised that she could take a child's part in the estate of her deceased husband, under section 2599 of Mansfield's Digest, instead of dower, she, on the second day of June, 1891, relinquished in legal form all her right, claim or possibility of dower in her first husband's estate, and elected a child's part. Pursuant to such statute, she then filed a petition in the Arkansas Probate Court, to which her children, Elizabeth, W. S., Jr., and Ethel, were made defendants, asking that she be given a child's part, or one-fourth interest, in the lands above described in fee simple. The petition was granted, and commissioners were appointed to set apart to her one-fourth interest or child's part in the two described tracts of land, there being no other property belonging to her deceased husband. They set apart to her the "20-acre tract" of land as her fourth part, and made report to the court accordingly, and it confirmed the report, and by order entered of record vested in plaintiff in fee simple the tract so set apart. The three children were parties to all these proceedings, and were represented by a guardian *ad litem.*

B. F. Quertermous, for his wife, the plaintiff, at once began the erection of a dwelling house and the other improvements on the tract set apart to her. In 1894 the Supreme Court of this State, in *Mack* v. *Johnson,* 59 Ark. 333, held that section 2599 of Mansfield's Digest was repealed by the Constitution of 1864. Many of the improvements had been made at the time of this decision. The three children, although minors, in consideration of their mother's relinquishment of dower, agreed with her, the plaintiff, that when they arrived of age they

would convey to her their respective interests in the twenty acres assigned to her. In compliance with this agreement two of the children, Elizabeth Quertermous and W. S. Quertermous, Jr., severally conveyed their interests in the land to their mother as each arrived at majority. But Ethel, having eloped, married J. C. LaCotts, on the 3d day of December, 1898, against the will of her mother, when she was a few days over the age of seventeen years. On account of this marriage Ethel and her mother were for a time estranged; and her husband was deeply prejudiced against her. But Ethel had, nevertheless, expressed a willingness and desire to carry out her agreement after arriving at majority, but was prevented by the threats of her husband.

On the 23d day of October, 1900, the defendant, Ethelbert LaCotts, a child, was born to Ethel, and her husband, J. C. LaCotts, under a threat that he would take the child and carry it where she would never see it again, compelled his wife to convey by deed to the child whatever interest she had in the land. He got possession of the deed, by what means does not clearly appear. According to her testimony she never delivered it to any one for the child, and never saw it or had it in her possession after signing it, and never directed that it should be recorded. On the contrary, she repeatedly stated that, if she could find it, she would destroy it.

Since the commencement of this suit J. C. LaCotts has filed it for record.

On March 26, 1904, Mrs. W. I. Quertermous, having purchased the interest of her daughter, Elizabeth, in the "Wolf Point Land," joined with W. S. Quertermous and Ethel LaCotts, the remaining heirs of W. S. Quertermous and her children, and sold and conveyed the "Wolf Point land" to H. C. and G. O. Perry, for the price and sum of $3,920 in cash. Of this sum Mrs. Ethel LaCotts received one-third, less expenses of sale, which was $1,306. No deduction was made on account of dower. This was treated as relinquished according to the agreement with the children.

The court, after hearing the evidence in the case, and the argument of counsel, found that the deed executed by Mrs. LaCotts to her son Ethelbert was obtained by duress of her husband and never was delivered, and "for these and other reasons

disclosed by the evidence is void and of no effect"; and found that plaintiff was owner of the land in controversy, and that the defendants had no interest therein; and cancelled the deed of Mrs. LaCotts to Ethelbert as a cloud upon her title. Defendants appealed.

Mrs. LaCotts, in demanding and accepting one-third of the proceeds of the sale of the "Wolf Point land" after she reached her majority, ratified the agreement she and her brother and sister made with their mother during her minority. The preponderance of the evidence shows that, before the sale of the "Wolf Point land", she knew of the agreement. She knew no dower had been assigned to her mother, and that the proceeds of the sale were divided according to the agreement. She was willing and desirous to convey her interest in the "twenty-acre tract" to her mother since she has been of age, but was prevented from so doing by her husband. She has been compelled by him through duress to execute the deed to her child, and doubtless is prevented from avoiding it by the same means. The evidence fails to establish a delivery of the deed. The husband, who secured it by duress, is in possession, but we find no evidence that it was delivered to him by the grantor for the grantee. The testimony of Mrs. LaCotts, in connection with the evidence which shows duress, proves that there was no delivery. The evidence sustains the findings of the chancellor in this respect. She, therefore, ratified the agreement with her mother after she reached her majority, is estopped from disputing her mother's title to the "twenty-acre tract", and her son, Ethelbert, takes nothing by her deed. See *Nanny* v. *Allen,* 77 Texas, 240; *Deford* v. *Mercer,* 24 Iowa, 118; *Handy* v. *Norman,* 51 Miss. 166; *Bull* v. *Sevier,* 88 Ky. 515; 22 Cyc. 549, and cases cited.

Decree affirmed.

WALKER v. HELMS.

Opinion delivered December 23, 1907.

84 614
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LIMITATION—TITLE ACQUIRED BY.—Where a purchaser of land at tax sale had been in actual possession of the land under a tax deed for more than two years, he acquired title, regardless of the validity of the tax sale; and the fact that he took a quitclaim deed to his wife from the original owner did not divest his title, as the latter had no title to convey.

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

H. A. Parker, for appellants.

1. W. F. Stevens, by virtue of possession for more than two years under a valid tax deed, had acquired a perfect title to the 60-acre tract before Hoard executed the quitclaim to Steven's wife. Kirby's Dig. § 5061; 59 Ark. 460; 60 Ark. 499; *Id.* 163; 57 Ark. 523; 58 Ark. 151; 53 Ark. 418; 71 Ark. 117; *Id.* 390; 75 Ark. 514; 80 Ark. 82; 80 Ark. 435; 80 Ark. 181; 78 Ark. 99; 34 Ark. 541. See, also, 79 Ark. 194; *Id.* 364; 80 Ark. 575; 83 Ark. 534.

2. There was no delivery of the Hoard deed to Mary I. Stevens; and if there had been, she could not have acquired thereby any more title than he had.

Thomas & Lee, for appellees.

1. Delivery of the deed to W. F. Stevens was a sufficient delivery to his wife, Mary I.

2. It is clearly shown that the execution of the deed to Mary I. Stevens was at the request of W. F. Stevens, and, even if there had been no consideration moving from her (although her joining in the conveyance of the 160-acre tract was a sufficient consideration), it will be treated as a voluntary settlement upon her by the husband, and the conveyance is valid. 20 Ark. 265; 36 Ark. 586; 75 Ark. 131; 44 S. W. 397; 47 Ark. 111; 46 Ark. 542.

McCULLOCH, J. This action was commenced at law to recover possession of a tract of land in Monroe County containing 60 acres and, by consent of all parties, the cause was transferred to the chancery court, where it proceeded to final decree in favor of the plaintiff for recovery of the land sued for.

The case involves a controversy concerning the title to the land betwen the appellèes, Sibbie Stevens Helms and Lecil Stevens, children of W. F. Stevens and his first wife, Mary I. Stevens, both deceased, and the appellants, Maude Walker, widow of said W. F. Stevens, and Oliver Stevens, the offspring of her intermarriage with Stevens.

Appellees claim that the title to the land was in their mother, Mary I. Stevens, and that they inherited it from her; and ap-

pellants claim that the title was in W. F. Stevens, that it was his homestead at the time of his death, that his widow is entitled to her homestead rights therein, and that the title in fee descended to the three children of W. F. Stevens.

The pleadings and evidence establish the following as the facts of the case, there being no dispute over the facts:

The quarter-section of land, of which the 60 acres in controversy formed a part, was originally owned by Thomas Hoard of Murfreesboro, Tennessee, who received a patent for it in 1861, and it was sold for taxes in 1877, and purchased by J. Cole Davis, who in due time, the land not being redeemed within the time prescribed by law, received a deed in proper form from the county clerk of Monroe County conveying the land to him pursuant to the tax sale. Davis conveyed the land to W. F. Stevens in 1881. The latter at once entered into actual possession, and cleared up, put a part of it in cultivation, and built a house on it, and occupied it as his homestead from then until his death. All the improvements were on the 60 acres in controversy.

In 1886, T. E. Hoard, sole heir of Thomas Hoard, executed a deed in Mary I. Stevens, quitclaiming to her all his interest in the land in controversy, and at the same time W. F. Stevens and wife, Mary I., executed to Hoard a deed quitclaiming to him all their interest in the other 100 acres in the quarter section. Each of these deeds recited a consideration of one dollar in money and the execution of the quitclaim from each to the other.

The quitclaim deed from Hoard was by W. F. Stevens, during the lifetime of his wife, Mary, delivered to his sister, Mrs. Hill, with instructions to keep it until he called for it. He never called for it, and two years after his death one of the appellees procured it from Mrs. Hill and caused it to be placed of record.

Mary I. Stevens died in 1892. Subsequently W. F. Stevens intermarried with appellant, Maude (now Mrs. Walker), and he died in 1901, leaving surviving his widow and three children named above.

The title to the land in controversy was unquestionably in W. F. Stevens. His grantor, Davis, purchased it at tax sale,

and no attack is made, either in the pleadings or proof, on the validity of the sale. The deed is exhibited with appellant's pleadings, and was introduced in evidence, and its validity was not questioned.

Besides, W. F. Stevens had been in actual possession of the land under the tax title for about five years when the Hoard quitclaim was executed, and this operated as a complete investiture of title by limitation. *Hudson* v. *Stillwell,* 80 Ark. 575; *Jacks* v. *Chaffin,* 34 Ark. 541.

The title being in W. F. Stevens, the quitclaim of Hoard to Mary I. Stevens conveyed nothing. Hoard had nothing to convey. There is no evidence or indication on the part of W. F. Stevens that he intended to settle the title to the land upon his wife, and the quitclaim itself was ineffectual for that purpose. The authorities cited by counsel for appellees, reciting instances where the husband or wife have in various methods conveyed or caused to be conveyed lands to the other as gifts or settlements, do not apply here.

Nor is there any element in the conduct of W. F. Stevens which would estop him or his heirs to assert that the title was vested in him and remained in him up to the time of his death. It is evident that in the transaction with Hoard he merely "purchased his peace" by quitclaiming his interest in 100 acres of his land, and that Hoard in return quitclaimed to Mrs. Stevens his interest, which amounted to nothing, in the 60 acres in controversy. This did not change, in anywise, the status of the title to the land in controversy.

We find nothing, therefore, in the record to sustain the decree, and the same is reversed and remanded with directions to enter a decree in accordance with this opinion. It is so ordered.

BILLINGSLEY *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Opinion delivered December 16, 1907.

SURVIVAL OF ACTION—KILLING OF WIFE.—Under Kirby's Digest, § 6285, providing for survival of a cause of action "for wrongs done to the person or property of another," a cause of action in favor of a

husband for negligently killing his wife does not survive his death, as it constitutes a wrong neither to his person nor to his property.

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

STATEMENT BY THE COURT.

This suit was instituted by one G. W. Hurley against the appellee to recover damages in the sum of $20,000, the alleged value of the services and companionship of Hurley's wife, who, it was alleged, "was killed through the carelessness and negligence of appellee's servants", and "by the wrongful act, neglect or default of appellee."

While the suit was pending, Hurley died, and it was sought to revive the cause in the name of appellant as his executor. The court, instead, abated the action, and this appeal is prosecuted from a judgment dismissing the cause.

Stuckey & Stuckey, for appellant.

1. The cause of action survives per force of the Constitution. Art. 5, § 31. It also survives by reason of the statutes. Kirby's Dig. § § 6285, 6286, 6288, 6298; 18 Mo. 162; 186 Mo. 445; 164 N. Y. 145; 23 Ky. 1879; 17 Pa. Super. Ct. 151; 63 N. J. L. 558; 75 N. Y. 192; 83 N. Y. 595; 58 Fed 532.

2. This being an action unknown to the common law, and based upon a statute only, the maxim, *"Actio personalis moritur cum persona"* can have no application.

T. M. Mehaffy and *J. E. Williams,* for appellee.

All questions involved in this action have been settled by this court contrary to the contention of appellant in *Davis v. Nichols,* 54 Ark. 358. See, also, 53 Ark. 117;51 N. H. 71; 70 Md. 319; 19 N. Y. 252; 61 N. E. 221; 29 S. W. 370; 23 Wis. 400; 50 La. An. 477; 111 Fed. 708; 49 Am. & Eng. R. Cas. 495; 151 U. S. 673; 28 S. E. 662; 46 S. W. 63; 74 N. W. 797; 75 S. W. 868; 23 So. 100.

WOOD, J., (after stating the facts.) The only question is: "did the cause of action survive the death of Hurley?" The action is based upon section 6288 of Kirby's Digest as follows: "When a wife be killed in this State by the wrongful act, neglect or default of any person, company or corporation, the husband

may have a cause of action therefor against such wrongdoer, and be entitled to damages for the services and companionship of his said wife in whatever amount the jury trying the cause may consider he is entitled to; provided, suit be brought within two years from the time the said cause of action occurs, which action may be brought by and in the name of the husband."

The statute under which survival to the executor of Hurley is sought reads as follows: Sec. 6285. "For wrongs done to the person or property of another an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator against such wrongdoer, or, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contract."

To establish a survival under this section, it must be held that the killing of the wife of Hurley was an injury to the person or property of Hurley himself. Such is the contention of appellant; but the case of *Davis* v. *Nichols,* 54 Ark. 358, decides directly to the contrary. Judge COCKRILL, rendering the court's opinion, said: "The 'injury to the person' mentioned in the provision has been construed to mean a bodily injury or damage of a physical character, and no other; and the injury to property, so far as it relates to personal property, is only such as was contemplated by the statute of 4 Edward III, c. 7, on the same subject."

It would be absurd to hold that the death of the wife would be a physical injury to the person of the husband, and the case and the authorities cited show that such rights as arise out of the domestic relation are not "property," in the meaning of the statute. The domestic services of a wife, and her companionship with the husband, possess none of the attributes of "property". The husband has the right to them by virtue of the marital relation, but they are purely personal to him. They can not be bought and sold; no pecuniary value can be placed upon them for that purpose. They are in him, and die with him. They are not things, but acts, sentiments and conditions. They are not "property", in the sense of this statute. Although, in the case of *Davis* v. *Nichols,* the question was as to the right of survival of the action against the administrator of a wrong-

doer, yet the statute under consideration here was necessarily under review there, and the construction given the words "wrongs done to the person or property" concludes the question here, unless we overrule that case. This we are unwilling to do, as we are convinced that it is correct and supported by sound reason and abundant authority. We will not enter upon a review here of the authorities, but, in addition to those cited in *Davis* v. *Nichols, supra,* see cases cited in brief of appellee.

The judgment is therefore, affirmed.

LATCH v. STATE.

Opinion delivered December 9, 1907.

TRIAL—DIRECTING VERDICT.—Where, in a prosecution for giving away whisky on election day, there was evidence tending to show that the whisky was given away by another, it was error to direct a verdict of guilty.

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

Pole McPhetrige, for appellant.

It was error in the court peremptorily to instruct the jury to return a verdict of guilty. There was evidence upon which they might or not have found the defendant guilty, and the appellant was entitled to have their verdict uninfluenced by the charge of the court.

William F. Kirby, Attorney General, and *Dan'l Taylor,* Assistant, for appellee.

Appellant's own testimony amounts to a confession of guilt. There is no prejudicial error.

HART, J. The appellant was convicted under an indictment charging him with giving away whisky on election day.

The evidence adduced at the trial is as follows: "J. J. Turner, for the State, testified that on the general election day, 1906, the defendant gave him a drink of whisky in the back end of Dr. Johnson's office in the town of Hatfield. On cross examination he was asked: "Q. Where was it (meaning the

whisky) when you got it? A. In the back end of Dr. Johnson's office. Q. Did you look there for it? A. Yes, looked up and about there, and we did not find it when we first looked, and Dr. Johnson came and pointed out where it was. Q. Then what did Mr. Latch do? A. He took the bottle down out of the shelf and told me to drink, and Mr. Latch drank, and Dr. Johnson took one, too. Q. What was done with the bottle? A. Mr. Latch set it back on the shelf."

Turner further stated that he did not know that he spoke directly about whisky: "Me and him were talking as we generally do when we get together. This talk being at Dover's store, or Wayland's, and he said: 'Let's go down there together and see what we can find.'"

Dr. Johnson testified as follows: "Something like a week or ten days before Mr. Hasher came to me to fix up some medicine for his wife. I told him I would have to have some whisky or alcohol before I could fix it, and he said he would get some. On the afternoon of the election day he came and said that he had some whisky. He had something across his shoulder, I didn't know what, but of course I had an idea, and I went in there and set down to the table and commenced writing, and George (meaning defendant) and Mr. Turner came, and George made the remark: "Here (or there) is a bottle that George Hasher left here." "I taken it out, and George went out in the meantime, and directly he came back with Turner, and George said: 'Doc, where is that bottle?' And I said: 'I set it on the shelf.' I can't say who got it down. I went ahead with my work. This is the only time I remember of George getting any whisky, and I couldn't say for sure whether either of them taken a drink."

The defendant testified as follows: "On the day of the election, I saw kind of a suspicious transaction by Mr. Hasher having what I thought was some whisky. I didn't know whether it was or not. I went down there to see if I could find out anything. I didn't know whether they had anything or not. Mr. Turner and I were talking about the saw mill business, and I remarked to him, 'Let's go and see if we can find anything.' When we first went in, Dr. Johnson was in the front room, doing

some work. I made some remark about where it was, and he told me. I went and got it, and me and Mr. Turner took a drink of it. It wasn't mine. After we had taken a drink, I put it back where I found it."

The court instructed the jury to return a verdict of guilty. The jury returned a verdict of guilty, and assessed the punishment at a fine of two hundred dollars.

The court erred in directing a peremptory verdict of guilty. Under the testimony adduced at the trial, the jury could have found that the whisky was given away by Dr. Johnson. At least, the testimony was not undisputed, and it was for the jury to say whether or not the defendant was guilty. *State* v. *Caldwell,* 70 Ark. 74.

Reversed and remanded.

APPENDIX

I.

OPINIONS NOT REPORTED.

St. Louis, I. M. & S. Ry. Co. *v.* Cain; Appeal from Chicot Circuit Court; Zachariah T. Wood, judge; affirmed July 15, 1907; *per* McCulloch, J.

Jackson *v.* State; appeal from Garland Circuit Court; W. H. Evans, judge; affirmed October 7, 1907; *per* McCulloch, J.

Little Rock Ry. & El. Co. *v.* Putsche; appeal from Pulaski Circuit Court; Edward W. Winfield, judge; reversed July 8, 1907; *per* McCulloch, J.

Wofford *v.* Clark; appeal from Franklin Chancery Court; J. Virgil Bourland, chancellor; reversed October 21, 1907; *per curiam.*

St. Louis & S. F. Rd. Co. *v.* Scott; appeal from Crawford Circuit Court; Jeptha H. Evans, judge; affirmed October 21, 1907; *per* McCulloch, J.

Bentonville Rd. Co. *v.* Arkansas & Oklahoma Rd. Co.; appeal from Benton Chancery Court; T. H. Humphreys, chancellor; reversed in part July 8, 1907; *per* Battle, J.

Fourche Planting Co. *v.* Brown; appeal from Pulaski Chancery Court; Jesse C. Hart, judge; affirmed October 21, 1907; *per* Wood, J.

Griggs *v.* Harton; appeal from St. Francis Circuit Court; Hance N. Hutton, judge; reversed July 15, 1907; *per* Hill, C. J.

Harvey *v.* Scally; appeal from Jackson Circuit Court; Frederick D. Fulkerson, judge; affirmed November 4, 1907; *per* Hill, C. J.

Park *v.* Smith; appeal from Arkansas Chancery Court; John M. Elliott, judge; reversed November 4, 1907; *per* Hart, J.

St. Louis, I. M. & S. Ry. Co. *v.* Priest; appeal from Miller Circuit Court; Jacob M. Carter, judge; affirmed October 28, 1907; *per* Hill, C. J.

Stephenson *v.* Garner; appeal from Howard Chancery Court; James D. Shaver, chancellor; reversed November 11, 1907, *per* Battle, J.

Wilson Stave Co. *v.* Webb; appeal from Pulaski Circuit Court; Edward W. Winfield, judge; affirmed November 11, 1907; *per* Hill, C. J.

Owen *v.* Mulkey; appeal from LaFayette Circuit Court; George W. Hays, judge; reversed November 25, 1907; *per* Wood, J.

Atwood *v.* State; appeal from Franklin Circuit Court; Jeptha H. Evans, judge; affirmed December 9, 1907; *per* McCulloch, J.

Crofton *v.* State; appeal from Howard Circuit Court; James S. Steel, judge; affirmed December 9, 1907; *per* Battle, J.

Waters-Pierce Oil Co. *v.* Eggner; appeal from Garland Circuit Court; Alexander M. Duffie, judge; reversed December 2, 1907; *per* Fletcher, Special J.

II.

CASES DISPOSED OF ORALLY.

Joe Gibson *v.* State of Arkansas; Lawrence Circuit Court; Frederick D. Fulkerson, judge; appeal dimissed on motion, September 30, 1907; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* J. W. Hope; Miller Circuit Court; Jacob M. Carter, judge; settled and appeal dismissed, September 30, 1907; *per curiam.*

The Consolidated Anthracite Coal Company *v.* Anton Naegle *et al.;* Johnson Circuit Court; Hugh Basham, judge; appeal dismissed by consent, September 30, 1907; *per curiam.*

C. R. Fix *et al. v.* Susan Hoskins; Pulaski Circuit Court, 1st division; Robert J. Lea, judge; advanced and affirmed as a delay case with penalty, October 7, 1907; *per curiam.*

H. J. Hanson *v.* W. L. Connery; LaFayette Circuit Court; Charles W. Smith, judge; appeal dismissed for noncompliance with rule nine; October 7, 1907; *per curiam.*

Harriet E. Allen *et al. v.* A. F. Cook Land & Timber Company. *et al.;* Chicot Chancery Court; Marcus L. Hawkins, chancellor; compromised and appeal and cross-appeal dismissed, October 7, 1907; *per curiam.*

Henry Starnes *v.* The State of Arkansas; Jackson Circuit Court; Frederick D. Fulkerson, judge; appeal dismissed on motion, October 7, 1907; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* C. E. Hatfield; Saline Circuit Court; W. H. Evans, judge; settled and appeal dismissed under stipulation of counsel, October 14, 1907; *per curiam.*

P. H. Mustain *v.* R. Tindell; Crawford Circuit Court; Jeptha H. Evans, judge; affirmed with penalty under rule seven; *per curiam.*

Henry Stroup *v.* The Watkins Laundry Machinery Company; Logan Circuit Court, northern district; Jeptha H. Evans, judge; affirmed for noncompliance with rule nine, October 21, 1907; *per curiam.*

Oscar M. Spellman *et al. v.* Lundee Chapman & Company *et al.;* Cleburne Chancery Court; Geo. T. Humphries, chancellor; appeal dismissed for noncompliance with rule nine, October 21, 1907; *per curiam.*

Cross County *v.* John Graham, *et al.;* Cross Circuit Court; Frank Smith, judge; appeal dismissed for noncompliance with rule nine, October 21, 1907; *per curiam.*

F. L. Jackson *v.* James Cheatham; Polk Circuit Court; James S. Steel, judge; appeal dismissed for noncompliance with rule nine, October 28, 1907; *per curiam.*

S. D. Higginbotham *v.* H. V. Ames; Craighead Circuit Court, Jonesboro district; Frank Smith, judge; affirmed, with ten per cent. penalty, as a delay case, November 4, 1907; *per curiam.*

H. P. Marshall *v.* Wash Pigg *et al.;* Johnson Circuit Court; Edward W. Winfield, judge; appeal dismissed on appellant's motion, November 11, 1907; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* J. D. Reinhardt; Crawford Circuit Court; Jeptha H. Evans, judge; settled and appeal dismissed, November 11, 1907; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Columbia F. Nelson *et al.;* Crawford Circuit Court; Jeptha H. Evans, judge; settled and appeal dismissed, November 11, 1907; *per curiam.*

E. T. Green *v.* G. J. Murphy; Logan Circuit Court, Southern district; Jeptha H. Evans, judge; appeal dismissed for noncompliance with rule nine, November 18, 1907; *per curiam.*

E. C. McClain *v.* The State of Arkansas; Clark Circuit Court; Jacob M. Carter, judge; appeal dismissed on motion of the Attorney General, November 25, 1907; *per curiam.*

H. P. Watson *v.* Ida May Favers *et al.;* Grant Circuit Court; Alexander M. Duffie, judge; dismissed under stipulations of counsel, November 25, 1907; *per curiam.*

Bank of Hope *v.* W. S. Brooks, *et al.;* Hempstead Circuit Court; Jacob M. Carter, judge; settled and appeal dismissed, November 25, 1907; *per curiam.*

Lon H. Pippin *v.* E. L. Horton *et al.;* St. Francis Chancery Court; Edward D. Robertson, chancellor; appeal dismissed for noncompliance with rule nine, December 9, 1907; *per curiam.*

E. C. Dunbar *v.* T. C. Dilday; Logan Circuit Court, Southern district; Jeptha H. Evans, judge; affirmed as a delay case, without penalty, December 9, 1907.

W. D. Wheeler *v.* John LaCotts; Arkansas Chancery Court; John M. Elliott, chancellor; affirmed for noncompliance with rule nine, and cross-appeal dismissed for same cause, December 16, 1907; *per curiam.*

Saline County Bank *v.* New York Life Insurance Company; Saline Chancery Court; Alphonso Curl, chancellor; settled and appeal dismissed, December 16, 1907; *per curiam.*

Tim O'Guin *v.* Aurilla O'Guin; Union Chancery Court; E. O. Mahoney, chancellor; appeal dismissed for noncompliance with rule nine, December 16, 1907; *per curiam.*

George R. Cagle *v.* James B. Gray; Pulaski Chancery Court; Jesse C. Hart, chancellor; affirmed as a delay case, without penalty, December 23, 1907; *per curiam.*

D. L. Bain *et al. v.* The American Freehold Land Mortgage Company of London, Limited; Ashley Chancery Court; James C. Norman, chancellor; settled and appeal dismissed, December 23, 1907; *per curiam.*

Arkansas, Louisiana & Gulf Railway Company *v.* Rhinaldo W. Baird; Ashley Circuit Court; Henry W. Wells, judge; affirmed under rule seven, December 30, 1907; *per curiam.*

Ira Congleton *et al. v.* Milton Robins *et al.;* Montgomery Chancery Court; Alphonso Curl, chancellor; appeal dismissed for noncompliance with rule nine, January 13, 1908; *per curiam.*

H. L. Shultz, *et al. v.* J. M. Wattenbarger *et al.;* Montgomery Chancery Court; Alphonso Curl, chancellor; affirmed for noncompliance with rule nine, January 13, 1908; *per curiam.*

Pine Bluff & Western Railroad Company *v.* Sarah M. Swofford *et al.;* Grant Circuit Court; W. H. Evans, judge; settled and appeal dismissed, January 20, 1908; *percuriam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* P. H. Prince, special administrator of the estate of Harriet Gwaltney, deceased; Faulkner Circuit Court; Eugent Lankford, judge; remittitur by appellee and judgment of lower court affirmed for remainder, by consent, February 3, 1908; *per curiam.*

W. A. J. Sturdivant *v.* A. W. Reese, special administrator of the estate of Minnie McCorley, deceased; Howard Chancery Court; James D. Shaver, chancellor; affirmed as a delay case, without penalty, February 3, 1908; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Jennetta Herid, administratrix of the estate of W. T. Herid, deceased; Pope Circuit Court; Hugh Basham, judge; appeal dismissed for noncompliance with rule nine, March 2, 1908; *per curiam.*

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