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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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AMENDMENT TO RULE VII

For reasons which are explained in the case of *North State Fire Insurance Company* v. *Dillard, infra,* p. 561, Rule VII is amended so as to read as follows:

RULE VII

In all civil cases when the appeal has been taken more than ninety days and a supersedeas bond filed, and the appellant has not filed in the office of the clerk an authenticated copy of the record, the appellee may, at any time, file in this court a certified transcript of the judgment, order or decree appealed from, the order granting the appeal and the supersedeas bond, with his motion to dismiss the appeal or affirm the judgment; and the appeal shall be dismissed or the judgment affirmed by the court at the cost of the appellant, unless the appellant pays the costs incurred on his motion and offers in good faith to prosecute his appeal and tenders an authenticated copy of the record, or shows good cause for a failure to tender the record entitling him to an extension of time for filing it under sec. 1194 of Kirby's Digest; provided, a notice of ten days of such intended motion be given the appellant or his attorney of record; and provided further, that the judgment will not be affirmed when the appeal has been voluntarily dismissed before the submission of said motion.

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

KIRST *v.* STREET IMPROVEMENT DISTRICT NO. 120.

86 188 1 265

Opinion delivered March 30, 1908.

1. IMPROVEMENT DISTRICTS—MODE OF ASSESSMENT.—Section 27 of art. 5 Const. 1874, providing that assessments for local improvements in towns and cities "shall be *ad valorem* and uniform," does not prohibit assessments made, not according to the value of the property itself, but according to the value of the benefits to the property. (Page 9.
2. SAME—BOARD OF ASSESSORS—DURATION OF EXISTENCE.—The board of assessors of an improvement district, provided for by Kirby's Digest, § 5676, is intended to exist until the district is paid out, and there is no further service for it to perform. (Page 10.)
3. SAME—POWERS OF CITY COUNCIL.—The powers of city councils in the matter of local improvement districts are prescribed by the statute, and the council possesses no authority not conferred upon it either in express terms or by necessary implication. (Page 11.)
4. SAME.—City councils are authorized by Kirby's Digest, § § 5679, 5680, to hear appeals of property owners from the action of the board of assessment and to certify their findings to such board; but not to reopen the entire assessment, nor to equalize the various assessments, nor to give relief to property owners not appealing. (Page 11.)
5. SAME—REMEDY AGAINST DISCRIMINATORY ASSESSMENT.—When, after the hearing of the appeals and the correction of the assessment list of an improvement district to conform to the findings of the city council, it appears that the several assessments of benefits are unjust, discriminatory and not uniform, a property owner in the district may, within thirty days after publication of notice of the passage of the ordinance imposing the assessment, institute legal proceedings, as provided by Kirby's Digest, § 5685, to correct or invalidate the assessment. (Page 12.)
6. SAME—POWER OF ASSESSORS TO MEET.—Two members of a board of assessment of an improvement district are not authorized to act as a board in the absence of the third member and without notice to him. (Page 13.)

7. SAME—POWER OF ASSESSORS TO RECONSIDER ASSESSMENT.—When the board of assessors of an improvement district file their assessment list, and notice thereof is given as required by Kirby's Digest, § 5678, such list becomes subject to the action of the council on appeals and of the courts on timely attack, and the council has no authority to return it to the board of assessors for reconsideration. (Page 14.)

8. SAME—WHEN ASSESSMENT ENJOINED.—Chancery will, in a timely suit, enjoin the enforcement of an assessment for a local improvement district if such assessment as a whole was arbitrary and not according to benefits. (Page 14.)

9. SAME—MODE OF ASSESSING PROPERTY.—In determining the benefits to accrue to each piece of property in an improvement district, as required by Kirby's Digest, § 5677, the assessors are required to make a fair and just estimate of the benefits which each tract of land, including buildings, will receive by reason of the improvement, and may adopt a percentage of the valuation of the property, including the buildings, as the value of the benefits, if in their judgment such a method best reaches the true measure of benefits thereto, or may adopt any other method that will reach the same result. (Page 15.)

10. SAME—ATTACK ON ASSESSMENT—EVIDENCE OF ASSESSORS.—In a direct attack upon the assessment of a local improvement district, the testimony of the assessors themselves is competent to show what matters entered into their estimate of the benefits to the property, in order to determine whether essential elements were arbitrarily disregarded or ignored by them. (Page 15.)

11. SAME—WHEN ASSESSMENT ENJOINED.—Where the evidence shows that the assessment of benefits in an improvement district was made practically upon a frontage basis, entirely excluding the valuation of the property, equity will enjoin its enforcement. (Page 16.)

12. SAME—LIMIT OF 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 such district as shown by the last county assessment," does not limit the amount which may be assessed against each particular piece of property to twenty per cent. of its value, but applies to the property of the entire district; the only limitation as to any particular tract being that the assessment shall not exceed the actual value of the benefit received. (Page 20.)

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

STATEMENT BY THE COURT.

Street Improvement District No. 120 was organized for the purpose of paving Main Street in the city of Little Rock,

from Eighth to Twenty-fourth streets. No complaint is made against the organization or of any proceedings prior to the making of the assessment of benefits by the board of assessors. The original assessment (hereafter called first assessment) was made by the entire board of assessors, and filed with the city clerk, who in turn published the notice as required by the statute. Within the ten days from the date of the publication appeals or protests were filed by Kate C. Collins and twenty-eight other owners of property in the district, asking for a correction of their assessments. Shortly thereafter two members of the board of assessors filed with the city clerk a formal communication, addressed to the mayor and city council, requesting that the assessment book be returned to the board of assessors for reconsideration. They stated that they were doubtful, at the time the assessment was made, as to whether they had adopted the proper method or basis upon which the benefits should be ascertained, and asked that the assessment book be returned for a further consideration, and for further legal advice and investigation as to the benefits to be derived, before making a further and final report to the council. A few days thereafter these two members of the board filed with the city clerk another formal communication, addressed to the city council, stating that the other members of the board had gone to Europe, and might not return for several months, and asking for the appointment of another in his place.

The city council referred the petitions, protests and appeals of the property owners, the book of assessment and the communications of the board of assessors above mentioned to the ordinance committee for consideration, recommendation and report to the council. That committee made a report to the council, in which they recited that the property owners objecting to said assessment had just causes or grounds for complaint against same; that the entire assessment was arbitrary—largely a matter of guess work, discriminating in favor of the most valuable and against the least valuable property in the district; and that it was, in the judgment of the committee, unjust, unequal and not in accordance with law and equity. The committee further reported that it was impractical to correct the assessment, and recommended that the book of assessment be returned

to the board of assessors for the purpose of reconsideration and correction. On motion, the city council adopted the report of the committee, and ordered the book of assessments returned to the board of assessors, as recommended. Thereafter two members of the board of assessors, in the absence of the other member in Europe, and without notice to him or any opportunity for him to be present or participate, proceeded to make a new assessment, and were about to file the same with the city clerk. At this point M. Kirst and a number of other property owners of the district filed their original bill in this case in the Pulaski Chancery Court, praying for an injunction prohibiting the filing of the second assessment. W. L. Terry and numerous other property owners, who had filed appeals with the city clerk from the action of the board in making the first assessment, intervened in said cause. The plaintiffs in the original bill afterwards filed an amended bill, alleging that the second assessment was null and void, praying that the assessors be enjoined from filing, and all parties connected therewith from proceeding to enforce, the same, and asking that the first assessment be declared valid, subject to the hearing of the appeals of the protesting property owners. The defendants and the interveners filed answers and cross-bills, praying that the first assessment be set aside, cancelled and held for naught, that the second assessment be ordered to remain on file with the city clerk, and that the defendants be permitted and ordered to proceed with its enforcement as the legal and valid assessment of the board.

Testimony of two of the assessors and several real estate agents, together with the county assessment and other documentary evidence, was introduced in evidence.

Upon the final hearing the chancery court enjoined the enforcement of both assessments. The plaintiffs have appealed from the action of the court in enjoining the enforcement of the first assessment, and the defendants and interveners have by cross-appeals appealed from the action of the court in enjoining the enforcement of the second assessment. The testimony and other facts are sufficiently set out in the opinion.

J. W. Blackwood, for appellants.

1. The power of special assessment is "based upon the theory that the owner of the property assessed is to receive a benefit corresponding to the amount assessed, and that this is to be paid to meet the cost and expense of the improvement. It is, therefore, of no consequence what the value of the lots may be, provided the enhanced benefit is equal to the assessment." 172 U. S. 270; 69 Ark. 76; 71 Ark. 27; Hamilton, Law of Special Assessments, 3, 50, 96, 106, 109, 179, 183, 192. It is in the discretion of the Legislature to provide the basis of the assessment, whether of benefits or *ad valorem.* 69 Ark. 76; 71 Ark. 27. And the Legislature, by its act of May 3, 1901, Kirby's Digest, § § 5676 *et seq.,* exercised this discretion and provided for the assessment upon the basis of benefits alone. The doctrine that the assessment must be according to benefits received (172 U. S. 270) has now been overruled, and that case, in its main features, is still in force. Cases *supra;* 181 U. S. 324; *Id.* 371; 197 U. S. 430; 187 U. S. 546; 188 U. S. 516; 195 U. S. 359;; 205 U. S. 135; Hamilton on Assessments, § 233 *et seq.*

2. There was no authority of law for referring the assessment back to the assessors. Their power was at an end when they made and filed their assessment, and property owners who were not satisfied with the assessment had the right to appeal to the city council in the manner provided by the statute. Kirby's Digest, § § 5679, 5680; 41 N. J. L. 90; 51 N. J. L. 109; *Id.* 544. The action of the assessors was conclusive, and the burden of proof is on those who attack the validity of the assessment. 84 Ark. 257. The council has no authority except that conferred upon it by the statute. 71 Ark. 24.

3. The second assessment, made in the absence of one of the board of assessors, and without previous notice to him, is void. 160 Ill. 611; 148 Ill. 221; 170 Ill. 316; 79 N. E. 962; 71 Ark. 24; 224 Ill. 617.

4. The statutory provisions limiting the cost of an improvement to twenty per centum clearly applies to the entire property of the district, not to the property of each individual property owner. Kirby's Digest, § § 5683, 5716; 59 Ark. 159; 67 Ark. 44.

5. Testimony as to how the assessors arrived at their

decision is incompetent. 48 Ill. 285; *Id.* 296; 130 Ill. 323; 168 Ill. 162; 66 Ill. 256.

W. Burt Brooks and *De E. Bradshaw,* for appellees.

1. The statute limits the assessment of benefits to 20 per cent. of the valuation as fixed by the county assessor. Kirby's Digest, § 3717. The plan contended for by appellants might easily result in practical confiscation of property of small value situated in the proposed district, because the owner of a lot of small value would be compelled to pay as much for the improvement as the owner of a lot of many times its value. 83 Ark. 54. Appellants' contention that the twenty per centum limitation applied to the whole of the property of the district, and not to the property of each individual owner, is contrary to the intent and spirit of the statute, as well as in conflict with the Constitution, art. 19, § 27. 42 Ark. 162; 32 Ark. 38; Kirby's Digest, § § 5456, 2906, 5683; 48 Ark. 252; Sutherland on Stat. Con. par. 288.

2. The assessment by the board of assessors was not an assessment of the benefits to be received by the lot owners by reason of the improvement, but was merely an arbitrary apportionment of the cost of the improvement upon the various lots in the district, without respect to whether the lot received so much benefit or not. The Constitution provides that the assessment shall be *ad valorem* and uniform. The statute provides that the board of assessment shall assess to the best of their knowledge and ability the value of all benefits to be received by each landowner by reason of the proposed improvement as affecting each of said lots within the district. Kirby's Digest, § 5677; Cooley on Taxation 660; 54 Cal. 536; 40 Wis. 315; 69 Ark. 76; 71 Ark. 27; 70 Ark. 466; 48 Ark. 382; 59 Ark. 537; 64 Ark. 561; Hamilton on Special Assessments, § § 235, 236, 240, note, 231; 148 Ill. 632; 150 Ill. 80; 147 Ind. 500; 49 L. R. A. 797.

3. Owners may appeal from the assessment to the city council, which shall hear the matter *de novo.* Kirby's Digest, § 5679. It shall enter on its minutes the result of its finding, and cause a copy to be certified to the board of assessors; and if any change has been made by the council, the assessors shall

make their assessment conform thereto. *Id.* § 5680. If the council has the right to refer the assessment back to the assessors for corrections, which right the statute clearly confers, has it not also the right to refer an illegal assessment back for modification and correction?

4. The assessment by the two remaining members of the board, the third having gone to Europe, was authorized by law. Kirby's Digest, § 7821; 36 Ark. 446.

W. L. Terry, for interveners.

It is contended in behalf of the minority in value: (1) The first assessment was violative of *ad valorem* clause in art. 19, § 27, Const. (2) Of the requirements of the act of May 3, 1901. (3) If it is authorized by the act of May 3, 1901, then the act itself is violative of the Constitution of the State. (4) The second assessment (correction of the first) must, when properly acted on by the city council, remain the only valid assessment. (5) Appellants are estopped to claim that the council failed to perform the duty allotted to it by the statute. Art. 2, § 22, Const.; art. 12, § 3, *Id.;* 42 Ark. 382; 172 U. S. 285; 64 Ark. 561; 69 Ark. 77; 70 Ark. 467; 84 Ark. 390; Kirby's Digest, § 5679; Cooley on Taxation (2 Ed.), 660; 69 Ark. 76; 32 Ark. 38; 21 Am. Rep. 684; 2 Dillon, Mun. Corp. (4 Ed.), § 761, p. 934; 187 U. S. 543; 188 U. S. 517; 125 U. S. 357; 181 U. S. 329.

ASHLEY COCKRILL, Special Judge, (after stating the facts.) This appeal involves the construction of our improvement district laws relating to the assessment against the property in the district of the cost of the improvement, and proceedings incident thereto.

Under our statutes in force prior to 1899, the cost of a local improvement was assessed against the real property in the district by an ordinance of the council levying an assessment of a percentage of the value of the property, as shown by the last county assessment, sufficient to pay for the cost. The Legislature of 1899 changed this by adopting a method requiring a board to assess the value of the benefits accruing to the real property, and the council to make an assessment or levy on the property based on those benefits. Subsequent Legislatures

have made additional amendments, still adhering, however, to the benefit assessment scheme. The result is that today our improvement district laws have a body and many basic provisions adopted under and in consonance with the old plan of assessing according to value of property, with the new method of assessing according to benefits rather awkwardly injected by way of amendment. These methods of assessment being radically different, it is a matter of no little difficulty to construe the various acts as a harmonious whole. In endeavoring to do so, however, it is helpful to refer briefly to the principles of law governing local assessments, and to compare these two different methods of assessment.

Special assessments for local improvements find their only justification in the peculiar and special benefits which such improvements bestow upon the particular property assessed. Any exaction in excess of the special benefits is, to the extent of such excess, a taking of property without compensation. Notwithstanding those principles so firmly settled, and in spite of *Norwood* v. *Baker,* 172 U. S. 270, it has been repeatedly held by the Supreme Court of the United States and this court that an act of the Legislature providing for the assessment of the cost of a local improvement according to the value of the property itself is not arbitrary, and is not in conflict with the Federal Constitution. These decisions are based on the principle that it must be assumed that the Legislature, in adopting such a method, has determined that the amount of benefits will accrue in proportion to the value of the property itself, and thus the assessment is still according to benefits, within the meaning of the law. The old act, therefore, adopting the plan of basing the assessments on the value of the property, was not in conflict with either the Federal or State constitutions. But it was entirely within the discretion of the Legislature to adopt the new plan, and it matters not whether this change was induced by the misconception of what was decided in *Norwood* v. *Baker,* 172 U. S. 270, or whether it was made because the Legislature determined the benefit method adopted to be the most equitable and just way of attaining uniformity and equality in the apportionment of local assessments. It is of no concern to the courts what was the controlling cause of the

change of plan. Sufficient it is that the Legislature in the act of 1899 and in subsequent amendatory acts has clearly adopted the plan of assessment according to the benefits, in place of that assessing according to the value of the property.

It is contended by counsel at the outset that sec. 27 of art. 19 of our Constitution, providing that local assessments shall be *ad valorem* and uniform, prohibits any assessments not made according to the value of the property itself. It is argued that "*ad valorem*" means according to the value of the property, and that any assessment of benefits, not reached by taking a proportionate part of the value of the property itself, is prohibited by the Constitution, and that an act requiring an assessment made in any other way is in that respect unconstitutional.

The phrase "*ad valorem*" means simply according to value. There is nothing in the Constitution to indicate that it means according to value of property. This constitutional provision does not attempt to fix the thing or basis according to the value of which the assessment against the property is made. Its only mandate is that the assessment against the property shall be based on value, as distinguished from some other standard, without in any way expressing or implying that the basis shall be the value of the property itself.

According to the statute under consideration, the basis of the assessment against the property is benefits. The board of assessors is required to "assess the value of the benefits to accrue" to each lot in the district. That done, the basis is fixed. The council then levies against each lot that percentage of the value of the benefits thus assessed by the board necessary to pay the cost of the improvement. The estimate of the value of the benefits made by the assessors is thus the basis upon which the council afterwards fixes and levies the assessment against the property.

Under the old plan the county assessor valued the property itself, and the council levied against the property a percentage of that value; under the present plan the board of assessors values the benefits, and the council levies against the property a percentage of that value. Both plans conform to the *ad valorem* and uniform provision of the Constitution. While neither is in conflict with the Federal Constitution, the present

benefit plan of assessment more logically conforms to it and to the principle that the basis of the assessments is benefits. This view of the meaning of the phrase *"ad valorem"* in our Constitution was adopted in *Ahern* v. *Board,* 69 Ark. 76. See *Chamberlain* v. *Cleveland,* 34 Ohio St. 565; *Jersey City* v. *Vreeland,* 43 N. J. L. 638.

After the assessment list had been properly filed with the city clerk, and within the ten days allowed, numerous property owners in the district filed with the city council appeals from the action of the board of assessors, setting up that the assessment of benefits against their property was in excess of actual benefits received and praying for a correction of the assessment against their property. Two members of the board filed a formal communication with the council, stating that they were in doubt whether they had estimated the benefits upon a proper basis, and asking for a return to the board of the assessment list for reconsideration and re-assessment. Pursuant to the report of a committee appointed to investigate the matter, the council, by adopting the report, found that the property owners objecting to said assessment had just grounds for complaint; that the assessment of benefits was arbitrary, discriminatory, unequal and unjust; that it would require more than the time of one regular meeting of the council to go into the various matters and questions involved, and that, as the board of assessors had asked for a return of the assessment list with a view to reconsider and correct the same, such a course might thus obviate the objections made in said petitions, protests and appeals. The council, therefore, ordered that the assessment list be returned to said board for the purpose of reconsideration and correction, and that in the meantime said petitions, protests and appeals lie on the table subject to call. The legality of this action of the council is challenged.

Counsel argue, first, that when the board filed its assessments its powers ceased, and that there was no board left to which to refer the assessment. The board of assessors is likened by counsel to a jury that has rendered a verdict and separated.

The only sections of the statutes bearing on this subject are as follows:

Kirby's Digest, section 5679. "Any one whose real estate is embraced in said assessment may at any time within ten days from the giving of said notice file with the city clerk in writing his 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, and on such appeal the matter shall be heard *de novo* on such evidence as may be adduced on either side."

Section 5680. "The city council shall enter on its minutes the result of its finding on any such appeal, and shall cause a copy of its findings to be certified to said board of assessors, which shall make its assessment conform thereto, if any change has been made therein by said city council."

The powers of the board do not cease upon the filing of the assessment list, because the statute expressly provides that it shall make such corrections in the assessment list as may be certified to it by the council. But, more than that, section 5687 of Kirby's Digest provides that the assessment may be annually readjusted according to additional improvements placed upon the lands when a succession of collections are necessary to pay for the improvement. This statute evidently contemplates, and we hold, that the board of assessors exists as such until the district is paid out, and there is no further service necessary for it to perform.

Did the council have the power under the statutes to refer the assessment back to the board of assessors?

The powers of the city council in the matter of local improvement districts are prescribed by the statute, and the council possesses no authority which is not conferred upon it either in express terms or by necessary implication.

The first section of the statute quoted provides merely for the appeal of a property owner from the action of the board in making the assessment "of *his* property," and that on his appeal the matter shall be heard *de novo* on such evidence as may be adduced *on either side*. The next section provides that the council shall enter on its minutes the result of its finding on any such appeal, and that the board of assessors shall make its assessment conform thereto, if any change has been made by the council. It is clear that the only authority given to the council

by the statute is to make its findings on the appeal of the individual property owner, and to certify the same to the board of assessors, and it then becomes the clerical duty of that board to make the change in the assessment thus certified to it by the council. The purpose of the statute is to give an aggrieved property owner an oportunity to have his particular assessment reduced to the value of the benefit. The issue is restricted to the value of the benefit to the particular lot involved in the appeal. No provision is made for the entire assessment list to be presented to the council, and there is no provision giving other property owners not appealing, notice of the appeals or an opportunity to be heard. If the Legislature had intended that there should be a general re-apportionment of the entire assessment upon the appeals, it is fair to presume that provision would have been made for notifying others interested.

The language of the statute is unambiguous, and it would take, not only a liberal construction to hold that the council had the right to reassess the property or refer the list back to the assessors for that purpose, but also a reading into the statute of something that is not there.

Under these statutes the council has no general supervisory jurisdiction over the board. If no appeal is taken from the assessment of the board of assessors, the council has no power to interfere with it. If a property owner appeals, its only power is to correct the particular assessment involved. At this stage of the proceedings the council, and ordinarily the property owner, does not know but that, when the appeals are settled, uniformity and equality will result. But in any event no authority is given the council to delve into that question. Its authority is limited to acting upon such appeals as are before it, and, when they are settled, to levying the assessment by ordinance.

But, it is argued, the owners of property which has been assessed below the real value of the benefits to accrue to it will not appeal to the city council, and it may happen that a mere lowering of the estimate of benefits in the cases appealed would be a wholly inadequate relief. It is said that the appealing owner has a dual interest to be conserved, the right to have the estimate of benefits placed upon his property reduced and the estimate of benefits to the property of owners who have not

appealed raised to the actual value of the benefit. It is urged that, if the latter should not be done, there would be no uniformity in the assessments, the burden of the improvement would be inequitably imposed, and the improvement itself might be defeated. We think that the statute makes ample provision for such a contingency. When the appeals have been disposed of by the city council, and the list of the assessment of benefits has been corrected by the board of assessors to conform to the findings of the council, it can be definitely ascertained whether the assessment of benefits is lacking in that uniformity which the Constitution requires. Another section of the statute provides as follows: "Within thirty days after the passage of the ordinance mentioned above the recorder or city clerk shall publish a copy of it in some newspaper published in such town or city for one time; and all persons who shall fail to begin legal proceeding within thirty days after such publication for the purpose of correcting or invalidating such assessment shall be forever barred and precluded." Kirby's Digest, § 5685.

When all of its provisions are considered, it is seen that the statute furnishes a remedy for every case: If the benefit to a particular lot has been estimated above its value, the remedy of the owner is by appeal to the city council within ten days after the publication of notice of the filing of the assessment list. If, after the hearing of the appeals and the correction of the list to conform to the findings of the council, it appears that the several assessments of benefit are unjust, discriminatory, and not uniform, the individual owner may, within thirty days after the publication of the notice of the passage of the ordinance, institute legal proceedings in the proper forum for the purpose of correcting or invalidating the assessment. The two provisions give to the owner his day in court for remedying any grievance that he may have, and, if no steps are taken within the time limit specified, the assessment of benefits becomes conclusive.

The fact that two of the board of assessors, in the absence of the third and without notice to him of their intention, requested the council to refer the assessment list back to the board, suggesting a doubt whether they had made the assessment upon a proper basis and the need of fuller legal advice, does not help matters, first, because they were not authorized to act as a board

without notice to the third; and, second, because when the first assessment was filed and the notice published it was subject only to the action of the council on appeals and of the courts on proper and timely attack. Their pleas for a return of the list gave no power to the council to return it.

The report of the ordinance committee to the effect that the appeals were too numerous to be heard at one meeting, and that a reference of the list back to the board might obviate the trouble of passing on the appeals, also goes for naught. The council did not have to pass upon all the appeals in one meeting. It was authorized to take such time as necessary, and to avail itself of the benefit of reference to appropriate committees, provided the council itself finally and actually acted on the appeals.

We hold that the council had no power or authority to refer the assessment list back to the board. While this is true, still the complaining property owners appealing to the council had the clear right to apply to a court in some appropriate proceeding to attack the assessment for want of uniformity or for other sufficient cause, until thirty days after the publication of the assessment ordinance. If no attack had been made within that time, the assessment would have been final. But these property owners by cross bills in the chancery court did assail the validity of the assessments in apt time, alleging, in substance, that the assessments as a whole were arbitrary and not according to benefits, and praying that the entire assessment be declared void, and that its levy and enforcement be enjoined. This was a timely and appropriate attack on the validity of the assessment as a whole, and the issues relating to the character of the assessment and the true basis upon which it was made were clearly and properly presented to the court for determination.

The next question arising is whether the chancery court was justified in holding the first assessment void.

The statute requires the board to assess the value of the benefit to accrue to each piece of property. Kirby's Digest, § 5677. This means that the assessors shall, from their knowledge, experience, observation and judgment, make a fair and just estimate of the benefit which each particular piece of property will receive by reason of the improvement. They must consider its value, superficial area, frontage, location, the im-

provements thereon, relation to business or other centers, and every factor which, in their judgment as a board, would go to make up the sum total of benefits. The true inquiry is, what will be the effect of the proposed improvement upon the market value of the real property, including the buildings thereon? The board may consider what the property is then fairly worth in the market, and what will be the value when the improvement is made. Consideration should be given to all facts and circumstances tending to show special benefits received from the improvement not flowing to the community at large. The benefits, if any, to the buildings on the land cannot be arbitrarily disregarded. There are cases holding that only the benefits accruing to the land as such should be considered, and that the enhancement in value to the buildings should not be considered. Whether those cases are right or wrong, the statute in this State contemplates that any benefit accruing to the real property, including buildings, shall be considered. The proviso to section 5677 of Kirby's Digest above referred to, expressly declaring that the assessments may be annually readjusted according to additional improvements placed upon the land, carries out that idea, because, if the benefits to buildings subsequently erected are to be considered in readjusting the assessment, it follows that the benefits to buildings already erected should be considered. Whether the buildings actually receive any benefit from the proposed improvement, and, if so, to what extent, is a question of fact for the board of assessors. No more definite rule can be laid down. The board of assessors may very properly adopt a percentage of the valuation of the property including the buildings as the value of the benefits, if in its judgment such a method best reaches the true measure of benefits to each piece of property, or it may adopt any other method which will reach the same result.

Guided by these rules, does the evidence justify a condemnation of the first assessment? The testimony on which the complaining property owners chiefly base their charges against the assessment is that of the assessors themselves, and it is urged that they are not under the law competent witnesses to impeach their own assessment. Several Illinois cases are cited to the effect that the testimony as to how the assessors arrived

at their decision is incompetent; that they cannot be interrogated as to their acts, and cannot be called as witnesses to impeach their own report. All of these, however, are cases where the assessment has been duly filed, ratified and confirmed by the council or other proper authorities. The question is raised in them by property owners resisting the collection of the assessment, and not in some proceeding that can be regarded as a direct attack on the assessment.

The validity of this assessment is assailed in this case in a direct and timely attack in a court of equity. The interveners in this case charge that the assessors acted arbitrarily, with the result of an assessment, as a whole, grossly inequitable, unjust, unfair, unequal, disproportionate, discriminatory, and therefore not uniform. The truth of these charges and the validity of the assessment is thus the question presented to the court. The question of the validity of the assessment is open to attack in this direct proceeding, just as much as it would be before the council on appeal, if our statutes were broad enough to include an attack of this character by appeal. The claim is made by the attacking parties that the assessors did not actually assess according to benefits, but made an assessment based on an arbitrary method which had no real relation to benefits. While the true inquiry thus before the court is not so much one of methods or plans as of results, still evidence of what plan was followed is important as throwing light on the question of whether a proper assessment has resulted. The character of their assessment may be best determined by ascertaining how they made it, and testimony as to what matters entered into their estimate of benefits is highly important in finding out whether all the proper elements of benefit were given consideration and whether essential elements were arbitrarily disregarded or ignored. These things are best known to the assessors, and we think that their testimony about them in this case is competent. *People* v. *Jefferson Co. Court,* 55 N. Y. 604.

The evidence shows that the assessment was made in the following manner: The assessors divided the estimated cost of the improvement by the number of lots in the district, which gave them $350 as a front lot cost. Taking that as a basis, they arbitrarily began at about the center of the district and

assessed the benefit to each lot at $350, shading it slightly as they proceeded south and increasing it a little as they went north from the center. The property in the south half of the district consisted for the most part of residence property, some of which was vacant, while that in the north half was mostly business property near the heart of the city with costly buildings located thereon. This method of assessment therefore resulted in a grossly discriminatory assessment as compared with either the assessed or actual valuations of the property itself, varying from one to two per cent. of the value of the most valuable business property and from twenty to sixty per cent. of some of the outlying residence property. This alone might not be sufficient to condemn the assessment, in a case where the assessors properly considered the question of value, and as a board permitted it to play such a part in their estimate of benefits as they in their judgment deemed it entitled. In instances where the benefits and conditions are the same, a front foot rule may result, and is not necessarily improper. But the evidence of one of the assessors in this case shows that he started out with the abstract proposition that values of the property had nothing whatever to do with the fixing of benefits in improvement districts, and that in this case he not only gave no consideration whatever to values, but could not have done so, because he was confessedly not familiar with the actual or comparative values of either the lots or buildings. His testimony shows, not that he concluded that values did not materially affect the benefits in this particular case, but that he ignored the questions of values on principle, because he did not believe that they should properly be considered as an element of benefits under the law. The evidence shows that the other assessors ignored valuations, not because they believed that they were not a material factor in their estimate of benefits in this assessment, but because they deferred to the opinion of the first assessor that it was not proper to consider them. The evidence also shows that these last two assessors made a second assessment of benefits based entirely on valuation of the property, and that they not only regarded such method of assessment the proper one in this case, but that the method adopted by the board in the first assessment ignoring values was actually contrary to

their judgment. The exclusion of the consideration of values, therefore, was actually against the judgment of two of the assessors, and was arbitrary on the part of the other. In any event, neither the board, nor a majority of it, considered the question of values of the property and determined that in this particular case they were not an important factor, but, on the contrary, they all practically ignored that question entirely, under a misapprehension of their duties. In other words, the evidence convinces us that this is not a case where special benefits were valued in the proper manner, giving to values and all other elements a fair consideration, which resulted in practically a front foot assessment, but rather that a front foot basis was arbitrarily adopted, without giving consideration to value and other elements of benefits. Having thus excluded material elements of benefit from their consideration, and adopted a front foot basis in a district where valuations and conditions were widely variant, without sufficient showing that such a basis had any proper relation to benefits to the property, the assessors made an assessment which, we think, does not, as a whole, measure up to the requirements of the Constitution and law.

The facts in this case are very similar to those in *People* v. *Jefferson County Court,* 55 N. Y. 604. In that case an assessment was attacked by a property owner in an appeal to a county court. The commissioners who assessed the benefits certified, and one of them testified, that they had apportioned the expenses of the work according to their judgment of the value of the benefit from it to the respective parcels of land, and that they had, upon examination, determined that each acre of land was benefited to the same amount. The court said: "It was not pretended that they had made a determination of the value of the benefit to each parcel of land assessed, and upon comparing the determinations had found that they disclosed an equal benefit per acre to all or nearly all the land assessed. * * * That tax was arrived at in a different way. It was imposed at the rate of $3.25 per acre on 33 1-3 acres. This single case, with the acknowledgment of the commissioners that they fixed the benefit per acre at the same sum, notwithstanding the different character of the different parcels of property, may be regarded as showing that the commissioners adopted, as

a rule of assessment, an apportionment per acre, and not, as they professed, an apportionment according to the benefit derived from the improvement. Under the statute the question was an open one before the county court to determine upon the evidence whether it appeared that an erroneous rule of assessment had been adopted. The court was not concluded by the return of the commissioners nor by the testimony of the one who was sworn. It was to determine, on the proofs, what rule was adopted, and was then to decide whether the rule thus adopted was erroneous. Considering all the evidence, it has decided that the rule which the commissioners professed to govern themselves by was not that which they in fact applied, and in so doing has extended to the appellants, in that court, the exact measure of protection which the statute required it to afford—for the requirement of the statute was substantial, not formal, and an assessment per acre was not an assessment according to benefit, though disguised in that form. We are of the opinion that the county court, in making the decision in question, was acting within the jurisdiction expressly conferred upon it, and that the proofs before it not only justified but required the decision which was made; and that the duty of apportioning the assessment according to a real and not a formal judgment of benefit can not be evaded without disregard of the law."

In *Kersten* v. *Milwaukee,* (Wis.) 48 L. R. A. 851, a street improvement assessment, which the statute required to be according to benefits, was attacked by an injunction proceeding in a court of chancery on the charge, among others, that the assessment was arbitrary and not according to benefits. The proof showed that the assessors assessed the property based upon the cost of the work in front of the abutting lots at the uniform rate of $1.00 per front foot. It was argued that all of the board viewed the premises and assessed the benefits after such view, and that the assessment was the judgment of the three commisioners. The court said:

"The court (lower court) has found that the assessment made by the board of public works was arbitrary, and based solely upon the cost of the work in front of the abutting lots. * * * With the accompanying facts and circumstances, it

(the assessment) shows quite conclusively that the board could not have exercised their judgment in arriving at a result. That this assessment of benefits to each of the adjoining lots should correspond in each case to as many dollars as the abutting lot had feet of frontage, and that the aggregate of benefits should very closely approximate the total cost of the work, are circumstances too significant not to arouse suspicion. * * * It is not enough for the board to say that they viewed the premises and exercised their judgment, if the facts negative that assertion. Here the facts cry out so loudly against the conclusion reached that we find no difficulty in agreeing with the court's estimate of the board's procedure." See also *People* v. *Reis,* 96 N. Y. S. 597; *People* v. *Buffalo,* 107 N. Y. S. 281; *Berdel* v. *Chicago,* 217 Ill. 429.

We hold that the first assessment was void, and that the court was right in so declaring, and in enjoining its levy and enforcement.

After the assessment list was referred back to the board of assessors, two of its members addressed a formal communication to the council stating that the third assessor was in Europe, and would not return for several months; that in reconsidering the assessment they would like to have the advice of a third assessor, and asking for the appointment of another in his place. The council not acting on this further than to receive and file it, the two members undertook to make a new assessment during the temporary absence of the third. Even if it be conceded that section 7821 of Kirby's Digest applies to boards of assessors, the action of two members of the board, in the absence of the third, without notice to him or opportunity on his part to be present or to participate, was unauthorized.

The statute provides that "no single improvement shall be undertaken which alone will exceed 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. It is contended that this section limits the amount which may be assessed against each particular piece of property to twenty per cent. of its value, and that it was intended as a protection for the individual owner. We do not think the statute is suscep-

tible of such an interpretation. According to its plain and unambiguous language, it applies to the property of the entire district. Its purpose is to prevent improvement districts from undertaking any work which will cost more than one-fifth of the assessed value of the property therein. Whether the improvement can be made within this limit as to cost can and must be ascertained at the outset. After the consent of a majority in value of the property holders has been obtained and evidenced as required by law, the first step to be taken is the appointment of a board of improvement, which shall immediately form plans for the improvement and procure estimates of its cost. The cost being ascertained, its comparison with the value of the real property in the district as shown by the last county assessment will disclose whether it exceeds twenty per centum of that value, and, if it does, the improvement should not be undertaken, unless the plans can be so changed as to reduce the cost within the statutory limit.

At this stage of the proceedings it can not be known whether the cost of the improvement will exceed the aggregate of benefits in the district. The next step is to appoint a board of assessors to assess the benefits. If the cost exceeds the benefits, it constitutes a second barrier to the improvement, for the assessments can only be made upon the benefits. The twenty per centum clause is a limitation upon the district alone, while the value of the benefits is both a limitation upon the district and upon the ultimate liability of the individual property owner.

If the twenty per centum clause applied to each piece of property, it would destroy uniformity in the assessments and interfere with the *ad valorem* principle as explained above. The board must assess the special benefit which each lot will receive. This benefit is usually less than the value of the lot, but it may be greater. The city council must levy such a per centum of the benefits as will produce the cost of the improvement. This makes the assessment *ad valorem* and uniform as to the benefits.

Now, suppose that two lots have a value of $100 each, but one is benefited $100 and the other only $10. If the cost of the improvement requires 50 per cent. of the amount of

benefits, the first lot would have to pay $50, and the second $5. But if the twenty per centum limitation applied to each particular lot, the first could only be made to pay $20. The uniformity in the assessment would be impaired, for the first lot would only contribute 20 per cent. of the benefit which it actually receives, while the second lot would pay 50 per cent. of the benefit accruing to it.

This interpretation placed upon the statute is strengthened by the fact that another section provides that if the assessment first levied shall prove insufficient to complete the improvement, it shall be the duty of the council to make additional assessments from year to year "until 20 per centum of the value of the real property of such district shall be collected and consumed in such improvement." Kirby's Digest, § 5716. The same limitation is thus placed at the end of the district that confronts it at the beginning, and in both instances the limitation in terms applies to the action of the council, whereas it is not referred to in the section defining the duties and prescribing the proceedings of the board of assessors. We think that the statute plainly provides for two harmonious limitations: the district as a whole shall never be assessed for more than twenty per centum of the assessed value of all the real property in the district, and the individual owner shall never be required to pay a greater sum than the actual value of the benefit he receives.

An illustration of a statute limiting the amount of the assessment on the particular lot in the district is found in the following act of Ohio: "In no case shall the tax or assessment especially levied and assessed upon any lot or land for any improvement amount to more than 25 per cent of the value of such lot or land as assessed for taxation; the cost exceeding said per centum that would otherwise be chargeable on such lot or land shall be paid by the corporation out of its general revenue." Acts Ohio (1871), p. 125. The limitation in that act in plain terms refers to the particular property in the district, and, in order to prevent a lack of funds by reason of it, provides for the payment of the excess over the limitation by the municipality. Our statute is plainly not one of that character.

The decree of the chancellor, enjoining the enforcement of both assessments, is affirmed. The affirmance of the decree leaves the improvement district legally formed, with the matter of assessments still in the hands of the board of assessors, with full power to make an entirely new assessment, which, when filed, shall operate and be subject to the same rule of procedure as though it were the original assessment.

CELENDER v. STATE.

Opinion delivered April 13, 1908.

1. ACCOMPLICES—SUFFICIENCY OF CORROBORATION.—It was not error to instruct the jury in a criminal case that the accused could not be convicted on the uncorroborated testimony of accomplices, and that their testimony must be corroborated by other evidence, direct or circumstantial, tending to connect defendant with the commission of the offense charged, but that it was not necessary that the corroborating evidence should be sufficient of itself, without the testimony of such accomplices, to convict the accused. (Page 24.)
2. APPEAL—OBJECTION TO EVIDENCE—SUFFICIENCY.—It was not error to refuse to exclude all of the testimony of a witness when part of it was admissible. (Page 25.)

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

Sam. R. Chew, for appellant.

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

BATTLE, J. Cleter Celender was indicted for larceny and burglary. The larceny was committed by defendant feloniously stealing, taking and carrying away two hundred pints and two hundred quarts of whisky, of the value of one hundred dollars, and of the property of the St. Louis, Iron Mountain & Southern Railway Company; and the burglary, in the night time, by defendant feloniously breaking and entering a certain railway car, the property of the St. Louis, Iron Mountain & Southern Railway Company, with the felonious intent to commit a felony, to-wit, larceny. He was acquitted of the burglary

and convicted of the larceny. He contends that the evidence adduced at his trial for the offenses charged, without the aid of the testimony of accomplices, was not sufficient to convict him of larceny. Was it sufficient?

About the 11th day of November, 1907, a car of the St. Louis, Iron Mountain & Southern Railway Company, on its side track at Van Buren, in this State, was broken open and robbed of whisky. Boxes were prized open, and boxes like those contained in the car, marked "Sunny Brook Whisky," without their contents, were found in the vicinity. About this time he (defendant) approached Henry Dunn and said to him, "There is a car broken open," pointing in the direction of the car that was broken open, "a car of whisky. We can get a bottle if you want to." Dunn refused to join him, and he departed. He and others were arrested for stealing the whisky and carried before a justice of the peace sitting as an examining court. At his request he was allowed to testify in his own behalf, as he had the right to do. He testified that he saw Bert Wallace and Chick Smith in the car, and saw them get the whisky, and they gave him three or four pints, and that he got the fifteen or sixteen pints that John Rooney had hid in an old lumber pile. This was whisky that Rooney had stolen from the car and concealed. The witness who heard him testify could not remember the exact amount of this whisky, but he remembered that he testified that it was "in the neighborhood of fifteen or sixteen pints." The whisky was worth seventy cents a pint. He was evidently jointly guilty of stealing the whisky stolen by Wallace and Smith, including the three or four pints he testified they gave him. His voluntary testimony in court, in connection with other testimony, independent of the testimony of accomplices, was sufficient to convince the jury that tried him that he was guilty of stealing the whisky of the railroad company of a value exceeding ten dollars.

Rooney, Mulligan and Titsworth were accomplices of the defendant. They testified in behalf of the State. In regard to their testimony, the court instructed the jury as follows: "The defendant cannot be convicted on the uncorroborated testimony of Rooney, Mulligan and Titsworth, but their testimony must be corroborated by other evidence, direct or circumstantial, tend-

ing to connect defendant with the commission of the offense charged. If there is such corroboration, and you are satisfied beyond a reasonable doubt that defendant is guilty, you will convict; otherwise you should acquit. It is not necessary that the corroborating evidence shall be sufficient of itself, without the testimony of Titsworth, Mulligan and Rooney, to convict the defendant. It is sufficient if there be such evidence, independent of theirs, either direct or circumstantial, tending to connect defendant with the commission of the offense, and that that evidence, together with the testimony of Titsworth, Rooney and Mulligan, convince your minds beyond a reasonable doubt that defendant is guilty. The corroborating evidence must tend to connect defendant with the commission of the offense. Evidence only that the offense was committed by somebody and the circumstances thereof, without tending to connect defendant with the commission of the offense, is not sufficient." Defendant objects to this instruction. But it is based upon section 2384 of Kirby's Digest, which is as follows: "A conviction cannot be had in any case of felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." And we think that the instruction is correct. *Meisenheimer* v. *State,* 73 Ark. 407.

One R. E. Judd testified in behalf of the State. Defendant moved the trial court to exclude all his testimony, which was overruled. As a part of his testimony was clearly admissible, the motion was properly overruled. Defendant specifically objected to parts of Judd's testimony, and the objections were overruled. The testimony admitted over these objections was not prejudicial.

Judgment affirmed.

CARNEY v. MATTHEWSON.

Opinion delivered April 13, 1908.

1. USURY—PENALTY.—A stipulation in a note to the effect that if it is not paid at maturity it shall thereafter draw interest at a rate greater

than the statutory limit is regarded as a penalty; and as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such stipulation is held to be free from usury.

2. SAME—COMPOUNDING INTEREST.—Taking a note which bears ten per cent. interest per annum and provides that if interest be not paid annually it shall become principal and bear the same rate of interest is not such a compounding of interest as would render the note usurious.

Appeal from Marion Chancery Court; *T. Haden Humphreys*, Chancellor; affirmed.

Matthewson recovered judgment against Carney on a note, and the latter has appealed. The facts appear in the opinion.

Sam. Williams, for appellant.

The contract is usurious and void. Art. 19, § 13, Const.; Kirby's Digest, § § 5389, 5390-1; 34 Barb. (N. Y.), 157; 31 N. Y. 473; 44 Pa. St. 32; 26 Pa. St. 271; 26 Ga. 403; 29 S. W. 623.

Woods Brothers, for appellees.

The contract is not usurious. 54 Ala. 646; 38 Ala. 114; 54 Cal. 562; 91 Me. 340; 23 Pick. 167; 137 Ill. 443; 79 Ga. 213; 97 Ga. 329; 3 N. H. 40; 4 Yeates (Pa.), 220; 2 Heisk. (Tenn.), 46; 19 S. W. (Tex.), 443; 28 Fed. 265; 12 Pac. (Cal.), 255; 33 S. C. 142.

HILL, C. J. The sole question involved in this appeal is whether the contract evidenced by the following note was usurious:

"$300.00 YELLVILLE, ARK., Nov. 23, 1903.

"Twelve months after date I promise to pay to the order of Angel Matthewson three hundred dollars, for value received, negotiable and payable without defalcation or discount and with interest at the rate of 10 per cent. per annum; and if interest be not paid annually, to become as principal, and bear the same rate of interest. Interest and principal payable at Bank of Yellville. Secured by deed of trust, which is a second lien on 166x210 of ground in Sec. 9, Tp. 18 N., R. 17 W.

"B. J. Carney."

This note was payable twelve months after date, and the interest upon the interest only became due, according to con-

tract, in the event payment was not made pursuant to the promise.

"Stipulations to the effect that if the debt be not paid at maturity it shall draw interest thereafter at a rate greater than the statutory limit are now generally regarded as penalties to induce prompt payment, and as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such agreements are held to be free from usury." 29 Am. & Eng. Enc. of Law, 507; Webb on Usury, § 119.

"The true test is: Has the debtor the absolute right to discharge and satisfy the contract at maturity by paying the principal debt and lawful interest? If he has, the contract is not vitiated by providing for the payment of an additional sum." 29 Am. & Eng. Enc. of Law, 506.

This is in conformity with the principle announced in *Chaffee* v. *Landers,* 46 Ark. 364.

Moreover, this is not such a compounding as would render the note usurious. This subject is fully discussed in *Grider* v. *Driver,* 46 Ark. 50, and *First National Bank* v. *Waddell,* 74 Ark. 241.

Judgment affirmed.

MAIN v. TRACEY.

Opinion delivered April 13, 1908.

SALE OF CHATTEL—DEFENSE.—When the sole question at issue in a case was whether an order of goods was countermanded before they were shipped, it was prejudicial error to permit the vendee to prove that no notice was received from the express company of the arrival of the goods, since the express company was the agent of the vendee, and its negligence was not attributable to the vendor.

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

Thornton & Thornton, for appellants.

1. When two parties enter into a contract, neither party can rescind without the consent of the other except for fraud;

and when one party has made an offer of purchase to another, that offer remains open for acceptance or rejection by the other until a demand for the withdrawal reaches the offeree. Tiedeman on Sales, § 40; Benjamin on Sales, § 64; 47 Ark. 519.

2. It was error to permit appellee Tracey to testify that the express agent at Bearden did not notify him of the arrival of the goods. The express company was the agent of the appellees, and not of appellants. 43 Ark. 353; 81 Ark. 134; 78 Ark. 123.

C. L. Poole, for appellees.

The mailing of the letter countermanding the order raises the presumption that the company or person to whom it was addressed duly received it, and the burden was on appellants to show by a preponderance of the evidence that they never received it. 60 Ark. 539. The order was not a contract of purchase until acceptance, but a mere proposal, subject to withdrawal at any time before acceptance. 1 Mechem on Sales, § 252. The contract shows that the goods were to be consigned to the place of business of appellees, this being different from the railroad station. It was the duty of the agent to notify appellees of the arrival of the goods, and in doing this he was the agent of appellants. The goods having arrived at their destination but still being held by the railroad agent for delivery to appellees, the right of stoppage *in transitu* still existed, and, appellants having availed themselves of this right, this act amounts to a rescission. 28 Am. & Eng. Enc. of L. 918; 21 *Id.* 58; 28 Ind. 365; 4 Wend. (N. Y.), 285; Beach on Cont., § 230.

HILL, C. J. This is the second appeal of this case. In *Main* v. *Tracey,* 76 Ark. 371, the facts are stated. Judgment for the defendant was therein reversed for failure of evidence of the countermand of the order reaching appellant before the goods were shipped. On the new trial, there was testimony adduced tending to show when the letter of countermand was written, when it was mailed, and when in due course of mail it would have been received by the appellant. This testimony tended to show that it would have been received on the 15th, and the goods were shipped on the morning of the 17th of June.

On the other hand, one witness testified that the letter of

countermand was received on the afternoon of the 17th, after the goods had been shipped out that morning. In view of the fact that this witness was interested in the result, and there were some possible discrepancies in two depositions given by him, the court could not say that it would be arbitrary for the jury to disregard his testimony. Therefore there would be some testimony tending to show that the letter of countermand was received before the goods were shipped; and, this being true, the countermand was effective because no contract was made until after the offer of purchase was accepted by he shipment.

The court permitted a son of the appellee to testify that no notice was received from the express company of the arrival of these goods. Other testimony along the same line was adduced. This was over the objection of the appellant, and is made one of the grounds for new trial.

The sole question at issue in the case is whether the countermand was received before the goods were shipped. Had the court sharply pointed out that as the sole question before the jury, it might be that this evidence would not have been prejudicial. But that was not done. This testimony had no proper bearing upon the real issue of the case, and was likely to lead the jury to believe that it was a relevant fact. The express company was the agent of the appellee. Whether the goods were duly carried by it, and whether notice was given after they arrived, were matters that could not affect appellant's right, for his duty was discharged when he delivered the goods to the express company. This testimony, unexplained and let in to the jury, might lead them to believe that it was the duty of the express company to give notice that the goods were there before liability could be fixed upon the appellee; or they may have taken it as a corroboration of the appellee's theory that the goods were not shipped until after the order of countermand was received. When it is borne in mind that the express company was the agent of the appellee, then any testimony generated from its action or want of action should not affect the other party to the controversy.

Whatever may have been the tendency of this testimony, certainly it did not tend to prove any thing in regard to the

issue. Appellee's testimony to sustain this verdict is weak; and if it had not been strengthened by this incompetent evidence, the result might have been otherwise. At any rate, the court cannot say that this error is not prejudical; therefore the judgment is reversed.

Reversed and remanded.

COOPER v. STATE.

Opinion delivered April 13, 1908.

1. SEDUCTION—EXTENT OF CORROBORATION REQUIRED.—Kirby's Digest, § 2043, providing that no person shall be convicted of the crime of seduction upon the testimony of the female "unless the same be corroborated by other evidence," requires corroboration as to the promise of marriage and the fact of sexual intercourse, but not as to the falsity of the promise. *Lasater* v. *State,* 77 Ark. 468, followed. (Page 31.)
2. INSTRUCTION—RELEVANCY.—As the jury is not bound to accept as true all of the testimony of the State or of the defendant in a criminal case, but may find the truth to lie partly on one side and partly upon the other, it was proper for the court to submit an instruction covering a phase of the evidence which may be fairly deduced partly from one side and partly from the other. (Page 31.)

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

Sam. R. Chew and *W. W. Cotton,* for appellant.

1. The prosecuting witness fails of corroboration on the propositions that appellant obtained carnal knowledge of her, and that he did so by virtue of a false or feigned *express* promise of marriage.

2. The 7th instruction was erroneous.

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

The prosecutrix is sufficiently corroborated. 77 Ark. 572; 40 Ark. 485.

PER CURIAM. This is an appeal by the defendant from a conviction for the crime of seduction. The case has been fully

argued by appellant's counsel in brief and at bar, and finally resolves itself into two points: First, was the testimony of the prosecutrix as to the promise of marriage and the carnal connection with the defendant sufficiently corroborated to meet the requirements of the law? and, second, was the 7th instruction justified by the facts?

1. The evidence of corroboration was of circumstances showing the relation and conduct of the parties to each other, and is sufficient to sustain a verdict, under the principle announced in *Lasater* v. *State*, 77 Ark. 468. This is conceded, and the attack is on the soundness of that decision. The court was then and is now convinced that the statement by the Court of Appeals of New York of the nature and character of evidence of corroboration expected and required, which was adopted, was sustained by both reason and authority.

2. The 7th instruction is as follows: "This is a prosecution for seduction, and it contemplates the obtaining of carnal knowledge of a woman of actual personal chastity by virtue of a false express promise of marriage. The law presumes the woman to be chaste; and if the defendant maintains that she is unchaste, he must show it by evidence. If a woman lapses from personal chastity, yet if she reforms and maintains her personal chastity for such a time that the jury can see that she is actually personally chaste at the time of the alleged seduction, then if the accused obtains carnal knowledge of her person by a false express promise of marriage, and this is sufficiently proved, the defendant should be convicted. If, however, it appears that the woman at the time of the alleged seduction was not possessed of actual personal chastity, the accused should be acquitted."

It is admitted that, abstractly, this is a correct statement of the law; but it is urged that there was no testimony authorizing that part of it which refers to the reformation after lapse from virtue. The prosecutrix testified that she had had no connection with any man save alone the defendant, and with him only under promise of marriage. The defendant introduced the testimony of one witness which, if believed, would have shown a shocking lack of chastity. That phase of the testimony was covered in the last paragraph of this instruction.

The defendant also introduced a witness who testified that several years prior to the time in question, when the prosecutrix was little more than a child, and he a mere boy, they had intercourse once. This the prosecutrix denied. The jury is not bound to accept all of a witness' testimony, or all of the theory of the State or of the defendant, but may find the truth to lie partly on one side and partly upon the other. When such is the case, it is right and proper for the court to submit an instruction covering the phase of the evidence which may be fairly deduced, partly from one side and partly from the other. *Kinman* v. *State*, 73 Ark. 126. The jury may have disbelieved the prosecutrix's denial of having intercourse with this boy when she was a child, and yet believed the balance of her testimony; and believed the testimony of this boy and disbelieved the testimony of the other witness who testified to acts of gross immorality at recent times. This possible view of the entire testimony rendered it proper for the court to present the law covering this phase of it. Had the court not done so, the jury should, under the latter part of this instruction, have acquitted the defendant if they had believed this boys testimony of the prosecutrix's single lapse from virtue when a mere girl, although they may have believed that she had lived a virtuous life for several years. That would not have been the law nor the justice of the case.

The court was right in giving this instruction, and there was no error in it. This case presents a sharp conflict in the evidence as to every material fact. It is the misfortune of the defendant that the jury did not believe his witnesses, and that seems to be the only ground he has of complaint.

The judgment is affirmed.

SIBLY v. CASON.

86 32
186 581

Opinion delivered April 13, 1908.

1. TAX SALE—AMOUNT OF COSTS.—Since the passage of the act of April 7, 1893 (Kirby's Digest, § 7093), a tax sale of land is not void because costs amounting to 85 cents were charged against the land. (Page 34.)

2. SAME—FAILURE TO TRANSFER LAND ON TAX BOOKS.—A tax sale of land is not void because the county clerk failed to transfer the land upon the tax books to the name of the purchaser, as required by Kirby's Digest, § 7094, as the failure did not injuriously affect the former owner. (Page 34.)

3. SAME—RIGHT OF MARRIED WOMAN TO REDEEM.—Under Kirby's Digest, § 7095, married women are not allowed to redeem lands from tax sale after the expiration of two years from the date of sale. (Page 35.)

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

Geo. Sibly, pro se.

1. Notwithstanding appellees' coverture, they are barred by the two years' statute.

2. The aggregate cost of eighty-five cents was not excessive, and the tax sale was valid. 72 Ark. 72; 72 Ark. 254-5. The item of 10 cents, clerk's fee for transferring the name of the purchaser to the tax book, was a lawful charge, a part of the aggregate cost of the sale and required to be paid by the purchaser at the time. If the clerk was derelict in his duty in that respect, his failure does not affect the validity of the sale.

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

The failure to transfer the land on the tax books to the name of the purchaser invalidates the sale. Black on Tax Titles, § 155; *Id.* § 641; 9 Md. 878; 7 Conn. 505; Kirby's Digest, § 7094.

BATTLE, J. On the 23d day of October, 1903, M. R. Cason and M. R. Hudson, claiming a certain tract of land, commenced a suit against George Sibly and S. S. Sibly in the Lonoke Chancery Court, to redeem it from a sale for taxes of 1895, and to set the sale aside. They alleged that they inadvertently and erroneously permitted the land to be sold on the 8th day of June, 1896, for the taxes of 1895; that it was sold to A. F. Ellis, who assigned the certificate of purchase to Max Frolich, and he conveyed or attempted to convey it to George Sibly and S. S. Sibly; that plaintiffs were at, before and since the sale, and are now, married women, and are entitled to redeem the land; and that the sale was illegal and void because the land

was sold for eighty-five cents costs, when the sum of fifty cents was the aggregate amount for which the same could lawfully be sold.

S. S. Sibly answered and denied that she had any claim to or interest in the land.

George Sibly answered and admitted that the land was sold on the 8th of June, 1896, for the taxes of 1895, and purchased by A. F. Ellis, and he assigned the certificate of purchase to Max Frolich, and that the county clerk of Lonoke County, at the expiration of two years from the day of sale, the land being unredeemed, conveyed it to Frolich, and he conveyed to George Sibly; and denied that it was sold at the tax sale for illegal or excessive costs.

After hearing the evidence adduced by all the parties, the chancery court found that the tax sale was illegal and void, and set same aside; and George Sibly appealed.

The evidence shows that, if the tax sale be valid, the land is the property of George Sibly. It is alleged that the sale was illegal because the land was sold for costs amounting in the aggregate to eighty-five cents, and the clerk of the Lonoke County Court failed, immediately after the tax sale, to transfer the land upon the tax books to the name of the purchaser. No other reason is given why the sale is illegal. Was it legal?

The land was lawfully sold for costs amounting to eighty-five cents, the same being as follows:

To clerk for making list for printer	$ .05
To clerk for attending sale	.10
To clerk for transfer on tax books of land sold for taxes to name of purchaser	.10
To printer for advertising	.25
To collector for making sale	.10
Certificate of purchase	.25
	$0.85

Salinger v. *Gunn*, 61 Ark. 414, 418; *Trimble* v. *Allen-West Commission Co.*, 72 Ark. 72; *Lewis* v. *Cherry*, 72 Ark. 254.

The failure of the clerk of the county court, immediately after the sale, to transfer the land upon the tax-books to the

name of the purchaser did not affect the validity of the tax sale. The statute allows the clerk a fee of ten cents for transferring and makes it a part of the costs of the sale. The land was sold in part for this cost before such transfer could be made, and it was the duty of the purchaser to pay it as a part of the purchase money. The transfer was evidently intended to keep trace of the land and prevent it escaping taxation. The failure to make it did not injuriously affect the owner, and consequently did not affect the validity of the sale. *Radcliffe* v. *Scruggs*, 46 Ark. 96. But appellees say the object of the transfer "is, in part, to apprise the owner of the sale, and thus give him an opportunity of redeeming." We do not think so. It is not calculated to serve that purpose. But section 7092 of Kirby's Digest was intended in part for that purpose. It provides as follows: "The clerk of the county court shall attend all such sales of delinquent lands and lots, town or city lots, or parts thereof, made by the collector of the county (sales for taxes), and shall make a record thereof in a substantial book, therein describing the several tracts of land, town or city lots, or parts thereof, as the same shall be described in the advertisement aforesaid, stating what part of each tract of land, town or city lot, was sold, and the amount of taxes, penalty and costs due thereon, and to whom sold." This record furnishes full information of sale and the amount necessary to redeem. The transfer does not, and it is unreasonable to presume that it was intended to give information it was not adapted to give, when a record is provided for that purpose which affords all the information necessary in that respect.

Appellees are not entitled to redeem. Married women are not allowed to redeem lands from tax sale after the expiration of two years from the date of sale. Kirby's Digest, § 7095.

It follows that the tax sale is valid, and George Sibly is entitled to the land.

The decree of the chancery court is reversed, and the cause is remanded with directions to the court to enter a decree in accordance with this opinion.

HART, J., being disqualified, did not participate.

PUGH v. TEXARKANA LIGHT & TRACTION COMPANY (1).

and

PILLOW v. COLLEGE HILL LIGHT & TRACTION COMPANY (2).

Opinion delivered March 16, 1908.

1. STREET RAILWAY—LIABILITY OF CONSTRUCTION COMPANY.—One who sells and delivers to another a street railway properly constructed is not liable for personal injuries subsequently caused by a defect in the roadbed of the railway. (Page 44.)
2. SAME—DUTY AS TO REPAIR OF HIGHWAY.—It is the duty of a company operating a street railway to build and keep the space of the highway occupied by its roadbed (which extends at least to the ends of the cross-ties) graded substantially with the level of the street, so as to permit vehicles to cross without difficulty. (Page 45.)
3. SAME—NEGLIGENCE—DEFENSE.—While street railway companies are not bound to furnish roads upon which it will be safe for horses to run away, they are bound to furnish reasonably safe roads; and if they do not, and such failure is the proximate cause, or one of the proximate causes, of a traveller's injuries, it is no defense that the traveller's horse was at the time running away, or was beyond his control. (Page 45.)

Appeals from Miller Circuit Court; (1) *Antonio B. Grace,* Judge, on Exchange of Circuits; (2) *Jacob M. Carter,* Judge; reversed as to Texarkana Light & Traction Company; affirmed as to College Hill Light & Traction Company.

Dan W. Jones and *Scott & Head,* for appellants.

1. While it is held that street railways are not an additional burden of servitude upon the streets, yet the theory upon which this adjudication is based is that they are not in fact obstructions, that, after being erected, the public use of the streets in the ordinary way of travel is not obstructed. In this case the street railway company had appropriated to its *exclusive* use, by the erection of the bridge or trestle causing the injury, that part of Broad Street which was then occupied by the bridge. This bridge was of such a nature that no carriage could cross the track at that point at right angles therewith, and it likewise rendered wholly impracticable the longitudinal use of the street by the public in vehicles. The public has a right to the use of all of the street and every part thereof, and any obstruc-

tion which permanently withdraws from the public this right is a nuisance. 1 Wood on Nuisances, § § 258, 259, 260, 266, 269, 274, 285, 301; Ray on Imp. Duties Personal, 243, 252; 1 Joyce on Elec. Law, 2 Ed. § § 379, 381; 30 S. W. 533; 48 N. W. 1007; Elliott, Roads & Streets, § 779; 67 N. E. 921; 93 S. W. 1057; 1 Thompson, Neg. § § 1233, 1234; 2 *Id.* § 1347; 23 Atl. 281; 1 Pac. 253; 37 Pac. 1012; 33 Fed. 320; 29 Atl. 1005; 58 S. W. 508; 11 S. W. 946; 2 Wood, Railroads, 970, § 269 note 1, 976; 19 S. W. 366; 27 S. W. 918; 27 S. W. 920; 37 Atl. 119; 1 Lewis, Em. Dom., 2 Ed., § 117; 11 S. W. 943; 54 Ark. 131; 68 Ark. 291; 79 Ark. 490; 61 Ark. 141. He who erects, as also he who maintains, a nuisance is liable for injuries resulting therefrom. 2 Cooley on Torts, 1282; 1 *Id.* 250-1; Ray on Imp. Duties, Personal, 53; Webb's Pollock, Torts, 259, 530, note; 2 Wood on Nuisances, § 838. Aside from the question of the culvert being a nuisance, there was evidence from which the jury might have found that the rails of the street railway west of the bridge were elevated to such an extent as to be a nuisance. A nuisance can not be justified on the ground of necessity. 42 N. W. 365; 59 Fed. 237; 35 N. W. 572.

The culvert not being authorized by the franchise, its construction was a nuisance. 1 Wood on Nuisances, § 300; 50 Ill. 210; 36 Atl. 73; 9 So. 525; 68 Pac. 360; 31 N. W. 327; 27 Am. & Eng. Enc. of Law (2 Ed.), 94.

2. Where two or more acts of negligence concur in producing an injury, each of said acts is, in a legal sense, a proximate cause.

(a) If a person do an act which is wrong *per se,* or in the nature of a public nuisance, he becomes, in respect to it, an insurer of the public, and is liable for any injury that may happen in consequence of it, to a person in the exercise of ordinary care, irrespective of any question as to the degree of skill or diligence exercised by himself or his agents or servants to prevent such injury. 1 Thompson, Negligence, § 60, p. 63; 1 Cooley, Torts, 101; 82 Ind. 426.

(b.) As to the runaway horse being the proximate cause: 61 Ark. 141; 79 Ark. 490; 37 Pac. 1012; 1 Sutherland on Dam-

ages (3 Ed.), § 26 p. 80; 5 Thompson, Negligence, § § 6089-6091; 17 Atl. 249; 18 Am. Rep. 239; 43 Atl. 143.

(c.) It is not necessary to show that the negligence complained of was the nearest cause in point of time. It may be remote in point of time, and yet be proximate in point of causation. 4 Otto, 469, 24 Law. Ed. 256; 111 U. S. 228; 166 U. S. 521; 1 Sutherland, Damages, § 39; 1 Thompson Negligence, § 75; 3 *Id.* § 2779; Watson, Damages, § 160; 61 Ark. 381; 73 Ark. 112; 75 Ark. 133; 37 Pac. 721; 22 N. E. 14; 96 N. Y. 264; 65 N. W. 676; 41 Pac. 995; 36 N. Y. 39; 69 S. W. 734; 42 Pac. 42; 61 S. W. 678; 53 Mo. 290; 2 S. W. 439; 26 Atl. 189; 18 Am. Rep. 239; 56 N. J. L. 370; 66 S. W. 609; 32 N. E. 285; 46 N. E. 17; 116 Ga. 152; 68 Ga. 572.

(d.) It is not necessary, in order to fix the liability upon the defendants, that they should have anticipated the particular injury that resulted, or injury in the precise manner that it occured. It is sufficient if it appears to have been a natural and probable consequence, and if they could have anticipated that some injury would occur. 1 Thompson, Negligence, § 59, p. 62 and note; Watson on Damages, § § 150-154; 1 Cooley on Torts, 125-7-8; 28 N. E. 446; 40 Am. Rep. 230; 69 N. W. 640; 48 N. W. 559; 93 S. W. 951; 89 Pac. 715; 42 N. W. 555; 12 Pac. 219; 86 N. W. 76; 101 S. W. 1025.

3. The College Hill Company was the holder of the legal title to the street railroad. It had not leased the road to the Texarkana Company, and is not absolved from liability for the negligence of the employes of the latter company. No deed had been tendered, nor was one passed until long after the injury. 17 Am. & Eng. Enc. of Law (1 Ed.), 896 *et seq.;* 67 Ark. 123; 28 S. C. 401.

William H. Arnold, for appellees.

1. The evidence is conclusive that at the time the track was delivered over to the Texarkana Light & Traction Company it was in good condition; but, even if there had been defects in the construction of the road, the liability of the College Hill Light & Traction Company ceased when under its contract of sale, it delivered the property to, and it was accepted by, the first named company. 1 Thompson, Negligence, § 686; 26 L. R. A. (Pa.),

504; 131 Pa. 416; 147 Pa. St. 199. The ordinance expressly shows that the franchise was transferable; moreover, there is statutory authority for such transfer. Kirby's Digest, § 886. When a lease or sale of a street railroad is authorized by law, the lessee or vendee is alone liable for the negligence of its operation. 193 Pa. St. 229; Nellis on Street Surface Railroads, 275. This court in the Daniels case, 68 Ark. 171, seems to have settled the law contrary to the liability of the College Hill Company. See also 100 S. W. 759; 76 Ark. 352; 114 Fed. 100; 55 Ark. 510; 196 U. S. 152; 87 S. W. 995; 89 S. W. 75.

2. True, the precise injury need not be anticipated, in order that a party may be held liable for his acts of negligence; yet it must be some like injury and some like intervening agency that did occur, to render the act of negligence the proximate cause. Where there is an intervening agency which could not have been anticipated as the natural and probable result of an act of negligence, such negligence can not be treated as an efficient concurring cause, but will be considered as a remote and not a proximate cause. 55 Ark. 510; 139 U. S. 223; 21 Am. & Eng. Enc. of Law, 493; 90 Tex. 223; 124 Fed. 113; 100 S. W. (Ark.), 764; 24 U. S. App. 17; 95 U. S. 117; 55 Fed. 949; 94 U. S. 469; 85 Pa. St. 293; 10 Am. Rep. 217; 88 Hun, 10; 52 Am. Rep. 74; 49 N. Y. Super. Ct. 406; 66 Ark. 68; Wharton on Negligence, § 134; 17 N. E. 200; 69 Ark. 402; 76 Ark. 430.

3. The building of the trestle was not an act of negligence; but, even if it had been, it could not reasonably have been anticipated as a natural and probable consequence that there would be a runaway down Beech Street to Broad which would collide with the bridge and produce an injury similar to that complained of in these cases. 56 Ark. 387; 101 Fed. 915; 9 Atl. 430; 106 Mich. 512; 107 Mich. 627; 57 N. W. 117. On the question of the runaway horse as the proximate cause of injury: 150 Pa. St. 145; 97 Mass. 258; *Id.* 266; 98 Mass. 587; 100 Mass. 49; 30 Wis. 250; 32 Me. 46; 38 Me. 204; 42 Me. 346; 51 Me. 127; 127 Pa. St. 184; 122 Pa. St. 601; 98 N. W. 934; 71 N. W. 888; 74 N. W. 815; 20 N. E. 105; 58 Atl. 283; 9 Atl. 430; 99 Wis. 361; 103 Wis. 66; 10 Am. Rep. 217; 39 Am. Rep. 603; 75 N. Y. 605.

BATTLE, J. The plaintiffs in these cases, who are appel-

lants in this court, in separate actions, sued for damages on account of an accident which occurred in the city of Texarkana, in this State, on the fourth day of July, 1904, as follows: Plaintiffs and others were riding in a two-seated surrey, and the horse drawing the same became frightened on Beech Street, and ran down grade three blocks and across two streets into Broad Street and upon a culvert in the street railway, which was operated by the Texarkana Light & Traction Company in that street. The surrey was thereupon overturned, and the occupants were thrown out, and some of them, if not all, were thrown upon the railway. A street car passing at that time ran upon those upon the railway, killing two, and crushing the feet or part of the legs of Maude E. Pillow, one of the plaintiffs. Mrs. Bayne Pugh, the other plaintiff, was severely bruised.

Mrs. Bayne Pugh alleged in her complaint "that the College Hill Light & Traction Company was, on the 4th day of July, 1904, the owner of an electric railway, then built and constructed along Broad Street past Beech Street in the city of Texarkana, in this State, from the intersection of Broad and Hazel streets to College Hill about two miles in length, and at the same time and for some time previous the Texarkana Light & Traction Company was operating said line of railway under some arrangement or agreement between said defendants, the nature of which was unknown to the plaintiff. That on the said 4th day of July, 1904, the plaintiff was riding in a two-seated carriage or surrey, accompanied with relatives and friends, when in passing along Beech Street, at or near Sixth Street, going toward said Broad Street, the horse drawing said surrey became frightened at the explosion of a fire cracker, or some other cause unknown to plaintiff, and proceeded to run along said Beech Street, which descends toward Broad Street, and the driver was unable fully to check or control said horse, and, running down on the west side of said Beech Street, pulled the left front wheel of said surrey against an obstruction placed by said College Hill Light & Traction Company near the center of Broad Street, and said obstruction constituting a part of the bed or track of said College Hill Light & Traction Company's railroad, and which obstruction said wheel could not and did not mount, and said horse turned toward the right, pulled said wheel against

the rail of said track adjacent and near to said obstruction, where the track had not been constructed and was not then maintained for one foot outside of said rail to conform with the character of material with which the balance of said street adjacent thereto had been constructed, but was constructed and maintained of softer material that had not been made solid and compact, and said wheel sinking low on said track close to, and hugging said rail, could not and did not mount said rail, and said horse, pulling said wheel along and against said rail, caused said surrey to be overturned, whereby plaintiffs was thrown from said surrey upon the track of said railway, at or near the intersection of Beech and Broad streets, Beech Street being at right angles to Broad Street.

"That the ordinance or franchise from the city of Texarkana under which the said College Hill Light & Traction Company had constructed said line of railway, and under which said Texarkana Light & Traction Company was then maintaining and operating said line, required the rails of said track to be so laid as to conform to the surface of the street, yet the said railroad was, while said surrey struck said obstruction, by said College Hill Company so carelessly, negligently and in violation of said ordinance constructed and maintained and was by the defendant Texarkana Company so carelessly, negligently, and in violation of said ordinance maintained and operated, with full knowledge of said obstruction, during said 4th day of July, 1904, that where said wheel met with said obstruction the rail of said track resting on said obstruction was at an elevation of fifteen inches above the surface of Broad Street adjacent thereto.

"Said ordinance further provides that the space between the rails of said track and for one foot outside each rail should be so constructed as to conform with the character of material with which the balance of the street was composed, and that the balance of the street had been and was then improved with a gravel coating pressed down and made compact to the depth of eight inches, forming a firm and solid roadbed, yet said College Hill Company carelessly, negligently, and in violation of said ordinance had constructed, and during said 4th day of July, 1904, was carelessly, negligently and in violation of said ordinance maintaining, its said track for one foot outside the rail, where said

left front wheel struck and ran alongside of said rail, with earth of softer nature than gravel and with gravel of less than eight inches in depth, and not pressed down and made compact as the balance of said street and the defendant, the Texarkana Company, was on and during said 4th day of July, 1904, carelessly, negligently and in violation of said ordinance maintaining and operating said railway at said point in said careless and negligent condition, contrary to the provisions of said ordinance and with full knowledge of such condition.

"That by reason of the overturning of said surrey plaintiff was violently thrown or fell from her seat in said surrey upon the ground, and was thereby greatly bruised, wounded, and injured, upon her head, shoulders, back, sides and hips, and thereby made sick and suffered great physical and mental pain and said injuries remained upon her unhealed for the ensuing six months, during all which time she suffered said pain. To her damage in the sum of one thousand dollars.

"The second count, after like allegations as in the first as to the ownership of said railway by said College Hill Company and being operated by the Texarkana Company, alleged that, under the same ordinance heretofore referred to, it was provided that all cars to be used on said line should be of modern equipment and provided with fenders, yet the defendant, the Texarkana Company, carelessly, negligently, in violation of said ordinance, on said 4th day of July, 1904, failed and neglected to use cars provided with air brakes, which were then of modern improvement, and customarily used upon street railways, and failed to provide fenders for its cars; said ordinance further provided that the rate of speed at which cars might be operated on said line of railway along on Broad Street, and past Beech Street, might be fifteen miles per hour, yet the rate of speed at which the car doing said damage was then carelessly, negligently, and in violation of ordinance being run by said Texarkana Company was greater than fifteen miles per hour, towit, at a speed of twenty-five miles per hour.

"That while plaintiff was lying at, on or near the track of said railway at or near the intersection of Broad and Beech streets, where she had been thrown, and before she was able to arise, a car of the Texarkana Company came along upon the

track going west on said Broad Street at said careless and negligent speed, and without any brakeshoe upon one of the front wheels of said car, and in charge of a motorman placed in charge of the car by said Texarkana Company, and said motorman approached and came across the crossing of said Beech and Broad streets at said careless and negligent speed, and was keeping no lookout for persons or vehicles approaching or attempting to cross or enter upon said railway tracks at or near the intersection of said streets, as was said motorman's duty, and without any airbrakes or fenders on said car and without any brake or shoe on one of the front wheels of said car, whereby said motorman was unable to stop said car as quickly as he otherwise could, and said motorman, without observing, as he could and should have done, the approach of said approaching horse and surrey, carelessly and negligently ran said car against said overturned surrey, and against plaintiff lying beneath said surrey, whereby she received additional scratches, wounds and bruises upon her head, neck, shoulders, back, side and hips, whereby she was made sick and then and for a long time thereafter suffered great physical and mental pain, to her damage in the additional sum of one thousand dollars. The injuries complained of directly resulted from all the alleged causes of negligence, combined, co-acting to produce a common result, towit, the damage and injuries complained of.

"Wherefore judgment is prayed against said defendants in the sum of two thousand dollars, and a lien upon the property of the defendants, declared in accordance with the statutes."

The defendants filed separate answers, and severally denied that the street railway constituted an obstruction in Broad Street; that they unskillfully, or negligently constructed or maintained it (the street railway). The College Hill Light & Traction Company denied that it owned or operated any cars; and the Texarkana Light & Traction Company denied that it carelessly or negligently operated the cars on the street railway. They deny that plaintiff was violently thrown to the ground or was greatly bruised or injured, or damaged in the sum of $1,000, or any other sum.

They alleged that, if plaintiff was injured, the proximate cause of the accident was the negligent riding by plaintiff in a

surrey drawn by a vicious and unruly horse and the running away of the horse with the surrey down Beech Street and rapidly turning to the right when it reached Broad Street and overturning the surrey by reason of its momentum and throwing the occupants to the ground; and that the accident was not caused by or connected with the construction of the street car track.

The action of Maude E. Pillow was only against the College Hill Light & Traction Company. She was in the surrey with Mrs. Pugh at the time of the accident, and made substantially the same allegations contained in the complaint of Mrs. Pugh. She further alleged that the motorman in charge of the car carelessly and negligently ran it upon and over both of her feet or legs, and thereby greatly bruised and mangled both of her feet and the lower part of her legs, and that to save her life both of her legs were amputated; and that she was thereby damaged in the sum of $50,000, for which she asked judgment.

The answer of the defendant was substantially the same as it was in the first case.

There was a separate trial in each action. The evidence in both cases was substantially the same. After it was closed the court instructed the jury in each case to return a verdict in favor of the defendants which was done.

The College Hill Light & Traction Company was organized, among other things, to build and sell street railways, and not for the purpose of operating them. It constructed the railway in question under a contract with the Texarkana Light & Traction Company, and sold the same to the latter company. The sale was completed by delivery in May, 1904, and from that time the purchaser had exclusive possession thereof, and operated it, and was doing so at the time of the accident on the fourth day of July, 1904. There was no evidence that it was not properly constructed at the time of the delivery, but on the contrary the evidence tends to show that it was. The verdict in favor of it in both cases is correct.

There was a drain across Broad Street, and across this drain a culvert was constructed as a part of the street railway in question. At this culvert the accident occurred. R. A. Munson, who visited the scene of the accident soon after it occurred, testi-

fied in both cases. His testimony is correctly and substantially stated by appellees, in part, as follows:

"That he went to scene of the accident and saw where the surrey struck the culvert. This culvert is twelve or fourteen inches above the drain and about seven feet long. The surrey struck the timber or plank which is about four inches thick laid lengthwise along the top of the ties. The mark was on the left end of this plank. And there was an indication of where the wheel had struck the rail about two feet from the mark on the plank, and the rail was a little above the graveling of the street, possibly three inches, and showed where the wheel had slipped along the rail quite a little distance as it plowed out the gravel from the rails. There was a sliding against the rail for, I think, six or seven feet."

Neither of the street railway companies acquired the exclusive right to so much of the streets as was occupied by the street railway, but subject to the right of the public to use it. Their right is concurrent with that of the general public, and is accompanied with the implied condition that the road shall be so constructed, maintained and operated as to produce no unnecessary or unreasonable interference with public or private rights, so "that the free use of the whole street by the public shall not be materially impaired." It is the common-law duty of the company operating the road "to keep the space of the highway occupied by its roadbed (which extends at least to the ends of its crossties) properly graded and in good repair, so as not to be an obstruction to travel across the roadbed longitudinally against it"—"must be built substantially with the level of the street, so as to permit vehicles to cross without difficulty." *Limburger* v. *San Antonio Rapid Transit Street Railway Company* (Tex. Sup.), 30 S. W. 533; *Detroit City Ry.* v. *Mills* (Mich.), 48 N. W. 1007; *Cunningham* v. *City of Thief River Falls* (Minn), 86 N. W. 763; *State* v. *Inhabitants of City of Trenton* (N. J. Sup.), 23 Atl. Rep. 281; *Wellington* v. *Gregson* (Kan.), 1 Pac. Rep. 253; *Groves* v. *Louisville Ry. Co.* (Ky.), 58 S. W. Rep. 508; *Heilman* v. *Lebanon & A. St. Ry. Co.* (Penn.), 37 Atl. Rep. 119.

The rule stated and sustained by this court in *St. Louis, I. M. & Sou. R. Co.* v. *Aven,* 61 Ark. 152, governs in cases like this. It is as follows: "They (municipalities) must use proper

care and vigilance to keep their streets and highways in a reasonably safe and convenient condition for travel. This is an absolute duty which they owe to all travellers; and when that duty is not discharged, and, in consequence thereof, a traveller is injured, without any fault on his part, they incur liability. They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads; and if they do not, and a traveler is injured by culpable defects in the road, it is no defense that his horse was at the time running away, or was beyond his control."

If, then, in this case the Texarkana Light & Traction Company failed to maintain the street railway in the condition it was in duty bound to do, and the defect in the railway caused by such failure was the proximate or concurrent proximate cause of Mrs. Pugh's injuries, it would be liable for damages caused by such neglect. The testimony of Munson, if true, tended to prove that the company had failed to maintain the railway in the manner it should, and that this failure was in part the cause of the accident. The court, therefore, erred in instructing the jury to return a verdict in favor of the Texarkana Light & Traction Company.

The judgment in Maude E. Pillow v. College Hill Light & Traction Company is affirmed, and in Bayne Pugh v. Texarkana Light & Traction Company and College Hill Light & Traction Company it is affirmed as to the latter company and reversed as to the Texarkana Light & Traction Company, and the cause is remanded for a new trial.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. WARNER.

Opinion delivered April 13, 1908.

1. RAILROADS—CONSTRUCTION OF STOCKGUARDS.—Under Kirby's Digest, § 6644, making it the duty of railroad companies which have constructed or may construct a railroad through inclosed lands, "upon receiving ten days' notice from the owner of such lands, to construct suitable and safe stockguards on either side of the said inclosure

where said railroads enter said inclosure," the fact that plaintiff's inclosure adjoins another inclosure through which the railroad has been built, and that stockguards have been constructed where the railroad enters the same, will not deprive him of the right to have stockyards on either side of his inclosure. (Page 50.)

2. SAME—SUFFICIENCY OF INCLOSURE.—Kirby's Digest, § 6644, requiring railroad companies to construct stockguards where their roads enter inclosed lands, applies whenever a railroad enters land of another inclosed by a fence calculated to keep out stock of most kinds, whether it be a lawful fence or not. *St. Louis & S. F. Rd. Co.* v. *Hale*, 82 Ark. 175, followed. (Page 50.)

Appeal from Craighead Circuit Court; *Frank Smith*, Judge; affirmed.

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

1. The court erred in refusing the 3d, 4th, 5th and 6th instructions requested by appellant. The statute is highly penal, and must be strictly construed. 68 Ark. 334; 64 Ark. 284. And where a railroad is constructed through two adjoining farms, separated only by a cross fence, and stockguards are properly constructed and maintained at the points of entrance and exit, this is a compliance with the spirit and intent of the statute. Kirby's Digest, § 6664.

2. Appellee failed to maintain a sufficient fence, and ought not to recover.

F. G. Taylor, for appellee.

1. The statute is plain, means what it says, and is mandatory. Unless complied with, neither of two adjoining owners is protected against the cattle of the other. 23 Am. & Eng. Enc. of L., 728 and note 4.

2. The question as to whether appellee maintained a sufficient fence was fully submitted by an instruction given by the court. A sufficient fence was all the law required. 82 Ark. 175.

BATTLE, J. On the second day of September, 1904, Mrs. S. J. Warner commenced an action against St. Louis Southwestern Railway Company, and alleged that she was the owner of a certain tract of land, that it was inclosed, and that the defendant was the owner and operated a railroad across the

land, and had failed to construct a cattle guard at the place where its road entered the inclosure, although it had been requested in writing so to do; and asked for the penalty of $200 on account of such failure.

The defendant answered, and admitted that its road entered the inclosure mentioned, and that it did not construct a cattle guard where its line of road entered the west side of the inclosure, and, among other things, pleaded as a reason therefor that Mrs. A. J. Patrick owned a farm immediately west of the land mentioned in plaintiff's complaint, and had the same inclosed, and that it constructed a good and sufficient cattle guard where its road entered the west inclosure of Mrs. Patrick's farm, and that there was no occasion for constructing the cattle guard where its road entered the inclosure of plaintiff on the west boundary of her farm, and alleged that it had constructed a sufficient cattle guard at the east enclosure of the farm.

Plaintiff owned the land described in her complaint, it was inclosed, and there was a fence between it and Mrs. Patrick's farm, which was immediately west of it. Plaintiff notified the defendant to construct cattle guards where its road entered her inclosure, which it failed to do. The jury in the case returned a verdict in favor of the plaintiff for $175.

The defendant complains only of the refusal of the court to instruct the jury, at its request, as follows:

"III. The jury are instructed that if they find from the evidence that the railway line of the defendant enters an inclosure immediately west of the plaintiff's farm, and it constructed a good and sufficient cattle guard where it entered the inclosure of the farm immediately west of the plaintiff's farm, and that the plaintiff's farm is joined to and connected with the farm immediately west of it, so that there is no passage or passway between the plaintiff's farm and the one lying west of it, the statute does not require the construction of a cattle guard under such circumstances.

"IV. The jury are instructed that if they find from the evidence that the plaintiff in this action owns a farm contiguous to and joining the farm of the Patrick estate immediately west of the plaintiff's farm, and that there is no passage or pass-

way between the plaintiff's farm and that of the Patrick estate; and they further find that the defendant has constructed a legal and proper cattle guard where its line enters the farm belonging to the Patrick estate and where it enters the plaintiff's farm on the east boundary thereof, you will find for the defendant.

"V. The jury are instructed that if they find from the evidence that the defendant constructed a suitable and safe cattle guard on the east side of the inclosure of the plaintiff's farm where its line of road enters said farm, and that said farm is adjoining the farm of the Patrick estate and is inclosed with it so there is no passage or passway between the two farms, and further find that it constructed a safe and suitable cattle guard and kept the same in good repair where it entered the western boundary or western inclosure of the said A. J. Patrick estate, then they will find for the defendant, as the construction of such cattle guard is a compliance with the statute.

"VI. The jury are instructed that before they can find for the plaintiff they must find from the evidence that the plaintiff had the land in question inclosed with a substantial and lawful fence."

This action is based on the following statutes: "Section 6644. It shall be the duty of all railroad companies organized under the laws of this State, which have constructed, or may hereafter construct, a railroad which may pass through or upon any inclosed lands of another, whether such lands were inclosed at the time of the construction of such railroad or were inclosed thereafter, upon receiving ten days' notice in writing from the owner of said lands, to construct suitable and safe stockguards on either side of said enclosure where said railroads enter said inclosure, and to keep the same in good repair."

"Section 6645. Any railroad company failing to comply with the requirements of the preceding section shall be liable to the person or persons aggrieved thereby for a penalty of not less than twenty-five dollars nor more than two hundred dollars for each and every offense, to be collected by civil action in any court having jurisdiction thereof."

Under these statutes the owner of inclosed land, through or upon which a railroad may be constructed by a railroad company organized under the laws of this State, is entitled to a suitable and safe stockguard built by the railroad company on either side of his inclosure where the railroad enters the same. This right, except as to inclosure, is unconditional. The fact that his inclosure adjoins another through which the railroad has been built and cattle guards have been constructed where the railroad enters the same will not deprive him of this right, unless the railroad passes through the inclosures at the same place and cattle guards have been constructed at such place; but that will not deprive him of the right to a cattle guard on the other side of his inclosure where none has been made. Unless the cattle guards be constructed in the manner indicated, they will not answer the purpose for which they are required; and one owner will be dependent upon the other for protection and subject to the depredation of cattle and other animals coming on and running at large upon the other's premises.

As to the inclosure of the land through which the railroad passes, it is not necessary that it be a lawful fence, as defined by the statute, before the owner can be entitled to cattle guards. It is sufficient if it be a "fence calculated to keep out stock of most kinds." *St. Louis & San Francisco Railroad Co.* v. *Hale,* 82 Ark. 175.

It follows that the court did not err in refusing instructions.

Judgment affirmed.

HILL, C. J., did not participate.

MURRAY v. GALBRAITH.

Opinion delivered April 13, 1908.

LIBEL—REPUBLICATION—SEPARATE ACTION.—A separate action will not lie on a republication by the same party of a libel where the republication was made prior to the action on the original article.

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

R. M. Galbraith brought an action of libel against Arthur Murray, alleging two causes of action, in separate paragraphs.

The first paragraph alleged that Murray was editor and proprietor of *The Press-Eagle*, a weekly newspaper published in Pine Bluff having a general circulation; that plaintiff and one J. B. York and C. Voss were commissioners of Graveling District No. 1, for paving Fifth Avenue in Pine Bluff, and were handling the funds of the district; that on June 19, 1906, defendant published in his paper the following article:

"There can no longer be any doubt of the fact that there is 'something rotten in Demmark' so far as the affairs of Graveling District No. 1 are concerned. Despite the tenderfootedness of two members of the committee appointed by the interested and defrauded property owners to make an investigation, facts have developed that clearly prove that the commissioners have charged their neighbors and fellow property owners of Fifth Avenue $10,477.85 for gravel for which they paid the St. Louis Southwestern Railway Company only $3,431.80, leaving a 'net profit' in this transaction alone of over $7,000. If the commissioners profited in this transaction, it is not unreasonable to suppose that they profited in the employment of labor and other items of expense necessary to the completion of this graveling district, which is conceded to be the most wretched botch of street paving ever perpetrated in this or any other community.

"*The Press-Eagle* is not addicted to publishing facts and figures involving the character of public or private citizens without being thoroughly advised as to the authenticity of these facts and figures. Therefore, when we stated last week that an apparent 'overcharge' of $7,000 had been made for gravel by the Commissioners of Graveling District No. 1, we were very careful to be within the bounds of truth, and to express the matter in language as mild as possible, so as to avoid giving offense or doing injustice to those responsible for the shortage, pending a thorough investigation by those most interested.

"This investigation has now been made so far as it is possible for the committee to proceed, and the facts in every way confirm the statement first made in this paper last week that the

commissioners had overcharged the district for about $7,000 for gravel alone. The cost of excavating, hauling dirt, curbing, etc., has not as yet been investigated, nor are we advised that it will be. But, if the investigation should be made, we should not be surprised if 'overcharges' were found in these items, as well as that disclosed by the investigation as to the cost of the gravel.

"There are three men who, by virtue of the trust imposed in them by their fellow-citizens, should be able to explain why their records show that this overcharge of over $7,000 was made in the purchase of gravel from the St. Louis Southwestern Railway Company. These men are J. B. York, president, Carl Voss, secretary and R. M. Galbraith, treasurer, of Graveling District No. 1. The two first named have been before the committee and interested property owners, and admitted their inability to explain the manifest overcharge. This leaves the burden of the explanation upon R. M. Galbraith, treasurer, who has been at Jacksonville, Ill., attending the funeral of a friend, for the past week or ten days.

"Meantime, another meeting of the property owners of Graveling District No. 1 has been called at the Board of Trade for Thursday night of this week. By that time, it is hoped that the obsequies at Jacksonville, Ill., will have been concluded, so as to enable treasurer Galbraith to return to the city and produce his vouchers and checks for $7,000, good and lawful money of the realm, that both his records and those of Secretary Voss show was paid to the St. Louis Southwestern Railway Company, and which the officers of that corporation assert over their official signature never came into their possession.

"In the classic language of the far-famed Sir Lucius O'Trigger, 'Tis a pretty quarrel as it stands.' "

That on the same date, these paragraphs appeared in the said Press-Eagle:

"Graveling District No. 1 is not the only paving district formed in Pine Bluff that was boodled. There are others."

"Still we see no very good reason why the check book can not be produced, even if the vouchers are missing."

Plaintiff alleged that by the above publication defendant sought to charge the plaintiff with the crime of embezzling the funds of the district, or fraudulently converting the funds of the

district to his own use, and defrauding said district of said funds, thereby seeking and intending to falsely impeach the honesty, integrity, veracity, and reputation of this plaintiff, and thereby exposing him to public hatred, contempt and ridicule.

The second paragraph contains the same general allegations as the first, and is based upon the following publication under date of June 26, 1906, therein set out:

"The damage suit filed against the editor of *The Press-Eagle* yesterday by two of the Commissioners of Graveling District No. 1 is not conclusive of anything except a determination on the part of the commissioners to shift responsibility for their own derelictions upon the shoulders of other and innocent parties. The imperfect and incomplete records kept by the commisioners show that the gravel of the district purchased from the St. Louis Southwestern Railway Company cost $10,447.85, while the records of the general auditor of the railway company and of the city clerk of Pine Bluff show that the gravel purchased cost only $3,434.80. Here is a manifest 'overcharge' of exceeding $7,000, of which treasurer Galbraith of the commission, after a two weeks investigation, traced $5,685.56 into the hands of local agent, J. W. Farley, of the Cotton Belt. This money is now said to have been remitted to the treasurer's office in St. Louis as receipts for freight, of which no itemized account was kept, which explains why the auditor had no record of it, so it is said. But the incontrovertible fact remains that, while the commissioners of Graveling District No. 1 purchased 500 car loads of gravel at $1.35 per yard, some six years later, the property owners of West Fifth Avenue, who desired the graveling district extended, purchased 100 car loads from the same railway company at about thirty per yard. This $1.05 excess per yard, which the property owners of Fifth Avenue of Graveling District No. 1 were required to pay on 500 car loads of gravel, totals the $7,000 overcharge of which they now complain, and which has not been explained to their satisfaction, although a majority of them, we are informed, have agreed to continue paying their tax assessments.

"*The Press-Eagle's* information concerning this graveling district imbroglio was obtained from the chairman and secretary of the committee of property owners appointed to get at

the facts, and their information came direct from official sources, as shown in the statements of auditor S. J. Johnson and city clerk W. A. Lee, published last week. If the comments made upon the official statements were libelous, then the statements themselves were libelous, and we do not consider this paper or its editor in any way responsible for the peculiar condition of affairs revealed by these official statements.

"That there was an overcharge of something like $7,000 for the gravel used on Graveling District No. 1, when compared with the charge for gravel used in extending that district, the records clearly show; and if the publication of this record, without attempting to prove who profited by this overcharge, is libelous and malicious, then we may plead guilty to the suit filed against us by Commissioners Galbraith and York, and settle their little damage bill, when properly discounted or rebated. Otherwise we consider ourselves from Joplin, Mo., and will have to be *cited* before we come across with that $75,000 to assuage the lacerated feelings of our friends, the Commissioners of Graveling District No. 1."

Plaintiff avers that by means of the publications he was injured in his reputation, good name and credit, and suffered mental shame and anguish in the sum of $37,500, and prays for judgment. An amendment to the complaint was filed asking for $27,500 as compensatory, and $10,000 as punitive damages.

Prior to the foregoing complaint and amendment, there had been first filed a joint suit for damages by this plaintiff and J. B. York for the alleged libel, which was afterwards dismissed. It was *The Press-Eagle's* comments upon this suit upon which was based the second count in plaintiff's complaint.

The answer denied malice and alleged good faith in the publications.

Trial was had, and verdict for plaintiff in the sum of $10,000 as compensatory damages. Defendant appealed.

W. F. Coleman, for appellant.

1. The court erred in giving a peremptory instruction. It is only where the alleged defamatory matter is unambiguous as to who was meant and what was meant that the court is authorized to take it from the jury. The court may decide whether the publication is susceptible of the meaning ascribed to it by

the complainant, but it is for the jury to say whether such meaning is truly ascribed. Newell on Slander & Libel (2 Ed.), 290, 305; 81 Ark. 363; 13 Am. & Eng. Enc. of Law (1 Ed.), 381, 382, 383; *Id.* 353; *Id.* 391; 393 note 3; 23 Ind. 265; 97 Mass. 1. The instruction took from the jury consideration of the question of qualified privilege. Cooley's Const. Lim. (6 Ed.), 558-9.

2. The court's instruction is misleading and argumentative, and therefore prejudicial. 11 Am. & Eng. Enc. of Law, 256, and notes 2 and 3.

3. In an action for libel it is proper to submit for the jury's consideration in mitigation of damages any evidence showing that defendant did not originate the defamatory charge, that it was a matter of common rumor at and before the time of publication, and that at the time of the publication he had good cause to believe and did believe the same was true. Also that the conduct of the plaintiff was such as to cause the defendant as a reasonable man to believe that the criticisms and comments complained of were fair. 72 Ark. 426; 13 Am. & Eng. Enc. of Law, 445; *Id.* 440, and note 6; *Id.* 442; Newell on Slander & Libel (2 Ed.), 884, § 18; *Id.* 883.

N. T. White and *Benjamin J. Altheimer,* for appellee.

1. Whether words are actionable *per se* is a question of law for the court. In this case there was no ambiguity in the articles complained of; either there was or was not a libel committed. If the jury could have found that appellee was not meant by the charges, then it would have been a question of fact for the jury; but where the language admitted of no other construction than that put upon it by the court, it became a question of law. 55 Ark. 501; 72 Ark. 422; 57 C. C. A. 49; 18 Am. & Eng. Enc. of Law (2 Ed.), 909 *et seq.; Id.* 912; *Id.* 950.

2. Where qualified privilege is pleaded, it is the duty of the court to declare as a matter of law whether or not the article was privileged. 18 Am. & Eng. Enc. of Law (2 Ed.), 1050; Newell on Slander & Libel (2 Ed.), 391, § 9; *Id.* 392, § 11; *Id.* 552, 568; 65 L. R. A. 984. Such being the case, there was no error in declaring the matter libelous and not privileged. 50 Ohio, 201; 106 Mo. 94; 66 Mich. 307; 2 Overt. (Tenn.), 99; 13 W. Va. 183; 81 N. Y. 126; 81 Ill. 77; 60 Md. 158; 21 Fla.

431; 50 Ohio St. 71; 99 Cal. 431; 49 N. J. 579; 57 Wis. 570; 154 Mass. 238; 24 Ore. 431; 65 L. R. A. 992.

3. Good faith, lack of malice or probable cause can not be interposed in mitigation of the *compensatory* damages one has suffered by reason of a libel; and in this case no special damages were sought, and no punitive damages allowed. 55 Ark. 501; 56 Ark. 103; 57 C. C. A. 45, 48; 36 C. C. A. 475; 47 C. C. A. 384; 71 C. C. A. 309; 81 N. Y. 126.

HILL, C. J. Murray was editor and proprietor of *The Pine Bluff Press Eagle,* a weekly newspaper published in Pine Bluff. Galbraith was one of the commissioners of Graveling District No. 1 of the city of Pine Bluff. Murray published in his newspaper articles in regard to affairs of the graveling district which caused this suit for libel to be brought by Galbraith against him. The complaint is in two counts. The first count is based upon an article published on the 19th of June, 1906. It is not necessary to discuss the first article, as it is clearly libelous *per se,* and not privileged.

The second count is based upon an article published on the 26th of June, after Galbraith and one other commissioner had brought a joint libel suit, which was subsequently dismissed. This suit was brought by the appellee upon the two publications. This publication will be set out in the Reporter's statement of the case. Among other instructions, the court gave the following: "That the articles published by the defendant and set out in the complaint are libelous *per se,* that they were not privileged, and that plaintiff is entitled to recover."

The facts in evidence are not sufficient to make this a privileged publication, and if the article in the second count was libelous *per se,* and made a distinct and separate cause of action, then his instruction was correct; otherwise, it is error.

An examination of the article set out in the second count, when disconnected from the previous publication, renders it difficult to determine exactly what charge is brought against Mr. Galbraith. Taken in connection with the previous article, it is in a sense a repetition of the libel, and in another sense an explanation and justification of why the first article was published, rather than a charge of actual wrong-doing or dishonesty. The law seems settled that a repetition of an identical libel is

not a new cause of action, but an aggravation of the pre-existing cause, and is always competent evidence tending to prove malice. The Supreme Court of New York said: "When a libelous article is republished before the commencement of an action, a separate action can not be maintained on such publication. The repetition of the publication may be pleaded and shown on the trial and bearing up the malice of the defendant and the extent of the injury and damage to the plaintiff." *Galligan* v. *Sun Ptg. & Pub. Co.,* 54 N. Y. Supp. 471.

The Court of Appeals of New York approved the following opinion of the Supreme Court of that State: "But the authorities are uniform that words proved as repetitions of the slander charged are not an independent ground of action in the case, and that no recovery can be had for uttering them. They reflect upon and strengthen the claim for damages on account of the words charged." *Enos* v. *Enos,* 135 N. Y. 609.

"Nor will a separate action lie on a republication by the same party of a libel, where the republication was made prior to the action on the original article." 25 Cyc. 431.

For the admissibility of such repeated libels, see a good discussion on the subject in *Gribble* v. *Pioneer Press Co.,* 25 N. W. 710.

Both the article in the first count and the article in the second count were printed before the bringing of this suit; and the utmost that can be said of the article in the second count is that it repeated the libel contained in the first. It is doubtful that it amounts to libel *per se.* Even if it does, however, under the principles above announced, it would not be an independent cause of action. If not libelous *per se,* of course the instruction is erroneous. Under either view, the judgment rendered under this instruction can not be sustained. It is clearly admissible as evidence showing the animus of the prior publication, but can not be sustained as an independent cause of action and libelous *per se.* The court so treated it, and therefore it erred. This error makes it necessary that the judgment be reversed, and renders it unnecessary to consider the other matters presented.

The cause is reversed and remanded.

BERGER v. MILLER.

Opinion delivered April 13, 1908.

SALE OF CHATTELS—RESERVATION OF TITLE.—Where a chattel is sold upon condition that the title shall remain in the vendor until the purchase price is paid, and that, in case of default in payment, the vendor shall have a right to immediate possession of the property, the vendor, upon such default, was entitled to possession, even against one who had bought it from the vendee.

Appeal from Craighead Circuit Court; *Frank Smith*, Judge; reversed.

STATEMENT BY THE COURT.

The appellee brought replevin against appellant, Satterwait, in justice's court, for the possession of a certain stove, with the usual allegations. Judgment was rendered in favor of the appellee, and appellant appealed to the circuit court. In the circuit court appellant Berger asked to be made a party defendant, setting up that he, through his agent, had sold the stove in controversy to appellant Satterwait, and had warranted the title, and that he had been notified by appellant Satterwait to defend. The petition was granted. Trial in the circuit court resulted in a verdict and judgment for appellee in the sum of twenty dollars. This appeal followed. The appellee contended, and introduced testimony which tended to prove, that she purchased the stove from the appellant Berger in connection with other furniture bought by her at the same time; that she was to pay in monthly installments of $25 until she had paid the amount of the purchase price, $125; that she had paid at the time the stove was taken from her the sum of $70; that the deputy constable came to her house and served a writ of replevin on one Mangrum, and took from her possession and over her protest, among other things, the stove in controversy; that on the day the case of appellant Berger against Mangrum was set for trial she appeared, but found that the case had been dismissed, and that her stove had been sold by the deputy constable to appellant Satterwait. She then brought this suit against appellant Satterwait to recover her property. Appellant Berger contended and introduced evidence which tended

to show that he sold the stove in controversy to one Mangrum under a written contract which provided for the payment of the purchase price of the furniture $125 in installments of $25 per month, and specified that the furniture purchased, including the stove, should "remain the property of Alex Berger until the purchase money is paid in full, and for default of any one of the payments the property shall, on demand, be returned to the said Alex Berger, his agents or assigns, in good order with *pro rata* pay for its use." Appellant Berger contended that Mangrum had defaulted in several payments, and that he brought replevin against him for the stove in controversy and delivered the writ to one Young, the deputy constable, with instructions not to serve if the "stuff was surrendered on demand."

There was evidence tending to prove that the stove was surrendered on demand. The sum of $70 had been paid on the purchase price of the articles, and the balance was due and unpaid. There was evidence on behalf of appellant tending to prove that the possession of the stove was voluntarily surrendered by appellee upon demand by the agent of appellant. The evidence on behalf of the appellee tended to prove that the possession of the stove was not voluntarily surrendered by appellee, but that she, on the contrary, objected to the taking of the property, and that the stove was taken by the deputy constable over her protest, under the pretense of authority conferred by the writ of replevin against Mangrum. The appellants asked the court to instruct the jury as follows:

No. 2 asked by the defendants: "If you find that Alex Berger parted with the possession of the cook stove involved in this suit on condition that the title remain with him until the full purchase price was paid, then you will find for the defendants."

No. 4 asked by defendants: "If the title to the cooking stove was retained by Alex Berger until the purchase price was fully paid, then the plaintiff was not entitled to the immediate possession of the stove when this suit was commenced, and cannot recover."

All these being refused, exceptions were saved, and carried into the motion for new trial. Defendants have appealed.

Chas. D. Frierson, for appellants.

1. The preponderance of the evidence shows that appellant sold the goods upon a *written* contract containing the provision that the goods should remain the property of appellant until the note was fully paid, and also that he might on default in payment, or in the event of removal, or when he deemed himself unsafe, retake the property. Such contract need not have been in writing. It is valid, title remaining in the vendor till payment; and on default he is entitled to immediate possession of the property. 1 Mechem, Sales, § § 561, 563-4, 613, 618, 626-628; 5 Fed. 419; 6 Am. & Eng. Enc. of L. (2 Ed.), 467, 479, 481; *Id.* 450, 453, 458, 438; 118 U. S. 663; 48 Ark 164; *Id.* 474; 49 Ark. 63; 68 Ark. 230; 66 Ark. 240; 55 Ark. 642; 57 Ark. 270; 63 Ark. 268; 64 Ark. 29; 75 Ark. 548; 39 Ark. 438; 60 Ark. 133.

2. Appellee's rights were derived from Berger, and were subject to his rights. Her right to possession of the goods ceased upon default, and she could not maintain replevin. 1 Mechem, Sales, § 630; 66 N. W. 370; 53 N. W. 159; 101 N. W. 1050; 95 N. W. 808; 55 N. W. 892; 28 Am. & Eng. Enc. of L. (2 Ed.), 656 *et seq.; Id.* 665; 55 S. W. 983; 5 L. R. A. (N. S.), 475; 24 Am. & Eng. Enc. of L. (2 Ed.), 485; 67 N. C. 333; 55 Vt. 308; 4 Cush. 198.

3. The court erred in refusing instructions 2 and 4 requested by appellant. Erred also in refusing the 5th instruction. 25 Am. & Eng. Enc. of L. (2 Ed.), 517-18; Cobbey on Replevin, § § 970-1.

Lamb & Caraway, for appellee.

1. The evidence is that appellee made her own contract with appellant full and complete, that there was no retention of title therein, that he did not advise her that there was anything more to be done except to make the payments, and that she knew nothing of Mangrum's signing his name to any instrument having any connection with this transaction. There was, therefore, a complete sale and delivery to appellee, and, upon default, appellant had no higher right than to sue for the debt and attach the property pending suit. 52 Ark. 450.

2. At the time Young took the property from appellee, and

at the time this suit was instituted, appellee was entitled to immediate possession of it. Kirby's Digest, § 6869; 56 Ark. 611.

WOOD, J., (after stating the facts.) The court erred in refusing to grant appellant's prayers numbered two and four. The evidence on behalf of appellant Berger tended to show that the sale of the stove in controversy was made upon condition that the title should remain in him until the purchase price was paid, and that, in case of default in the payment of any of the installments when due, he should have the right to the immediate possession of the property. Under such a contract the vendor would have the right to the immediate possession of the property. *Ferguson* v. *Hetherington,* 39 Ark. 438; *Kirby* v. *Tompkins,* 48 Ark. 273; *McRae* v. *Merrifield,* 48 Ark. 160-164; *Simpson* v. *Shackleford,* 49 Ark. 63; *Ames Iron Works* v. *Richardson,* 55 Ark. 642; *Faisst* v. *Waldo,* 57 Ark. 270; *Edgewood Distilling Co.* v. *Shannon,* 60 Ark. 133; *Public Parks Amusement Co.* v. *Embree-McLean Carriage Co.,* 64 Ark. 29. See also, *Little Rock Vehicle & Implement Co.* v. *Robinson,* 75 Ark. 548.

The theory presented by these instructions was not covered by any of the instructions given. The appellant Berger was entitled, under the evidence adduced by him, to have this specific contention submitted to the jury, and for the error of the court in refusing it the judgment is reversed, and the cause is remanded for new trial.

HILL, C. J., did not participate.

IMPROVEMENT DISTRICT NO. 1 OF WYNNE *v.* BROWN.

Opinion delivered April 13, 1908.

1. SALE OF CHATTEL—SUFFICIENCY OF ANSWER.—Where a complaint averred that plaintiff sold and delivered an article to defendant, an answer which denied that the article was purchased by the defendant, or on its account, was sufficient on demurrer. (Page 63.)
2. SAME—DEFENSE.—Where an improvement district was sued for coal alleged to have been furnished to it to run a water and electric light plant for the city, it is a good defense that such plant was being

operated by the city, and that the coal was furnished by the city for its operation. (Page 63.)

Appeal from Cross Circuit Court; *Frank Smith,* Judge; reversed.

J. T. Patterson, for appellant.

The answer was sufficient to put in issue whether or not appellee sold the coal to the improvement district. If the coal was purchased and used at all, it was by the city council under authority of the statute, and the city was liable for the debt. Kirby's Digest, § § 5675, 5442, 5443; 67 Ark. 36; 56 Ark. 205; 80 Ark. 125.

Allen Hughes, for appellee.

1. The failure to deny the delivery amounts to an admission thereof. This implied admission becomes conclusive when taken in connection with the further allegation that the coal, if purchased at all, was purchased by the city of Wynne.

2. The case in 56 Ark. 205, cited by appellant, is not in point. The question is not whether the improvement district may make a valid contract to purchase coal, but whether it as a corporation is bound for the expense of operation incurred by the city while the latter is operating the improvement. An improvement district may operate a water and light plant and incur debts in the operation hereof. 81 Ark. 402.

PER CURIAM. R. L. Brown sued Improvement District No. 1 of the city of Wynne, and its commissioners, and subsequently joined the city and its mayor, but later dismissed as to them. Brown sued for three cars of coal which he alleged he had sold and delivered to the Improvement District on January 21st, February 4th and February 26th, respectively, attaching an itemized account therefor. He further alleged that the coal was sold to the Improvement District upon an agreement that it should pay for the same in cash, and the price thereof became due immediately upon the delivery of the coal; and then alleged a failure to pay, and asked judgment for the contract price. To this the Improvement District filed an answer, denying that the coal mentioned was purchased by the commissioners or the Improvement District, or for or on their account. For further answer

they say that, at the time the coal was alleged to have been purchased, the water and light plant owned and erected by the defendant Improvement District was under the control and was being operated by the city of Wynne, pursuant to the authority, contained in section 5675 of Kirby's Digest; and that said coal, if purchased at all, was purchased by the city of Wynne, to be by it used in the operation of said water and light plant, and that the city of Wynne continued to operate said water and light plant until about the 8th day of April, when it turned the same over to this defendant to operate and maintain.

This answer was met by a demurrer, which was sustained, and judgment was entered for plaintiff, and the defendant has appealed.

Appellee has filed a motion, pursuant to section 1229 of Kirby's Digest, to advance and affirm this case as a delay case. After response thereto, pursuant to Rule 2, the case was submitted to the court.

The case was briefed upon both sides on the motion, and a consideration of the same has convinced the court that the motion to advance and affirm as a delay case is not well taken. The case has been fully presented by counsel, and considered by the court, and the court now of its own motion disposes of it, instead of pursuing the usual practice of merely passing upon the motion to advance and affirm, because it would be a useless consumption of time, after the court has thoroughly considered it, to pass it over for another consideration at a future date.

The first paragraph of the answer is not as complete a denial of the purchase and delivery of the coal as good pleading would require, and the appellee contends that only the purchase of the coal is denied, and that the delivery stands admitted, and that it would be liable for the coal as it was delivered to it. The suit is not on *quantum valebat,* but is a suit upon contract. The contract is denied, and the denial is sufficient to be free from an attack by demurrer.

The second paragraph of the answer also contains a good defense. Section 5675 of Kirby's Digest authorizes cities to take over water works and light plants, when they have been erected by improvement districts, and to operate and maintain the same.

When a water and light plant is thus being operated by the city, necessarily the city is the party responsible for the purchases made for its maintenance and operation, and that is what this answer alleges.

It is true that the answer further alleges that some month or two after these purchases the plant was turned back to these commissioners, but that can have no bearing upon this case. The purpose of turning it back and the authority therefor are not issues, and that much of the answer is surplusage.

For the error in sustaining the demurrer to the answer, the judgment is reversed, and the cause is remanded with directions to overrule the demurrer and proceed with the case.

PATTERSON v. PATTERSON.

Opinion delivered April 20, 1908.

PARENT AND CHILD—CUSTODY.—In a controversy between a husband and wife, living separately, over the custody of an infant a year and a half old, it is improper to remove the child temporarily from its mother's custody when she is shown to be capable, both morally and financially, of properly caring for and nurturing it.

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

Read & McDonough, for appellant.

1. The appellant is financially able to properly care for the child, and it is conceded that she is a woman of good character, kind to the child, and because of its age she should have custody of it. 38 Ark. 406; 50 Ark. 351; 75 Ark. 193; 78 Ark. 193.

2. Under the circumstances of this case, the bringing of an original petition for habeas corpus in this court is proper practice. 48 Ark. 286.

Edwin Hiner and *Youmans & Youmans,* for appellee.

McCULLOCH, J. This proceeding involves a controversy between husband and wife concerning the custody of their in-

fant child. The chancellor awarded the custody of the child to its father, allowing him to remove the child out of the jurisdiction of the court. The relation of husband and wife still subsists between the parties—no divorce proceedings being pending, though it appears that they have separated themselves from each other and are living apart.

It does not appear from the evidence that either of the parents are incapable, either morally or financially, of properly taking care of the child, but on account of its tender age we feel sure that the interest of the child would, for the present at least, be best subserved by permitting it to remain in the custody of the mother, who is more capable of giving it the care that it needs most now. The child was about a year and a half old when the chancellor decreed its custody to the father. This is too tender an age at which to remove a child from its mother, when she is shown to be capable of properly caring for and nurturing it. *Wann* v. *Wann,* 85 Ark. 471.

The decree awarding custody is only of a temporary nature, and subject to change when different circumstances demand it.

Reversed and remanded, with directions to enter a decree in accordance with this opinion awarding the custody of the child to appellant, its mother. The chancellor is authorized, of course, to make such orders as he may deem just and proper giving appellee reasonable opportunity to visit his child.

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

Opinion delivered April 20, 1908.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Where a brakeman, in endeavoring to make a flying switch, voluntarily placed himself in a place of danger and was injured, when he could have accomplished the end sought without incurring risk, he was guilty of contributory negligence, which will debar a recovery.

Appeal from Faulkner Circuit Court; *Eugene Lankford,* Judge; reversed.

Lovick P. Miles, for appellant.

Under the facts shown in evidence and uncontradicted, the court should have granted a peremptory instruction for the appellant. Not only did the deceased assume the risks ordinarily incident to his employment, but also he must be held to have assumed the extra hazard to which he voluntarily subjected himself and the consequences of his own contributory negligence. 78 Ark. 213; 77 Ark. 376; 56 Ark. 206; 143 Mass. 107; 165 Mass. 171; 80 Minn. 1; 86 Me. 400; 91 Me. 268; 170 U. S. 57; 191 U. S. 64; 170 U. S. 665; 56 Ark. 206; 65 Minn. 337; 57 Ark. 461.

Carmichael, Brooks & Powers, Sam Frauenthal and *P. H. Prince,* for appellee.

If the power driving wheel brakes of the engine had been in good working order, the engineer could have stopped it in time to have avoided the injury. There is no evidence that deceased knew the brakes were in bad order, but if he had known it he did not, under the Federal statute, assume the risk. An employee does not assume the risks arising from the master's negligence, nor from the failure of the master's failure to comply with statutory requirements. Safety Appliance Act, § § 1 and 8; 57 Ark. 377; 44 Ark. 525; 59 Ark. 103; 77 Ark. 637; 78 Ark. 219; 70 Ark. 299; 67 Ark. 208; 82 Ark. 595; 194 U. S. 140; 4 Penn. (Del.) 387; 116 Fed. 867.

BATTLE, J. Marie Fuller, as administratrix of the estate of Sylvester Fuller, deceased, sued St. Louis, Iron Mountain & Southern Railway Company for damages on account of injuries caused by the negligence of the defendant. She alleged in her complaint "that on the 21st day of July, 1906, Sylvester Fuller was an employee of the defendant as a brakeman on its freight train, operated and run through said Chicot County; that on said day said Sylvester Fuller, under direction of the defendant, was engaged in doing station switching for defendant at Dermott, a station on defendant's line of railroad in said Chicot County; that in doing said switching at said time and place it was necessary, and said Sylvester Fuller was directed by said defendant, to assist in poling a freight car from the spur track to the main track of defendant's line of railroad;

that in performing this duty, and under direction of defendant, said Sylvester Fuller used a piece of iron as such pole, which was furnished by said defendant as the tool for performing this duty; that, while said Sylvester Fuller was thus engaged in performing this duty, the defendant did carelessly and negligently run the engine of said freight train back on said Sylvester Fuller, crushing him between said engine and freight car; that at the time the engine of defendant was defective and unsuitable for use; that the air brakes on said engine were in bad order and discontinued, and that said engine was not provided with proper appliances for braking power; and that this defective and unsuitable condition of said engine was well known at the time to the defendant, and was wholly unknown to said Sylvester Fuller.

Plaintiff says that, "as the said engine was being run towards said Sylvester Fuller, while he was thus engaged in doing said duty of switch-poling, the engineer of defendant in charge of said engine at the time saw the perilous condition in which Sylvester Fuller was placed prior to the injury, and in ample time to have stopped the engine and prevented the injury, had not said engine been in such a defective condition, as above set forth, and the said defendant, through its said negligence, did fail to stop said engine and did not stop the same, but did carelessly and negligently run the same against the said Sylvester Fuller, crushing him between said engine and said freight car on said spur track, causing him such injury that he died therefrom."

The defendant denied each and every allegation of negligence, and alleged, in further defense, that the intestate of appellee was guilty of contributory negligence in failing to exercise due care for his own safety in the discharge of the work in which he was engaged, and in negligently assuming a place of danger and manner of working; and, in further defense, the defendant alleged that the injury and death of the intestate of plaintiff was the approximate result of a risk of injury and death which said intestate assumed in taking and continuing service with the defendant.

The jury in the case returned a verdict in favor of the plain-

tiff for $750, and the court rendered judgment accordingly; and the defendant appealed to this court.

The leading facts in the case are as follows:

Sylvester Fuller, the intestate of appellee, was a railroad brakeman, of about three years' experience, on a freight train of appellant, operated in Chicot County, in this State. He was acting as "head brakeman" of the train at the time he was injured. The crew operating the train attempted to make what is known as a "running switch" of a car, and put it on a side track at Dermott, a station on appellant's road in Chicot County. The car did not roll quite far enough, and was in the way of cars passing on the track from which the crew attempted to switch it, or, as expressed in the briefs of counsel, "did not roll quite in the clear." Fuller voluntarily, without direction from any one, assumed the work of "poling" the car into "the clear," without being directed to do so, and went to a scrap-pile and picked up an angle bar or "fish-plate," from 18 to 24 inches in length. He returned to the engine and unnecessarily assumed a dangerous position on the pilot of the engine, and attempted to push the car in the clear by placing the angle-bar against the pilot-beam of the engine and the car, and then causing the engine to move forward. He gave the engineer in charge of the engine a signal to move forward, which he did slowly and cautiously, moving at the rate of two miles an hour; the engineer not seeing or knowing what appliance he used. The angle-bar failed to accomplish his purpose. He cried aloud, but it was too late, and he was crushed. The angle-bar was too short. In the event it broke or slipped, there could not be time to stop the engine before it came in contact with the car. Had Fuller stood on the ground on the right side of the pilot-beam, as he should, with his angle-bar, and "poled" the car in that way, there would have been no way for him to have been caught and crushed. He was clearly guilty of contributory negligence. Appellant asked the court to instruct the jury to return a verdict in its favor, and it erred in refusing to do so.

Reversed and remanded for a new trial.

Ex parte THOMPSON.

Opinion delivered April 20, 1908.

1. JUSTICE OF THE PEACE—FINDINGS OF FACT.—Kirby's Digest, § 6213, providing that "upon trials of questions of fact by the court it shall state in writing the conclusions of fact found separately from the conclusions of law," does not apply to the judgments of justices of the peace. (Page 73.)
2. CERTIORARI—JUDGMENT OF JUSTICE OF PEACE.—In considering the validity of a judgment of a justice of the peace on certiorari, the reviewing court should not consider any evidence imported into the judgment of the justice in the shape of findings of fact as the basis of his decision. (Page 73.)
3. CONSTITUTIONAL LAW—AGREED STATEMENTS.—The constitutionality of acts of the Legislature or of Congress fixing or attempting to fix the boundary lines of the State will not be determined upon an agreed statement of facts, however sincerely or honestly made. (Page 74.)

Certiorari to Sebastian Chancery Court; *J. Virgil Bourland,* Chancellor; affirmed.

STATEMENT BY THE COURT.

On the 6th of February, 1908, James P. Barry filed an affidavit before John Danner, a justice of the peace of Upper Township, Sebastian County, alleging that Clint Thompson had, on the 5th of February, committed the crime of disturbing the peace. A warrant for his arrest was issued to the constable of the township, and he was arrested, and his trial set for February 7th. On the 7th the case was tried before the justice on a plea of not guilty, and a plea to the jurisdiction of the court, and the justice made the following findings:

"That said offense was committed in that part of the said State and added to said State by an act of Congress approved February 11, 1905, and by the act of Legislature of said State of Arkansas entitled 'An act extending the western boundary of the State of Arkansas over a strip of the Choctaw Nation between the Arkansas line and Poteau River adjacent to Ft. Smith, approved February 16, 1905.' The court doth find that said offense was committed, and said strip is within the jurisdiction of said court; therefore, the plea of the defendant to the judisdiction of the court is overruled by the court, and the

court, being well and sufficiently advised as to all the matters of law and facts therein, doth find the said defendant guilty, and doth assess a fine of $55."

Following which is a judgment in ordinary form for the fine and costs, and that the defendant be committed to the county jail until the above fine and costs are paid according to law. A commitment to the jailer of Sebastian County was issued, and Clint Thompson was imprisoned in the jail of said county. On the same day of his conviction, Thompson filed a petition for habeas corpus before the Hon. J. V. Bourland, chancellor, in which he set forth that he was illegally restrained of his liberty by the jailer of Sebastian County, under said judgment and commitment, which judgment he claimed was void on the ground that the justice of Upper Township was without jurisdiction over the place where the offense was alleged to have been committed, said place not being a part of the State of Arkansas; the allegation being that the act of the General Assembly of Arkansas referred to in the judgment was unconstitutional, and that the act of Congress referred to had been repealed. This petition was demurred to by the attorney for the jailer, upon the ground that the court was without jurisdiction to try the matter presented, and that the petition did not state facts sufficient to constitute a cause of action. The cause came on to be heard before the chancellor upon the petition and demurrer, and an agreed statement of facts which was as follows:

"It is agreed by counsel in the above case that the acts for which petitioner was convicted was committed on a strip of land adjacent to the city of Ft. Smith, Arkansas, and lying between the original western line of said State and the Arkansas and Poteau rivers, and is included and embraced in the lands described in the act of Congress of February 11, 1905, and the act of the General Assembly of Arkansas of February 16, 1905.

"Tom W. Neal,
"T. S. Osborne,
"Attorneys for Petitioner.
"W. H. Rector,
"Asst. Prosecuting Atty. for 12th District of Arkansas.

The chancellor denied the writ, and Thompson seeks to reverse his action by certiorari.

T. S. Osborne and *Tom W. Neal,* for petitioner.

1. The writ of certiorari is the proper procedure in this case. 45 Ark. 158; 48 Ark. 283; 81 Ark. 504.

2. The strip of land where the offense is alleged to have been committed is not, in contemplation of law, a part of the State of Arkansas. Art 1, Const. (Ark.) 1836; art. 1, Const. (Ark.) 1861; *Id.* 1864; *Id.* 1868; *Id.* 1874; 5 U. S. Stat. at Large, 50-52; 7 *Id.* 311; *Id.* 234; 30 *Id.* 497, § 9; 33 *Id.* 714. The act of Feb. 16, 1905 (Acts 1905, p. 124, § 1) was void, the Constitution of 1874 having fixed the permanent boundaries of the State. Art. 1, Const. 1874; 8 Barb. (N. Y.) 186; 20 N. Y. Supp. 157; 65 Hun, 194; 6 Words & Phrases, 5310; 1 Bryce, American Commonwealth, 2 Ed., 422; 6 Am. & Eng. Enc. of L. 890; 1 Ark. 27; 2 Dallas (U. S.) 204.

3. The criminal laws of the State can have no extra-territorial force. 5 Ark. 409; 17 Ark. 561; 30 Ark. 41; 22 U. S. 362.

4. The writ of habeas corpus was the proper remedy. Kirby's Digest, § 3864; Black's Const. Law, 51, § 22; 75 Ark. 542; 45 Ark. 283; 48 Ark. 158; 100 U. S. 375; 1 Bishop's New Crim. Law, § 1410, par. 3 and 7; Church on Habeas Corpus, 2 Ed. § 83; 9 Am. & Eng. Enc. of L. 213, *et seq.;* 12 Wall. (U. S.) 458; 3 Dallas (U. S.) 411; 40 Ark. 501; 26 Ark. 545.

William F. Kirby, Attorney General, and *W. H. Rector,* for respondent.

1. The object of the writ of habeas corpus is to liberate those who may be imprisoned without sufficient cause, and to deliver them from unlawful custody. 48 Ark. 289. This writ can not be made a substitute for *quo warranto,* writ of error or appeal. 100 U. S. 375; 110 U. S. 651. The justice of the peace was at least acting with *de facto* jurisdiction; and, keeping in mind the distinction between acts creating offenses and acts granting jurisdiction or certain powers to courts, the question of constitutionality can not be raised in this proceeding, but only by the commonwealth. 29 Pa. 129; 15 Am. & Eng. Enc. of L. 155; Church on Habeas Corpus, § 256 *et seq.;* 49

N. J. 326; 16 Ia. 369; 48 Ark. 289; 13 Col. 525; 173 U. S. 453; Chase's Dec. 364; 122 Mass. 445; 139 U. S. 504; 6 Sup. Ct. 1121; 76 Wis. 357; 76 Wis. 365; 62 Wis. 154; 5 Fed. 899; 87 Am. St. Rep. 198; 21 O. St. 610; 24 Wend. 539; 36 Conn. 422; 14 Wis. 164; 17 Wis. 521; 49 Ark. 443; 4 Ark. 582.

2. The fixing of boundaries is a political and not a judicial function. 2 Pet. 254; *Id.* 710; 5 Pet. 46; 12 Pet. 511; *Id.* 520; 1 How. 303; 11 Wall. 611; 10 Otto 490; 72 Fed. 1006; 11 N. H. 17; 61 Me. 184; 3 R. I. 127; 58 Tex. 228; 44 Tex. 393; 3 Dana 489; 23 Minn. 40; 64 Tex. 233; 143 U. S. 638. If the act of the Legislature in question is contrary to the State Consittution, which is not conceded, then the State Constitution is itself repugnant to the Federal Constitution. Compare art. 1, Const. 1874 with art. 4, § 3, Fed. Const.; art. 6, § 2, Fed. Const.

HILL, C. J., (after stating the facts.) Petitioner seeks through a writ of certiorari to reverse a decision of a chancellor denying him the writ of habeas corpus. A judgment of a justice of the peace of Upper Township of Sebastian County was sought to be declared void upon the ground that the justice had found petitioner guilty of a crime committed without his jurisdiction. It appears from the finding of fact inserted by the justice in his judgment and in the agreed statement of fact made by counsel on the trial before the chancellor that the jurisdiction of the justice over the place where the crime was committed depended upon the constitutionality of an act of the General Assembly of February 16, 1905, entitled "An act extending the western boundary of the State of Arkansas over a strip of the Choctaw Nation between Arkansas State line and Poteau River adjacent to Fort Smith," Acts of 1905, p. 124; the contention being that said act is in conflict with article 1 of the Constitution of 1874, which reads as follows: "We do declare and establish, ratify and confirm the following as the permanent boundaries of the State of Arkansas," therein describing the boundaries.

Before the court should decide this question, there should be a record here that properly calls for a decision of it. It has been earnestly insisted that the judgment upon its fact shows that the justice was without jurisdiction, and that the judgment,

being void upon its face, can be attacked by habeas corpus. This contention is bottomed upon the theory that the act of the General Assembly and the act of Congress are without effect. Does this record call for a decision of this question?

Sec. 6213 of Kirby's Digest, provides: "Upon trials of questions of fact by the court, it shall state in writing the conclusions of fact found separately from the conclusions of law." When the circuit court tries facts without a jury, it has frequently been decided that its findings of fact, made pursuant to this statute and recited in the judgment, present questions of law for review here without the aid of a bill of exceptions. On such appeal the question is, accepting the facts as found, does the judgment rendered logically follow? *Smith* v. *Hollis,* 46 Ark. 17; *Bradley* v. *Harkey,* 59 Ark. 178; *Springfield F. & M. Ins. Co.* v. *Hamby,* 65 Ark. 14; *Webb* v. *Kelsey,* 66 Ark. 180. No case is found where a finding of fact by a justice of the peace, incorporated into his judgment, has been held to have the same effect as the finding of fact by the circuit court incorporated in a judgment in order that it may be reviewed on appeal. In fact, from the very nature of it, this section and such practice can not apply to judgments of justices of the peace. On appeal from them, the trials are *de novo* and not upon error, and no reasons exist for the preservation of their findings of fact in the judgment or by bill of exception, and it is unauthorized by law and contrary to usual and orderly practice. When a justice does make such unauthorized recitals, they have no probative force. The principle governing such unauthorized recitals is stated in *State* v. *Johnson,* 38 Ark. 568: "Evidence can not be imported into the record of the judgment. Its recitals of what appeared to the satisfaction of the court stated only the conclusion of the court upon the evidence, and is merely explanatory of the grounds of the judgment or order." This was said of a judgment of a circuit court into which was attempted to be imported the evidence upon which the judgment rested. *A fortiori,* the judgment of a justice of the peace can not be strengthened or weakened by importing into it the evidence upon which the justice acted.

The principle announced in *State* v. *Johnson* is well supported by prior and subsequent decisions of this court; *Cox* v.

Garvin, 6 Ark. 431; *Touchstone* v. *Harris,* 22 Ark. 365; *Hall* v. *Bonville,* 36 Ark. 491; *Smith* v. *Hollis,* 46 Ark. 17; *Bradley* v. *Harkey,* 59 Ark. 179.

Therefore, in considering the record, the court should not consider any evidence imported into the judgment of the justice in the shape of findings of fact as the basis of his decision. Disregarding the justice's finding of fact, then, the evidence relied upon is found in the pleadings and agreed statement of counsel.

In the case of *Powell* v. *Hays,* 83 Ark. 448, the court decided an act of a co-ordinate department of the government to be void upon the allegations in the petition and response. These allegations, however, were sustained by the oral testimony of distinguished witnesses in which there was no conflict as to essential facts, and also by record evidence from the office of the Secretary of State.

On rehearing, the attention of the court was sharply drawn to the necessity of determining whether a statute is law or not law according to the very truth of the case, and not according to shifting circumstances which might in one instance make a statute a law and in another instance make the same act not a law. Although the court had considered that matter, and had found that the facts alleged in the pleadings were proved to be the truth, yet, realizing the force of the suggestions made, the court decided not to rest the decision upon admissions in pleadings alone, although so strongly fortified, and placed the ground of decision upon the record evidence also, in order that a precedent be not made of deciding the validity of statutes upon agreed statements or admissions in pleadings.

In that case the court fully approved the principles announced in *Chicago & G. T. Ry. Co.* v. *Wellman,* 143 U. S. 339, the following extracts from which are pertinent here: "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of an act of any Legislature, State or Federal, and the decision necessarily rests on the competency of the Legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power

is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. * * * We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts." See *La. & Ark. Ry. Co.* v. *State,* 85 Ark. 12.

The application of these principles to the case at bar makes it plain that it is not the duty of the court in this proceeding to determine so grave a question as the constitutionality of acts of the Legislature or Congress, fixing or attempting to fix the boundary line of the State, upon an agreed statement of facts, however sincerely and honestly made.

The judgment denying the writ of habeas corpus is affirmed.

McCULLOCH, J., (dissenting.) I am of the opinion that if the strip of territory has not been legally annexed to the State of Arkansas and to Upper Township in Sebastian County (which question we have not considered), the judgment of the justice of the peace is void, and can be so declared in the *habeas corpus* proceeding, because it shows on its face that the alleged offense was not committed within the jurisdiction of the court. The whole record of conviction properly comes before the court on the hearing of the petition for *habeas corpus,* and it shows on its face that appellant was convicted of the commission of the act in the territory described. If the territory is foreign to the limits of the State, it is the same as if the judgment had recited that the offense had been committed in some other State or some other county, beyond the jurisdiction of the court.

I think, therefore, that the other questions in the case are properly before us, and that we should determine them.

Mr. Justice BATTLE concurs herein.

GURDON & FORT SMITH RAILWAY COMPANY *v.* CALHOUN.

Opinion delivered March 9, 1908.

1. MASTER AND SERVANT—NEGLIGENCE.—Where an employee of a company engaged in constructing a railroad sued both the construction company and the railroad company for injuries caused by a heavy implement falling from a construction train, it was error to refuse to charge the jury that if the construction company was not in control of and operating the construction train at the time of the injury, and had nothing to do with the loading of the implement on the train, then their verdict should be in favor of the construction company. (Page 80.)
2. NEGLIGENCE—RES IPSA LOQUITUR.—Where a heavy implement fell from a railway train and injured an employee of a construction company engaged in tracklaying, a presumption of negligence arises, either in the manner of loading the train or in the manner in which the train was operated. (Page 81.)
3. APPEAL—HARMLESS ERROR.—One cannot complain of an instruction more favorable to him than he was entitled to under the proof. (Page 82.)
4. DAMAGES—EXCESSIVENESS.—A verdict for $5,000 as damages will not be set aside as excessive where the evidence shows that plaintiff had his nose broken and his upper lip cut so that he lost the use of it, that his wrist was broken, and he was otherwise injured and disabled, and that by reason of his injuries he suffered great bodily and mental pain, and was permanently disfigured and disabled. (Page 82.)

Appeal from Pike Circuit Court; *James S. Steel,* Judge; reversed in part.

STATEMENT BY THE COURT.

The Dalhoff Construction Company, an independent contractor, was building a bridge over the Antoine River, in Pike County, for the Gurdon & Ft. Smith Railway Company. The Construction Company was doing the grading and bridge work, and the Gurdon & Fort Smith Railway Company was doing the track-laying work, such as placing the ties on the dump and laying the steel on the ties. The Railway Company had a construction train on the road for that purpose. Appellee was directed by the foreman of the Construction Company to saw off the ends of "sway brace" on the bridge. The bridge was one hundred and fifty feet long. The construction train was at the end of the bridge about one hundred feet from where appellee was at work, cutting the "sway braces." It was laying

the steel at the time at the request of the Dalhoff Construction Company, in order to keep their carpenters at work. The Construction Company desired the work of laying the steel "rushed" in order that it might get its bridge material through over the track, and hence made the request of the Railway Company to "rush" that work. The Railway Company was laying the steel, working toward appellee. The appellee described the manner in which he was injured as follows: "The train must have been something like 100 feet from me, coming towards me; when I went to work, I walked down the track and stepped down on to the cap, which was only about 24 inches below. I had cut two sway-braces when they closed in on me. I was standing on a plank about 14 inches wide. I saw the train coming, and knew what it was doing. At the time the tie jack fell I was standing still. I had finished the sawing, and didn't have anything to do until the train got out of the way. The train would move the length of a rail or half the length of a rail sometimes. I could have climbed over the train, if I had wanted to take the chances, which I wouldn't do. The rails were 28 or 30 feet long. The train naturally moved very slow. I had seen the work train at work several days before this. I was stooping over at the time I was struck, looking down the train to see if anything loose was hanging down, as sometimes car stakes drop through. These were ordinary flat cars, and I knew how they were worked. The top of the car would have been level with my head if I had been standing straight. The tie jack fell and knocked me off on the ground." The "tie jack," says the witness, "was made somethink like a carpenter's horse, about seven feet long. They load ties on this, and there is a trigger, and they knock that trigger, and it lowers the ties and lets them down on the tracks."

Appellee sued appellants, alleging that they were jointly engaged in the construction of a line of railroad, etc.; that he was in the employ of the Dalhoff Construction Company, "and while doing work upon the bridge a construction train passed over said bridge, on which train was loaded a tie jack made of heavy pieces of timber, and which weighed about 300 pounds; that said tie-jack was negligently placed upon said car near the edge, and that in passing over the bridge, without fault of the plaintiff, the same fell from said car, striking the plaintiff," and

causing the injuries of which he complains, and which he specifically described in his complaint. "That said injury was caused by the negligence of the defendants in failing to properly load said car, and in negligently and carelessly running the same over the said bridge, negligently permitting said tie-jack to fall from said car, and failing to warn the plaintiff of the danger therefrom."

The Dalhoff Construction Company answered that it was jointly engaged with the Gurdon & Fort Smith Railway Company in the construction of the railroad; admitted that plaintiff was in its employ, and assisting in the building of the bridge over Antoine River; denied that it was responsible for the injury of plaintiff; alleged that the Construction Company had nothing to do with the management or operation of the construction train that injured plaintiff, that it had nothing to do with the placing of the "tie jack" on the train, and alleged that the injury was without the fault or negligence of the Construction Company in any way whatever.

The appellant Railway Company answered, denying all the material allegation of the complaint specifically, and setting up contributory negligence of plaintiff, by way of affirmative defense.

The cause was sent to the jury upon the facts substantially as above stated and upon instructions. The verdict was for $5,000 against the defendants jointly. Judgment was entered accordingly. Motions for new trial were made by each defendant, and overruled.

This appeal was prosecuted by each of the appellants.

Other facts stated in the opinion.

Tom M. Mehaffy and *J. E. Williams,* for appellant Railway Company.

1. Appellee was an employee of the construction company, an independent contractor. If he was injured by reason of any act or failure of that company, appellant railway company is not liable. 53 Ark. 503; 77 Ark. 551.

2. There is no presumption of negligence against the railway company in this case. It could owe no greater duty to appellee than it would owe to one of its own employees, and, in-

deed, like the proprietor of premises on which a party has gone by invitation, the extent of its duty would seem to be to exercise due care to guard him against the consequences of hidden or unusual dangers on the premises. Thompson on Neg. § 680; White's Supplement, *Id.* 979; 74 N. E. 919; 79 Ark. 437. This case does not fall within the rule *res ipsa loquitur*. 73 S. W. 279; 43 S. E. 443; 40 Fed. 566; 111 Fed. 58.

3. This case does not fall within the statutory presumption of injuries caused by the running of trains, and no presumption of negligence arises from the receipt of the injury. 69 Ark. 380.

H. F. Auten, for appellant Construction Company.

The court should have granted appellant Construction Company's request for a peremptory instruction in its favor. If any negligence was shown, it was that of the Railway Company, and there is no contention nor proof that this appellant was either interested in or had any control of the operation of the train. The court further erred in refusing the second instruction requested by said appellant. 63 Ark. 183.

McRae & Tompkins, for appellee.

1. Appellant Construction Company is liable. The servant is not bound to make examination for defects but may rely upon the judgment and discretion of the master. In this case the foreman was chargeable with the duty of seeing that he was not subjected to unnecessary dangers. 48 Ark. 347; 77 Ark. 377; *Id.* 458; 56 Ark. 206-11; 104 Mo. 114; 55 Am. Rep. 169; 48 L. R. A. 758, note 5. The train being there at the Construction Company's instance, it is liable for failure to use reasonable care to prevent the tie-jack from falling; but if it be held that this duty did not devolve upon it, then it is liable for failure to make timely discovery and to warn appellee of the danger. 67 Ark. 295; 110 Mass. 241; 100 U. S. 213.

2. Appellee was not a trespasser, but rightfully on the bridge, and appellant Railway Company owed him the same duty it owed to its own servants or to the public. Did this appellant use ordinary care? The presumption of negligence arises from the injury, and the fact that the tie-jack fell is conclusive proof of its negligence. The doctrine *res ipsa loquitur*

applies. 63 Ark. 636; 134 N. Y. 418; 77 Ia. 607; 41 Neb. 1; 75 Ark. 479; 57 Ark. 418. And the burden was upon defendant to show that it was not negligent. 57 Ark. 429; 54 Ark. 209; 2 Labatt, Master and Servant, § 834.

WOOD, J., (after stating the facts.) First. The Dalhoff Construction Company asked the court to instruct the jury to return a verdict in its favor. It also asked the following:

"The jury is instructed that if it finds that the Dalhoff Construction Company was not in control of and operating the construction train over the bridge at the time of the injury, but that the same was being operated by the railroad company in carrying on its own business, and that the Dalhoff Construction Company had nothing to do with the loading of the tie-jack, which caused the injury, on said train, then your verdict should be in favor of the defendant, the Dalhoff Construction Company."

The court, upon the undisputed facts, should have granted these requests, and it was prejudicial error to refuse them. There was no evidence to warrant the finding of negligence on the part of the Construction Company. It had nothing whatever to do with the work of placing ties and laying steel, in which work the construction train was engaged at the time appellee received his injuries. The work of placing ties and laying steel was exclusively the contract of the railway company. It was operating the train from which the "tie-jack" fell that injured appellee. If there was any negligence that caused the injury to appellee, it was the negligence of the appellant railway company; for it alone was responsible for the loading of the tie-jack, and the management and operation of the train from which the tie-jack fell. The mere request of the Construction Company to the Railway Company for the latter to do the work of laying the steel earlier than it otherwise would have done, in order to accommodate the Construction Company, did not render that company liable for any negligence on the part of the Railway Company resulting in the injury to appellee. There were no contractual relations between the Construction Company and the Railway Company, and the latter company in yielding to the request of the former was doing it as a simple act of kindness. The making the request by the one and the

granting it by the other did not create the relation of principal and agent or master and servant, and did not make them joint tort feasors. Therefore, in our opinion, upon the undisputed facts, if there was actionable negligence, the Railway Company alone was responsible for it. The rule requiring the master to exercise ordinary care to provide a safe place and appliances for his servant and to warn him of latent dangers, etc., has no application to the facts of this case, for the reason that the construction company had provided appellee a safe place. There is no evidence to show that it was not safe. There were no latent dangers of which it was incumbent on the Construction Company to warn appellee. Appellee was perfectly familiar with the work, and such danger as there was from the location of the tie-jack on the car was as obvious to him as to the Construction Company. It is unnecessary, therefore, to consider other rulings of the court bearing upon the liability of the appellant Construction Company.

The proof was not sufficient to sustain the judgment as to the Construction Company, and it is reversed as to it, and the cause is dismissed.

Second. The appellant Railway Company contends that the injury complained of was not caused by the running of its train, in the sense of the Constitution and statute making railroads liable for the damage done by the running of trains. But it is unnecessary to pass on this question, for the uncontroverted facts raised the presumption of negligence.

Appellee was in a place where he had a right to be. It was a safe place until made dangerous by the presence and operation of the train over which appellant railway company had the exclusive management and control. The falling of a "tie-jack," weighing three hundred pounds, from the car could not well have happened in the usual course unless there had been some negligence in loading it on the car in the first place, or in the manner in which the train was operated and the car was moved, in the second place. Such an implement, if handled with ordinary care, could not fall from the car in the usual and ordinary method of its use as shown by the proof. The fact, then, that it did fall raises the presumption of negligence, and the doctrine of *res ipsa loquitur* applies. See *Price* v.

St. Louis, I. M. & S. Ry. Co., 75 Ark. 479-491; *Choctaw, O. & G. Rd. Co.* v. *Dougherty*, 77 Ark. 1; *Arkansas Tel. Co.* v. *Ratteree*, 57 Ark. 429; *Railway Company* v. *Hopkins*, 54 Ark. 209; 4 Elliott, Railroads, § 1644; *Bice* v. *Wheeling Electrical Co.*, 59 S. E. 626.

The court instructed the jury that the fact that the jack fell off at the time, as testified to, raises no presumption that the persons in charge of the train were negligent. The appellant contends that under this instruction the verdict was erroneous. The instruction was not the law applicable to the facts proved. But the verdict of the jury was supported by sufficient evidence, had they been correctly instructed. We can not reverse a judgment that is based upon a correct verdict because the court below gave an erroneous instruction more favorable to appellant than it was entitled to. *Southern Cotton Oil Co.* v. *Spotts*, 77 Ark. 458.

The verdict and judgment were right, notwithstanding the erroneous instruction.

The appellee alleged that the falling of the tie-jack broke his nose, split his upper lip and broke or mashed the cord of his upper lip so that he lost the use of his upper lip, broke his wrist, and otherwise injured and disabled him; that by reason of said injuries he suffered great bodily and mental pain, and has been permanently disfigured and disabled. There was evidence to sustain these allegations. The judgment is affirmed.

JOHNSTON v. SCHNABAUM.

86 82
90 514

Opinion delivered April 20, 1908.

1. BILLS AND NOTES—INDORSEMENT—PAROL EVIDENCE TO EXPLAIN.—Parol evidence is admissible to explain or qualify an unrestricted indorsement on commercial paper, as to show that the purpose of such indorsement was merely for collection, and not for a sale of the instrument, in which case there is no implied liability on part of the indorser as guarantor of payment. (Page 85.)

2. SAME—PAYMENT BY STRANGER—EFFECT.—Payment of a note by a stranger thereto and delivery to him of the note will be held to be a purchase until an intention to the contrary is shown. (Page 86.)

Appeal from Randolph Circuit Court; *John W. Meeks,* Judge; reversed in part.

Appellants *pro se*:

The Bank of Maynard is not liable. It is shown in evidence that its indorsement on the note was without consideration to it, and was made for the purpose of collection only. Parol evidence was admissible to show the character of the indorsements, why and for what purpose they were made. 2 Enc. of Evidence, 521, 537, 255; 27 Ark. 329; 15 Ark. 372; 29 Ark. 501; Joyce on Defenses to Com. Paper, § § 212, 255.

J. B. McCaleb and *Witt & Schoonover,* for appellee.

The fact, if true, that the Bank of Maynard received no consideration for its indorsement is no defense except as against the accommodated party. Joyce on Defenses to Com. Paper, 279. It appears that the Redwine indorsement was made without authority, and since the Bank guarantied that indorsement it should be held liable for that reason. 3 Am. & Eng. Enc. of L. 831. One who indorses a note after maturity is liable on it as an indorser to his immediate indorsee and to subsequent holders. 7 Cyc. 826.

McCULLOCH, J. J. L. Johnston and G. H. Counts, together with G. S. Johnston, now deceased, executed to one Redwine as guardian of an infant their negotiable promissory note for the sum of $197 with interest from date, and at or before maturity of the note Redwine delivered it, bearing his blank indorsement, to the Bank of Maynard for collection and deposit of the proceeds to his credit. Appellants J. L. Johnston and Counts were sureties on the note for G. S. Johnston, the principal obligor. Subsequently, and after the maturity of the note, the Bank of Maynard, which was located at Biggers, Randolph County, Arkansas, received a verbal message from appellee, Schnabaum, requesting the bank to send the note to the Randolph County Bank at Pocahontas, and that he (Schnabaum) would "take it up."

The Bank of Maynard made the following indorsement on the back of the note: "Previous indorsement guarantied. Pay to the order of any bank or banker. (Signed) Bank of Maynard, by J. T. Talbert, cashier."

The note was then fowarded to the Bank of Randolph County for collection; appellee paid the full amount of the note and interest to the bank, and the note was delivered to him without further indorsement thereon, and the amount so paid was sent by the collection bank to the Bank of Maynard, and the latter in turn paid it over to Redwine.

Appellee held the note a year or longer, and then instituted this action on the note against the appellants, J. L. Johnston and Counts, as makers and the Bank of Maynard as indorser. Redwine was also sued, but the action was dismissed as to him.

Appellee testified that he instructed Robinson, the person by whom he sent the message to the Bank of Maynard, to request the bank to send the note to the Bank of Randolph County, but not to mark it paid, and that he would "take it up as received and would carry it until Johnston could pay it off." His testimony shows further that he did not, in making the payment, intended to discharge the debt, but intended to purchase the note and hold it for payment by the makers.

Robinson, in his testimony, denied that appellee instructed him to request the Bank of Maynard not to mark the note paid or that he expected to hold the note as secured. He testified that appellee only told him to request the bank to send the note to the Bank of Randolph County, and that he would "take it up." This, the evidence shows, was the only message ever delivered to the bank, and that the note was forwarded in response to this message.

The court instructed the jury that if the Bank of Maynard made the indorsement in question, and the note had not been paid to appellee, the bank was liable. This was equivalent to a peremptory direction to the jury.

We think that, according to the undisputed evidence, the bank was not liable.

So far as the guaranty of the previous indorsement of Redwine is concerned, that amounted only to a guaranty of the genuineness of the indorsement, and did not render the

bank liable on the note. The other part of the indorsement was unrestricted, and, unless explained, would render the indorser liable. But it is shown by undisputed evidence that the note was sent to the Bank of Randolph County for collection, and that the indorsement was made only for that purpose.

The question arises, then, whether parol evidence is admissible to explain or qualify an unrestricted indorsement. The authorities seem to uniformly sustain the view that under such circumstances parol testimony would be admissible for that purpose. Mr. Daniel, in discussing the various circumstances under which parol testimony is admissible for such purpose. says: "Secondly, it might be shown that the indorsement was upon trust for special purpose, as from a principal to an agent, to enable him to use the instrument or the money in a particular way, or for collection." 2 Daniel, Negotiable Instruments, § 720. See also to the same effect: Joyce on Defenses to Commercial Paper, § 255; *Doolittle* v. *Ferry,* 20 Kan. 230; *Lovejoy* v. *Citizens' Bank,* 23 Kan. 331; *Patten* v. *Pearson,* 57 Me. 428; *McDonough* v. *Goule,* 8 La. 473; *Lawrence* v. *Stonington Bank,* 6 Conn. 521; *Dale* v. *Grear,* 38 Conn. 15; *Ricketts* v. *Pendleton,* 14 Md. 320. In *Lovejoy* v. *Citizens' Bank,* 23 Kan. 331, a note was made payable to the president of the bank, individually, and was by him indorsed in blank to the bank. The court held that, notwithstanding the unrestricted indorsement, he could prove by parol evidence that the note represented a debt of the maker to the bank, and that he (the nominal payee) made the indorsement merely for the purpose of passing title to the bank.

No rule of evidence is, we think, violated by admitting such explanation. While the law implies, from an unrestricted indorsement, a contract to guaranty payment of negotiable paper, still the fact may be shown that the purpose of the assignment was merely for collection, and not for a sale of the instrument; and when this is shown, no liability as guarantor of payment is implied.

The appellee in this case knew that the note was forwarded by the bank only for collection, and could therefore claim no greater rights under the indorsement than his immediate transferee could have claimed. Indeed, the form of the

indorsement itself may be said to show on its face that it passed the title for collection only. It reads "to any bank or banker," which would indicate that it was for collection.

The other two appellants stand in a different attitude. They appeared on the face of the note as joint makers, but were in fact merely sureties for G. S. Johnston. They were primarily liable to any holder of the note for the amount thereof, notwithstanding any irregularity in the indorsement.

Appellee was a stranger to the contract represented by the note, and a payment by him of the amount and delivery to him of the note will be held to be a purchase until an intention to the contrary is shown. 7 Cyc. p. 1025. These two appellants did not, in their answer, make any denial of the transfer of the note to appellee as alleged in the complaint, but rested their defense entirely upon the plea of payment. There was some evidence tending to show that the note was paid to appellee by Johnston, the principal debtor, but there was a conflict in the testimony, and the jury settled that issue in favor of appellee.

The judgment against the Bank of Maynard is reversed, and the cause is dismissed, but the judgment against the other two appellants is affirmed.

SCHOFIELD v. RANKIN.

Opinion delivered April 20, 1908.

JUDGMENT—AMENDMENT.—While a court of record has plenary and continuing powers to amend its records so as to make them speak the truth, a trial court may not amend the record entry of a judgment after the Supreme Court reversed such judgment upon the ground that the trial court had no jurisdiction of the subject-matter.

Appeal from Woodruff Chancery Court; *John Fletcher;* Special Chancellor; affirmed.

Moore, Smith & Moore, for appellant.

1. The courts have power at any time to amend the record so as to speak the truth. 40 Ark. 231; 75 Ark. 12; 68 C. C. A. 577.

2. Having found that the record of the decree did not truly reflect the action of the court, it erred in denying the petition on the ground that the judgment and mandate of this court precluded it from considering the questions arising on its finding. By an appeal the trial court does not lose jurisdiction of its records. They remain within its control and custody, and the court has the right as well after appeal as before, and after affirmance or reversal, to amend it. 87 S. W. 195; 103 N. W. 1062; 119 U. S. 587; 44 Mo. 342; 68 Mo. 476; 45 Cal. 64; 67 Cal. 339; 53 Ark. 253; 35 Ark. 588; 72 Ark. 322; 76 Ark. 538; 68 Ark. 283; Freeman on Judgments, par. 65; 3 Ala. 312; 60 Cal. 283; 36 Cal. 521; 66 Ark. 336; 76 Ark. 391.

3. The courts have a continuing power over their records, not affected by lapse of time, and the plea of laches does not avail here. 45 Mo. 173; 6 How. 38; 89 Cal. 485; 49 Ia. 376; 119 Ill. 118; 2 Dan. Ch. 1016-17, notes 7 and 10.

Gustave Jones, Roleson & Woods, P. R. Andrews, N. W. Norton and *Rose, Hemingway & Rose,* for appellee.

1. Orders *nunc pro tunc* are made only with great caution and circumspection. 10 Mo. 363; 4 Ark. 629; 9 Ark. 189; 40 Ark. 229. Such an order is not a revisory proceeding. It is to enable the court to make the judgment conform to the case actually rendered, and is not a revisory power to correct judicial errors. It can only show what was actually done. 72 Ark. 22; 52 Mo. 60; 76 S. W. 384; 141 U. S. 416; 50 Mo. 148; 1 Black on Judgments, § 132; 28 So. 640; 84 Mo. App. 423; 54 N. E. 575; 47 Pac. 471; 21 Ark. 86; 25 Ark. 265.

2. The decree being void, it can not be amended *nunc pro tunc.* 75 Ark. 8; 85 S. W. 676. And to hold that any amendment could make valid a sale that was void when made would work a manifest injustice. 55 Ark. 34; 70 Ark. 209; 75 Ark. 415; 1 Wall. 636. This court has held that the decree was void. There is no difference between a judgment void on its face and no judgment. 81 Ark. 463.

3. If there was any mistake, it was that of appellants deliberately made for their own advantage. The courts will not relieve against such mistakes, and appellants will not be permitted to take inconsistent positions. 49 Ark. 217; 45 Ark.

37; 22 Ark. 445; 32 Ark. 346; 64 Ark. 213; 57 Ark. 638.

4. The doctrine of laches applies in this case. "A court of equity * * * has always refused to aid stale demands where the party has slept on his rights, or acquiesced for a great length of time." 67 Ark. 313; 117 Fed. 868. Courts of equity usually follow the law relating to limitations in applying the doctrine of laches. 19 Ark. 16; Kirby's Digest, § 5073. Yet nearly twice the time allowed by statute elapsed between the date of the "family settlement" and the filing of the petition in this case. 4 Ark. 624; 20 Fed. 164; 1 Md. 20; 1 Black on Judgments, § 129; 60 Atl. 17; 109 N. W. 1085; 103 N. W. 1062; 38 N. E. 1014; 15 Am. Dec. 614; 43 Pac. 875; 93 U. S. 418; 66 Ark. 183; 1 Freeman on Judgments, § 60; 25 Ohio Ct. Ct. 657; 52 N. H. 190; 43 Pac. 875.

5. Appellants have had their day in court. There is no way to evade the force of this court's decision on last appeal that the decree of the lower court was void by showing matters that occurred before the appeal was decided, and which might have been presented by a timely amendment at any time before and pending that appeal. They are estopped by the record. 47 Am. Dec. 47; 91 U. S. 533; 94 U. S. 351; Elliott, App. Proc. § 580; 195 U. S. 300; 18 Ark. 292; 56 Ark. 170; 14 Ark. 624; *Id.* 624; 1 Ark. 936; 79 Ark. 479; 5 Ark. 202; 14 Ark. 522; 10 Ark. 192; 33 Ark. 169; 36 Ark. 17; 73 Ark. 451; *Id.* 513; 70 Ark. 423; 77 Ark. 279; 7 Ark. 555; *Id.* 404; 63 Ark. 141; 65 Ark. 98; 67 Ark. 481; 6 Cranch 267; 152 U. S. 338; 148 U. S. 240; 73 Pac. 196.

McCULLOCH, J. This is the fourth appearance here of this case in different forms. *Rankin* v. *Schofield,* 71 Ark. 168; *Rankin* v. *Schofield,* 81 Ark. 440; *Rankin* v. *Fletcher,* 84 Ark. 156.

The case came here first on appeal by Sallie Spott Rankin (present appellee) from a consent decree entered by the chancery court directing a sale of the lands in controversy and division of the proceeds. This court set aside and reversed the decree and remanded the case for further proceedings. The lands had been sold under the decree, and after the case was remanded Mrs. Rankin filed a petition in the case against the heirs of the purchaser for restitution and for an accounting and de-

cree for all rents and profits of the land received by the purchaser while in possession thereof. The heirs (who are the present appellants) appeared and contested her right to restitution, on the ground that the sale was valid as to the purchaser, and also on the ground that the right to recover the land was barred by the statute of limitation. The chancery court held that the purchaser acquired a valid title to the lands, and gave a decree denying the right to restitution, from which Mrs. Rankin again appealed. A majority of the judges, on consideration of that appeal, held that the former decree of the chancery court ordering the sale of the land was absolutely void because it was a consent decree (the guardian of Mrs. Rankin, who was then an infant, not having authority to consent), and the court entered it solely by reason of the consent of parties and without consideration or judicial action on the part of the court, and because the decree was not within the issue raised by the pleadings; also that Mrs. Rankin's right to restitution was not barred by limitation. The court set aside and reversed the decree and remanded the case to the chancery court with directions to enter a decree in accordance with the opinion and for further proceedings.

After the case was remanded appellants, who are the heirs of said purchaser and the appellees in the last-mentioned appeal, filed their petition in the court below, alleging that the first decree was not entered by the court without consideration or investigation of the issues and proof, but that the court did investigate the facts and pronounce a decree sanctioning and approving the compromise and agreement of the parties. They alleged that the entry of the decree was erroneous in failing to recite an investigation and consideration by the court, and they prayed that the record of the decree be amended, *nunc pro tunc,* so as to conform to the true findings of the court.

The chancellor heard the petition upon oral testimony and depositions, and found that the allegations of the petition were sustained by the evidence, but decided that the judgment and mandate of the Supreme Court precluded the chancery court from amending the record of the former decree which had been set aside and reversed. The petitioners appealed.

It will be seen that when this effort was made to have the

record of the former decree of the chancery court amended, that decree had been set aside and reversed by this court on appeal; and also that it had been adjudged by this court, on appeal in the proceedings for restitution, that the decree was absolutely void, and that the sale under which appellants claimed title to the property in controversy was void.

Can the record of the original decree at this time be amended?

It can not be regarded otherwise than as well settled now that a court of record has plenary and continuing powers over its own records for the purpose of amendment, so as to make the records speak the truth concerning its proceedings. *Bobo* v. *State,* 40 Ark. 224; *Ward* v. *Magness,* 75 Ark. 12; *Groton Bridge Co.* v. *Clark Press Brick Co.,* 68 C. C. A. 577.

An appeal from a judgment or decree does not deprive the court which rendered it of control over its records or of jurisdiction to amend them. *Arkadelphia Lumber Co.* v. *Asman,* 72 Ark. 322, s. c. 79 *Id.* 284. It is a common practice in this court to consider amendments made by lower courts of their records in cases pending here on appeals, and even to postpone the consideration of cases here until alleged errors in the record can be corrected below by amendment.

But in the case now before us the decree sought to be amended had been set aside and reversed by the judgment of this court, and that judgment had become final. The record entry is merely the evidence of the decree pronounced by the court. That is the reason why the power remains in the court to amend the record so as to make it speak the truth.

Now, when a case comes here on appeal or writ of error, this court considers it upon the evidence brought before us on the record; but when we reverse a judgment or decree, it is the judgment or decree pronounced by the court that is reversed, and not the mere entry of it on the record. The effect of the reversal is to annul, vacate and set aside the judgment or decree—to completely wipe it out as if it had never been in existence. Nothing remains of it—it is gone. When this is so, there is nothing left for the court to amend. The record entry of a judgment or decree which has at that time no legal existence can not be amended.

It may be urged, however, that, inasmuch as appellants were not parties to the first appeal, they were not bound by the judgment of this court. This contention is not without force, but we need not decide that question. Appellants were brought in as parties when the petition against them for restitution was filed, and this court, on appeal, adjudged that Mrs. Rankin was entitled to restitution and remanded the case with directions to enter a decree in her favor for restitution. That judgment of this court is final. We have no further control over it, and it must be accepted as an adjudication of the rights of the parties.

The only questions left open by this court for further adjudication were those concerning "the rights of the parties to return of the proceeds of sale of lands, * * * rents of land and improvements thereon, or other incidents consequent on the recovery of same." This court held, on the last appeal just referred to, that the original decree of the chancery court was void, and that no rights were acquired under it. This, on the ground that the court did not act judicially in pronouncing the decree, but merely recorded the agreement of the parties, and on the ground that the decree was not within the issues raised by the pleadings. The decree itself being void because the court had no jurisdiction of the subject-matter thereof, the record of its entry could not be amended. *Gregory* v. *Bartlett*, 55 Ark. 30.

We are of the opinion that the learned special chancellor was correct in his view of the law as to the power of the court to amend the record at that time, and his decree is therefore affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO. *v.* BROOKSHER.

Opinion delivered April 20, 1908.

1. RAILROAD—DIVERSION OF WATERCOURSE—DAMAGES.—Though a right-of-way deed conveyed to a railway company the right "to change the watercourses" upon certain land, the company will be liable to the grantor or his heirs if a watercourse was unnecessarily diverted upon the land. (Page 94.)

2. INSTRUCTION—APPLICATION TO EVIDENCE.—It was not error to refuse to give an instruction not based upon evidence. (Page 96.)

3. EVIDENCE—OPINION AS TO DAMAGES.—Since a witness may testify his opinion as to the value of land before and after the diversion of a watercourse upon it, it was not error to permit him to testify as to the amount of damage sustained by such diversion. (Page 96.)

Appeal from Marion Circuit Court; *Brice B. Hudgins,* Judge; affirmed.

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

1. Having acquired by deed its right-of-way through the land, including the express provision therein of the right to change the watercourses, appellant was not liable to the appellees, the evidence disclosing nothing more than the damage resulting from that change. 47 Ark. 334. This is the right which the company had purchased and paid for; hence the allegation and attempt to prove unskillfulness in the work of constructing the culvert running straight the stream, instead of diagonally, has no place in this case.

2. The court erred in admitting incompetent evidence as to the amount of damages. Witnesses should not be permitted to estimate the amount of damages, but should testify to the conditions and facts, and it is for the jury to draw their own conclusions from these facts uninfluenced by the opinions of witnesses. 71 Ark. 302; 47 Ark. 501; 67 Ark. 375; Sedgwick on Damages, § 1293; Lawson, Expert and Op. Ev. 448; 68 Ark. 224; 70 Ark. 401.

3. The court should have given the first instruction requested by appellant. No one is permitted to allow his damages to accumulate, or to magnify the same by his negligence or failure to take such reasonable precautions as are within his power to minimize the damage. 38 Ark. 357.

W. S. Chastain and *Frank Pace,* for appellee.

1. The Walbrink case, 47 Ark. 330, relied on by appellant, supports the appellees' contention, they having alleged and proved an *unnecessary, negligent* and *unskillful* construction of the culvert. The right granted in the deed to make changes in the stream does not confer upon appellant the power unnecessarily and negligently to do so. No effort is made to

show any necessity for changing the stream so as to throw the water upon appellees' land. The company owed the duty to appellees to make a reasonable expenditure to avoid injuring them. 47 Ark. 340.

2. There is no evidence on which to base the instruction No. 1 requested by appellant, but on the contrary the evidence shows that the damage occurred at the first rise after the culvert was constructed. 47 Ark. 340.

3. Appellant's objection to admission of witnesses' estimates of damages is untenable, and cases cited by it do not apply here. It is not contended that the opinion of a witness given abstractly to a gross amount is competent, but there was in this case a sufficient showing of facts to enable the jury to fix the amount of damages. It was necessary to rely to some extent on the opinions of witnesses, but such opinion evidence was based on a legal foundation. 66 Ark. 498.

McCULLOCH, J. This is an action instituted by appellees, the widow and heirs of W. R. Brooksher, against appellant railway company to recover damage done to their lands, which adjoin the right-of-way of the railroad, by reason of construction of a culvert under the roadbed, whereby the waters of a certain creek were diverted from the original channel and caused to flow over the land in question. They recovered a judgment for damages, and the railway company appealed.

Before the construction of the railroad, W. R. Brooksher and wife, by deed duly executed, conveyed to the company a right-of-way through the land in question, and expressly granted "the right of changing watercourses." The roadbed was constructed diagonally across the creek, and the culvert was built straight through the dump or roadbed, so as to change the course of the stream, and cause it to flow over the land, and make a different channel. The evidence shows that the culvert was skillfully constructed, and is of sufficient size to permit the waters of the stream to pass through.

Is the railway company, under these circumstances, liable for the damage done to the land? The damage was caused, not by any unskillfulness in the construction of the culvert, but solely by reason of the changing of the course of the stream. The evidence shows that the diversion of the course of the

stream could have been avoided, and the consequent injury to the adjoining land obviated, by bridging the stream, instead of putting in the culvert, or by running the culvert with the original course of the stream diagonally through the roadbed. The engineer of the road testified that this could have been done.

But, after all that is said, the controlling question recurs to the proposition that the damage was caused solely by the diversion of the course of the stream, and whether the terms of the deed gave the railway company the right to unnecessarily inflict damage in that way without compensation to the owner of the land.

Appellees' ancestor expressly consented, by the terms of his deed, to a change in the course of the stream, and it is contended that they are thereby precluded from recovering damage thus inflicted. The company undoubtedly purchased the right to change the course of the stream, but did this give it the right to do so unnecessarily to the injury of adjoining lands?

Appellant relies upon the case of *St. Louis, I. M. & S. Ry. Co.* v. *Walbrink,* 47 Ark. 330, as decisive of the question. In that case Judge SMITH, in delivering the opinion of the court, said: "The diversion of the water-course was expressly authorized by the terms of the deed; and the defendant is not liable for consequential damages resulting therefrom, it not being alleged nor proved that the work was done unnecessarily, or negligently, or unskillfully. No man can maintain an action for a wrong where he has consented to the act which occasions his loss." The difference between that case and this is that it is here proved that the change in the course of the stream was caused unnecessarily. It could have been avoided by the use of other practical means of crossing the stream and allowing the water to flow thereunder undisturbed.

In *St. Louis, I. M. & S. Ry. Co.* v. *Harris,* 47 Ark. 340, which was decided about the same time the Walbrink case was decided, Chief Justice COCKRILL said: "No effort was made to show a necessity for so constructing the roadbed as to turn the current of the England and other creeks over the appellee's land, but the company sought to justify its conduct under the appellee's deed for the location of the road, granting among

others 'the right to change watercourses and taking water.' While the grant of a right-of-way to the railroad carried with it a license to do all that was necessary for its proper construction, the company remained liable, nevertheless, for any proximate injury that resulted to the grantor from the want of care and skill in whatever work it undertook in order to effect the construction. * * * If the beds of the streams had been located on the appellee's lands before the road was constructed, and an attempt had been made 'to change the watercourse,' as the deed has it, it would have been incumbent on the company to perform this work so as to inflict no unnecessary injury upon the appellee; and if the right of the company to bring the streams from the lands of others on to the lands of the appellee be conceded, the duty remained upon it of so enjoying that privilege as not to injure the appellee more than would be required in providing a proper channel for the water through the premises."

No effort was made in the trial of the present case to show whether or not the cost of constructing a bridge or trestle over the stream or of running the culvert with the original course of the stream diagonally through the roadbed would exceed the cost of construction over the means adopted. It may be that the cost would be so much in excess of the cost of constructing the culvert in the way it was done that it was not reasonable or practical to require the company to adopt the former mode of construction. But that state of the case was not shown to exist. The engineer merely stated broadly that the company could, if it had seen fit, have let the water through without diverting it by constructing either a bridge or trestle or a culvert running with the stream.

We think the jury were warranted in finding that it was unnecessary to divert the stream so as to cause an injury to appellee's land, and that the company is liable for the damage.

Error of the court is assigned in refusing to instruct the jury that it was incumbent on appellees to "use ordinary care to protect their lands from injury, and that if they stood by and allowed such injury to be done and made no effort to prevent the same" they could not recover. There was no evidence to base such an instruction upon, as it was not shown that they

"stood by and allowed the injury to be done." The evidence shows that the injury was caused by the first rise of the stream shortly after the construction of the culvert. The court properly refused to instruct upon an abstract proposition.

Objection was made to propounding the following question to witnesses for appellees: "Taking the actual value of the land at the completion of the work, supposing the consequences to be known, comparing it with what the value would have been if the flow had remained as formerly, and fixing your damages at the difference, what do you think would have been the damage?" This question was propounded to the witnesses after they had been shown to possess familiarity with the land in question before and since the alleged injury to it and knowledge of its value. In response to the question, each witness stated his opinion as to the amount of the damage. Each also described the land and the character of the injury to it. It is contended that it is not proper to permit witnesses to give opinions as to the amount of damages—that the statements of witnesses should be confined to facts so that the jury may estimate the damages. *St. Louis, I. M. & S. Ry. Co.* v. *Jacobs,* 70 Ark. 401; *St. Louis, I. M. & S. Ry. Co.* v. *Law,* 68 Ark. 218. This contention is undoubtedly sound in principle. But it will be observed that the question was so framed as to elicit the opinion of the witnesses as to difference between the value of the land before it was injured and afterwards. That was the proper measure of damages, and it was competent to prove it in that way. *Little Rock & Ft. S. Ry. Co.* v. *Evins,* 76 Ark. 261; *St. Louis, I. M. & S. Ry. Co.* v. *Ayers,* 67 Ark. 371; *Railway* v. *Combs,* 51 Ark. 324.

In *Railway* v. *Combs, supra,* Chief Justice COCKRILL, speaking for the court, said: "Opinions are confessedly admissible to prove the value of the land before and after the construction of the railway; but the extent of the injury is the difference between their values, and that difference is the result reached by the answer to the single question, what damage has the land sustained? It is only a question whether the witness or the jury shall perform the mental process of subtraction, and that can be of no judicial importance so long as the witness is required to show, in advance, such knowledge of the facts as to satisfy the judge that his opinion may be of value, and may

be made to disclose the facts upon which it is based."

The evidence sustains the verdict, both as to liability and the amount of the damage.

Affirmed.

SOMERS v. MUSOLF.

Opinion delivered April 20, 1908.

1. LANDLORD AND TENANT—EVICTION—DAMAGES.—Where a lessor, after executing a lease for a term of years, ejected his lessee before the term expired, the measure of damages was the profit or compensation which the lessee would have earned for his services under the contract if he had been permitted to perform it, less what he earned or could by reasonable effort have earned in other employment during the unexpired period. (Page 100.)
2. SAME—DAMAGES FOR EVICTION—COUNTERCLAIM.—Where a lessee of a farm, by the terms of his lease, undertook to furnish the labor of his two brothers, for which he was to receive a fixed compensation in addition to one-half of the farm produce, and was ejected by the lessor before expiration of the lease, in determining the lessee's damages the amount which it would have cost him to furnish the labor of his brothers should be deducted, but not the earnings of such brothers during the unexpired period of the contract. (Page 100.)
3. SAME—ENFORCEMENT OF CONTRACT.—A stipulation in a contract of lease that the lessee and his brothers should have the privilege of doing any extra work on the premises at prices which might be agreed upon cannot be made the basis of a recovery of damages. (Page 101.)

Appeal from Benton Chancery Court; *T. Haden Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

The plaintiff, Julius Musolf, and defendant, Edward Somers, on November 1, 1899, entered into a written contract whereby the latter leased his farm in Benton County to the former for a term of five years, and employed him to manage and cultivate the farm during said term. The contract seems to be in the nature of both a lease of the lands and a contract for hire of the services of Musolf and his family.

The contract provides, in substance, that Somers, the lessor, should furnish the farm in question, and all the stock, cattle and poultry thereon, all necessary wood for fuel, fencing and building purposes, all seed necessary for planting and to furnish and keep the tools and implements in repair and pay Musolf $20 per month during the first year of the term for extra work; that the lessee, Musolf, should, with his family, give his and their entire time to the management of the farm and attention to the orchard, stock and cattle, and that he should receive, in addition to the above-named sum for extra work, one-half of all the products of the fields, garden and orchard and one-half of the value of increase of the stock, cattle and poultry. It was further agreed that the parties should share equally the expenses of harvesting and marketing the crops produced on the premises.

It is conceded that two of Musolf's younger brothers were members of his family, and were, by both parties to the contract, so considered in making the contract.

Musolf was wrongfully dispossessed of the premises four years before the expiration of the term under a writ of unlawful detainer improvidently issued, and instituted this action against Somers and the sureties on his supersedeas bond given on appeal in the unlawful detainer action, to recover damages sustained by reason of being thus prevented from occupying the premises and performing the contract.

The chancellor made the following findings and rendered a decree in favor of the plaintiff for the balance therein found to be due:

"The plaintiff is entitled to receive as damages the value of his lease from April, 1901, to November, 1904, less what he agreed to pay defendant Somers for the lease during that period, and less what the plaintiff earned during said period; and the court doth assess the amount which plaintiff is to recover as follows:

"One-half the amount the place produced in apples, peaches and strawberries, less the expense of gathering and marketing the same, above the labor of Musolf and brothers ..... $ 621.07

"One-half value of increase of stock..... 100.00

"One-half rental value of 100 acres of land for general farming purposes outside of first increase of stock, increase and product of poultry and product of the cows under the terms of the rental contract.... 600.00

Total ----------$1,321.17

"Deduct from this sum the entire amount earned by plaintiff in farming and all other work during said period, which the court finds was..... 475.00

"Leaving balance due plaintiff of.....$ 846.17

"The court further finds that plaintiff did not during the period receive the earnings of his brothers, and is not chargeable with any part of the same; but finds that, by the terms of the contract and by his agreement with them, he was entitled to the amount earned by them under the terms of the rental contract for their support; that the reasonable cost of maintaining them diminished the amount which he would have received, but that the value of what he would have received from poultry, eggs and the product of two cows and what he would have been likely to receive by the labor of himself and brothers for extra work for defendant under the rental contract would have more than compensated him for the cost of keeping his said brothers. In this conclusion the court takes into account all the provisions of the contract, and gave judgment for plaintiff for $846.17."

Defendants appealed.

E. P. Watson and *Mechem & Mechem,* for appellants.

McGill & Lindsey, for appellee.

McCULLOCH, J., (after stating the facts.) Counsel for appellants make the following summary of their contention as to the incorrectness of the chancellor's findings and decree:

"First. In holding that plaintiff should recover one-half of the amount of apples, peaches and strawberries produced, less the expense of gathering and marketing the same above the labor of Musolf and brothers, $621.07.

"Second. In holding that there were 100 acres of land fit for general farming purposes, to be accounted for.

"Third. In refusing to allow defendants in the accounting for the money earned by brothers of plaintiff during the term.

"Fourth. In holding that the reasonable cost of keeping plaintiff's brothers would have been compensated for by the poultry, eggs, the product of two cows and the extra work which they would have done for defendant under the lease."

The chancellor, in ascertaining the value of fruit and berry products of the farm during the period named, accepted as correct the account of appellant Somers, so there can be just complaint from appellants on that point. He (the chancellor) then deducted the cost of gathering the crops over and above what would have been the services of appellee and his family if they had been allowed to perform the services under the contract. Appellants contend that the total cost of cultivating, gathering and marketing the crops should be deducted. We do not think so. The correct measure of appellee's damages was the profit or compensation he would have earned for his services under the contract if he had been permitted to perform the contract, less what he earned in other employment or could by reasonable effort have earned during the unexpired period. His profit under the contract was what he would have received, less the cost to him of performing the contract. The value of his own services should not be deducted, as that was to be compensated for by his earnings under the contract. If he was chargeable with the value of his own services, then he could not also be charged with what he earned in other employment during the unexpired period, for that would be charging him twice for the same thing. Now, the only cost of performing the contract with which he was properly chargeable was what it would have cost him to furnish, in addition to his own services, the labor which he contracted to furnish—that is the labor of his two brothers. The chancellor undertook to account for this—whether or not he did so correctly will be discussed later on in this opinion. Suffice it to say that we find no error in the conclusion reached by the chancellor on this branch of the case.

Nor do we find any error in refusing to deduct the earnings of appellant's brothers during the unexpired period of the contract. As we have already said, the amount it would have cost appellee to furnish the labor of the two brothers should have been deducted from what could have been earned under the contract, but not the amount the brothers earned in other em-

ployment. To do so would be to charge appellee twice for the same thing. He should not, at the same time, be charged with what their services would cost him and what they earned in other employment. The same principle which requires that in the adjustment of appellee's damages he be charged with his own earnings under other employment, but not the value of his own services while performing the contract, also requires that the cost to him of the services of his brothers in performing the contract be charged against him, and not their earnings in other employment. After Somers broke the contract, he could not demand that appellee keep his two brothers in his employment, so that their earnings would lessen the damage caused by the breach of the contract. All that he could demand was that the cost to appellant of obtaining the services of his brothers should be deducted from the earnings which he would have realized under the contract, for that is what it would have cost him to perform the contract.

The chancellor endeavored to charge appellee by deducting from what he would have earned by performing the contract the cost of his brothers' services, and found that "the value of what he would have received from poultry, eggs and product of two cows and what he would have been likely to receive by labor of himself and brothers for extra work for defendant under rental contract would have more than compensated him for the cost of keeping his said brothers." There is no evidence to sustain this finding. The record is destitute of any proof, either of what appellee would have received from poultry, eggs and the product of the cows, or of what would have been received for extra work, or what the cost of keeping his brothers would have been. The burden was on appellee to prove his damages, and his proof fails in this respect. The contract provided that appellee and his brothers should have the privilege of doing any extra work on the premises required by Somers at prices which might be agreed upon, but it was optional with Somers whether or not he would have any extra work done, and the privilege extended to appellee of doing the work was subject to the further contingency of his agreeing with Somers as to the price. A contract for extra work thus subject to such contingencies was no contract at all, and

could not be made the basis for recovering damages. It could not be shown that Somers would ever call upon appellee to perform any extra work—he could do so or not as he pleased —nor that the two could ever agree upon the price to be charged for such work.

Inasmuch as it is impossible to do complete justice between the parties without ascertaining and deducting the cost to appellee of supplying the services of his brothers in performing the contract, the case must be reversed for that purpose. In doing this the court should also ascertain and allow appellee an additional amount sufficient to cover what his share would have been of the "poultry, eggs and product of the two cows." On these points the case will be left open for further testimony to be introduced by either party.

We are also of the opinion that the finding of the chancellor as to rental value of the land for general farming purposes was erroneous. He found that there were 100 acres subject to cultivation, and he fixed the rental value at $3.00 per acre. The testimony shows that about half of the land was covered with fruit orchards—apples and peaches—and that this was worth very little for general farming purposes. Somers testified that other crops raised in the orchard would just about compensate for the work done on it without yielding any profit. The other witnesses made no direct estimate as to what the fruit orchard was worth for general farming purposes, though appellee gives an account of the crops the orchard land produced the years he occupied the farm. There is also proof as to what some of the land produced in other years. We are convinced from the proof that the orchard land was worth something for general farming purposes, but not as much as the chancellor allowed. We think the proof sufficient to sustain an allowance of $450, instead of $600, for appellee's half of the rental value of the land, and that justice will be done by fixing the allowance at that sum.

The decree is therefore reversed, and the case is remanded with directions, after hearing further testimony upon the questions of fact hereinbefore indicated, to enter a decree in favor of the plaintiff for the sum of $696.17, together with any further sum that the court may find his share of the poultry, eggs

and cows would have amounted to, less what the services of his brothers would have cost him in performing the contract.

WARD v. STURDIVANT.

Opinion delivered April 20, 1908.

APPEAL—INSTRUCTIONS—EXCEPTION IN GROSS.—Where the appellant excepted in gross to several instructions given, the court will look no further upon ascertaining that any one of them was correct.

Appeal from Howard Circuit Court; *W. S. Eakin,* Special Judge; affirmed.

W. V. Tompkins, D. B. Sain and *W. P. Feazel,* for appellant.

W. C. Rodgers, for appellee.

Appellant's objection to the court's refusal to give instructions is too general. Likewise as to the instructions given by the court, the statement that "plaintiff excepted to all of said instructions" is too general, and can not avail here. 38 Ark. 528; 39 Ark. 337; 54 Ark. 16; 59 Ark. 312; *Id.* 370; 60 Ark. 250; 75 Ark. 181; 76 Ark. 41; 78 Ark. 7; 79 Ark. 338; 80 Ark. 528; 84 Ark. 73; 84 Ark. 95.

WOOD, J. This suit was brought by the appellant against the appellee for the possession of a certain tract of land in Howard County. Appellant claimed under a sheriff's deed issued by virtue of a sale of the land under execution to satisfy a judgment in favor of appellant against one J. B. Sturdivant.

Appellant alleged that J. B. Sturdivant sold the land in controversy to W. A. J. Sturdivant for the fraudulent purpose of cheating, hindering and delaying his creditors, of whom appellant was one. The appellee, W. A. Sturdivant, denied that the land in controversy was sold for the fraudulent purpose of hindering and delaying creditors, and alleged that the land in controversy was bought by him from J. B. Sturdivant in good faith and for a valuable consideration, and he claims under deed from J. B. Sturdivant, and set up title under said deed, and by virtue of the seven years statute of limitations.

On behalf of appellant the evidence tended to prove the allegations of her complaint, and on behalf of appellee there was evidence tending to sustain the allegations of his answer.

These were issues of fact, which were submitted to the jury under instructions to which no specific objections were pointed out in the trial court. The instructions were numbered from one to eleven respectively.

The appellant, the record shows, "excepted to all of said instructions, but the court gave same over the objections" of appellant. This presents no specific objection to any one of the instructions, and we find that some, if not all, of them are correct. *Atkins* v. *Swope,* 38 Ark. 528, 539; *Neal* v. *Peevey,* 39 Ark. 337, 339; *Quertermous* v. *Hatfield,* 54 Ark. 16, 20; *Fordyce* v. *Russell,* 59 Ark. 312, 314; *Oxley Stave Co.* v. *Staggs,* 59 Ark. 370, 375; *Dunnington* v. *Frick Co,* 60 Ark. 250, 256; *Young* v. *Stevenson,* 75 Ark. 181, 183; *Wells* v. *Parker,* 76 Ark. 41, 42; *Wade* v. *Goza,* 78 Ark. 7, 14; *Walnut Ridge Mer. Co.* v. *Cohn,* 79 Ark. 338, 341; *Kansas City S. Ry. Co.* v. *Morris,* 80 Ark. 528, 535; *Mathews* v. *State,* 84 Ark. 73; *Johnson* v. *State,* 84 Ark. 95.

Appellant objected to the ruling of the court in refusing to give "each and every one of her requests for instructions, and duly saved her exceptions thereto." But she does not urge here any specific reason why the court should have given any one or all of these requests. We find that the instructions of the court, upon the whole, were a correct application of the law of the case to the facts; and, as there was evidence here to sustain the verdict, the judgment is affirmed.

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

Opinion delivered April 27, 1908.

1. CARRIERS—PUTTING OFF PASSENGER BEYOND DESTINATION—DAMAGES.—Where the testimony shows that a passenger on a train, who was helpless from paralysis, was put off at a station beyond his destina-

tion in a rough and brutal manner, that he was seriously bruised, and that he suffered intensely from lying in a mud hole on a cold day, in consequence of which he had fever and was sick for two months, a verdict for $1,500 damages is not excessive. (Page 107.)

2. SAME—PASSENGER'S MENTAL CONDITION.—A railroad company is liable to a passenger, who was put off beyond his destination, for his physical suffering from the weather and for fatigue resulting from his attempting to walk back to his destination if his mental condition was such that he did not understand his situation. (Page 107.)

3. SAME.—Where a railway passenger brought suit for damages for being carried beyond his destination, and there was evidence both that he lacked the mental capacity to know what he was doing and that he was forcibly and brutally ejected from the train, it was not error to tell the jury that, if the conductor told him that if he would remain on the train until he got to a certain station, arrangements would be made to return him from there, and that he left the train *voluntarily* before reaching such station, then he could not recover on account of anything that occurred at the time and after he left the train. (Page 108.)

4. WITNESS—TERMINATION OF CROSS EXAMINATION.—It was not reversible error for the trial court to terminate a cross examination unless some arbitrary abuse of judicial discretion is shown. (Page 108.)

5. SAME—CONSTRUCTION OF INSTRUCTIONS AS A WHOLE.—Where a railway passenger sued for injuries in being put off beyond his station, and the court charged the jury that if, on account of the infirm physical condition of the plaintiff, he wandered away unattended, and by reason of his *physical* infirmity was thereby injured, then defendant is liable for a fair compensation, the use of the word "physical," instead of *mental,* was not misleading if the meaning of the court, in view of other instructions given, was plain. (Page 108.)

Appeal from Faulkner Circuit Court; *Eugene Lankford,* Judge; affirmed.

Lovick P. Miles, for appellant.

1. Stating the case most strongly in favor of the appellee, the verdict is manifestly excessive, so much so as to indicate undue passion, prejudice or sympathy for him.

2. He is not entitled to recover for any damage from cold, rain, mud, or physical fatigue or injury which resulted from his attempt to walk back to Conway. There is evidence that appellee knew his condition and what he was doing—whence he came and whither bound—and there is no evidence charging appellant with any knowledge of mental impairment. 75 Ark.

479; 3 Thompson, Neg. 2738; 14 Barb. (N. Y.), 585; 4 Thompson, Neg. 2899.

3. In this case, where, in sharp contradiction of two others, a witness detailed a most improbable story of the treatment, it was an abuse of judicial discretion to cut short the cross examination of that witness at the end of about two minutes.

4. It is not contended, nor is there proof, that appellee's infirm physical condition caused him to wander away from Menifee, and there was no law, and no facts to warrant the giving of the third instruction.

Sam Frauenthal and *G. W. Bruce*, for appellee.

1. The verdict was not excessive. 67 Ark. 399; 58 Ark. 137; 83 Ark. 6; 56 Ark. 51; 79 Ark. 335.

2. Because of the mental infirmity of appellee. whose mental and physical condition was known to the conductor, as appears by the evidence, he is entitled to recover damages incurred after he left Menifee. 5 Am. & Eng. Enc. of L.. 564 and note 1; 2 Hutchinson on Carriers, § 992; 67 Kan. 512; 75 Ark. 479; 49 N. Y. Supp. 510; 41 La. Ann. 57.

3. There was no abuse of discretion in refusing to permit further cross examination of the witness Sexton. It covered his entire life history, and consumed not less than a half hour.

4. No error in instruction 3, when considered in connection with the court's other instruction that "if the plaintiff knew his condition," etc., he could not "recover any damages for what occurred after he was put off at Menifee and started to walk down the track."

HILL, C. J. William Day, who was suffering from partial paralysis, started from Menlo, Ga., to Conway, Ark., where he was going to reside with his brother, a resident of that place. His paralysis prevented him from being able to walk, and so seriously affected his vocal organs that he was unable to talk intelligibly, and his mind was more or less affected by the disease. There is some difference of opinion as to the extent of his power of speech and mental faculties; but that both were manifestly impaired, and that both of these infirmities were apparent, is fairly deducible from the evidence.

His friends provided his ticket, and assisted him on the train, and pinned upon the lapel of his coat a letter to the conductors and station masters, stating his destination and route, and explaining his condition and asking them to assist him on boarding the right trains and in transferring. This letter was upon his coat at all times in plain sight.

He was carried beyond Conway to Menifee, and walked back from there towards Conway, but fell in a mud hole, and remained there several hours until rescued by some negroes and then carried to the home of his brother. He sued the railroad company for injuries received from being put off the train, and consequent suffering and injuries in attempting to get back to Conway, and recovered judgment for $1,500, and the railroad company has appealed.

The first question presented is the amount of damages; it is claimed that they are excessive. There was testimony tending to prove he was roughly and brutally put off the car, that he was seriously bruised, and that he must have suffered intensely by lying in a mud hole on a cold day. In consequence of this exposure, he had fever and was sick in bed for two months. If the appellant's testimony was true, and the jury has accepted it—and, in fact, there is no contradiction of his suffering and sickness—the verdict is not excessive.

It is next urged that the appellee was not entitled to recover for damages from the cold, rain, mud, physical fatigue, etc., which resulted from his attempt to walk back to Conway. Appellant's argument is that, if he was conscious of his condition, and knew what he was doing, he could not recover for damages resulting from his effort to walk back to Conway, and he seeks to bring the case within the principle of *Jewell* v. *St. Louis, I. M. & S. Ry. Co.*, 82 Ark. 598. But the court, in the 19th instruction, told the jury that "if the plaintiff knew his condition, and understood whence he came and where he was going, then he cannot recover any damages for what occurred after he was put off at Menifee, and started to walk down the track." There is sufficient evidence that his mental condition was such that he did not understand whence he came and where he was going, and there is some testimony that he did understand the situation. The appellant was entitled to have this conflict sub-

mitted to the jury, which was fairly done in this instruction, and, the finding being against it, it is concluded on this issue.

The court further told the jury that, if the conductor told Mr. Day that if he would remain on the train until he got to Plummerville, he would arrange for him to be returned from there, and that he left the train voluntarily at Menifee, then the plaintiff could not recover on account of any thing that occurred at the time and after he left the train at Menifee. Appellant asked this instruction without the word "voluntarily" qualifying his leaving the train, and the court inserted it. The court was right in this modification. There was substantial testimony, not only that Mr. Day did not have the mental capacity to know what he was doing, but that he was forcibly and brutally ejected from the train.

The next point raised is that the court refused to permit appellant's counsel to continue the cross-examination of a witness. As has been often said, reversible error is not predicated upon conduct of the court in terminating a cross-examination unless there is some arbitrary abuse of sound judicial discretion shown. None is discovered here. See *Richardson* v. *State,* 80 Ark. 201; *Treakle* v. *Vaughan,* 83 Ark. 258.

The next point raised is as to the refusal of the court to strike out parts of an answer to questions in depositions. The court fails to find merit in the objection.

The next question raised is as to instruction number 3, given by the court, which will be set out in a footnote.* The

* Instruction No. 3 given by the court was as follows: "If you believe from the evidence that the plaintiff was a passenger on the defendant's train from Little Rock to Conway, and that, at the time, the plaintiff was *physically* incapacitated to take care of himself, and that the defendant received and accepted him as such passenger, knowing or having been notified of his said infirm condition, or by same being apparent, and unattended, and the plaintiff, on account of his infirm condition, was carried by his destination, Conway, and to the station of Menifee, and that at the station of Menifee he was told to get off, or put off the train at that station, by the conductor, and that defendant, knowing the physical infirmities of plaintiff, or being notified thereof, did not use due care in putting the plaintiff in some person's care at Menifee, and that, on account of the infirm *physical* condition of the plaintiff, he wandered away from Menifee, unattended, and by reason of his *physical* infirmity was thereby injured, then the defendant is liable for a fair compensation for whatever damage and injury may have resulted therefrom." (Rep.)

appellant has not complied with the rules of court in making the abstract; and if it had not been that the appellee set out the omitted instructions and modified instructions, the court would have been unable to have understood the instructions, and would have disregarded objections to them under the settled practice in this regard. But, as the instructions have been set out by the appellee, and have been considered, the court prefers disposing of them on their merits. The instruction in question is correct, except the last paragraph, and in accord with *Price v. St. Louis, I. M. & S. Ry. Co.*, 75 Ark. 479. The last paragraph, that if, "on account of the infirm physical condition of the plaintiff, he wandered away from Menifee unattended, and by reason of his physical infirmity was thereby injured," etc., contains a mere misuse of the word "physical" for "mental." It is meaningless to ascribe the wandering back to Conway to a physical infirmity, and sensible jurors, taking it as a whole and in connection with the other instructions, could not possibly be misled.

The court is of the opinion that the case was fairly tried, and there is substantial evidence to sustain the verdict.

The judgment is affirmed.

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PAVING DISTRICT OF FORT SMITH *v.* SISTERS OF MERCY.

SEWER DISTRICT OF FORT SMITH *v.* SISTERS OF MERCY.

Opinion delivered April 20, 1908.

IMPROVEMENT DISTRICTS—EXEMPTION FROM ASSESSMENTS.—A provision in the charter of an incorporated academy exempting its property "from all taxation, State, county, municipal and special, during the existence of" its charter did not exempt such property from assessments for local improvements.

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

These two suits were brought by the Sisters of Mercy of the Female Academy of Fort Smith, Arkansas, against the Board

of Improvement of Paving District No. 5 of Fort Smith, and against the Board of Improvement of Sewer District No. 2 of Fort Smith. The facts are stated in the opinion.

Youmans & Youmans, for appellants.

The terms "tax" and "taxation" do not include assessments for local improvements. Hamilton on Special Assessments, § § 21-39; 21 Ark. 40; 65 Ark. 498. The act (§ 3 of act approved December 20, 1860) under which appellee claims exemption in this case has no wider application than that contained in art. 16, § 5, Const. 1874, and Kirby's Dig. § 6887. For definitions of special assessments and local assessments, see Hamilton, *supra,* and 15 So. 906; 25 Am. & Eng. Enc. of L. (2 Ed.) 1168; Rosewater on Special Assessments, 85; Elliott on Roads and Streets, § 543; Cooley on Taxation, (3 Ed.) 1153. Prior to the passage of the act relied on, this court had recognized the distinction between taxes and assessments, of which the Legislature must have had knowledge. 21 Ark. 50. Having such knowledge, if it had been the intention to exempt appellee from such assessments, the Legislature would have employed appropriate language for that purpose. See, also, 147 U. S. 190. Statutes exempting property from taxation do not apply to special assessments. Hamilton on Special Assessments, § 312; 69 Ark. 68. Such exemptions are of grace, and must be strictly construed. 53 Pa. St. 219; 57 Ark. 445; 92 Ky. 89, 13 L. R. A., 668. The assessments in these cases do not, as contended by appellees, fall within the term "special" used in the act in question. 50 Mo. 155; 80 Mo. 397; 96 Ill. 255, 36 Am. Rep. 143; 128 Mo. 188, 32 L. R. A. 157; Gould's Dig. § § 72-79; 67 Pac. 68; 88 Tex. 458, 53 Am. St. Rep. 770; 58 Tex. 545.

Brizzolara & Fitzhugh, for appellees.

The statute provides that appellee's property shall be "exempt from all taxation—State, county, municipal and special—during the existence of this charter." Under the Constitution of 1836, under which this act was passed, the Legislature had authority to exempt property from taxation of every kind. 30 Ark. 128. A special assessment for local improvement is a

special tax. 2 Cooley on Taxation, 1181, 1182 and cases cited in note 2; 34 Atl. 1028; 56 N. Y. 261; 21 Wis. 514; 2 Mich. 586; 11 N. W. 598; 49 Atl. 838; 2 Pac. 800; 42 Pac. 1003; 61 S. W. 362; 147 U. S. 190; Kirby's Dig. § § 5687-89; 2 Desty on Taxation, § 177. Wherever a distinction has been drawn between special taxes and special assessments, such distinctions have been made by the particular statute in controversy or by the Constitution. There is no distinction unless expressly made so by the statute. 96 Ill. 255. In this case the exemption is in the charter of appellee. 21 Ark. 54; 4 Wall. 143; 11 Johns. (N. Y.) 80; Hamilton on Special Assessments, § 316; 93 Pa. St. 129; 22 Wis. 53; 105 Pa. 278; 38 Miss. 334; 21 Gratt. 604; 104 Mass. 470.

HART, J. These two suits were brought to enjoin the collection of assessments for local improvements on the ground that the property involved is exempt by reason of a private statute. The court below held that the statute applied to assessments for local improvements, and enjoined the collection in each case. An appeal was taken in each case.

The same point being involved in the two cases, they will be considered together.

Appellee was incorporated by private act, approved December 20, 1860. The exemption claimed is contained in section three of the act, which is as follows:

"Section 3. Ten acres of ground, to each academy or corporation, with the buildings and property thereon, books, apparatus and whatever else may be used in carrying on said academies, respectively, shall be exempt from all taxation, State, county, municipal and special, during the existence of this charter."

Section one of the act provides that the charter shall continue for 90 years.

It is conceded that the improvement districts were properly formed, and that the lots in controversy are situated within the boundaries of the respective districts. The sole question to be determined is whether the property is exempt by the provisions of the act above referred to.

The act in question was passed under the Constitution of

1836. Under that Constitution, the Legislature had authority to exempt property from taxation. *Oliver* v. *M. & L. R. Rd. Co.,* 30 Ark. 128.

The Constitution of 1874 exempts certain classes of property from taxation. This court has construed this constitutional exemption to refer to taxes for general purposes of revenue, and has held that such property is liable for assessments for local improvements. *Ahern* v. *Board of Improvement Dist. No. 3, Texarkana,* 69 Ark. 68; *Board of Improvement* v. *School District,* 56 Ark. 350.

Appellee contends that this construction should not be placed upon exemptions provided for in a private act granting a charter, and that such a case is entirely different from an exemption found in the general revenue law.

The statute in question conferring corporate powers upon appellee and exempting it from all taxation is to be regarded as a contract between the corporators on the one hand and the State on the other; and each is entitled to the benefit of all the stipulations contained therein. We can see no good reason why any word used in the contract should be given any other than its usual and ordinary meaning. In the case of *Sanders* v. *Brown,* 65 Ark. 498, the court held that a local assessment is not a "tax," within an exception in a covenant of warranty of the taxes for a certain year, and in support of its holding cited the case of *McGehee* v. *Mathis,* 21 Ark. 40. The latter case had been decided under the Constitution of 1836 and recognized the difference between taxes and assessments. Each has a distinct legal meaning, and the word "tax" does not include assessments.

Counsel for appellee urges that the word "special," used in the act in question with "taxation," refers to local assessments. In support of their contention, they call the court's attention to the following: "The charter of a private corporation, exempting from the imposition of any tax or assessment all its property and effects, exempts it from assessment for benefits for local improvements." Hamilton on Special Assessments, § 316.

A reference to the cases cited by the author will show that all of them contained the words "taxes" and "assessments," and the court in each case recognized that they had a distinct meaning, and that one was not included in the other. The case of *Bright-*

man v. *Kirner,* 22 Wis. 53, cited by appellee, does not support its contention. The exemption there was against taxes and assessments. The cases of *Southern Ry. Co.* v. *Jackson,* 38 Miss. 334, *State* v. *Newark,* 27 N. J. L. 185, *Richmond* v. *Richmond & Danville R. Co.,* 21 Grat. 604, cited by appellee, do not sustain its contention, because the tax attempted to be assessed in each of the cases was a municipal tax, and was in no sense an assessment for a local improvement. The only cases which in our judgment sustain his contention are *Harvard College* v. *Board of Aldermen,* 104 Mass. 470, and *Olive Cemetery Co.* v. *Philadelphia,* 93 Pa. St. 129, and these cases are opposed to the weight of authority and to the better reasoning.

"An assessment of benefits for local improvements has never been regarded as a tax, or termed such in legislative proceedings, in our public or private laws, or in popular intercourse." *City of Bridgeport* v. *New York & New Haven Rd. Co.,* 36 Conn. 263.

We think the words "special taxation," used in the act, refer to special taxes levied and collected after the manner of general taxes, such as road and school taxes. The statutes in force at the time of the passage of this act authorized the levy of a road tax upon petition of a majority of the inhabitants of a county, and the Legislature, no doubt, had in mind this and such taxes similar to it as might afterwards during the existence of the charter be legally levied.

On February 10, 1851, an act was passed by the General Assembly of the State of Illinois incorporating the Illinois Central Railroad Company. By it the company was made the beneficiary of a land grant from Congress to the State, and the said corporation was exempted "from all taxation of every kind except as herein provided for." In construing this act the Supreme Court of the United States held that an exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay the cost of local improvements. *Illinois Central Rd. Co.* v. *Decatur,* 147 U. S. 190.

In the case of *State* v. *Newark,* 36 N. J. L. (7 Vroom) 478, the act incorporating the prosecutors declared that their property should not be subject to taxes or assessments, and the court

held that the words "taxes" and "assessments" are not synonymous, and that they exempt the property from assessments for benefits as well as from taxes for general revenue for public use. Dodd, J., in his opinion said: "The distinction in the legal meaning of the words is recognized and acted on in the decided cases in this State where the attempt has been made to obtain exemption fram these special assessments, on the ground that they were included within the word 'taxes.' These cases have been cited to sustain the judgment below, but they go wholly and decisively, I think, to a contrary result. They establish clearly that assessments are not taxes, in the ordinary legislative sense of the words. They so expressly declare. In the case of the *City of Patterson* v. *The Society for Establishing Useful Manufactures, etc.*, 4 Zab. 385, the expense of grading and paving a street had been assessed upon lots owned by the defendants, and such assessments were held by the Supreme Court not to be a tax within the meaning of the defendant's charter, which exempted their property from 'all taxes, charges and impositions under the authority of the State.' It was said that the words 'taxes, charges and impositions,' specified in the charter, were manifestly those only for public and general use. The same view was taken in the *State* v. *Newark,* 3 Dutcher, 185. An assessment for benefits was discriminated from taxes or impositions. In neither case was the word 'assessment' employed in the exempting clause of the charter. This recognition by our own courts of the essential difference between the words 'taxes' and 'assessments,' as expressive of essentially different things, would seem to be conclusive against holding them, in this case, to be simply identical in meaning."

Their distinction in meaning is clearly recognized in the case of *Emery* v. *San Francisco Gas Co.*, 28 Cal. 345, and also in the case *First Division of the St. P. & Pac. Rd. Co.* v. *St. Paul,* 21 Minn. 526.

In the State of Rhode Island it has been held that, though technically speaking a street assessment is a tax, the word "taxation," as ordinarily used, does not include assessments for local benefits. In the case of *Swan Point Cemetery* v. *Tripp,* 14 R. I. 202, the exemption was sustained because the exemption

clause in the charter contained the words "taxes and assessments."

In the case of *McMillan* v. *Tacoma,* 67 Pac. 68, it was held that a special assessment was not included within the term "special tax," and that the latter applied to road and school taxes.

The distinction between a special tax and an assessment for local benefits or improvements has been recognized in the cases of *Farrer* v. *St. Louis,* 80 Mo. 379, and *Lamar Water & Electric Light Co.* v. *Lamar,* 32 L. R. A. 164.

In the case of the *Roosevelt Hospital* v. *New York,* 84 N. Y. 108, where a provision in an act incorporating a charitable institution in the city of New York exempted its real estate from taxation, it is held that such real estate is not thereby exempted from an assessment for a local improvement; that the assessment was not taxation within the meaning of the act. To the same effect, see *Zabel* v. *Louisville Baptist Orphans Home,* (Ky.) 13 L. R. A. 668; *Sheehan* v. *Good Samaritan Hospital,* 50 Mo. 155.

Ordered that the cause be reversed and remanded to said chancery court with directions to dismiss the complaint for want of equity.

HILL, C. J., not participating.

ARKANSAS INSURANCE COMPANY v. MCMANUS.

86 115 / 87 173

86 115 / 90 541

Opinion delivered April 20, 1908.

1. FIRE INSURANCE—PRESERVATION OF INVENTORY.—Under a fire insurance policy which stipulated that "the asssured shall take a complete itemized inventory of stock at least once in each calendar year, and, unless such an inventory has been taken in detail within twelve months prior to the date thereof, one shall be taken in detail within thirty days after date hereof," and that he shall keep the last preceding inventory, if such has been taken, in a fire-proof safe, a policy was not avoided by assured's failure to preserve a partial inventory taken before the policy was issued if he took a complete inventory within the required time and kept it in a fire-proof safe. (Page 118.)

2. SAME—KEEPING MERCHANDISE ACCOUNT.—Where a merchant holding a fire insurance policy kept an account which shows the amount of his sales and inventory taken at the time of the issuance of the policy and the invoices of goods subsequently purchased, he will be held to have substantially complied with a requirement of the policy that he keep a merchandise account. (Page 118.)

3. SAME—SUFFICIENCY OF OWNERSHIP OF PROPERTY INSURED.—Under a provision in a policy of fire insurance that it shall be void "if the interest of the assured be other than unconditional and sole ownership, both legal and equitable, or if the subject of the insurance be upon ground not owned by the assured in fee simple," the title of an equitable owner is sufficient where he is in actual possession and is entitled to a deed conveying the legal title. (Page 119.)

4. SAME—VALIDITY OF PENALTY FOR NON-PAYMENT OF POLICY.—The act of March 29, 1905, providing that in all cases where loss occurs, and the fire, life, health or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay to the holder of such policy, in addition to the amount of loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees" (Acts 1905, p. 307), is not an arbitrary and unjust classification of insurance companies, but is a valid exercise of the State's police power. (Page 120.)

Appeal from Calhoun Circuit Court; *George W. Hays,* Judge; affirmed.

C. S. Collins, for appellant.

1. The court erred in treating the inventory of October 16th as a substantial compliance with the terms, conditions and warranties of the contract. It was no compliance at all with the plain letter and spirit of the contract. The promises to keep certain books, inventories, invoices, etc., were by the terms of the application and policy made warranties. 102 S. W. 195. The iron safe clause is valid, and compliance with its conditions indispensable to recovery. 61 Ark. 207; 62 Ark. 43; 65 Ark. 240; 31 S. W. 321; 33 S. W. 554; 78 Am. St. Rep. 216. Where there has been no compliance at all, there can be no substantial compliance, and here there is no pretense that the inventory contracted for the application, that of June 1st, was preserved. In the absence of proof of a custom to that effect, keeping a sales book showing daily cash sales in the aggregate is no substantial

compliance with the contract to keep a merchandise account. 58 Ark. 573; 53 Ark. 353; 65 Ark. 248.

2. The policy was void for want of legal title in the appellee, whereas under the policy he was required to have both the legal and equitable title. 71 Ark. 292.

Smead & Powell, for appellee.

1. The inventory of October 16th, taken by appellee in the belief that it was necessary in order fully to comply with the requirements of the policy, part of the previously taken inventory having been lost, was a substantial compliance with the policy. 79 Ark. 160-4; *Id.* 266.

2. If the testimony of appellee is true, and it is not disputed, he is the "sole, unconditional and fee simple owner" of the land on which the building was located. There is certainly a sufficient showing of title, coupled with possession to support a recovery. Ostrander on Fire Insurance, § 72, p. 234; 29 Fed. 496; 16 Am. Eng. Enc. of L., (2 Ed.) 931.

McCULLOCH, J. This is an action instituted by the appellee, J. W. McManus, against the Arkansas Insurance Company to recover the amount of a policy of fire insurance upon a store house and stock of merchandise. The complaint alleges that the property insured was totally destroyed by fire, and that appellant had refused to pay the amount of the policy. The appellant, in its answer, set forth the defense that the assured had failed to comply with the iron-safe clause by preserving his last preceding inventory, taken on June 1, 1905, and by failing to keep a cash-book and merchandise account as required by that clause. By an amendment to its answer, it set forth an alleged breach of one of the conditions of the policy which provided that the entire policy should be void "if the interest of the assured be other than unconditional and sole ownership, both legal and equitable, or if the subject of the insurance be upon ground not owned by the assured in fee simple."

The application for insurance contained a statement that an inventory had been taken on June 1, 1905. The policy, which was dated October 13, 1905, contained the following clause: "The assured shall take a complete itemized inventory of stock at least once in each calendar year, and, unless such an in-

ventory has been taken in detail within twelve months prior to the date hereof, one shall be taken in detail within thirty days after the date hereof, or this policy shall be null and void from this date." Another clause of the policy required the assured to keep his books "and also the last preceding inventory, if such has been taken," in a fire-proof safe.

Appellee testified that he received the policy on October 16, 1905; that he immediately discovered that several pages of the preceding inventory had been destroyed or lost, and that he at once proceeded to take a new inventory, showing the stock on hand to be $1,244.59. which he preserved and produced at the trial. He admitted that he did not preserve the parts of the inventory taken in June preceding, and that the same was burned in the fire.

It is contended on behalf of appellant that the failure to preserve the partially destroyed inventory of June, 1905, was a violation of the terms of the policy. We do not so regard it. The requirements of the policy must be tested according to the facts as they existed at the time of the issuance of the policy, which contained the conditions quoted above. The effect of these conditions was to require the preservation of the inventory then in existence, and, if there was no inventory then in existence, that one should be taken within thirty days and preserved. This clearly had reference to a perfect and complete inventory, and not to an incomplete one or one which had been partially destroyed. There was no obligation on the part of the assured to preserve an incomplete inventory; but it was obligatory upon him, from the conditions of the policy, that, if he did not then have a complete inventory, he should take one within thirty days. If he had failed to take a complete inventory within thirty days from the date of the policy, the fact that he had on hand an incomplete inventory would not have been a compliance with the policy. It follows, therefore, that the taking of a new inventory, when the preceding one was found to be incomplete, was a sufficient compliance with the terms of the policy. Certainly, the assured was not required to preserve an incomplete preceding inventory and also to take a new one within thirty days.

The contention of the appellant that the terms of the policy were violated by failure to keep an itemized account of his daily

cash sales is disposed of in the recent case of *Arkansas Mut. Fire Ins. Co.* v. *Stuckey,* 85 Ark. 33, and need not be further discussed. The proof in this case shows that the daily cash sales were entered on the books.

A violation of the policy is also contended for on the ground that the assured failed to keep a merchandise account in that particular form on his books. The account, however, does show the amount of his sales, and the inventory taken at the time of the issuance of the policy and the invoices of goods purchased since then were preserved, and it is a complete account. The purpose of a merchandise account is to show the amount of goods purchased and sold, so that the amount on hand may be ascertained. Where an account shows the amount of goods sold, and the invoices are preserved which show the amount of goods purchased, all that is required in keeping such an account is fully accomplished. The statutes of this State require that the terms and conditions of an insurance policy need only be substantially complied with. Under the statutes, therefore, it is necessary to look only to the substance, and not to the particular form, of the account kept. If the account is substantially in such form that the amount of goods on hand may be reasonably ascertained, that is all that is required.

The evidence adduced at the trial shows that the store house covered by the policy was situated upon ground which had been given to appellee by his father, but which had not been conveyed to him by deed. He testified that his father gave him the land and promised to make him a deed, and that he built the house. He testified further that he had exclusive possession of the property since his father gave it to him, and that the failure to make the deed was the result only of carelessness. The question arises then, whether or not this is a sufficient compliance with the term of the policy. It is well settled by authority that conditions in insurance policies that the assured shall have "unconditional and sole ownership" of the property insured, or that he shall have "the title in fee simple," are complied with by showing that the assured has the equitable title. It is held in many cases that possession under a contract to convey is "unconditional and sole ownership," and also that it is "title in fee simple," within the meaning of that requirement of the policy.

2 Cooley's Briefs on Insurance, pp. 1354, 1376; Ostrander on Insurance, § 72. It was so held as to a parol contract to convey. *Milwaukee Mechanics' Ins. Co.* v. *Rhea,* 123 Fed. 9. And the same doctrine must necessarily prevail as to possession under a parol promise to convey as a gift, where valuable improvements have been made by the donee upon faith of the promise.

We find no cases involving the construction of a policy which contains the exact language of the policy in this case, wherein it is stated that the interest of the assured must be "unconditional and sole ownership, both legal and equitable." But it follows from the authorities just cited that the same rule should apply to the construction of these terms of this policy. The equitable title, coupled with actual possession, bears with it all the incidents of legal title. This constitutes in effect the legal title for all practical purposes. Under such a title, the possessor may defend his possession at law as well as in equity. Equitable title, coupled with actual possession, may be the basis of a defense in a suit at law. *Daniel* v. *Garner,* 71 Ark. 484. And it is sufficient upon which a suit against a trespasser may be based.

The language of an insurance policy is the language of the insurer, and must be most strongly construed against the insurer. The particular terms used in the policy must be construed according to their ordinary meaning and acceptation. Therefore, the title of an equitable owner who is in actual possession and is entitled to a deed conveying the legal title must be construed as "sole ownership, both legal and equitable." It is such to all intents and purposes, and it would be unreasonable to construe it otherwise.

There is no error in the record as to the amount of liability under the policy, and the judgment must be affirmed.

The court assessed a penalty against appellant pursuant to the statute enacted by the Legislature at the 1905 session, the constitutionality of which is questioned. The statute is as follows:

"In all cases where loss occurs, and the fire, life, health or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay to the holder of

such policy, in addition to the amount of loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorneys' fees to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as costs are or may be by the law collected." Acts 1905, p. 307.

A statute in this precise form, except that it omitted fire and accident insurance and applied only to life and health insurance, was enacted by the Texas Legislature, and its constitutionality was upheld by the Texas courts (*Union Central Life Ins. Co.* v. *Chowning,* 86 Tex. 654; *N. Y. Life Ins. Co.* v. *Orlopp,* 61 S. W. 336); by the United States Circuit Court of Appeals for the Fifth Circuit (*Merchants' Life Assn.* v. *Yoakum,* 98 Fed. 251); and by the Supreme Court of the United States (*Fidelity Mut. Life Assn.* v. *Mettler,* 185 U. S. 308; *Iowa Life Ins. Co.* v. *Lewis,* 187 U. S. 335). The Texas courts held that the statute could be sustained as a proper exercise of the police power of the State, and the Circuit Court of Appeals seems to have based its conclusion on the same ground, as the opinion quotes at length from the opinion in *Atchison, T. & S. F. Rd. Co.* v. *Matthews,* 174 U. S. 96, upholding, as a proper exercise of the police power, a statute of the State of Kansas relating to the liability of railroads for damages by fire and providing that in all actions against railroad companies to recover such damages the plaintiff may recover a reasonable attorney's fee as a part of the judgment.

The Supreme Court of the United States, in the Mettler case, sustained the Texas statute on the ground that it constituted one of the conditions upon which insurance corporations were permitted to do business in the State; and the court also held that it was not an arbitrary and unjust classification against the corporations doing life and health insurance business so as to amount to a denial to those corporations of the equal protection of the laws, which is guarantied by the Fourteenth Amendment to the Constitution.

The statute now under consideration could, under the reasoning of these cases, be sustained upon either of the grounds stated.

A Nebraska statute provides that in actions on insurance policies, in cases of total loss by fire, "the court, in rendering judgment against an insurance company upon any such policies of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." The Supreme Court of that State, in a line of decisions, has upheld the statute as a valid exercise of police power. *Farmers' Mutual Ins. Co.* v. *Cole,* 93 N. W. 730; *Lancashire Ins. Co.* v. *Bush,* 60 Neb. 116; *Farmers' & Merchants' Ins. Co.* v. *Dobney,* 62 Neb. 213.

And the Supreme Court of the United States in *Farmers' & Merchants' Ins. Co.* v. *Dobney,* 189 U. S. 301, following the doctrine of the Mettler case, and affirming the decision of the Supreme Court of Nebraska, also upheld the statute. In the Dobney case the line of reasoning would seem to indicate that the court meant to uphold the Nebraska statute as a police regulation, though it is not expressly so stated in the opinion.

The Supreme Court of Kansas upheld a similar statute in *British America Ins. Co.* v. *Bradford,* 60 Kan. 82. In the opinion in that case by Chief Justice Doster, the court said: "Fire insurance has come to be a business public in its nature. It has come to be 'clothed with a public interest,' and is therefore properly a subject of legislative regulation. The State is interested in the preservation of the property of its citizens, that the general values of the commonwealth may not be impaired. Especially is it interested in the preservation of its homes and their rebuilding when destroyed. To the end that insurance companies may be compelled to respect the obligations voluntarily taken upon themselves to subserve the policies of the State in these respects, the Legislature may rightfully impose upon them the repayment to insurers of attorneys' fees necessarily incurred in suits to make good their delinquencies. To do so is no violation of the Fourteenth Amendment declaring that 'no State shall deny to any person within its jurisdiction the equal protection of the law.' "

The Supreme Court of Florida has upheld a statute of that State authorizing the recovery of reasonable attorney's fee against life and fire insurance companies in suits upon policies. *Tillis* v. *Liverpool, etc., Ins. Co.,* 35 So. 171; *Hartford Fire Ins. Co.* v. *Redding,* 37 So. 62.

The statutes of Tennessee prescribe that in suits on insurance policies a penalty of twenty-five per cent. of the amount of the loss may be imposed upon a losing defendant when the refusal to pay was not made in good faith, or upon a losing plaintiff when it appears to the court that the bringing of the suit was not in good faith. The Supreme Court upheld the statute as a police regulation. *Continental Fire Ins. Co.* v. *Whitaker,* 112 Tenn. 151, 79 S. W. 119. The court, speaking through Judge Neil, said: "It seems clear that there is a sufficient difference between insurance contracts and others to authorize the provisions of the statute. No one would carry insurance except for the indemnity that contracts of this character provide. The burden is a heavy one, and an enormous tax upon individual incomes and upon the whole country as well. This heavy sacrifice is endured through long series of years, with the just expectation that upon the maturity of the contract insurance companies will promptly and honestly comply with their agreement to pay the indemnity; and this payment is usually of very great importance to policy holders, not only in the respect of the amount involved, but also in the promptness of the payment. The maturity of these contracts most generally arrives when the beneficiaries of them are in dire need. A man's dwelling house has been destroyed, and he has no means of providing shelter for his family. His storehouse and goods have been consumed by fire, and his business is ruined unless he can promptly recover his insurance. The head of a family dies, and his widow and little ones are left without the means of support, unless they can promptly obtain the relief which the husband and father provided for them through long years of toil and sacrifice in paying insurance premiums. When people, under such conditions, are met by heartbreaking delays, * * * it is neither unconstitutional nor improper from any point of view, that the Legislature should pass a law, one of the purposes of which is to protect the policyholder from the expenses so made necessary by the action of the insurance company when it shall be made to appear that the defense is not made in good faith."

The following cases, we think, announce the same principle, though they are based upon different kinds of statutes. *Atchison, Topeka & S. F. Rd.* v. *Matthews,* 174 U. S. 96; *Seaboard*

Air Line Ry. Co. v. *Seegers,* 207 U. S. 73; *Duckwall* v. *Jones,* 156 Ind. 685.

The case of *Seaboard Air Line Ry. Co.* v. *Seegers, supra,* is an instructive one on the subject. A statute of South Carolina provides that every claim for loss or damage to property while in the possession of a common carrier shall be adjusted and paid within forty days, and that a carrier failing to adjust and pay such claim within the time specified shall be subject to a penalty of $50 for such failure. The court upheld the statute, and Mr. Justice Brewer, in delivering the opinion of the court, quoted with approval the following language of the Supreme Court of South Carolina in passing upon the constitutionality of the statute: "The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in a court, operating as a deterrent of the carrier in refusing to settle just claims, and a compensation of the claimant for the trouble and expenses of the suit which the carrier's unreasonable delay and refusal make necessary."

The decisions of the Supreme Court of the United States settle beyond doubt the question that the statute is not in conflict with the Federal Constitution. If it be true, then, that the "equal protection of the law" and "due process of law" provisions of the Federal Constitution are not violated by the statute in question, it is difficult to see how any provisions of the Constitution of this State, which affords, in substance, the same protection and no more, is violated.

No authority against this view is brought to our attention except *Phenix Ins. Co.* v. *Hart,* 112 Ga. 765, and *Thompson* v. *Traders' Ins. Co.* (Mo.) 68 S. W. 889, in which the courts of Georgia and Missouri pronounced unconstitutional statutes prescribing penalties for *vexatious* delays in adjusting and paying claims for losses under insurance policies. Whatever doubts may be entertained concerning the constitutionality of the statute we are now considering, there can be no reasonable doubt of the validity of a statute providing a penalty for vexatious delay or frivolous defenses against claims due under insurance policies, such as the Georgia and Missouri statutes. Therefore,

we cannot view the cases last cited as having much persuasive force.

We do not think that any previous decisions of this court militate against the validity of this statute. The court has repeatedly upheld a statute prescribing penalty against railroad companies for failure to pay wages of discharged employees.

An amendment to that statute extending its provisions to all corporations in their dealings with employees was recently passed upon by this court without question as to its constitutionality. *Wisconsin & Ark. Lbr. Co.* v. *Reaves,* 82 Ark. 377.

A line of decisions of this court are pressed upon our attention, holding a stipulation in contracts for payment of attorney's fee in event of suit to be void. These decisions are, however, in effect placed upon the ground that it is against policy of courts to enforce penalties or forfeitures for the breach of a contract to pay money. The courts should not, however, refuse, out of mere considerations of policy, to aid in the enforcement of penalties prescribed by the Legislature, when not forbidden by the Constitution. Under such circumstances, the Legislature, and not the courts, is to be the judge as to the policy to be adopted or pursued.

After careful consideration of the question, we are of the opinion that the statute violates no provision of the Constitution, and is a valid exercise of legislative power. We approve the views expressed by the Kansas, Tennessee and Nebraska courts that the business of insurance is of such a public character that it is a proper subject of distinct regulation, and the State is so interested in the speedy adjustment and payment of indemnity under insurance policies for loss of life, health or property of its citizens, that penalties may be prescribed for unreasonable delay in that respect. These statutes are correctly based upon the theory that insurance companies, after loss occurs, have the insured at a great disadvantage, and are in position to inflict great damage by mere delay in payment of losses. Therefore it is neither unjust nor unreasonable to inflict a penalty which will in some degree compensate for that injury where the resisted claim is finally adjudged to be just, and which will also tend to deter the company liable from interposing unnecessary delay in settlement. The penalty imposed by this statute may seem un-

usually harsh, and it is argued that the severe penalty is calculated to deter companies from litigating losses against which their defenses appear to be meritorious. That was a matter for legislative determination, and we do not find the penalty imposed by this statute to be so unreasonable as to justify us in declaring it void on that account.

Judgment affirmed.

WOOD, J., dissents as to penalty.

TEAGUE v. STATE.

Opinion delivered April 20, 1908.

1. FORGERY—ALLEGING TENOR OF INSTRUMENT.—An indictment for forgery which alleges the forgery of a writing "of the tenor, purport and effect following, towit," followed by what appears to be a copy of the instrument, will be held to have set forth the tenor of the instrument. (Page 129.)
2. SAME—VARIANCE.—An indictment for forgery which fails to set out an erased word on the forged instrument and a marginal memorandum thereon is not fatally variant. (Page 129.)
3. SAME—ALLEGATION OF INTENT.—An indictment which in effect alleges that defendant unlawfully and feloniously uttered a note, knowing it to be forged, with the intent feloniously to obtain possession of another's property necessarily imports that the note was uttered with a fraudulent intent. (Page 130.)

Appeal from Arkansas Circuit Court; *Frederick D. Fulkerson,* Judge, on exchange; affirmed.

STATEMENT BY THE COURT.

Appellant, W. F. Teague, was indicted for the crime of forgery and of uttering a forged instrument. The jury returned a verdict of guilty on the second count, and fixed his punishment at a term of two years.

The second count of the indictment is as follows: "The grand jury, in the name and by the authority of the State of Arkansas, accuse the said W. F. Teague of the further crime of uttering a forged writing, committed as follows, towit: The said W. F. Teague, in the county and State aforesaid, on the 31st

of August, A. D. 1906, did then and there unlawfully and feloniously utter, publish and pass as true to one J. M. Thompson, who was then cashier of the Home State Bank, of DeWitt, a certain paper writing, which said paper writing was false and forged, and which purported to be a promissory note made by W. F. Teague and Oscar Buchmiller, and payable to the Home State Bank for the sum of twenty-five dollars, which said false and forged writing is of the tenor, purport and effect following, towit:

'$25.00.

'DeWitt, Ark., August 31, 1906.

'Ninety days after date, we, or either of us, promise to pay to the order of Home State Bank twenty-five and no-100 dollars, for value received, negotiable and payable without defalcation or discount at the Home State Bank of DeWitt, Arkansas, with interest from maturity at the rate of ten per cent. per annum until paid. The makers and indorsers of this note hereby severally waive presentment of payment, notice of nonpayment and protest.

'W. F. TEAGUE,

'OSCAR BUCHMILLER.'

The said false and forged writing then and there uttered, published and passed as true by the said W. F. Teague to the said J. M. Thompson as cashier as aforesaid * * * with the intent then and there feloniously to obtain possession of the money and property of the Home State Bank and of the said J. M. Thompson, and to cause the said J. M. Thompson and the said Oscar Buchmiller to be injured in their estates, the said W. F. Teague then and there well knowing said writing to be false, forged and counterfeit. Against the peace and dignity of the State of Arkansas."

The note, as introduced in evidence, was as follows:

"$25

"DeWitt, Ark., August 31, 1906.

"Ninety days after date, we or either of us promise to pay to the order of Home State Bank twenty-five and no-100 dollars, for value received, negotiable and payable without defalcation or discount at the Home State Bank, of DeWitt, Arkansas, with interest from ~~date~~ maturity at the rate of ten per cent. per annum

until paid. The makers and indorsers of this note hereby severally waive presentment of payment, notice of nonpayment and protest.

"No. 535. Due Nov. 31, 06.

"W. F. TEAGUE,
"OSCAR BUCHMILLER."

J. M. Brice, for appellant.

1. The indictment is bad because of the use of the words (in describing the alleged forged note) "of the tenor, purport and effect," etc. These are established rules of law: in construing an indictment nothing can be taken by intendment or by way of recital to supply the want of certainty; in cases of doubt the words of an instrument are to be construed most strongly against the pleader, and the last words or clause prevails. 66 Ark. 308; 77 Ark. 537. The legal meaning of "tenor" is "exact copy". 58 Ark. 242. Surplusage means unnecessary averments in an indictment which do not conflict in meaning with any necessary allegations. 11 Am. & Eng. Enc. of Law (1 Ed.), 552. The words "purport and effect" can not be harmonized in meaning with "tenor" as above defined. They are not excessive allegations; but, if so, that will vitiate the indictment, if they render it uncertain, double, or repugnant. 10 Ark. 318. See also 6 Ark. 165; 77 Ark. 537.

2. The failure to allege that the defendant uttered the instrument with the "intent to defraud" and to charge that it was "wilfully" done renders the indictment bad. Fraudulent intent is the gist of the action. Clark's Crim. Proc. 262.

3. There is a fatal variance in the indictment and proof. The description of the instrument set out in the indictment must correspond in every particular to the one introduced in evidence. 62 Ark. 516; Clark's Crim. Proc. 332; 58 Ark. 242.

4. The court erred in refusing to give the first instruction requested by appellant, to the effect that an insane person is one whose mind is affected by general imbecility, or is subject to one or more specific delusions. 11 Am. & Eng. Enc. of Law (1 Ed.), 105.

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

1. True, the word "tenor" means an exact copy, and, such being the case, the meaning contained in the words "purport and effect" being included in the former word, the latter words are only surplusage, and may be stricken out without destroying the efficiency of the accusation. 58 Ark. 242; 32 Ark. 611; 5 Ark. 349; 2 Ohio St. 91; 8 Ia. 288; 14 Wis. 479; 27 N. C. 287; 102 Ia. 681; 58 N. W. 911; 29 Eng. Law & Eq. 558; 72 Miss. 110; 18 Mo. 445; 44 S. W. 245; 103 Ind. 419; 17 Tenn. 392; 9 Yerg. (Tenn.), 392; 101 Ind. 379; 26 Ia. 407.

2. The indictment sufficiently expresses the idea conveyed by the words "wilfully" and "with intent to defraud." The meaning of the word *wilfully* is embraced within the scope of the terms *unlawfully, feloniously and knowingly.* 24 N. W. 535; 7 Pac. 872; 64 Ia. 333; 24 Kan. 445; Wharton's Crim. Law, § 380; 62 Ark. 368; *Id.* 533; 47 Ark. 572.

HART, J., (after stating the facts.) Appellant contends that the indictment is bad because the words "tenor, purport and effect" were used in describing the note alleged to have been forged and uttered. The word "tenor," used in an indictment, imports an exact copy. *McDonnell* v. *State*, 58 Ark. 242; *Crossland* v. *State*, 77 Ark. 537. The words "purport and effect" mean the substance of an instrument, and were, therefore, surplusage in the indictment, for their meaning does not conflict with that of the word "tenor," but is rather included and expressed in it.

2. Appellant, also, contends that there is a variance between the alleged forged instrument contained in the indictment and the one introduced in evidence. A comparison of the two shows that the variance consists in the word "date" marked as indicated in the face of the note and the words and figures as follows "No. 535. Due November 31,-06," written in the margin of the note. In the absence of proof to the contrary, the presumption is that the marks on the word "date" (thus, ~~date~~) were intended to erase it, and that the word "maturity" was substituted in its stead before the note was presented for negotiation by appellant. Hence it forms no part of the note. The memorandum in the margin of the note, showing its number and the date when due, forms no part of the instrument. For this

reason they may be omitted from the description, when the instrument is set out according to its tenor. *McDonnell* v. *State,* 58 Ark. 249.

3. Appellant also urges that the court erred in not sustaining a demurrer to the indictment for the reason that it fails to allege that he uttered the instrument with intent to defraud. Under the Code no particular form of words is required to be used in an indictment. *Read* v. *State,* 63 Ark. 618; *Blevins* v. *State,* 85 Ark. 195. The indictment, stripped of its verbiage, alleges that appellant unlawfully and feloniously uttered a note, knowing it to be forged, with the intent to feloniously obtain possession of the property of another. These allegations necessarily import that it was uttered with a fraudulent intent. *Bennett* v. *State,* 62 Ark. 517; *Carroll* v. *State,* 71 Ark. 403.

4. Appellant also urges that there was error in not giving his first instruction on the subject of insanity as a defense to crime. This point was fully covered in the instructions given by the court.

Judgment affirmed.

86	130
87	307
88	128

86	130
90	491

MAHONEY v. ROBERTS.

Opinion delivered April 27, 1908.

1. ACTIONS—MISJOINDER—PREJUDICE.—It was not a prejudicial error to join a cause of action for breach of a contract with another for a tort where the same evidence was necessary to sustain both causes, as the two causes of action, if brought separately, might have been consolidated under Acts of 1905, p. 791. (Page 137.)

2. WITNESSES—COMPETENCY OF WIFE.—A wife, sued jointly with her husband, may, under Kirby's Digest, § 6164, be required to testify at the instance of the adverse party, but, under Kirby's Digest, § 3095, she cannot be compelled to testify for or against her husband or concerning any communication made by one to the other during the marriage. (Page 138.)

3. TORT—PROCURING BREACH OF ANOTHER'S CONTRACT.—Persons who aid another to violate a contract with a stranger, whether for the pur-

pose of injuring the latter or for the purpose of obtaining some benefit for themselves at the latter's expense, to his injury, are guilty of an actionable wrong, and are liable for damages. (Page 139.)

4. HUSBAND AND WIFE—LIABILITY FOR JOINT TORT.—A married woman is liable for a tort committed during coverture jointly by her husband and herself if in committing such tort she acted of her own volition. (Page 139.)

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

Carmichael, Brooks & Powers, for appellants.

1. Verdict is not supported by the evidence. The contract was that Mahoney should not enter into said *business in competition* with Roberts. This means only the *same business,* for if construed to mean *all business,* the contract would be void as in restraint of trade. Beach on Monopolies and Ind. Trusts § 37; 71 S. W. Rep. 691, 695; 97 Mo. App. 64.

2. In suits for conspiracy the wife is wholly relieved from liability. Fritzherbert, N. B. 116; 44 N. C. 46 2 Munf. 15; 44 Ark. 640.

3 The names of Mrs. Mahoney and Collins should have been stricken from the complaint for misjoinder of parties and causes of action. Webb's Pollock on Torts (last Ed.), p. 66; citing and reviewing *Lumley* v. *Gye,* Q. B. (1853); 11 L. R. A. 550, 545; 21 *Id.* 223. See also 44 C. C. A. 426; 105 Fed. 163; 62 L. R. A. 673. Two appellants can not be held liable for the mere inducing another to break his contract, there being no coercion. 91 Ky. 112; 48 N. Y. 430; 13 Lea, 508; 75 Me. 225; 159 Penn. 420; 91 Ky. 136. A malicious motive can not be a cause of action. 67 L. J. Q. B. (N. S.), 119; 24 Pa. 308; 75 *Id.* 467; 13 Lea, 507; 72 N. Y. 43; 121 Mass. 114; 8 Gray, 409.

4. Breach of contract and tort can not be joined. Anson on Contracts, 273 and authorities *supra.*

5. The rule in civil conspiracies is that *damages,* and not malice, is the gist of the action. 73 Ark. 437; 7 Hill (N. Y.), 107; Cooley on Torts, 85, 86; 4 Enc. Pl. & Pr. 739, 740.

6. A married woman is not liable for her wrongs of the nature of violation of contract. 39 Pa. St. 299; 46 Vt. 332; 48 Pa. St. 497; 5 La. Ann. 586; 11 Mo. 400; 49 N. H. 314; 97 N.

C. 106; 29 Tex. 523; 67 Me. 251; Webb's Pollock on Torts, 64. The action sounded in tort. 58 Ark. 138.

7. The mere loan of money or property to help another is not a conspiracy. 73 Ark. 440; 8 Cyc. 649 note; 6 L. R. A. 230; 80 Ark. 438.

8. Husband and wife can not be partners. 56 Ark. 277. Nor can they testify for or against each other. Kirby's Digest, § § 3094, 3095.

J. G. Dunaway and *J. W. Blackwood,* for appellee.

1. The decree in the chancery court is *res judicata* on all questions except damages. The verdict settles that, and is sustained by the evidence.

2. This court has settled the law as to restraint of trade. 62 Ark. 101. See 63 Am. Dec. 383; 106 Cal. 332; 69 Ga. 656; 45 Ga. 319; 6 Ill. App. 60; 145 Ind. 35; 32 Md. 561; 27 Mich. 15; 33 N. J. Eq. 597; 72 Hun (N. Y.), 43; 106 N. Y. 486; 143 N. Y. 488.

3. A retiring partner who contracts to quit the business must quit. He may be enjoined. 7 Daly (N. Y.), 355; 3 Green (Iowa), 596; 28 N. J. Eq. 151; 62 L. T. N. S. 453; 11 Ind. 70; 60 Pa. St. 458.

4. A covenant not to carry on a certain trade, etc., is broken by the covenanter acting as manager, agent or employee. 55 Law Times N. S. 769; 166 Pa. St. 230; 42 N. J. Eq. 606; 18 W. R. 993; 4 Ch. D. 636; 38 L. J. 111; 36 Ch. D. 411; 19 W. R. 556; 118 Cal. 352; 6 Ind. 203; 34 How. Pr. (N. Y.), 202; 166 Pa. St. 230; 24 L. T. N S. 249; 40 W. R. 220; 61 N. H. 83; L. R. 7 Exch. 127.

5. Using name of son or nephew as mere cover or blind is a breach of covenant. 32 Md. 561; 17 Law Times (N. S.), 486.

6. All the defendants were responsible in a case like this when fraud, malice and conspiracy all unite, whatever may be ruling as to *Lumley* v. *Gye,* 2 El. & Bl. 216. L. R. 6 Q. B. Div. 333; 107 Mass. 555; 76 N. C. 355; 70 Ib. 601; 21 L. R. A. 233; 62 L. R. A. 967; Addison on Torts, vol. 1, p. 37; Cooley on Torts (2d Ed.), 581; 40 L. R. A. (Md.), 382; 176 Ill. 608; 56 L. R. A. (W. Va.), p. 804; 62 L. R. A. 967; 80 Tex. 400; 16 S. W. 111.

7. Mrs. Mahoney's testimony was competent. 54 Ark. 159; 33 *Ib.* 611; 37 *Ib.* 298; 43 *Ib.* 307; 59 *Ib.* 180; 62 *Ib.* 26; 68 *Ib.* 180; Kirby's Digest, 3093; Vol. 15 of Am. & Eng. Enc. Law, p. 900.

8. The husband and wife may be jointly sued and charged for a tort done by both of them, if the wife does not act by the husband's coercion. 12 Mod. 246; 4 Bing. N. Cas. 96; 51 Me. 308; 114 Mo. 560; 49 N. H. 318; 56 N. H. 339; 45 La. Ann. 1221; 16 Neb. 306; Add. (Pa.), 13; 17 Q. B. D. 177; 67 Me. 259; 56 N. Y. 43; 17 R. I. 81; 3 Barb. (N. Y.), 500; 16 Mass. 389.

BATTLE, J. Mord Roberts brought this action against J. Mahoney and Emma E. Mahoney, his wife, and F. D. M. Collins. For cause of action he alleged in his complaint: "That on the 26th day of January, 1906, he and the defendant J. Mahoney were doing a partnership business in the city of Argenta, Arkansas, and were engaged in what is commonly known as the concrete and cement work and other kinds of business; that, being unable to agree in the further prosecution of their work as partners, they dissolved the said partnership by mutual consent, making certain divisions of the partnership property; and in consideration of $500, cash in hand paid by the said plaintiff to the said defendant, J. Mahoney, the said J. Mahoney entered into an agreement that he would not engage in said business in competition with plaintiff in Argenta, Arkansas. That the said J. Mahoney, being unable to engage in said business directly without violating his said agreement with plaintiff, conspired with his said co-defendants to unlawfully and fraudulently do business under the name of said defendant, Frank Collins, a minor under the age of twenty-one years, thereby seeking to circumvent said agreement and the spirit and terms thereof, and the said J. Mahoney and his wife, Emma E. Mahoney, furnished to the said Frank Collins teams, tools, implements, bondsmen and money with which to carry out the unlawful and fraudulent enterprise; that the said Collins is a son of the said Mrs. Mahoney, and a stepson of the said J. Mahoney, and they all live together, and have their office together in the city of Argenta, Arkansas, and collect the money from the work done in said business, and share the same in common as partners. That the said J. Mahoney is

skilled in the concrete and cement business, and is well known as such in Argenta, and is wilfully and unlawfully soliciting and doing business in Argenta, Arkansas, in gross and utter violation of his said contract with plaintiff, by the aid, connivance and assistance of his said co-defendants, Mrs. Emma E. Mahoney and F. D. M. Collins, to the great damage of the plaintiff, towit, in the sum of five thousand dollars."

The defendants demurred to the complaint on the following grounds:

"1. The complaint does not state facts sufficient to constitute a cause of action.

"2. For misjoinder of parties.

"3. For misjoinder of causes of action."

The defendant, Mrs. Mahoney, moved the court to strike her name from the complaint for the following reasons:

"1. That there is a misjoinder of parties.

"2. Because there is a misjoinder of causes of action."

The defendant Collins, asked to have his name stricken from the complaint for the same reasons.

The court overruled the demurrer and the motions to strike.

The defendants separately answered the complaint. J. Mahoney admitted the former partnership with plaintiff, and that he entered into a contract with the plaintiff that he would not again enter into the cement and concrete business in Argenta in competition with plaintiff; and he and the other defendants denied all the material allegations in the complaint; and Mrs. Mahoney pleaded her coverture in bar of the action against her.

"The plaintiff filed an amendment to his complaint, alleging that, in a certain case in the Pulaski Chancery Court wherein Mord Roberts was plaintiff and James Mahoney, Emma E. Mahoney and F. D. M. Collins were defendants, it was alleged by the said plaintiff that after the execution of the agreement between the said Roberts and the said James Mahoney, Emma E. Mahoney and F. D. M. Collins, being, respectively, wife and stepson of the defendant, J. Mahoney, unlawfully conspired with the said J. Mahoney and caused the said J. Mahoney to unlawfully do business under the name of the said Collins, thereby seeking to circumvent both the spirit and terms of said agreement, and the said Emma E. Mahoney furnished the said Collins teams,

apparatus and money with which to carry on the said cement business in the city of Argenta, contrary to the terms and agreement of said instrument. That, upon issues joined by the defendants, the Pulaski Chancery Court decreed, and the court, being well and sufficiently advised in the premises and after hearing the argument of the solicitors herein, doth find that the business conducted in the city of Argenta under the name of Frank Collins, or F. D. M. Collins, is in fact the business of J. Mahoney, and is in violation of the agreement entered into by the plaintiff, and J. Mahoney, on the 26th day of January, 1906. And that said agreement is lawful. The plaintiff alleges that the parties to the said suit in the Pulaski Chancery Court are the same as in this court, that the issues as to whether the business carried on by said Frank Collins was the business of J. Mahoney and a violation of the said agreement and that [whether] said agreement was lawful, were questions determined by the Pulaski Chancery Court, and plaintiff now attaches a complete transcript of the complaint, the amended complaint, the answers of the said defendants and the decree in the said cause as 'Exhibit A' to this amendment to the complaint."

The defendants answered the amendment and denied that the record in the Pulaski Chancery Court is *res judicata,* and stated the facts to be that the decree "itself shows that F. D. M. Collins and Mrs. Emma Mahoney were not mentioned in said decree."

The jury selected and impaneled to try the issues in the case, after hearing the evidence adduced by the parties and the instructions of the court, returned a verdict in favor of the plaintiff against all the defendants for $475. The court rendered judgment against them for that amount, and they appealed.

The evidence supporting the verdict of the jury shows the following facts:

Plaintiff, Mord Roberts, and the defendant J. Mahoney, previous to the 26th day of January, 1906, and on that day did a business as partners in Argenta, Arkansas, and had been engaged in what is commonly known as the concrete business; and on that day dissolved partnership, and entered into the following agreement:

"To all concerned: Today appeared before me James Ma-

honey and Mord Roberts, formerly of the firm of Mahoney & Roberts, contractors, 116 Main Street, Argenta, Arkansas. The object of this document is for the purpose of dissolving the above partnership by mutual consent for a consideration of five hundred dollars paid to Mahoney by said Roberts, which is hereby acknowledged; Mr. Mahoney retaining all teams, wagons, tools and other appurtenances pertaining to the business that he had in his possession at the time of the formation of the above partnership. Mr. Mahoney relinquishes all his claims on cement, block machine, and all royalties on products of said machine. Mord Roberts by this agreement becomes in sole possession of all the above, which is relinquished by Mr. Mahoney. Mr. Roberts will continue the business at No. 116 Main Street, Argenta, Arkansas, and assumes all liabilities of said partnership, and is alone authorized to receive all bills due the former firm. All future business and contracts contemplated by the above firm reverts to Mr. Roberts. All material, such as rock, cement and sand, is the property of said Mord Roberts; Mr. Mahoney agreeing to turn business of above nature over to Mr. Mord Roberts, in the city of Argenta, Arkansas. Mr. Mahoney further agrees that he will not enter into said business, in Argenta, Arkansas, in competition to said Roberts.

"This January 26, 1906.

(Signed) "MORD ROBERTS,
"J. MAHONEY."

On the 20th of August, 1906, plaintiff instituted a suit in the Pulaski Chancery Court against the defendants, and alleged in his complaint therein that, after the execution of the foregoing agreement, "the defendants Emma E. Mahoney and F. D. M. Collins, being, respectively, wife and stepson of the defendant, J. Mahoney, unlawfully conspired with the said J. Mahoney and caused the said J. Mahoney to unlawfully do business under the name of the said Collins, thereby seeking to circumvent both the spirit and terms of said agreement; and the said Emma E. Mahoney furnished to the said Collins teams, apparatus and money with which to carry on the said cement business in the city of Argenta, contrary to the terms of said agreement." After hearing the evidence adduced in that case, the Pulaski Chancery Court found "that the business conducted in the city of Argenta

under the name of Frank Collins, or F. D. M. Collins, is in fact the business of J. Mahoney, and is in violation of the agreement entered into by the plaintiff and J. Mahoney on the 26th day of January, 1906; and that said agreement is lawful;" and perpetually enjoined the defendants from carrying on the cement business in the city of Argenta in violation of said agreement.

Mrs. Mahoney is the wife of J. Mahoney, and Collins is the son of Mrs. Mahoney and the stepson of J. Mahoney. They are closely associated as a family, and all live and have their office in Argenta. Collins worked for J. Mahoney and plaintiff, while they were in partnership. After the dissolution of the firm, J. Mahoney, Mrs. Mahoney and Collins carried on the concrete business in Argenta, in the name of Collins. Mahoney furnished tools, teams, did concrete work, and superintended the work of the firm, free of charge, Collins was a minor, without any property subject to execution. He rendered services in the performance of labor and supervision of the business of the concern. Mrs. Mahoney had considerable property, and was treasurer. She received as much as $10,000 from the sale of one piece of her property. She received the money paid for work done, and paid with the same the expenses of the business, and advanced money necessary to secure contracts. Mahoney entertained great prejudice and ill will towards the plaintiff, and sought to injure him in his business, and made the business in the name of Collins subserve that purpose. Defendants concede that plaintiff has been damaged by reason of the violation of his agreement with Mahoney as much as the amount of the verdict. Mrs. Mahoney was required to, and did, testify in behalf of the plaintiff, in the trial of this action, over the objections of the defendants.

The first question in the case is, was there a misjoinder of causes of action in plaintiff's complaint? Appellants insist that there was, because J. Mahoney was sued for breach of contract, and the other defendants were sued for a tort. If this be true, was it prejudicial?

Section 6148 of Kirby's Digest provides: "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The court had jurisdiction of both causes of action, and both causes could be joined in the same action and prosecuted to judgment, unless the defendants, or one of them, moved to strike out one of the causes. The same evidence was necessary to sustain both causes, except that it was necessary to show that Mrs. Mahoney and Collins caused J. Mahoney to violate his agreement. The same damages and judgment were recoverable in both cases. Had a separate action been brought for each cause, the court could have consolidated them and tried them as one action, under the act of May 11, 1905, which is as follows: "When causes of action of a like nature or relative to the same question are pending before any of the circuit or chancery courts of this State, the court may 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, and may consolidate said causes when it appears reasonable to do so." Acts of 1905, page 798. The causes of action being relative to the same question, the two actions could have been consolidated. (*St. Louis, Iron Mountain & Southern Railway Company* v. *Broomfield,* 83 Ark. 288; *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285.) As this could have been done if separate actions had been brought, it is difficult to see how the trying the two causes as one action in this case was prejudicial. There could be no prejudice in the plaintiff adopting the course the court could have compelled the parties to follow if two actions had been brought.

There was no error in compelling Mrs. Mahoney to testify on motion of plaintiff. Section 6164 of Kirby's Digest. But she could not be compelled to testify for or against her husband, or concerning any communication made by one to the other during their marriage. Such testimony, if any, upon objection, should have been excluded. A general objection to the competency of the witness would not have been sufficient, if any of the testimony had been admissible, as in this case.

The decree in the suit brought by appellee in the Pulaski Chancery Court against the defendants determined that the business done in the name of Collins was the business of J. Mahoney, and that Collins and Mrs. Mahoney aided him in transacting it; that the agreement entered into by appellee and appellant, J. Ma-

honey, on the 26th of January, 1906, was lawful and valid; and that the business transacted by the appellants was in violation of it. As to these facts, the decree is *res judicata.* The evidence adduced in the trial of this action, in addition to the decree, was sufficient to sustain the jury in finding that the assistance given to J. Mahoney by his co-defendants was for the purpose of inducing and did induce him to violate his agreement. No other satisfactory explanation can be given of the transaction or carrying on the business in the name of Collins, a minor, without the means sufficient to do so.

The evidence was also sufficient to sustain the jury in finding that the assistance was rendered with the intent to injure appellee (they participating in the evil intent of J. Mahoney), or for the purpose of obtaining some benefit for themselves at the appellee's expense, or both, to his injury. In such case they were guilty of an actionable wrong, a tort, and were liable for damages. *Dale* v. *Hall,* 64 Ark. 221; *Boysen* v. *Thorn,* 21 L. R. A. 233, and authorities cited in note; *Walker* v. *Cronin,* 107 Mass. 555; *Raymond* v. *Yarrington,* 62 L. R. A. 967; *Gore* v. *Condon,* 40 L. R. A. 382; *Doremus* v. *Hennessy,* 176 Ill. 608; *Angle* v. *Chicago, St. Paul, etc., Railway,* 151 U. S. 13, 14; *Lumley* v. *Gye,* 2 El. & Bl. 216; 2 Cooley on Torts (3d Ed.), page 592, and cases cited; Pollock on Torts, pp. 668, 669.

Appellant Mrs. Mahoney insits that she can not be held liable because of her coverture. In *Kosminsky* v. *Goldberg,* 44 Ark. 402, it is said: "For the wife's torts committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: 1. Where the husband is absent and had no knowledge of the intended act, as in *Head* v. *Briscoe,* 5 Carr. & Payne, 484 (24 E. C. L. R. 667), where a man was held answerable for a libel published by his wife, although they were permanently living apart. See also *Catterall* v. *Kenyon,* 3 Q. B. 309, 40 E. C. L. R. 749. 2. Where the husband is absent, but where the tort is done under his direction and instigation, as in *Handy* v. *Foley,* 121 Mass. 259. 3. Where the husband was present, but the wife acted of her own volition, of which *Cassin* v. *Delaney,* 38 N. Y. 178, is an example. And 4. Where the tort is committed in the company of the husband, and by his command or encouragement; for instances of which see *Daily* v. *Houston,* 58 Mo. 361; *Brazil* v. *Moran,* 8

Minn. 236. In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party; and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she can not be sued alone. But in the last case supposed the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presence, if unaccompanied by his direction. * * * His presence raises a presumption that she was acting under compulsion. * * * Of course, this presumption may be rebutted by proof that he did not authorize or influence her act." Schouler on Husband and Wife, section 135; *Carleton* v. *Haywood,* 49 N. H. 314.

Mr. Schouler, in his treatise on Husband and Wife, says: "If the husband dies before damages are recovered in the suit, the wife alone remains liable. So it would seem that the common law recognizes a liability on her part which continues through the marriage relation; coverture operating, however, so as to suspend the remedy against the married woman, and to bring in as a joint party the custodian of her fortune." Schouler on Husband and Wife, § 136.

In this case Mrs. Mahoney held the purse strings of the firm, received the proceeds of the business, and with them paid the expenses and debts of the concern. She was the dominant party. The jury were justified in finding that she was free from coercion.

Judgment affirmed.

HILL, C. J., did not participate.

STATE v. DOWDY.

Opinion delivered April 27, 1908.

1. APPEAL—REVIEW—ASSIGNMENT OF ERRONEOUS REASONS.—Where the chancellor's decision in a case was correct, the case will be affirmed,

even if the reasons upon which the court based the decision are not sound. (Page 143.)

2. CONTEMPT—EVIDENCE.—Where defendant was enjoined from interfering with the title to any lands owned by plaintiff, he will not be punished for contempt for selling land claimed by plaintiff if it does not appear that plaintiff owned such land. (Page 144.)

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

S. Brundidge, Jr., for appellant.

The original order of injunction having been properly made, it was valid and binding until annulled or revoked. No appeal was ever taken, nor any motion to dissolve the injunction ever interposed. Appellee was a party to the proceeding, and can not attack it collaterally, nor question its validity except upon the ground that it was void. 9 S. C. 606; 35 Kan. 616; 12 N. E. 136; High on Injunctions, § § 847, 848.

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

1. The decree was too indefinite and uncertain to be enforced. It did not notify appellee in detail or in specific terms as to what acts were enjoined. 62 Ind. 493; 58 Fed. 132; 25 Hun, 57; 58 Conn. 502; 29 Fed. Cases, 17517; 18 Ind. 458; 74 N. Y. Sup. 1089; 5 Munf. (Va.) 442; 10 Paige, 485; 4 Paige, 444; 9 Paige, 234.

2. Attachment for contempt will not issue for disobedience of a temporary restraining order, but only for violation of the final decree. 9 Cal. 18; 49 Am. St. Rep. 374; 32 How. Prac. (N. Y.), 408; 5 Hare (26 Eng. Ch.), 415.

3. If the decree was definite and certain, attachment could not issue until it appeared that these terms had been violated and that Greer had suffered damages thereby. 11 Paige, 180; 10 Paige, 485.

McCULLOCH, J. This is an appeal from a decision of the chancery court of White County in a contempt proceeding whereby appellee was charged with having disobeyed a former decree of that court enjoining him from violating a certain contract entered into between him and one Greer, the plaintiff in that cause.

The decree which appellee is charged with having disobeyed

is (omitting caption and recitals as to appearances of parties, etc.), as follows:

"And it appearing to the court that on the 9th day of September, 1895, plaintiff and defendant entered into a written contract, whereby defendant for a valuable consideration agreed that he, the said P. P. Dowdy, would in no way interfere with the title to any of the lands owned by said B. W. Greer at the time of the date of the said contract, in White County or elsewhere, either directly or indirectly to give any information to any persons which will enable them to interfere with or disturb the title or quiet enjoyment of said Greer to said lands, and that he would refrain from doing or saying anything that will disturb the peaceable and quiet possession of said Greer. And it further appearing that, since the execution of said contract, said defendant has been actually engaged in giving the divers other claimants information as to alleged irregularities in said Greer's title and inducing them to institute suits in the courts of this State against said Greer involving the title to the said Greer's lands; that said P. P. Dowdy is threatening to continue in the further interference with the business and affairs of said Greer in open violation of his said contract, and is about to procure and incite frivolous litigation; that said Dowdy is wholly insolvent, and that by reason of the acts of said defendant the plaintiff is about to suffer irreparable loss and damage. It is therefore by the court considered, ordered, adjudged and decreed that the plaintiff, P. P. Dowdy, be and he is hereby perpetually and forever restrained, prohibited and enjoined from the violation of his said contract of September 9, 1895, either directly or indirectly by himself or by his agents, attorneys, or other representatives in this: That he is further restrained from interfering in any manner, directly or indirectly, with the title of any lands owned by the said Greer on the date of said contract, towit: September 9, 1895, directly or indirectly by giving information in any way or manner, directly or indirectly, to any person or persons which will enable him or them to interfere with or disturb the title or quiet enjoyment of said Greer to said lands, from doing or saying anything directly or indirectly that will disturb the peaceful and quiet possession of said Greer, and that defendant pay all costs of this action, for which execution

may issue in manner and form as upon a judgment at law, and that the temporary restraining order heretofore issued herein be and the same is hereby made perpetual to the extent expressed in this decree and is set aside and held as naught except as herein expressed."

Greer filed his motion, supported by affidavit, alleging in substance that appellee had disobeyed the terms of the decree by "transferring to Bayard C. Rhodes the W. ½ of S. E. ¼, section 1-7-5, and the W. ½ of N. W. ¼ section 7-7-5, as attorney for H. A. Pierce in disobedience of the injunction."

Appellee filed his response to the motion, denying that he had disobeyed the injunction, and, among other things, denied that Greer ever had any title to the said tracts of land described in the motion.

The cause was submitted to the court upon the motion and supporting affidavit, and appellee's response thereto, a copy of the temporary restraining order and the former decree alleged to have been disobeyed, and also a copy of the contract between Greer and appellee which the latter was enjoined from violating. The chancellor decided that the former decree of the court was "so indefinite and uncertain that the same can not be inforced by the court in a proceeding for contempt," and discharged appellee from the rule. That decision has been brought here for review.

We are of the opinion, without adopting the view of the chancellor to the effect that the entire decree was unenforcible because it is too indefinite and uncertain, that the record before us would not sustain an order punishing appellee for contempt. The whole case was submitted on the motion; and if the decision was correct, it becomes our duty to affirm it, even if we conclude that the reasons upon which the court based the decision are not sound. *Fordyce Lumber Co.* v. *Wallace,* 85 Ark. 1; *Greenlee* v. *Rowland,* 85 Ark. 101. The chancellor did not undertake to pass upon the facts of the case, and based his decision on the uncertainty of the former decree; but, as we find no evidence in the record which would have justified an adjudication that appellee had brought himself in contempt of court, it is our duty to affirm the decision.

It of course goes without controversy that, as the court

had jurisdiction to render the former decree enjoining him from violating the contract with Greer, appellee was bound to obey its terms, and that by disobedience he would subject himself to punishment for contempt of court. *Meeks* v. *State,* 80 Ark. 579.

The decree in question enjoined appellee from violating his written contract with Greer of a certain date whereby he agreed that he would not in any way "interfere with the title to any lands owned by said B. W. Greer at the time of the date of the contract, in White County or elsewhere, either directly or indirectly, to give any information to any persons which will enable them to interfere with or disturb the title or quiet enjoyment of said Greer to said lands, and that he would refrain from doing or saying anything that will disturb the peaceable and quiet possession of said Greer."

It is alleged by Greer in his motion that he had a title to the lands described therein, but this is denied by appellee, and, before the latter could be punished for contempt, proof of this fact should have been adduced.

The original contract was introduced in evidence, but it describes the lands which formed the basis of the agreement only by reference to certain records in the office of the recorder of White County. The lands are not described in any other manner in the contract, and, as the records therein referred to of the recorder's office are not brought into this case, we have no means of knowing whether a description of the particular tracts which are described in this proceeding was included or not. The record fails, therefore, to sustain the charge that appellee has violated the contract. Now, if it was shown that these lands were described in the contract as a part of the lands to which Greer claimed title, and that appellee had done some act which would interfere with or defeat that title, it might be held that he had violated his contract and the terms of the decree so as to render him subject to punishment for contempt. But, as these lands were not described in the contract, so far as is made to appear in this record, and as there is no proof that Greer has any title to these lands, the conveyance executed by appellee as attorney for Pierce could not constitute disobedience of the court's decree. Of course, appellee can not be held to be in contempt of court simply because he undertakes to convey lands

which Greer may see fit to lay claim to, whether he has title thereto or not. The contract and the decree of the court enjoining obedience to its terms can not be construed as a roving commission to Greer to prevent appellee from having anything to do with any lands to which he (Greer) may see fit to assert a claim. The contract and decree operate, at most, only on the lands which are referred to in the contract and those to which Greer has title.

It is questionable whether or not the case is brought here by proper method for review, but the conclusion which we have reached respecting the correctness of the chancellor's decision renders it unnecessary for us to pass on the method employed in bringing the case here.

Affirmed.

STUCKEY *v.* O'NEAL.

Opinion delivered April 27, 1908.

APPEAL—INVITED ERROR.—Where appellant's first elicited evidence concerning a portion of a transaction that had no relevancy to the issues, they cannot complain if appellee in rebuttal proved the rest of the transaction.

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

Morris M. Cohn, for appellants.

It was error to allow appellee to state the circumstances of the transaction with Arnold. It had no bearing on the case, and was prejudicial. Self-serving utterances and verbal conversation with another in the absence of the party are not admissible. 72 Ark. 409; 76 *Id.* 481; 74 *Id.* 437; 19 *Id.* 590. The utterances of strangers to a party do not bind him. 50 Ark. 397; 76 *Id.* 435.

Ulysses S. Bratton and *Harry H. Myers,* for appellees.

1. Verdicts are not disturbed if supported by any legal evidence. 67 Ark. 537; 76 *Id.* 326; 84 Ark. 241.

2. It was not error to admit the testimony as to the conversation between Arnold and appellee; but if it was, it was invited error. 14 Ark. 86. Furthermore, it was harmless. 77 Ark. 435; 73 *Id.* 407; 74 *Id.* 417; 76 *Id.* 276.

McCULLOCH, J. Appellants, who are attorneys at law, instituted this action against the appellee to recover a balance alleged to be due on a fee for defending him in the circuit court of Lawrence County on a charge of murder. The account also embraces a balance alleged to be due on a fee for representing appellee in a damage suit brought in the same court. The sole issue of fact in the case is as to the amount agreed upon as fee, the appellants claiming that in the murder case it was fixed by agreement at $2,000, and appellee claiming that it was fixed at $1,000, and that he had paid it in full. The case went to the jury upon this disputed fact, and a verdict was rendered in favor of appellee. The verdict was contrary to what appears to be the great preponderance of the evidence; but it can not be said that the evidence was insufficient to sustain the verdict. We do not feel at liberty to disturb the verdict on that account.

Appellants introduced evidence concerning a transaction between themselves and one Arnold, which had no bearing upon the issue in the case. It was this: They proved by Arnold, who claimed to be a friend of O'Neal, the appellee, that they agreed to pay him $250 to assist them in getting up the evidence in the case, and that this amount was to be paid by them out of the fee which they were to receive in the case; that some time during the pendency of the case against appellee they wrote to the latter requesting him to pay Arnold $200, and that appellee paid Arnold $100 of the amount, but declined to pay any more. It was not contended that appellee had agreed to pay the amount to Arnold. On the contrary, the evidence introduced on the part of the appellants showed affirmatively that he was not to pay the amount, and that the agreement to pay Arnold was a voluntary one on their part. Arnold testified, at the instance of the appellants, concerning the payment to him of the $100 by appellee, and related the circumstances under which it was paid.

While appellee was on the stand as a witness, he was asked by his counsel to state the circumstances under which he made the payment of $100 to Arnold, and in reply he made this state-

ment, which was objected to, and which is now assigned as error: "Mr. Arnold came in pretty soon, and I says, 'I received a letter from Stuckey and Campbell requesting me to pay you $200 for services rendered in this case.' I was a little surprised at this because I had done John several favors. Says I, 'I tell you what I will do; you are going to go into the saloon business, and you are going to want me to take sides.'"

The transaction with Arnold concerning the payment for his services was collateral, and had no place in the case, as it had no bearing upon the issue as to what amount appellee had agreed to pay appellants to defend him. But appellants are not in a position to complain of the introduction of this question into the case, as they brought it forward and introduced the first testimony concerning it. We fail to see how appellants could have been prejudiced by the statement related above as to what passed between appellee and Arnold. It could not possibly have had any influence on the jury in arriving at a conclusion as to the amount appellee had agreed to pay appellants for their services. However, if it was prejudicial, appellants are in no attitude to complain because they had first drawn out the testimony concerning the payment of this money and the circumstances under which it was paid, and appellee was entitled to have the whole of the transaction given to the jury after a part of it had gone in.

There was no objection to any of the instructions of the court.

Judgment affirmed.

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

Opinion delivered April 27, 1908.

1. MASTER AND SERVANT—PENALTY FOR DISCHARGE WITHOUT PAYMENT OF WAGES—JURISDICTION.—The so-called penalty provided by Kirby's Digest, § 6649, whenever a railroad company discharges a servant without paying his wages within seven days from his discharge, is

not strictly a penalty, but is an incident to the claim for wages, and may be added thereto in determining jurisdiction. (Page 149.)

2. GARNISHMENT—WAGES OF RAILWAY EMPLOYEE.—Kirby's Digest, § § 3695, 3696, providing that no garnishment should issue where the sum due is $200 or less, and where the property sought to be reached is wages due to a defendant by any railroad corporation, until a judgment has been recovered, and that no railroad corporation shall be required to make answer where a garnishment is issued before recovery of a personal judgment against defendant, is a valid exercise of the State's power. (Page 149.)

3. MASTER AND SERVANT—PENALTY FOR NONPAYMENT OF WAGES.—Where, during the time in which a railroad company was in default in paying the wages of a discharged servant, a valid judicial garnishment for a time prevented the company from paying such wages, this period *pro tanto* arrested the running of Kirby's Digest, § 6649, which provides for the continuation of the wages of a servant who is discharged without paying his wages. (Page 150.)

Appeal from Marion Circuit Court; *Brice B. Hudgins,* Judge; modified and affirmed.

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

1. The suit for wages and for the penalty are separate and distinct causes of action. 78 Ark. 208; 70 *Id.* 226. If complaint contains more than one cause of action, they should be stated in separate paragraphs and numbered. Kirby's Digest, § 6092. Had the court required plaintiff to state his two causes of action in separate paragraphs, one would have been for a debt of $100, the exclusive jurisdiction of which is vested in justices of the peace. Const. 1874, art. 7, § 40.

2. The railway company was not liable for the penalty during the time the garnishments were pending, and this amount should be deducted. Defendant had seven days in which to pay the wages. Kirby's Digest, § 6649. Garnishment before judgment is forbidden. *Ib.* § 3696. The garnishment proceedings were at most only irregular, and defendant could not disregard them. Sec. 3696 has never been construed. The question is incidentally discussed in 82 Ark. 236. There the garnishment was void by Kirby's Digest, § 3905. As to liabilities of garnishees, see 14 A. & E. Enc. Law (2 Ed.), p. 842 (b), p. 843;

Ib. p. 852-3 N. 1 p. 853, etc.; Drake on Attachment (4 Ed.), § § 458-462.

Frank Pace, for appellee.

1. This suit is under section 6649, Kirby's Digest, which is for the better protection of employees, and it was not the intention of the Legislature to create or require two causes of action. 82 Ark. 379; 83 *Id.* 445. See 58 Ark. 407; 70 *Id.* 228.

2. The garnishment was void. Even if regular, garnishment before judgment is void. Kirby's Digest, § 309. No deduction should be made for the time between November 14th and December 29th. Appellant did not fail to pay the wages because of the writ of garnishment, and no reason or excuse is shown for the failure. After the garnishment was quashed and Miser's suit dismissed, no payment or tender was made from December 29th to February 8th, and appellee was compelled to bring suit.

HILL, C. J. Pat Walsh was employed by the appellant railroad company as a fireman at $4 per day, and was discharged on November 14, 1906, and sued for $100 unpaid wages and for sixty days' wages—from November 14th to January 18th—at $4 per day, amounting to $240, for failure to pay his wages within seven days of discharge, pursuant to section 6649, Kirby's Digest. He obtained judgment for $95.85 wages and $240 penalty.

1. The appellant questions the jurisdiction of the circuit court to maintain the action for $100 wages, and says the added $240 claimed is a separate cause of action which should be separately sued for in a different count. In *Leep* v. *St. Louis, I. M. & S. Ry. Co.,* 58 Ark. 407, and *St. Louis, I. M. & S. Ry. Co.* v. *Pickett,* 70 Ark. 226, the nature of this so-called penalty was discussed, and it was held to be damages—both exemplary and compensatory—and not a penalty, although so nominated in the statute. It is an incident to the amount due for wages, an unearned increment, as it were, and may be added to the claim for wages in determining jurisdiction.

2. On November 15th Walsh was sued by a creditor, and the railway company garnished. This garnishment was later quashed, but judgment was rendered against him on December

7th, and on December 8th a judicial garnishment was served on the railroad company. On December 29th this garnishment was dismissed. On January 3d Walsh appeared to claim his wages as exempt against the garnishment, and learned it was dismissed. After sixty days expired he brought his suit for wages and for sixty days' additional wages beginning on date of his discharge. The court found from evidence adduced the facts essential to entitle Walsh to recover the continuing wages after his discharge, and gave judgment accordingly, as well as the amount due at date of his discharge. The appellant seeks to avoid payment of so much of the penalty as accrued while the garnishments were pending. The garnishment before judgment was contrary to section 3695, Kirby's Digest, and by section 3696 made void and not effective as notice. This court has often given full force to the statute, and there is no reason why it should not, for it is unquestionably a valid exercise of the State's power.

From December 8th to December 29th there was a valid judicial garnishment pending. This arrested the running of the wages while it existed, and that period must be subtracted from the period sued for.

With this modification the judgment is affirmed.

CARTER v. MCNEAL.

Opinion delivered April 27, 1908.

1. DEEDS—DELIVERY—PRESUMPTION FROM GRANTEE'S POSSESSION.—Where a deed is shown to be in the grantee's possession, a presumption of delivery arises, and the burden is on one who maintains the contrary to disprove its delivery. (Page 153.)
2. HUSBAND AND WIFE—EFFECT OF CONVEYANCES BETWEEN.—A deed of land by a husband directly to his wife, in the absence of fraud, conveys to her the equitable estate. (Page 154.)

Appeal from Benton Chancery Court; *T. Haden Humphreys*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellees brought this action in the Benton Chancery Court to cancel two deeds, one executed by their father to their mother,

and the other executed by their mother to their sister, to a part of the lands embraced in the first deed. The first deed is asked to be cancelled because their father executed it with intent to defraud his creditors, and because it was not delivered to their mother.

Charges of undue influence and want of mental capacity in the grantor are the grounds on which the second deed is sought to be avoided.

The undisputed facts are that Benjamin Ruddick owned a homestead in Benton County, Arkansas, consisting of 120 acres. In June, 1903, he was threatened with a suit for slander. He believed that his homestead could be sold to satisfy any judgment that might be obtained against him in that suit. In order to avoid this, he executed a deed to his homestead to his wife. He gave instructions to the justice of the peace, who took his acknowledgment, to have the deed recorded. The next day he and his wife left for Texas. On the same day, and before the deed had been carried to the clerk's office for record, one of his sons got the deed from the justice, carried it to his father's house and put it among his papers. This was done by direction of the father.

After a short time, Benjamin Ruddick and his wife returned home and resided upon the homestead until his death, which occurred in July, 1904. He left surviving him, his widow, Nancy Adeline Ruddick, and his children, Harriet McNeal, Nancy Ann Ruddick, William Ruddick, J. C. Ruddick, Clarina Anderson, Lizzie Smith and Julia Carter.

A son, Lafayette Ruddick, had died about eight or ten years before, leaving one child, Clyde Ruddick, who was a minor at the date of the death of Benjamin Ruddick. All were made parties plaintiffs in the suit except Nancy Adeline Ruddick and Julia Carter, who were made defendants.

The deed of Benjamin Ruddick to his wife, Nancy Adeline Ruddick, was filed for record on the 4th day of October, 1904, and embraced his homestead. The deed of Nancy Adeline Ruddick to Julia Carter was executed on the 11th day of October, 1904, and filed for record the same day. A part of the homestead, comprising forty acres, was the quantity of land conveyed by this deed. Other facts appear in the opinion.

The chancellor found that there had been no delivery of the first deed, and that the second deed was null and void, and rendered a decree cancelling both deeds. Defendants have appealed.

Rice & Dickson, for appellants.

1. Mrs. Ruddick's own deposition, taken alone without the support of other disinterested witnesses appearing in the record, is conclusive proof of her mental capacity to make the deed to her daughter. The proof is also ample to show that it was executed, not because of undue influence exerted upon her, but for a valid and sufficient consideration. If she had been an imbecile, the deed, under the circumstances shown in the record, would have been valid and binding. 73 Ark. 170.

2. There was no agreement at the time of the meeting of the heirs after the death of Ruddick. The things merely "talked of" at this meeting and never consummated or completed, not in writing and without any consideration, were certainly not binding on her. Kirby's Digest, § 3654, subdiv. 4; 44 Ark. 83.

3. Did not the title pass when Ruddick executed and acknowledged the deed to his wife, and left it with the notary public with direction to take it and have it recorded, at the same time leaving with the notary the money to pay for the recording? 6 Ark. 109; 24 Ark. 11; 9 Ark. 91; 40 Ark. 243; 20 Ark. 216; 77 Ark. 89; 52 S. W. 1033. If this was not a sufficient delivery, there was at any rate a delivery when, afterwards, he "went and got his papers," took out the deed and handed it to his wife. 82 Ark. 492; 74 Ark. 104.

4. The demurrer should have been sustained because plaintiffs allege that they are suing as heirs of a fraudulent grantor. The administrator only could sue. Kirby's Digest, § 81. Yet he could not maintain suit for the benefit of either heirs or creditors on the ground that the conveyance was fraudulent, since they are not permitted to complain of the sale of a homestead on any grounds. 57 Ark. 610; 67 Ark. 325; 1 Am. & Eng. Enc. of Law (2 Ed.), 274; 86 S. W. 636; 63 S. W. 125.

Rice & Rice, for appellees.

1. The deed executed by Ruddick to his wife was not delivered, and did not become operative. "The act of delivery

must be with intent on the part of the grantor to divest himself of title, and the deed must be accepted by the grantee with intent to take title; the grantor must part with the deed and all right and dominion over it, intending it shall operate as a deed, and the acceptance must be with such intent." 81 S. W. 1091; 17 S. W. 319; 16 S. W. 497; 10 S. W. 856; 65 S. W. 975; 80 Ark. 11.

2. The interest of Mrs. Ruddick in the lands was defined and fixed by the agreement had at a family settlement shortly after her husband's death.

3. Mrs. Ruddick's deed to Julia Carter was void or voidable because of undue influence, both actual and presumptive, inducing the execution thereof. 27 Am. & Eng. Enc. of Law, 452-461; 1 Jarman on Wills, 66-8, and note.

4. The statute, Kirby's Digest, § 81, has not been construed, but it is manifest from the statute that a fraudulent grantor, within the law, is one who conveys real estate with intent to defraud *creditors* (not heirs at law); it includes all classes of real property cast by descent upon the heirs at law, and recognizes their right of inheritance in real property conveyed by the ancestor with intent to delay creditors. If the land conveyed is a homestead, the right is expressly given to sue and recover for the use and benefit of the heirs at law; but is not given to creditors, and the fraudulent grantor of the homestead may be secure against attacks of creditors, but not of the heirs.

HART, J., (after stating the facts.) Appellees claim that the deed of Benjamin Ruddick to his wife was never delivered. The burden of proof to show this fact was upon appellees. *Smith* v. *Stephens,* 82 Ark. 50.

They adduced testimony in the court below to the effect that after his return from Texas Benjamin Ruddick told several persons that the deed (referring to the one executed to his wife) was of no effect because it had not been delivered. That soon after his death his brother, two of his intimate friends and some of his children met to arrange a family settlement, and that the defendant Nancy A. Ruddick was present and did not claim the land. That, when asked where the deed was, she replied that she did not know. That the deed was produced by the husband of defendant Julia Carter. That it was then agreed that the widow should have the homestead for life, and plans were

made to have it set apart for her use by proper orders of court. Nothing further in this behalf was ever done.

Opposed to this is the positive testimony of the defendant Nancy A. Ruddick, unobjected to, that her husband sometime during the fall before his death delivered the deed to her. She detailed the circumstances under which he delivered it. She said that he was looking over some papers one day; that he picked up the deed, and handed it to her, saying, "This is yours;" that she unfolded it, looked at it, and put it back in a bureau drawer where he kept their papers; that it was there when her husband died; that after this time she talked with her husband about making a deed to their daughter, Julia Carter, and that he advised her to do it.

We think the chancellor erred in finding that there was no delivery of the deed. The testimony adduced by appellees was not sufficient to overcome her positive testimony. The fact that her husband continued to manage the land which was their homestead was natural. The testimony does not show that she took any part in the family meeting which was held soon after her husband's death except to answer such questions as were asked her, and her seeming acquiescence in the expressions of opinion by her deceased husband's brother and by her children that she had only a life estate in the lands may be attributed to ignorance on her part of the legal effect of the deed, or it may have been occasioned by her grief at the recent loss of her husband.

A deed of land by a husband directly to his wife, in the absence of fraud, conveys to her the equitable estate. *Ogden* v. *Ogden,* 60 Ark. 70; *George Taylor Com. Co.* v. *Bell,* 62 Ark. 26.

When the deed was first executed by Ruddick, it was done for the declared purpose of preventing his lands being sold in satisfaction of an anticipated judgment against him; but this cause had ceased to exist at the time it was delivered to his wife. Hence we infer that it was done to make provision for her in case she outlived him.

We think the testimony fails to show that the deed from Nancy A. Ruddick to Julia Carter was obtained by undue influence. Nor do we think a want of mental capacity on the part of the grantor to make the deed was shown. Besides, she testi-

fied in this case, and said she was satisfied, and that she was happy, living with her daughter, Julia Carter; that the consideration expressed in the deed was that the grantee should support her during her natural life. Moreover, an examination of the record shows that she was subjected to a rigid cross-examination, the result of which shows that her mind was clear, and that she fully comprehended what she was doing when she executed the deed to her daughter.

This was a ratification of her former execution of the deed, if any was necessary. Besides, she was living at the date of the trial, and her heirs could not bring suit to set aside her deed to her daughter. Their right to do this was predicated upon the theory that the deed from Benjamin Ruddick to his wife was invalid.

Reversed and remanded with directions to enter a decree not inconsistent with this opinion.

COLUMBIA COUNTY BANK v. EMERSON.

86 155
187 560

Opinion delivered April 27, 1908.

1. BILLS AND NOTES—SALE OF PATENTED ARTICLES.—A note given as payment for royalty checks, which were to be used in purchasing patented articles, is within the terms of Kirby's Digest, § 513, requiring notes given in payment of patented articles to be written on a printed form and to show their consideration on their face. (Page 159.)
2. SAME—DISCRIMINATION IN FAVOR OF MERCHANTS UPHELD.—The act of April 23, 1891, providing that notes given for payment of patented articles or patent rights must show that they were so given, and permitting defenses to such notes in the hands of innocent holders, did not unlawfully discriminate in providing in § 4 that the act shall not apply to merchants and dealers who sell patented things in the usual course of business. (Page 159.)

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

The Columbia County Bank brought suit against J. W. and S. M. Emerson upon a note in the following language, towit:

"Magnolia, Arkansas, April the 27th, 1904.

"$147.00.

"November the 10th, 1904, after date, for value received, we promise to pay to the order of J. C. Karner one hundred and forty-seven and no-100 dollars, at Magnolia, Arkansas, with interest at 10 per cent. per annum from maturity until paid. The makers and indorsers of this note hereby severally waive presentment of payment, notice of non-payment and protest.

"J. W. EMERSON,

"S. M. EMERSON."

Indorsed: "Without recourse.

"J. C. KARNER."

The defendants answered, setting up that the note was given in payment of patent-right territory, and was not executed upon a printed form as required by Kirby's Digest, § § 512-4, and that plaintiff is not an innocent holder of the note.

There was testimony tending to show that the bank acquired the note without knowledge of any defense thereto. J. C. Karner, payee of the note, testified that he executed to defendants a receipt as follows:

"$294.00. Magnolia, Arkansas, April 27, 1904.

"Received from J. W. and S. M. Emerson two hundred and ninety-four dollars, in full payment for seventy royalty checks for $4.20 each, being advanced royalty on Karner Sash Locks, the purpose of which is to carry locks in stock ready for shipment to such points in the United States as they may direct.

"J. C. KARNER."

He testified that the note was given for coupons which his factory accepted as payment on the locks, and that he employed the defendants to sell these locks.

The following is a copy of the coupon checks delivered to the defendants by Karner:

"Nickel Manufacturing Co., Morris, Ill., $4.20: Upon presentation of this check, duly indorsed by one of my authorized managing agents, you will accept the same in payment of thirty-five cents per dozen, on twelve dozen Karner Sash Locks at the price of $1.70 per dozen, and charge the same to my account on royalty.

"J. C. KARNER."

It was proved that Karner was assignee of the patent under which the Karner Sash Lock was manufactured and sold.

The contract between Karner and defendants was as follows:

"This is to certify that J. C. Karner, of Mexia, Texas, is the exclusive owner of letters patent No. 686,673, for an improved automatic window lock, to be hereafter known as the 'Karner Sash Lock.' I have therefore this day appointed J. W. and S. M. Emerson or their legal representatives sole and exclusive agent for the sale of the Karner Sash Lock in the county of Nevada, State of Arkansas, in which to begin work, and for one year from date hereof I hereby authorize said agent to order locks from Nickel Manufacturing Company, Morris, Ill., and I join said manufacturers in agreeing to furnish said agent all the sash locks they may order at the price of one dollar and seventy ($1.70) cents per dozen, according to my contract with them for furnishing the goods, a copy of which is hereto attached. I further agree that, for every sixty dozen locks ordered by said agent, they shall have exclusive control of an additional county for one year from date of selection, such selection to be made by them and upon any unoccupied county in the United States, and I agree to furnish them with well settled counties to select from for five years from date hereof; said agent having full authority to sub-lease any field accumulated under this contract for one year from date of selection. They shall also have equal privileges with other agents of selling the Karner Sash Locks in the counties of Columbia, Lafayette and Union, State of Arkansas, and Claibourne Parish, State of Louisiana for one year from date. I further agree to furnish free of charge one perfect model, one hundred order blanks, and one hundred cards with which to begin work on or before the 10th day of May, A. D., 1904.

"It is understood that, for having leased the above field and for any privilege which said agent may enjoy under this contract, I make no requirement of them whatever, further than they agree to use ordinary diligence in selling said goods, and for not less than the established retail price of fifty cents.

"Given under my hand this, the 27th day of April, 1904.

"J. C. KARNER."

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

"You are instructed that if you find from the evidence that the note sued on was given in part payment of the purchase money of patented instruments known as the 'Karner Sash Locks', and that they were not given in payment of patent-right territory, then you will find for the plaintiff the amount due on said note, together with the interest due thereon." The court refused to instruct the jury as asked by plaintiff, but instructed them as follows:

"The court instructs the jury that if they find from the evidence that the note herein sued on was executed in payment of a patent right or in payment of patent-right territory, or payment of purchase money for patented instruments, and that said note is not executed upon a printed form, and does not show upon its face that it was executed in consideration of such patent-right or such patent-right territory, then they will find for the defendants."

There was a general verdict for defendants; also a special verdict finding that the note was not given for patent-right territory, but for a patent instrument or thing. Judgment was entered for defendants. Plaintiff has appealed.

Smead & Powell and *McKay & Lile,* for appellant.

1. The general verdict can not be sustained on the theory that there was a lease of patent-right territory, because the act, Kirby's Dig. § 513, applies to sales only; and there is no evidence that there was a sale of a patent right, or patent-right territory.

2. The act is unconstitutional, being in conflict with that clause of the Fourteenth Amendment prohibiting a State from denying to "any person within its jurisdiction the equal protection of the laws." It conflicts also with art. 4, § 2, U. S. Const., and art. 2, § 18, State Const. See, also, 75 Ark. 542.

Stevens & Stevens, for appellees.

1. The evidence is ample to sustain the verdict.

2. The constitutionality of the act has been sustained. 50 U. S. (L. Ed.) 1176; 75 Ark. 328; 51 U. S. (L. Ed.) 220.

HILL, C. J. This is a suit upon promissory notes, and the defense thereto is that they were given in payment of patent-

right territory, or in payment of the purchase money of patented instruments, and that they were not executed in conformity to the act of April 23, 1891, which appears as secs. 512, 513 and 514 of Kirby's Digest, requiring such notes to be executed on a printed form showing upon their face that they were executed in consideration of a patented machine, implement or territory, as the case might be.

The case was tried before a jury, and both a general and a special verdict were rendered upon the questions submitted. There was nothing in the case to go to the jury, as the testimony is undisputed, and the contract resting in writing. The substance of the testimony and the written instruments will be found in the statement of the facts. It will be seen therefrom that the consideration for the note was the payment of royalty checks, and the contract shows that these royalty checks were used in purchasing the patented articles and right to sell in certain counties. Therefore, the question really is as to the constitutionality of said act of 1891.

The act, in so far as it affected patent rights, was sustained by this court in *Woods* v. *Carl,* 75 Ark. 328, which case was affirmed by the Supreme Court of the United States, *Woods* v. *Carl,* 203 U. S. 358. See, also, *Allen* v. *Riley,* 203 U. S. 347, sustaining a statute of Kansas to the same general purpose as the one in question.

In *Woods* v. *Carl,* this court left open, because unnecessary to that decision, the effect of the exemption in the act as to sales of patented articles. That question has now been settled by the Supreme Court of the United States. In *Union County Bank* v. *Ozan Lumber Co.*, 127 Fed. 206, this part of this act was held unconstitutional by Judge Rogers on account of this exemption. That case was carried to the Circuit Court of Appeals and there affirmed, the alleged unconstitutionality resting upon another ground. *Ozan Lumber Co.* v. *Union County Bank,* 145 Fed. 344. It was then taken to the Supreme Court of the United States by certiorari, the decisions of Judge Rogers and of the Circuit Court of Appeals were reversed, and the statute sustained on all the points attacked. *Ozan Lumber Co.* v. *Union County National Bank of Liberty,* 207 U. S. 251. This court adopts the reasons of Mr. Justice Peckham, speaking for the

court in that case, as the answer to the argument urged against the unconstitutionality of the statute.

Judgment affirmed.

ROSEMOND v. STATE.

Opinion delivered April 13, 1908.

HOMICIDE—MURDER—SUFFICIENCY OF EVIDENCE.—Where one strikes another with intent merely to inflict chastisement, and death results from some peculiarity in deceased's constitution or other unexpected incident, the result is manslaughter merely; but where death naturally ensues from the force or manner or instrumentality of the chastisement, and the chastisement is made regardless of its probable result in death, the jury is authorized to find deliberation and specific intent to take life, and consequently to convict of murder in the first degree.

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

Searcy & Parks and *Wm. L. Moose,* for appellant.

It is conceded that the evidence is sufficient to convict appellant of murder in the second degree, but it is not sufficient to sustain the conviction of murder in the first degree. 82 Ark. 97; 37 Ark. 239; 83 Ark. 268.

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

Malice is shown, and a spirit of revenge harbored by appellant against deceased for sometime previous to the assault. That it was premeditated is shown by appellant's own testimony, and the club used was a deadly weapon. The evidence sustains the verdict.

HILL, C. J. Appellant's counsel thus states his case: "About six-thirty o'clock on the evening of March 2, 1907, Charles Lewis and two or three other negro companions were walking along the road or street leading from the commissary at Stamps, Arkansas. They were going home from their work

at the end of the day, and the way led over a bridge across a body of water known as the 'Pond.' Just before reaching the bridge, they overtook the defendant, Ike Rosemond, another negro, who was known to the others not as Rosemond but as 'Big Boy.' The defendant joined them, and they walked along in 'rotation,' as one of the witnesses states it. Before they overtook him, the defendant had picked up a stick about three feet long and about two by three inches. After they had gone about two hundred yards on the way across the pond, without warning the defendant stepped around in front of Charles Lewis, and knocked him down with the stick, and struck him the second time as he fell, and was about to strike him the third time when John Seawood spoke to him and said: 'Don't do that, Big Boy,' whereupon the defendant dropped the stick and went back towards town. Lewis's skull was fractured, and he died about eleven o'clock that night. The defendant was tried and convicted of murder in the first degree and sentenced to be hanged."

To this statement may be added these facts: The stick with which Lewis was killed was larger at one end than the other, having been trimmed at one end so that it was a handy weapon. Lewis weighed about 150 pounds, and Rosemond was a stout man. Lewis had caused Rosemond to be fined for having carried a pistol, and Rosemond bore a grudge against him therefor, and had threatened to get even with him for this act. A few minutes before the assault, Rosemond said he intended going away. Immediately after the assault, he fled the country. Rosemond testified that he was mad at Lewis for having caused him to be fined, and that he intended to give him a whipping, but did not intend to kill him. He says he struck him harder than he intended to, and that he was madder than he thought he was.

The sole object of this appeal is to seek to reduce the murder from the first to the second degree, and the question is, Does this evidence support the finding of murder in the first degree?

It is insisted that there is no contradiction of the testimony of the appellant that he only intended to give the deceased a whipping, and did not intend to take his life, and that, the specific intent to kill being absent, the evidence falls short of establishing first-degree murder.

A club used by a strong man in the way that this one was used might well be as deadly as a pistol or dirk, and so it proved in this instance. If the intent is merely to inflict chastisement, and death results from some peculiarity in deceased's constitution, or other unexpected incident, then the result is merely manslaughter. But where death naturally ensues from the force or manner or instrumentality of the chastisement, and the chastisement is made regardless of its probable result in death, the jury is authorized to find deliberation and specific intent to take life, and consequently convict of murder in the first degree. Wharton on Homicide, 3d Ed. § 87; *Green* v. *State*, 51 Ark. 189; *State* v. *Shaw*, 64 S. C. 566, s. c. 60 L. R. A. 801; *McWhirt's Case*, 3 Grat. 594, s. c. 46 Am. Dec. 196; *Com.* v. *Fox*, 73 Mass. 585.

An examination of these authorities satisfies the court that the evidence here was sufficient to justify the jury in finding murder in the first degree.

Judgment affirmed.

DALHOFF CONSTRUCTION COMPANY *v.* MAURICE.

Opinion delivered April 27, 1908.

1. CONTRACT—CONSTRUCTION—PAROL EVIDENCE TO EXPLAIN.—Where a contract between a contractor and sub-contractor for railroad construction work provided that the latter should receive so much per lineal foot for driving and capping piles, the contractor to furnish all caps and necessary iron work, the intention was that the sub-contractor should furnish the piles and drive them for the stipulated price, and it was error to permit parol evidence to be introduced to show what the contract meant. (Page 164.)
2. SAME—INTEREST.—Where a contract between a contractor and sub-contractor stipulated that upon completion of the work the engineer should make a final statement, and the sub-contractor should be paid upon his rendering clear receipts to the former "from all sub-contractors and employees on said work and owners of material used," releasing the contractor from liability to such persons, the sub-contractor was not entitled to recover interest so long as suits were pending against him to recover for materials furnished in completing the work. (Page 165.)

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

H. F. Auten, for appellant.

Pugh & Wiley, for appellee.

HILL, C. J. Maurice filed suit in chancery court against the Dalhoff Construction Company, the St. Louis, Iron Mountain & Southern Railway Company and Martin & Boyd, seeking to recover under a contract between Maurice and the Dalhoff Construction Company, and also for material furnished Martin & Boyd, which it was alleged the Dalhoff Construction Company assumed the payment of, and to enforce a lien against the railway company.

The Iron Mountain Railway Company was building a line of railroad in the eastern part of the State, crossing the Arkansas and White rivers near their mouths, and the Dalhoff Construction Company was the contractor. Maurice was a subcontractor under the construction company on trestle work between the Arkansas and White rivers. Maurice sued the construction company, and obtained judgment and a lien on the railroad. This is an appeal by the construction company as to three items allowed, and a cross appeal by Maurice for one item disallowed.

The first item is for $1,891.68 for putting on 7,882 lineal feet of capping at 24 cents per lineal foot. So much of the contract as is material to that point reads as follows: "Said F. W. Maurice, known throughout this agreement as contractor, hereby agrees to and with the Dalhoff Construction Company, known throughout this agreement and referred to as the company, to do and perform all the furnishing, driving and capping all piles, trestle work between the Arkansas and White rivers, on the Memphis, Helena & Louisiana Railroad. * * * For and in consideration of said work being duly performed and completed as provided, and so accepted by said engineer, said company are to pay contractors as follows: For driving and capping, twenty-four cents per lineal foot, the company to furnish all caps and necessary iron work for construction and transportation of labor and material."

Maurice contended, and was sustained by the chancery court, that he should have twenty-four cents per lineal foot for placing the caps on the piling. The construction company contends that the twenty-four cents included driving and capping the piles, as well as furnishing them. Each party has produced evidence tending to corroborate his theory, but the question depends upon a construction of the contract, and testimony of what was done under it could not be considered unless it was ambiguous. When this testimony is turned to to aid the construction of the contract, it is found to be conflicting, and there is little, if any, light thrown upon the question by it. The contract is not ambiguous, but stipulates that Maurice was to furnish the piles and drive and cap them for twenty-four cents per lineal foot, and that the company was to furnish the caps. These caps were necessarily placed upon the piles after they were driven, and were a part of the permanent structure of the trestle. The court erred in making a separate allowance for the capping.

The next question is as to the interest. The decree was for $4,647.34, and the court allowed interest from the time of the last estimate, except as to a draft of $1,300.26, which was allowed from date of its acceptance, as the court infers. There was a clause of the contract as follows: "Upon the completion of all of the work herein contracted for in the time and manner agreed upon, the engineer shall make a final statement of all the work done, from which shall be deducted the sum of the payments heretofore made on monthly estimates, and the residue shall be paid by said company at its office to said contractors, upon their receipting for the same in full upon said final estimate and rendering clear receipts to the party of the first part from all sub-contractors and employees on said work and owners of material used, releasing the party of the first part from all liability to said sub-contractors, laborers or owners of material used."

The railroad company in turn had required a similar contract of the construction company. Maurice admitted that there were two claims for material furnished him under the contract being asserted against him and a lien sought to be enforced against the railroad, and that there were suits pending at the time he brought his suit, and were undetermined at the time he

testified. He disputed the correctness of the claims made in these suits. The decree provided that $1,500 of the amount be reserved until the suit upon one of these claims then pending in Phillips Circuit Court be determined.

As long as the material furnishers were prosecuting claims for material furnished Maurice, which would be a lien upon the railroad if established, Maurice could not claim that he was entitled to payment from the construction company, in view of the above-quoted clause of his contract, and therefore it was error to allow interest from the time of the last estimate. It is argued that this provision had been abrogated by the construction company offering to pay Maurice if he would give bond to protect it against this suit, and that a bond was tendered, but it is shown that the parties failed to agree upon this settlement. Had they done so, then the interest would have been from the date of such agreement, not from the last estimate. Under any view, it was error to charge interest from the last estimate. This error did not run as to all the judgment. Maurice furnished some material for Boyd & Martin, and they gave him a draft on the construction company for $1,300.26, and this was accepted by the construction company, and interest on the item in the cross appeal is in the same category. This did not fall within the terms of the contract above quoted, and interest should run from date the piles were used.

The third item was one of costs, and that is immaterial, as the court reverses the judgment upon other items, and of course a reversal of the costs goes with it.

On the cross-appeal, this issue is presented: Boyd & Martin took Maurice's contract and completed it, and used some piles that had been gotten out by Maurice, and by agreement the construction company was to pay Maurice for the piles so used by Boyd & Martin. The construction company contends that Boyd & Martin used 96 sticks, and that they were worth ten cents per lineal foot, agregating 4,690 feet, making $469. Maurice claims that Boyd & Martin used 234 sticks, aggregating 13,858 feet, and that they were worth fifteen cents per foot amounting to $2,078.70. The court found ninety-six sticks, and allowed $469 therefor, and Maurice cross appeals. There is a decided conflict in the testimony upon this point. Maurice and his father and his

superintendent testified with much detail and circumstantiality as to the piles that were used by Boyd & Martin. Their testimony is positive, and they had the means and opportunity of knowing the facts to which they testified, and they are corroborated in part by three other witnesses. On the other hand is the testimony of Dalhoff and Boyd, and it lacks the circumstantiality and knowledge of the situation shown by the three witnesses against them. Weighing the testimony by the usual rules governing courts in such matters, there is a decided preponderance to sustain Maurice, both as to the number of sticks used and the value thereof. It would serve no useful purpose to go into the details of the same.

The judgment is, upon the appeal, reversed as to the first item for capping; as to all interest allowed upon sums growing out of the contract from the last estimate; and upon cross appeal is reversed as to the item complained of, for disallowance of 234 caps at fifteen cents. The cause is remanded with directions to the chancery court to state the account in conformity with these conclusions.

ON REHEARING.

Opinion delivered May 11, 1898.

PER CURIAM. Maurice moves the court to modify its judgment, in so far as it remanded the case to the chancery court to state the amount, and asks that a final decree be entered herein accordance with the opinion.

Appellees admit that all other items than the $1,300.26 draft and the $2,078.70 for the 234 piles, arose under the contract, and there should have been no interest upon them, according to the opinion, until judgment. This admission relieves the court of wading through the evidence as to the various items which were not appealed from, and which went into the judgment, in order to determine the interest that they should bear. The appellees insist that it is an unnecessary delay to wait until the next term of the chancery court to have the decree entered there, and that they are entitled to a decree here, and a judgment upon the supersedeas bond as well.

After looking into the matter and finding the court relieved of an investigation which the decision of the case did not call for, the court has decided that the appellees are right in their contention that they should have judgment here. Therefore, the judgment is modified so as to give appellees final judgment in accordance with the opinion.

The lower court awarded costs; and as some of the items sued for were unquestionably due, the court will not reverse the finding in that respect.

The case of *Haney* v. *Maurice,* referred to in the judgment, has found its way here on appeal from a judgment against Maurice for $1,650. In order to cover the possible affirmance of that judgment here, and the interest and costs thereof, $2,000 of the judgment ordered rendered will be stayed pending the final determination of said cause.

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

Opinion delivered May 4, 1908.

INSTRUCTIONS—RELEVANCY TO ISSUES.—Where a railroad company was sued upon a contract alleged to have been made with its roadmaster, and put its defense upon the ground that the terms of the contract made by the roadmaster were different from those alleged by plaintiff, it cannot complain that the court did not submit to the jury the question whether the roadmaster was authorized to make the contract.

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

Buzbee & Hicks and *Geo. B. Pugh,* for appellant.

1. It is error to instruct the jury on an issue where there is no evidence to support it. 79 Ark. 225; 77 Ark. 109; 69 Ark. 380. And, where an instruction is given submitting in general terms a certain issue along with others, it is error to refuse an instruction definitely and separately submitting it to the jury. 82 Ark. 503; 69 Ark. 134; 76 Ark. 227; 80 Ark. 438.

2. The burden was on plaintiff to show that the agents

with whom he contracted were authorized by the appellant to make such contract. 84 Ark. 373; 68 Ark. 284; 34 Ark. 194.

C. T. Wetherby and *Holland & Holland,* for appellee.

Appellant's special requests for instruction with reference to proof of agency were properly refused. The principal is bound by the act of his agent if it is within the scope of his apparent authority. Appellant was estopped to deny the agency because it had received the benefits of the contract so far as performed. 10 Cyc. 935; *Id.* 1066-7; *Id.* 1078; *Id.* 1080; 72 Am. Dec. 759; Mechem on Agency, 83, 84; *Id.* 105; *Id.* 148.

HILL, C. J. This is a suit for damages by Delaney against the railroad company for failure to permit him to carry out a contract which it had made with him to load upon cars at Hartford a quantity of dirt from the Bolen Darnell Coal Company's mine, suited for ballasting. The plaintiff recovered, and the railroad company appeals, and complains of the refusal of the court to give two instructions which, in effect, went to the authority of the roadmaster to make the contract sued upon. It is also contended that there is no evidence to authorize the finding that the roadmaster had authority to make the alleged contract.

The answer of the appellant to a second amended complaint alleged a contract existing between the appellee and the railroad company for the loading of the aforesaid dirt, the terms of which differed from that alleged by the appellee, but it set forth a contract between itself and the appellee covering the subject-matter of the disputed contract. In other words, it admitted a contract as to the loading of this dirt by the appellee, but claimed that the terms, extent and conditions of the same were different from those contended for by the appellee. And in effect that is the evidence of the appellant. It put its defense upon a contract made by its roadmaster with appellee, but alleged different terms from those which the appellee claims, and asserted a contract to remove some dirt from this particular pile.

In view of this state of the pleadings and the evidence on behalf of the appellant, it can not complain that the court did not submit the question of the authority of the roadmaster to make the contract to the jury.

Judgment affirmed.

BOYD v. LLOYD.

Opinion delivered May 4, 1908.

1. EVIDENCE—PAROL EXPLANATION OF WRITING.—Where a contract, as written, is ambiguous and incomplete, parol evidence is admissible to show what the words used meant. (Page 171.)
2. DEEDS—SUFFICIENCY OF CONSIDERATION.—An agreement upon the part of the grantee to support the grantor during his lifetime is a sufficient consideration for a deed conveying land. (Page 171.)

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

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

1. The evidence is ample to show that Jackson knew the nature of the transaction, and was fully capable of executing the deed and contract. The fact that he was physically weak and not bright mentally does not show that he was incapable of executing the contract. 66 Ark. 623; 70 Ark. 166.

2. It is shown that the instruments were executed at the instance of Jackson himself, and that no fraud or undue influence was practiced by appellant. The burden was on appellees to prove fraud, etc. 18 Ark. 123; 25 Ark 225; 40 Ark. 417; 37 Ark. 145; 49 Ark. 367.

3. Under the facts in this case the consideration was not so inadequate as to justify canceling the deed. 75 Ark. 89; 55 Ark. 112; 54 Ark. 195; 150 Ill. 212; 54 Ill. 363; 67 Ill. 500; 121 Ill. 130; 128 Ill. 502; 46 Ark. 542; 2 Devlin on Deeds, § 814; *Id.* § 807; 22 Pa. St. 245; Wald's Pollock on Contracts, 1885 Ed., 576; Beach on Mod. Law, Contracts, § 193; 6 Am. & Eng. Enc. of L., (2 Ed.), 696, 701; 123 Mo. 300.

Kie Oldham, for appellees.

No consideration was in fact paid. In view of the evidence and the circumstances under which the deed was executed, the age, decrepitude, helplessness and mental weakness of the old man, and the experience and mental superiority of appellant, the conclusion cannot be resisted that the bargain was not a fair one, the consideration being grossly inadequate, and that ap-

pellant took advantage of his incapacity. 26 Ark. 610; 15 Ark. 603; 22 Ark. 92; 94 U. S. 506; 11 Wheat. (U. S.) 103; 113 U. S. 89; 87 Ky. 616; 21 Tex. 47; 1 Aiken (Vt.) 390; 203 Ill. 211; 23 Ia. 237.

BATTLE, J. Fannie Jackson Lloyd and Alice Jackson, claiming to be the heirs of Clem Jackson, brought suit against R. S. Boyd in the Lonoke Chancery Court to set aside a deed executed by Clem Jackson, their father, in his lifetime, to the defendant. They alleged that the deed was without adequate consideration, and was procured by fraud. The defendant answered, admitting the execution of the deed, and denying the other allegations in the complaint.

The deed was made on the 12th day of April, 1905, and conveyed a certain tract of land, containing eighty acres, to the defendant. The consideration stated was one hundred dollars, the receipt of which the grantor acknowledged in the deed. On the same day the grantor and grantee entered into the following contract in writing:

"Know all men by these presents:

"That Clem Jackson, party of the first part, and R. S., Boyd, party of the second part, do hereby make and enter into the following contract, towit: whereas, Clem Jackson has on this day sold to R. S. Boyd, the S. ½ of S. E. of sec. 9, 1 S., R. 8 W. in Lonoke County, Arkansas, for and in consideration of $100 cash in hand, the payment of which is hereby acknowledged. And it is further agreed that the said Clem Jackson is to receive one-half of the net proceeds from the place, after taxes and expenses are deducted. At the death of Clem Jackson, the term of this agreement expires, and the land and entire proceeds shall remain in R. S. Boyd. Furthermore, the said R. S. Boyd, party of the second part, shall keep the taxes paid upon the land, use his best business tact in the management of the same. He also further agrees to care for the said Clem Jackson or have it done when sick, and to see that he has food, clothes, and necessary attention when sick. It is further agreed and understood that this agrement is made at the request and solicitation of the said Clem Jackson.

"Witness: JOSHUA WARDLOW.

his
"CLEM X JACKSON
mark
"R. S. BOYD."

After executing the deed Jackson improved and hopes of his recovery were entertained, but he grew worse and died on the 17th of June, 1905, leaving plaintiffs his only heirs.

The court, after hearing the evidence, found that the defendant "did not practice any actual fraud whatever upon Clem Jackson, but, by the terms of said contract had and made with the said Clem Jackson, he only undertook to take care of and provide for the said Clem Jackson while sick, and the court further finds that the said R. S. Boyd did in fact take care of and provide for the said Clem Jackson, but that the services were an inadequate consideration for the deed and the property therein described." The court cancelled the deed and contract, and rendered judgment for the costs against the defendant, and he appealed.

The evidence showed that the one hundred dollars stated in the deed to have been paid for the land were not paid, but were to be used by Boyd in the improvement of the land, one half of the proceeds of which Clem Jackson was to have during his life.

The preponderance of the evidence sustains the finding of the court to the effect that defendant did not practice any actual fraud upon Clem Jackson, and that he did take care of and provide for Clem Jackson. But it does not sustain the finding that the defendant only undertook to take care of and provide for his grantor while sick. He agreed and undertook to see that he "had necessary attention when sick," but this was in addition to food and clothes to be furnished when needed. This is a reasonable construction of the contract. Why should he furnish food and clothes only when he was sick? He was feeble and unable to work, and would need them as much, if not more, when well as when sick. But the contract as written was ambiguous and incomplete, and parol evidence was admissible to show what the words actually used meant. The evidence shows that he was to maintain and support Jackson during his lifetime. This sustains the construction we place upon the contract. This is

everywhere regarded as a sufficient consideration for a deed. 2 Devlin on Deeds, (2 Ed.), § 807, and cases cited.

The decree is reversed, and the cause is remanded with directions to the court to render decree in accordance with this opinion.

HART, J., being disqualified, did not participate.

CROW v. ROANE.

Opinion delivered May 4, 1908.

1. JUDICIAL NOTICE—COUNTY BOUNDARIES.—The courts take notice judicially of the location of county boundary lines. (Page 174.)
2. COUNTIES—BOUNDARIES.—Although in 1866 Red River made a sudden change by avulsion whereby certain lands which theretofore had been on the south side of the river were left on the north side, the act of December 22, 1874, creating Miller County and fixing Red River as the north boundary of the county, and the act of March 5, 1867, creating Little River County and fixing the same river as its south boundary, intended to fix the boundary between these two counties at the center of the channel of the river as it existed at the time of the passage of these acts. (Page 174.)

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

John N. Cook, for appellant.

The court will take judicial notice of navigable streams, county boundaries, etc: 34 Ark. 224; 68 Ark. 462.

Where a river is the dividing line between two States or counties, a cutoff, even where the river makes a new channel, will not have the effect of giving the land to the State or county on whose side it is thrown by reason of the cut off. 196 U. S. 23, 49 L. Ed. 372; 143 U. S. 359, 36 L. Ed. 186; 6 L. R. A. (U. S.) 162.

The acts of 1827, creating Lafayette County, of 1867, creating Little River County, and of 1874, creating Miller County, are *in pari materia,* and the Legislature is presumed to have passed each with reference to the others. When Little River

County was formed, the land was in Lafayette County. That act, 1867, makes no mention of Lafayette County, but expressly detaches lands from Hempstead County. In speaking of Red River, the act meant the river as shown by United States surveys and maps, etc., and the act of 1874 therefore included the lands in litigation as within the boundaries of Miller County. Black on Interpretation of Laws, 204; 76 Ark. 303; Acts 1867, p. 218, § 1; Acts 1874, p. 65 , § 1.

J. D. Conway, for appellee.

The acts of 1827, 1828 and 1829, Laws of Ark. Terr., 1835, pp. 142, 144 and 150, defining the boundaries of Lafayette and Miller counties, make it clear that the Legislature had in mind the Red River as it ran at the date of the passage of these acts, and, the U. S. maps, survey, etc., referred to by appellant, not having been made until in 1840 and 1841, the claim that the acts of 1827, 1867 and 1874 are *in pari materia* falls. Red River is not the line between Miller and Little River counties, but the center of the main channel of Red River. 34 Ark. 244; 68 Ark. 462. In creating Little River County in 1867 and Miller County in 1874, the Legislature evidently had in mind the many changes in the river, and used the language defining the boundaries advisedly, and by the last act intended to fix the center of the main channel of the river as it ran at that date, as the boundary between the counties. 130 Cal. 136.

McCULLOCH, J. Appellant instituted against appellee in the circuit court of Miller County a statutory action of unlawful detainer, the subject-matter of the action being certain land alleged to be situated in Miller County. Appellant filed a supplemental pleading, which is treated as an amendment to the complaint, alleging that prior to the year 1866 the lands were situated south of Red River according to the map of the Government survey, and that during said year the river made a sudden change by cutoff or avulsion whereby the said lands were left on the north side of the river, and that such continues to be the situation thereof to this day.

Appellee filed a special plea to the jurisdiction of the court, which was sustained, and the action was dismissed.

The court takes notice judicially of the location of county boundary lines. *Cox* v. *State,* 68 Ark. 462.

We know by the act of December 22, 1874, creating Miller County, the Legislature fixed the north boundary of the county at the center of the main channel of Red River. The present channel of the river remains the same now as it was in 1874, and the lands in controversy are situated now, as then, north of the channel of the river. They are therefore situated in Little River County, and the circuit court of Miller County had no jurisdiction over them as the subject-matter of the action.

The Legislature, by an act passed March 5, 1867, created Little River County, and fixed the south boundary thereof at the south bank of Red River. This was after the lands in controversy were changed from the south to the north side of the channel of the river.

The Legislature, as we have already shown, passed the act of December 22, 1874, creating Miller County and fixing the north boundary thereof at the center of the main channel of that river. The effect of this last legislation was to change the south boundary line of Little River County from the south bank of Red River to the center of the main channel of the river, thus fixing that as the boundary line between Miller and Little River counties.

Now, it is argued by learned counsel for appellant that the lawmakers, in fixing the channel of Red River as the boundary line between these counties, are presumed to have had reference to the channel as it existed when former statutes, both territorial and State, were passed constituting it as county boundary lines before the channel was changed in 1866; but we are of the opinion that such a presumption cannot be indulged in the face of this change in the channel of the stream which brought about changed conditions with respect to the lands effected by the change. The change itself of the channel of the stream affords the strongest reasons why the Legislature should have deemed it expedient to fix the new boundaries according to the changed position of the channel and the lands effected thereby. If the Legislature considered local conditions at all, and we ought to presume that such considerations were given weight, the fact that when Miller County was created these lands were situated on

the north or Little River side of the Red River affords the most convincing reasons for fixing the boundary so as to place them in that county. That, too, is in accordance with the plain language of the statute.

The case of *Waters* v. *Pool,* 130 Cal. 136, is quite similar to this, and is instructive. There the channel of the Sacramento River constituted the boundary line between two counties, and the land in question was situated on a peninsular formed by a bend in the river. A cutoff across the neck of this land changed the channel so as to place the peninsular lands on the opposite side of the channel, and the Legislature passed an act to clearly define the boundary between these two counties and referred to the channel of the river as the boundary, without specifying whether the reference was to the old or to the new channel. The court said: "We, therefore, must presume that the Legislature used the language defining the boundary advisedly, and intended to fix the middle of the Sacramento River, as said river ran at the date of the passage of the act, as the boundary between the two counties."

For the same reasons we are convinced that the Legislature meant to fix the boundary line between Miller and Little River counties at the center of the channel of Red River as it existed at the time of the passage of the statute.

Affirmed.

RITCHIE v. BLUFF CITY LUMBER COMPANY.

Opinion delivered May 4, 1908.

1. PAYMENTS—RECOVERY.—When a person, without mistake of fact or fraud, duress, coercion or extortion, pays money on a demand which is not enforceable against him, the payment is deemed voluntary, and cannot be recovered. (Page 178.)

2. SAME—CREDITS ON ACCOUNT.—Where there are mutual accounts between two persons, credits upon one side are applied to the extinguishment of debits on the other as payments intentionally made thereon. (Page 178.)

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

STATEMENT BY THE COURT.

This action was brought by the Bluff City Lumber Company against George W. Ritchie to recover money claimed to have been advanced by it to him.

The facts adduced by appellant are as follows: Prior to February 24, 1903, appellant was in the employ of appellee as a sales manager at a salary of $175.00 per month, and in addition had been loaned several thousand dollars by appellee without interest. On that day he tendered his resignation to John F. Rutherford, who was the vice-president, general manager and secretary of appellee. Rutherford desired him to remain with the company, and asked him to state upon what terms he would do so. After some discussion of the terms, appellant states that an agreement was entered into between the parties whereby he was to receive $3,000 per year and the use of $10,000 without interest, the contract to be in force for five years; that a memorandum of the contract was reduced to writing and signed by Rutherford for appellee and by himself. In addition, he says that the contract provided that certain obligations then due by him to appellee were to be cancelled, and that the written memorandum of the contract is now lost; that he entered upon the discharge of his duties under the contract, and that from that date until the institution of the present suit was paid at the rate of $3,800 per year.

During the trial, it was agreed between the parties that it is a fact that it was the custom of appellee, prior to the date to be made known by the evidence, that when employees were drawing in excess of $1,800 per year for their services, the books would only show a salary of $150 per month, and when an employee received more than that amount it was credited to him afterwards, and charged in the books to labor or expense. This was done to prevent any one from knowing what these employees were getting.

Mr. Robert York had this changed about September 1, 1906, so as to reflect the actual facts. The testimony also shows

that the books of the company show a mutual account of debits and credits between it and appellant. A credit of $150 per month was given appellant each month as salary and $2,000 additional credit was given him at the end of each year in the labor and expense account. The debit side of the account consisted of advances made from day to day to appellant.

Rutherford testified that he was representing appellee in making the contract, and that the terms of the agreement was that appellant was to receive two hundred and fifty dollars per month or three thousand dollars per year salary, and appellee was to let him have $10,000 without interest; that the contract was for five years, and that he thinks he signed a memorandum in writing to that effect; that he told Mr. York that he had made a proposition to appellant for $250 per month and the use of $10,000, and that York told him to make the deal for five years.

J. B. York, for appellee, testified that he was at the date of the contract, and is now, president of appellee company; that he was not present when Rutherford made the contract with appellee, but that it was talked over with him. The following is quoted from his testimony:

Q. "You talked about it (referring to a conversation with Rutherford)."

A. "I talked about it, or we did, and I remember very distinctly that he was to get $250 per month and $10,000 for five years, and he was to have the note returned to him (referring to a note owed by him to appellee), but was to pay the Bluff City Lumber Company interest, and it would not have been let out on no other terms."

Q. "Did you get the information then from Ritchie or Rutherford?"

A. "It was talked over together."

Robert York testified that he went with the company September 1, 1905, and soon after learned that appellant was getting $3,800 per year as salary; that he was looking through the accounts of appellant and others and found a credit of two thousand dollars, and that this credit was of date of the latter part of December or the first of January, 1906. "I told appellant that it would not be entered that way."

There was a verdict and judgment in favor of appellee in the sum of $2,549.25.

Appellant filed a motion for a new trial, and upon it being overruled perfected his appeal to this court.

N. T. White and *Ben J. Altheimer,* for appellant.

In the absence of fraud, duress, extortion or coercion, money voluntarily paid, even on an unjust or illegal demand, cannot be recovered. 72 Ark. 555; 73 Ark. 565; 22 Am. & Eng. Enc. of L., (2 Ed.), 609; 49 Ark. 70; 44 Am. St. Rep. 529; 33 Id. 686. There is no evidence of duress or extortion, and fraud will not be presumed, but must be proved. 17 Ark. 151; 9 Ark. 482; 11 Ark. 378; 33 Ark. 727; *Id.* 259; 25 Ark. 225; 31 Ark. 554.

Austin & Danaher, for appellee.

The doctrine of estoppel on the ground of voluntary payment cannot be invoked in this case. The money was never actually paid to appellant by any officer of the company. He was in charge of the books and, being indebted to the company, credited himself with these amounts, which credits were repudiated by the company as erroneous as soon as discovered.

HART, J., (after stating the facts). The rule is well settled that when a person, without mistake of fact or fraud, duress, coercion, or extortion, pays money on a demand which is not enforceable against him, the payment is deemed voluntary, and can not be recovered. *Larrimer* v. *Murphy,* 72 Ark. 555; *LaFayette* v. *Merchants' Bank,* 73 Ark. 565; *Vick* v. *Shinn,* 49 Ark. 70; 22 Am. & Eng. Enc. of Law, (2d Ed.), 609.

Appellant invokes the application of this doctrine in the present case as a ground for reversal. The undisputed testimony shows that appellant received certain advancements from time to time from appellee, and was credited with the sum of $3.800 per year, beginning from the date of the contract in controversy. There may be some grounds for dispute about the exact terms of the contract, but there is none in regard to the fact that the credits were placed upon the books of the company, and that with the knowledge of Rutherford, its secretary and general manager. It is claimed by appellee that the making of

the advancements and the placing of the credits to the account of appellant was not a payment, but we fail to perceive the reason or justness of this contention. Where there is an open account between two parties, in the absence of an agreement to the contrary, all items of the account become constituent parts thereof, and are applied in payment of the oldest item in the account on the other side, and he only is entitled to recover in whose favor the final balance upon the whole account is found. The rule is where there are mutual accounts, the credits on one side are applied to the extinguishment of debits on the other as payments intentionally made thereon.

For the reason that there is no evidence to show that the payments were not voluntarily made with the full knowledge of the facts, the cause is reversed and remanded for a new trial.

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

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Opinion delivered May 4, 1908.

1. CARRIERS—SUFFICIENCY OF TENDER OF LIVESTOCK FOR SHIPMENT.—A station agent has authority to bind the carrier by a stipulation as to the mode of delivery of stock for shipment. So where the shipper notified the station agent that he had a consignment of sheep and hogs ready for shipment and within a short distance of the station, and was instructed to leave the stock where they were until the cars arrived, and did so, this was a sufficient tender of the stock for shipment. (Page 181.)
2. APPEAL—PREJUDICE.—Where the trial court eliminated from an action against a carrier for failure to furnish cars the question of a promise or contract to furnish the cars, the defendant was not prejudiced by the court's refusal to submit to the jury an instruction upon this subject, requested by it. (Page 182.)
3. CARRIERS—SPECIAL DAMAGES FOR DELAY.—Where the station agent was notified that a shipper was holding livestock ready for shipment, the carrier will be held liable for special damages for expenses of keeping the stock during the period of the carrier's delay in furnishing cars. (Page 182.)

Appeal from Boone Circuit Court; *Brice B. Hudgins*, Judge; affirmed.

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

Notwithstanding the verdict is smaller than the amount claimed, improper items of damage were included therein.

No foundation was laid for a measure of damages, and the court erred in fixing the same in its instruction. For correct rule see 74 Ark. 358.

An instruction that if the plaintiff applied to defendant for cars, and it failed to furnish them in a reasonable time, and by such failure the plaintiff was damaged, "you will find for the plaintiff in whatever sum you find from the evidence he was damaged by such failure," is fundamentally wrong, in opening up the way for the allowance of any sort of damages known to the law.

"To charge a common carrier with special damages for delay in transporting freight, notice of the circumstances out of which the special damages grew must have been given to the carrier at the time of or before making the contract of shipment." 72 Ark. 275; 190 U. S. 540; 82 Pac. 502.

The instruction that tender at the depot was waived if the plaintiff penned his stock within a mile of the depot at the instance of the defendant was erroneous, there being no evidence that defendant forced, caused or persuaded him to select the lot that he did.

Crump, Mitchell & Trimble and *Frank Pace*, for appellee.

1. The damages claimed by plaintiff as appears by the evidence were (1) the expense of caring for the stock, (2) loss of stock by death, and (3) loss occasioned by shrinkage in weight; and the proof was sufficient to sustain the verdict.

2. If the language, "you will find for the plaintiff in whatever sum you may find from the evidence he was damaged by such failure," was objectionable, and was not sufficiently explained in another instruction given. Appellant should have asked specifically a further explanation. 65 Ark. 619.

Having been advised by the agent that appellant had no facilities at the depot to receive the stock pending the arrival

of cars, and to pen his stock at a different place until notified of their arrival, appellee's compliance with this request was a sufficient tender. Moore on Carriers, 116.

McCULLOCH, J. This is an action instituted by appellee against appellant railway company to recover damages resulting from failure of the company to furnish cars for shipment of sheep and hogs from Bergman, a station on appellant's road. Appellee made the request for cars on October 19, 1906, to be furnished on the twenty-first day of the same month, and the cars were not furnished until October 30th, the alleged injury to the sheep and hogs occurring in the meantime on account of the delay.

Appellee lived ten miles from the station, and communicated the request for cars by telephone. The telephone call was answered by an employee in the office named Stevenson—not the station agent—and appellee testified that Stevenson promised to furnish the cars on the 21st of the month. He further testified that Stevenson informed him that the company had no pens at Bergman sufficient to take charge of the stock, and instructed appellee to stop outside of town, where the stock could be properly cared for until the cars arrived. Appellee then drove the sheep and hogs over to a place about three-fourths of a mile from Bergman, reaching there on the evening of October 20th, where they were kept until the cars arrived. On arrival there appellee went over to Bergman and saw the station agent, who, he testified, informed him that the cars would be there the next day, and instructed him to leave the stock where they were until the cars arrived, promising to send a messenger informing appellee of the arrival of the cars.

Stevenson denied, in his testimony, that he made any promise to furnish cars, but said that he merely stated to appellee that they would do the best they could to get cars, and that he communicated the request to the station agent. The station agent, Butler, denied that either he or Stevenson had authority to promise cars, or that he ever promised the cars at any specified time, but admitted that he received the request for cars, and forwarded same immediately to the train-dispatcher at Cotter.

It is therefore undisputed that appellee made the request for cars on October 19th, and that they were not furnished until

October 30th. No effort was made by appellant to explain the delay. It is also undisputed that appellant's station agent knew, as early as October 20th, that appellee had his consignment of sheep and hogs ready for shipment in a short distance of the station and kept them there, instead of bringing them to the station, upon instruction of the agent. This was a sufficient tender of the stock for shipment. *St. Louis, I. M. & S. Ry. Co.* v. *Wynne Hoop & Cooperage Co.*, 81 Ark. 373.

The delivery or tender of freight to the carrier for shipment may be made in accordance with such arrangement between the parties—that is, between the shipper and the carrier's agent—as they may choose to make in regard to the mode of delivery. Says Mr. Hutchinson: "They may make such stipulation upon the subject as they see fit; and when such stipulations are made, they, and not the general law, are to govern." 1 Hutchinson on Car. § 115. A station agent has authority to consent to such arrangements. 1 Hutchinson on Car. § 462.

The court instructed the jury that before appellee could recover damages the jury "must find from the preponderance of the evidence that the plaintiff applied to the defendant for cars in which to ship his stock, and that the defendant failed to furnish said cars in a reasonable time, and that by such failure the plaintiff was damaged." The court gave no instructions submitting the case to the jury on the question of a promise or contract to furnish cars, and that question was thus eliminated from the case. Appellant requested the giving of instructions on that subject, which the court refused, and the refusal is assigned as error. As the instructions given by the court eliminated that question from the case, appellant could not have been prejudiced by the court's refusal to give the instruction asked. Appellee did not, in the case finally submitted to the jury, rely upon any express promise or contract to furnish cars, but relied upon the duty imposed by law upon the carrier to furnish cars within a reasonable time after demand.

The verdict included special damages for expense of keeping the stock during the period of delay, and appellant contends that this was unwarranted and erroneous. Under the rule announced by this court in *Choctaw, O. & G. Rd. Co.* v. *Rolfe*, 76 Ark. 220, such damages are recoverable under the facts

proved in this case. The facts and circumstances proved to have been brought to the knowledge of appellant's agent were sufficient to put the company on notice that special injury would result from the continued delay in furnishing cars. The evidence sustains the verdict.

Affirmed.

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

Opinion delivered May 4, 1908.

1. RAILROAD—CONTRIBUTORY NEGLIGENCE—PRESUMPTION.—Where plaintiff was injured by a moving car while attempting to cross a railway track, and testified that she looked before she started across the track and could not see any moving car approaching, it will not be presumed that she was negligent in failing to listen because she failed to state that she listened as well as looked for approaching cars. (Page 185.)
2. APPEAL—HARMLESS ERROR.—Where the question was whether defendant railroad company was negligent in injuring a licensee upon its track, it was not prejudiced by the introduction of evidence that it had many years previously maintained a footbridge for the travelling public at the place of injury, but had removed it before the injury occurred, where the court instructed the jury that, "no matter what had been the previous use of the premises of defendant by plaintiff and others of the public, the same were the private property of the defendant, and the railroad company had the right at any time to terminate the practice." (Page 185.)

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

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

1. Appellee's own contributory negligence should bar recovery. She had notice that the appellant moved cars in switching in the yards without regard to the rights of passers. It is negligence for a person to go upon a railroad track without exercising the senses both to see and hear approaching trains. 61 Ark. 558; 65 Ark. 239; 79 Ark. 137; 76 Ark. 224; 78 Ark. 60; 69 Ark. 139.

2. It was error to admit testimony as to the bridge or viaduct which formerly crossed the railroad track at or near the place where the injury occurred. If the maintenance of the viaduct was an invitation to the public, that invitation was withdrawn when appellant removed it; but there is no evidence to show either an express or implied invitation. 40 Atl. 614.

3. It is shown that there was a public crossing on either side of the yards. Having therefore a safe place to travel, appellee was as a matter of law guilty of contributory negligence in being in the yards, whether others used the yards in passing or not. 83 Ark. 300.

L. A. Byrne, for appellee.

1. Appellee was not a trespasser, but a licensee, and the appellant, having induced the public to use its right of way at this point, owed her the duty to keep a look out for her safety. 77 Ark. 561 and cases cited; 78 Ark. 22; 80 Ark. 528; 37 Am. & Eng. R. Cas. (O. S.) 313; 41 *Id.* (O. S.) 414; 13 *Id.* (N. S.) 462; 20 *Id.* (N. S.) 372; 103 Ia. 649; 67 S. C. 499.

2. Testimony as to the building of the viaduct was admissible, being one of the acts by the railroad company showing that it had provided a way for the traveling public; and when the viaduct came down, if the company desired to withdraw its invitation to the public, it should have given timely notice. 77 Ark. 561.

3. The character of the crossing and the extent of its use so as to vest rights in the public in that use, is a question of fact for the jury. 15 Am. & Eng. R. Cas. (O. S.) 424; 24 L. R. A. 531; 28 Am. & Eng. R. Cas. 656; 147 Mass. 495; 131 Mass. 391; 160 Mass. 211; 74 Fed. 285.

MCCULLOCH, J. Appellee was injured while attempting to cross the railroad tracks of appellant in the yard at Texarkana, and sued for and recovered damages. She was crossing the tracks along a path which it is claimed had been continuously used by the public generally by permission of the railway company for a number of years, and she attempted to pass through an opening between the ends of two cars when a switch engine backing with a string of cars "kicked" a car backward against one of the cars near which appellee was passing, causing the

car to strike her, knock her down and inflict serious injury. She testified that she looked before she started across the track through the opening, but could not see an engine or any moving cars. There was evidence also to the effect that the railroad employees kept no lookout, and did not sound any signal by bell or whistle.

The evidence is conflicting upon every material point, but there was evidence sufficient to warrant the jury in finding the facts as stated above. This being true, it cannot be said that the evidence was insufficient to justify a verdict for damages.

Counsel contend that appellee does not clear herself of the charge of contributory negligence because she fails to state that she listened as well as looked for approaching cars. She does not say that she did not listen or that she stopped her ears so that she could not hear. She merely states that she looked for engines or moving cars. Now, there is nothing in her testimony which would warrant the jury in finding that she did not listen as well as look, or that anything prevented her from hearing the noise of approaching engine or cars if such noises had been made. She approached the track with her sense of hearing unimpaired, so far as the evidence discloses, and looked for the approach of engines or cars.

The rule stated in *St. Louis, I. M. & So. Ry. Co.* v. *Martin,* 61 Ark. 549, does not apply to the facts of this case.

Objection is made to the ruling of the trial court in allowing evidence to be introduced showing that many years before the injury occurred the railway company maintained for public use a foot bridge over the track at the place where it is claimed the path now runs. The evidence shows that many years before the injury, when an old hotel building was burned, the company took down the overhead bridge, and there is evidence tending to show that the path has been used generally by the public since the bridge was taken away. Without stopping to consider whether the evidence concerning the maintenance of the bridge was material or competent, we can not see how it could possibly have prejudiced appellant. There was no dispute about the previous maintenance and taking away of the bridge. The question in dispute was whether or not the railway company at the time of appellee's injury was permitting the public to use

the path through the yards. If it was, then appellee enjoyed the license, with the balance of the public, of traveling the path, and the employees of the company owed her the duty of ordinary care not to injure her while she was crossing the tracks. The court instructed the jury, at appellant's request, that "no matter what had been the previous use of the premises of defendant by plaintiff and others of the public, the same were the private property of the defendant, and the railroad company had the right at any time to terminate the practice."

With this admonition before the jury, we cannot see how any prejudicial effect could have come from the testimony concerning the abandoned bridge.

Judgment affirmed.

JACOBS v. BENTLEY.

Opinion delivered May 4, 1908.

1. APPEAL—INSUFFICIENCY OF ABSTRACT.—Instructions given by the trial court will not be considered on appeal if appellants neglect to set them out in their abstract or brief. (Page 188.)
2. ADMINISTRATION—COLLATERAL ATTACK UPON LETTERS.—Where the record of the appointment of an administrator is regular upon its face, the validity of such appointment cannot be impeached upon collateral attack by showing that at the time of his appointment the administrator was not a resident of the State. (Page 188.)
3. SALE OF GOODS—WHEN RIGHT OF STOPPAGE ENDED.—While a vendor's right to stop goods *in transitu* is not defeated until they have come into the vendor's actual possession or into his constructive possession by a delivery to his agent, yet when the vendee dies and his administrator takes possession, the transit is terminated, and the vendor's right of stoppage ended. (Page 189.)

Appeal from Monroe Circuit Court; *Eugene Lankford*, Judge; affirmed.

Manning & Emerson, for appellants.

1. The *transitus* is not ended until the goods have come into the vendee's actual possession, or into that of his authorized

agent. 43 Ark. 172. Appellant's right to rescind the sale could be exercised as well because of Seay's death as because of insolvency. 3 L. R. A. 647; 3 Pac. 396; 19 N. W. 410.

2. Atkins was a non-resident of this State, and could not serve as an administrator here; but, if competent to serve, there was no authority of law for Renfro's subscribing Atkins's name to the affidavit and petition for appointment. The clerk's act in issuing the letters of administration was a nullity, and the letters isued were void.

Thomas & Lee, for appellee.

The *transitus* was at an end. No effort to stop the goods *in transitu* was made until after the goods had been carried to their destination by the railroad company, by it delivered on the order of Seay to his agent, Capt. Wofford, and by him taken and delivered at Indian Bay; and no effort was then made until after appellant Garrett went to Indian Bay, where he found the goods in the store house of deceased, and an inventory being taken. 44 Ark. 556; 51 Ark. 133; 54 Ark. 307; 38 Ark. 614; 50 Ark. 20; 83 Ark. 426; 23 Am. & Eng. Enc. of L., 909, 911. Moreover, the subsequent delivery to the administrator occurred before any effort was made to stop the shipment.

2. The probate court is vested with a potential jurisdiction over the estate of a decased person from the happening of the death of that person. It has exclusive power to grant letters of administration, and its clerk has the power in vacation to issue such letters, subject to its confirmation. The granting of letters in this case could not be attacked collaterally. If erroneously issued, the remedy was by appeal. 19 Ark. 50; 10 Ark. 549; 19 Ark. 515; 44 Ark. 500; 45 Ark. 269; 46 Ark. 375; *Id.* 467; 57 Ark. 14; 64 Ark. 132.

HILL, C. J. John Seay was a liquor dealer at Indian Bay, Monroe County, where he died on the night of the 31st of August, 1903, intestate, leaving personal property at that place. On the 20th of August he had bought a bill of liquors of the appellants, Jacobs & Garrett, liquor merchants of Memphis, Tenn., and they shipped the goods in due course of business, routed to Clarendon, Ark., where they were delivered by the agent of the railroad company, who had authority for that pur-

pose from Seay, to a steamer plying on White River, and were carried by the steamer to Indian Bay. They were delivered to the steamer on August 31st, about nine o'clock in the morning, and reached Indian Bay on the morning of the 1st of September. The steamboat captain then learned of the death of Seay and put the goods on the wharf at the usual landing place, except one barrel of whiskey, which he kept for his freight charges. After keeping this for some two weeks, he delivered it at Seay's late place of business.

The railroad agent at Clarendon wired to Jacobs & Garrett of the death of Seay, and they wired back to stop the goods in transit, but before their telegram was received the goods had been delivered to the boat and gone to Indian Bay, and no message reached the carrier to stop delivery. Garrett came to Indian Bay shortly afterwards to investigate, and found the goods in the possession of one Renfro, who was acting for one Atkins, who had been appointed administrator of Seay's estate by the probate clerk in vacation on the 3rd of September, which appointment was later confirmed by the probate court in term. Garrett returned without taking any action in regard to the goods, and brought replevin on the 16th of October against the parties alleged to be in possession of them, including the administrator. He lost in the lower court, and brings the case here. There was testimony tending to establish the right of stoppage *in transitu,* if the right had been seasonably exercised.

Appellants criticize several of the instructions, but they do not set out the instructions in their abstract or brief, but proceed upon the theory that the court is familiar with the record, instead of making the court familiar with the record through their abstract. Under the well-settled practice of the court, such criticisms of the instructions do not present matters for review.

The principal attack is made upon the administration letters granted to Atkins. The proceedings were regular upon their face, and showed compliance with the statute in such matters. It was attempted to be shown that at the time of his appointment Atkins was out of the State of Arkansas, and was a non-resident of the State, and that Renfro made the application and bond and affidavit for him. The proceedings and record of the

probate court cannot thus be impeached in a collateral proceeding. *Hare* v. *Shaw,* 84 Ark. 32, and authorities there collated.

"The right of the unpaid vendor to stop goods *in transitu* upon the bankruptcy or insolvency of the vendee is not defeated by the mere arrival of the goods at their destination. The *transitus* is not at an end until they have come to the vendee's actual possession, or his constructive possession by a delivery to his agent." (Citing many cases.) *Mason* v. *Wilson,* 43 Ark. 172; 2 Mechem on Sales, § 1508-9.

"The transit, *ex hypothesi,* continues, and the right of stoppage may be exercised, until the goods have arrived at their destination, and have come into the actual or constructive possession of the buyer." 2 Mechem on Sales, § 1573.

When a man dies, "the probate court becomes vested 'with at least potential jurisdiction over his entire estate, which is put in actual exercise, if not before, at least upon the granting of letters testamentary or of administration.' Upon the granting of such letters, all his property, although the purchase money for the same may be unpaid, passes into the custody of the law, and becomes assets, a trust fund in the hands of his executor or administrator for the payment of his debts, subject to any liens or charges thereon or interests therein acquired by any other person in his lifetime." *Blass* v. *Hood,* 57 Ark. 13.

"As the successor of the vendee's rights upon his death, his administrator or executor may take possession, thereby terminating the transit and putting an end to the right of stoppage." 2 Mechem on Sales, § 1594.

The goods in question went into the hands of the administrator of the estate, and that administration, being *prima facie* regular, is impervious to collateral attack. The goods being in the hands of said administrator before the right of stoppage was attempted to be exercised, the title of the estate to them cannot be defeated in this action.

The case was tried upon this theory in the lower court, and it was right.

Judgment affirmed.

MILHAM v. PINE BLUFF & WESTERN RAILROAD COMPANY.

Opinion delivered May 4, 1908.

RAILROAD—STOCK KILLING—NEGLIGENCE.—A verdict in favor of a railroad company, in a suit for the killing of a horse, will not be set aside, although the headlight on the train which killed the horse was defective, where the evidence shows that the horse suddenly ran in front of the train, so near as to make it impossible to avoid the killing.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; affirmed.

Wm. G. Bouic, for appellant.

Austin & Danaher, for appellee.

BATTLE, J. J. W. and S. P. Milham brought an action in the Grant Circuit Court against Pine Bluff & Western Railroad Company to recover damages occasioned by the defendant killing a horse of the plaintiff. Defendant recovered judgment, and plaintiffs appealed.

The horse of appellants was killed by the defendant's train. Appellants contend that appellee was guilty of negligence as follows:

"First. In permitting its right of way to grow up with high bushes, sufficient to hide animals approaching the track, and in such close proximity to the track as to obstruct the view of the engineer and to make it impossible to keep that vigilant lookout for the protection of persons and property as is required under the law of this State.

"Second. The railroad company was negligent in operating its engine on and over their road with a defective headlight, by reason of which the engineer could not keep an effectual lookout on and near the track."

The record fails to show that appellants objected to instructions given by the court or asked for any. The only question, then, in the case is, was the verdict of the jury, which was in favor of the defendant, sustained by evidence?

Walter Milham, one of the appellants, testified in the trial that he examined the track and right of way where the horse was killed, for the purpose of ascertaining whether there was

any bushes growing there, and he found none sufficient to obstruct the view of the engineer and fireman of the train. This was sufficient to sustain the verdict, notwithstanding there was evidence to the contrary.

As to the headlight used at the time of the killing, the engineer and fireman of the train testified that the train was using an oil light, and that the horse was killed in a dark, rainy night; that the light was not as good as it might have been or equal to an electric light; that the train was running nine or ten miles an hour; and that the horse suddenly ran near and in front of the train, so near as to make it impossible to avoid the killing. The evidence fails to show that the headlight contributed to the injury. The train was moving slowly, and no reason appears why the light in use was not sufficient to enable the trainmen to discover the horse in time to avoid the killing, if it had been upon the track or so near as to be within the range of the vision of the engineer or fireman while looking along the track.

Judgment affirmed.

JONES v. JACKSON.

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Opinion delivered April 27, 1908.

1. APPEAL—NECESSITY OF BILL OF EXCEPTIONS.—Where the judgment record shows that a demurrer to an answer was sustained, and that exceptions thereto were saved, the question whether the court erred in so ruling is presented, without the necessity of a bill of exceptions. (Page 199.)
2. BILLS AND NOTES—DEFENSE—BAD FAITH OF PURCHASER.—In a suit upon a promissory note by an indorsee thereof, an answer which alleges that the note was procured by fraud, and that plaintiff had knowledge that the maker denied liability and notice of circumstances tending to show fraud in contracting the debt which the note evidenced, before he purchased it, sets up a good defense. (Page 199.)
3. SAME—FRAUD—PARTICIPATION OF PURCHASER.—One who purchases a note with notice that it was procured by fraud is not a *bona fide* purchaser, though he did not participate in its fraudulent procurement. (Page 200.)

Appeal from Sharp Circuit Court; *John W. Meeks,* Judge; reversed.

R. M. Jackson sued Jones & Wilson upon a note executed by them to W. E. Smith and by him assigned to plaintiff. Separate answers were filed by the defendants. They were substantially the same. That of defendant Jones is abstracted by his counsel as follows:

1. That he admitted that on the 8th day of May, 1905, by their promissory note he and his co-defendant promised on or before the first day of February, 1906, to pay to the order of W. E. Smith the sum of five hundred and nineteen dollars and twenty-five cents, but denied that said note was given for value by either of said defendants.

2. He denied that on the 16th day of May, 1905, or at any other time, before maturity of said note or after its maturity, plaintiff, in due course of trade and for value, or for any consideration became the owner of said note by purchase or otherwise from payee, W. E. Smith, and denies that plaintiff is still the owner and holder of said note, as alleged in plaintiff's complaint.

3. He states and alleges the facts to be that said note was obtained by the said W. E. Smith through fraud and false pretense and intimidation, and that it is, and was, without consideration, all of which was well known to said R. M. Jackson before he became the holder and pretended purchaser of said note.

4. That about the 20th day of April, 1905, the said W. E. Smith came to this defendant and represented to him that he was agent for one S. E. McNeil, of Calico Rock, Ark., who had a good, fresh and salable stock of general merchandise for sale, whose storehouse had recently been burned, and that he (Smith) would give this defendant a great bargain in said goods if he would purchase the same. That after repeated efforts the said Smith induced this defendant to go to Calico Rock to buy said goods.

5. That defendant had never had any experience in the mercantile business; knew nothing about goods nor their value; that when they reached said town of Calico Rock they found the said S. E. McNeil in charge of a stock of goods piled up stairs in an old store house, some in boxes and some piled around on the floor; that the place where the goods were was poorly lighted, and what goods were shown this defendant in daylight were the

best goods and the clothing, jewelry, trimmings, and the goods that were damaged and old were shown him after night by very poor lights; that he was unable to detect by what little opportunity he had, the defects in said goods; that the said W. E. Smith and the said S. E. McNeil told defendant, which he was let to believe, that said goods were all new goods and salable.

7. That said Smith represented to this defendant that he would sell and was selling said goods to defendant at a discount of twenty-five per cent. from the first cost price; that Smith and McNeil never showed defendant any invoice bills of said goods, and in listing the same he was compelled to take their word for the wholesale price, when in truth and in fact the said goods had been marked up on an average of twenty-five per cent. more than original costs; and some of said goods must have been fifteen years old. That the invoice as taken by said Smith and McNeil showed said goods to be worth, as they represented, something over $2,000.

8. That, after deducting twenty-five per cent. and throwing out a few things, the sum amounted to the sum of $1,586.25. That while there at Calico Rock this plaintiff was induced to execute two certain promissory notes to the said S. E. McNeil, one dated April 28, 1905, for $400.00, payable sixty days after date, before but few of said goods had been invoiced; and to secure the payment of said note this defendant was induced to give a mortgage to said S. E. McNeil on certain personal property. That on the next day the said Smith and McNeil, by fraud and false pretense, which they never fullfilled, viz.: "That all of said goods were new and not damaged in any way, and that they, Smith and McNeil, would give defendant all the time he wanted when he should reach home with the goods, to examine them fully, and that if any defects were found or any goods damaged they would make them good by deducting the value of the damaged goods from the amount, and place credits on said notes for the same; and further they threatened to foreclose the mortgage he had given to secure the $400.00 and sell his personal property, unless he went forward with the deal and give the note $667.00 note. That they failed and refused to make good the damaged goods and to give him credit for same upon said notes."

That, in addition to the fraud and false pretense and coercion, as above stated, in securing the first and second notes above described at Calico Rock, when the defendant and the said Smith reached Hardy with said goods, said Smith, in order to get defendant to execute the note sued on, and obtain a security thereon, proposed to defendant and promised him that he might take all the time he wanted to examine said goods when he should open them up, and, if they were not good fresh goods as represented to defendant at Calico Rock by said McNeil and Smith, that he need not pay said note, but threatened said defendant that if he refused to give said note he, Smith, would attach said goods at the depot, and that this defendant would have to pay the other notes theretofore given. That the said Smith further agreed and promised this defendant that he would leave the note sued on with Walker Clayton or any other man in Hardy until defendant should haul the goods out and open them up, and if they did not prove to be as good as represented that the said Smith was not to have the possession of said note, and same was not to be delivered to him until all defects and damages should be made good.

That, after he had executed said note, the said Smith refused to allow the said Walker Clayton or any one else to hold said note as per agreement.

That, in addition to said goods being old and moth-eaten, rotten and musty, there were a great many coats without vests; that in the few coats shown defendant by the said Smith and McNeil at Calico Rock there were vests to match, but when defendant opened up said clothing he found there were only four coats and vests, and 78 coats had no vests at all, which defect damaged the same more than one-half. That there were 36 pairs of shoes that did not mate, and are absolutely worthless; that the notions and jewelry were old and valueless. That immediately, viz., on the 11th day of May, 1905, after examination, and discovering the fraud as above set out, he went to the said Smith, and notified him of same, and demanded that he (defendant) be made whole as promised and agreed by said Smith. That the said Smith failed and refused to make good the damage on said goods as he had promised to do, and failed and refused to give him credit on the said notes therefor. That

this defendant then and there notified said Smith that he would not pay said note now sued on by plaintiff, and demanded that Smith return the same to him, and offered then and there on the 11th day of May, 1905, to return to said Smith and McNeil all of said goods and demanded a surrender of said note. That said defendant proposed to return the goods to them at Hardy or any other point they might want them shipped to. That on the 16th day of May, 1905, and before the said R. M. Jackson had pretended to trade for said note, in the town of Hardy, in the presence of his co-defendant J. A. Wilson, this defendant informed the said plaintiff, R. M. Jackson, that the said note was fraudulently obtained and was without consideration and warned him not to buy or trade for same, and all the circumstances and fraud practiced on him by the said Smith and McNeil in obtaining said note and that he would not pay it. That immediately after the commencement of this suit this defendant proposed and offered to plaintiff, by his attorney, at the store house of said R. M. Jackson, in the town of Hardy, to turn over to him the said goods as set out in the invoice filed herewith, if he would return to him the note sued on; that on the next day by certain promises and fraudulent representations, this defendant was induced to execute another note to said McNeil, payable November 15, 1906, in the sum of $667.00, and the remainder on said goods, the sum of $519.25, the note sued on, he was induced by the said Smith and McNeil to execute to said Smith and to obtain a security on the same, which he did in the person of J. A. Wilson his co-defendant.

9. That, after the said Smith and McNeil had induced defendant to execute the first note and mortgage in the sum of $400, they refused to make good any of the defects they promised to do, and when the goods had reached the depot at Hardy the said Smith threatened to attach same for balance $519.25, and not allow said defendant to haul same out until this said note was executed and delivered to said Smith.

10. That in the purchase of said goods the said Smith guarantied said goods to be good merchantable goods and free from incumbrance, and, relying upon what he and the said S. E. McNeil said and promised to do, this defendant was fraudulently deceived and induced to execute said note, when in truth

and in fact said goods, with few exceptions, were old and moth-eaten—being an old stock of goods owned by J. A. Schenck & Son of Hardy, Ark., which had recently been removed from Hardy to Calico Rock. That in truth and in fact the said goods did not belong to the said McNeil at all, but were, at the time of the sale, the property of said Schenck & Son, and the said McNeil had no interest in them, that the notes given to said McNeil were immediately assigned by said McNeil to said Schenck & Son, as well as the mortgage given by this defendant, which notes and mortgage have been paid by this defendant with interest thereon of about $1,200.

11. This defendant, further answering, states that at the time this defendant was induced to purchase said goods and execute said notes he was assured by said Smith that said goods were free from incumbrance of every kind, when in truth and in fact said goods had been mortgaged by said J. A. Schenck & Son to Edward-Stanwood Shoe Co., of Chicago, Ill., for the sum of $406.90, which mortgage was dated April 18, 1905, and not satisfied.

12. That said goods were old, worn, moth-eaten and worthless, which fact was not known to this defendant until he had hauled the goods out from Hardy and opened them up and undertook to put them in his store house for sale. He then discovered the enormity of the fraud perpetrated upon him, and how the goods, instead of being sold to him at a discount, had been sold much higher than fresh goods were worth in the market. That, immediately on discovering said fraud, this defendant notified the said W. E. Smith of the same, and that he would not pay to the said Smith the sum of this said note sued on by the said plaintiff.

13. That defendant also informed the said plaintiff, R. M. Jackson, that the said Smith had perpetrated a fraud on him in obtaining said note in the sale of said goods; and again, before said plaintiff traded or pretended to trade for said note, this defendant told him, the said R. M. Jackson, that he would not pay it, for him not to trade for it, and that his co-defendant, also so advised said plaintiff.

14. Defendant further states that he has on hand about $959.00 worth of said goods, according to the invoice of said

goods, consisting of clothing, shoes, etc., which he has heretofore offered and still offers to turn over to said R. M. Jackson or W. E. Smith in satisfaction of said note sued on. That he has long since paid the other notes, a large amount of which went to satisfy the mortgage which was on the goods, given by the said J. A. Schenck & Son.

A demurrer to each paragraph of the separate answers was sustained, and thereupon defendants filed an answer, which was substituted for paragraph 2 above set out, and is substantially as follows:

Defendants admit that W. E. Smith assigned the note in blank by indorsing his name thereon, but denies that plaintiff in due course and before maturity became the owner of the note, that the assignment was made for value, or that plaintiff is the owner thereof.

Plaintiff's testimony tended to prove that he purchased the note in good faith and for a valuable consideration before its maturity.

The cause was tried before the court, a jury being waived, and judgment was for plaintiff. Defendant has appealed.

David L. King, for appellant.

The answer sufficiently states a defense in setting out that plaintiff had knowledge before purchasing that appellants denied liability because of the fraud, false pretenses and intimidation practiced upon them by the vendors of the goods. I Daniel, Neg. Inst. 718; *Id.* 740; Edwards on Bills and Prom. Notes, 516; 2 Randolph, Com. Paper, § 986; *Id.* 1019; 33 Ark. 69; 3 Ohio, 92; 23 Ark. 258; 58 Ark. 446; 50 Ark. 314; 30 Ark. 417; 12 Ark. 218; 49 Ark. 20; 50 Ark. 447; 55 Ark. 582; 14 Ark. 69.

Sam H. Davidson, for appellee.

1. Appellant's statements in his answer that he informed appellee that the note was fraudulently obtained was without consideration, etc., were mere conclusions, and constituted no defense. Appellee could not be affected unless it was shown that he had actual knowledge of a defense before he purchased the note, and such defense should have been distinctly pleaded,

together with an allegation of knowledge on the part of plaintiff. As between Smith and appellant, the doctrine of *caveat emptor* applies. 8 Am. & Eng. Enc. of L., 795; 124 Mass. 431; 31 Ark. 170; 8 Am. & Eng. Enc. of L., (1 Ed.), 795 and note 6. There is no allegation that appellant could not examine all the goods by daylight, or have waited until the next day, or have had a better and sufficient light. From all that appears by the allegations of the answer, their true condition could have been ascertained by the use of ordinary diligence. Appellant would have had no remedy against Smith and McNeil. 31 Ark. 170; 102 Mass. 220; Benjamin on Sales, 4 Am. Ed. § 430.

2. There is nothing presented by the purported bill of exceptions. A certificate at the end of a bill of exceptions which states: "And now on this 28th day of February, 1907, is presented this bill of exceptions, which is signed and sealed and appeal allowed and certified by the court," is not an authentication of the truth of the matters contained therein, nor does it present such matters for the consideration of the court. 51 Ark. 278; 81 Ark. 65; 79 Ga. 558; 78 Ga. 356; 3 Enc. of Pl. & Pr. 458; 35 Ark. 386; *Id.* 395; 58 Ark. 110.

HILL, C. J. Thos. W. Jones as principal, and J. A. Wilson as surety, executed a note for $519.25 to W. E. Smith. Smith assigned the note to R. M. Jackson, who sued Jones and Wilson upon it. Jones and Wilson filed separate answers, which were substantially the same. The substance of the answers will be set out by the Reporter in the statement of facts, and it will be seen therefrom that the defense was based upon the alleged fraudulent sale of a stock of goods by Smith to Jones, and that Jackson was not an innocent purchaser of the note and had knowledge of the fraud perpetrated upon Jones by Smith. The court sustained motions to make the complaint more specific and certain; and after amendments sustained demurrers to all of the answers except a substitute for paragraph 2, which admitted the assignment of the note from Smith to Jackson and denied that the date it was assigned was the date shown on the note, and alleged that it was not made before maturity, and that Jackson did not become the owner in due

course of trade, and denied that the assignment was made for value, and denied that Jackson was the owner.

That was the only defense left to Jones. Judgment was obtained on the note, and Jones and his surety appealed.

It is insisted that the bill of exceptions does not show that it was filed within the time allowed for it to be made a part of the record. This is true; but the court finds it unnecessary to consider the bill of exceptions, for the record shows the sustaining of the demurrers to the answer and the exceptions thereto, which were properly preserved; and such record presents a question for review, without the need of a bill of exceptions. *Bush* v. *Prescott & N. W. Ry. Co.*, 76 Ark. 497.

The answers set forth evidentiary matters that are not proper in pleading, and they cannot be commended as examples of good Code pleading; but, when taken as a whole, they sufficiently charge fraud in the sale of the goods to make a good defense between the vendor and vendee, under the principles which were reviewed and announced in *Mason* v. *Thornton*, 74 Ark. 46. It seems that the lower court sustained the demurrers because the allegations were not sufficient to connect the fraud in the sale with the holder of the note.

The allegations, in substance, charge that Jackson had notice of the fraud, false pretense and intimidation perpetrated upon the defendant by Smith, and that Jackson was informed that the note was fraudulently obtained and was without consideration, and was warned not to buy or trade for the same, and of all the circumstances and fraud practiced on Smith in obtaining said note, and also that Smith would not pay it. Counsel for appellee argues that these allegations do not present a defense, because they do not allege that the holder of the note participated in the acts complained of or in the fraudulent transfer of the instrument, or bad faith on his part in the purchase of it; and relied upon *Thompson* v. *Love*, 61 Ark. 81, to sustain him. That was a suit upon a note given to a hedge fence company. Its execution was admitted, and the defense made that it was fraudulently procured, and the holder was not a *bona fide* purchaser. There was evidence to sustain the allegation of fraud in the procurement of the note. The case turned on whether the purchaser was a *bona fide* purchaser. The only

evidence bringing notice home to him was information which he received to the effect that the makers of this and other similar notes were solvent and good for their contracts, but that the payee of these notes had agreed not to sell them. The court, following *Burke* v. *Dulaney,* 153 U. S. 233, correctly decided that this was insufficient to make the purchaser a *mala fide* holder. The court has had occasion recently to re-examine the principles of *Burke* v. *Dulaney,* and has again approved them, in *Graham* v. *Remmel,* 76 Ark. 140.

It is unquestionably true that mere notice of a promise not to negotiate a note does not prevent a purchaser for value in due course of trade from being a *bona fide* purchaser, for he must have knowledge, not of some oral contemporaneous promise, which is inadmissible in evidence, but of something wrong with the paper itself. This notice, actual or constructive, must be that there is some fraud or equity or illegality affecting the original parties. Tiedeman on Commercial Paper, § 300; 1 Daniel on Negotiable Instruments, § 799, (5th Ed.); *Old National Bank of Ft. Wayne* v. *Marcy,* 79 Ark. 149.

Following the excerpt from *Burke* v. *Dulaney,* the court, in *Thompson* v. *Love,* then made a quotation from Tiedeman on Com. Paper, § 289, concluding as follows: "But the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the *bona fide* character of a holder can only be destroyed by proof of his participation in a fraudulent transfer of the instrument." This quotation is from the discussion as to what constitutes *bona fides* in a purchaser. There was a conflict, or rather a progress, in the English decisions on the subject. One rule was laid down by Lord Kenyon, subsequently overruled by Lord Chief Justice Abbott (Lord Tenterden), and this was in turn modified and finally overruled by Lord Denman, when he was Chief Justice, and the rule as first announced by Lord Kenyon amplified and established. Chancellor Kent, when he wrote his commentaries, stated the law as it then existed, following the cases then prevailing in England, but which were afterwards overruled, and his text has been followed by some of the courts, but in most instances overruled later, making the rules substantially the same on both sides of the water. This subject is treated more

fully in 1 Daniel on Negotiable Instruments, (5th Ed.), § § 770, 776. It was reviewed and explained in *Murray* v. *Lardner,* 2 Wall. 110, which case has been followed very generally by State as well as Federal courts. See the notes to it in 6 Rose's Notes, 388, 394. The discussion was as to what should constitute *mala fides,* negligence, gross negligence, suspicious circumstances, or participation in the original fraud or fraudulent transfer, etc. The discussion was not as to the notice which was necessary to bring home to the party sought to be charged knowledge of fraud. That matter is considered in another section of Tiedeman on Com. Paper (§ 300), and concludes as follows: "Finally it is not necessary that the purchaser should have notice of the particular defense or defect, in order to be charged with constructive notice. It is sufficient if he has a general notice that there is something wrong with the paper. But if he makes inquiry *bona fide* and to the extent of his ability, without substantiating the general notice of defeet, he can claim the protection of a *bona fide* holder."

Mr. Daniel says: "It is quite clear and well settled that the purchaser need not have notice of the particular fraud or equity or illegality, in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is some fraud or equity or illegality affecting the original parties. * * * So if he knows the maker denies his liability or refuses to acknowledge it." 1 Daniel on Neg. Inst. (5th Ed.), § 799. The foregoing statement of the principles was adopted by this court recently in the case of *Old Nat. Bank of Ft. Wayne* v. *Marcy,* 79 Ark. 149.

The statement from Tiedeman's text, quoted in *Thompson* v. *Love,* when detached from the statement that notice of something wrong with the paper is sufficient to charge the purchaser with notice, is misleading, but, when considered in connection with it, is correct. It was error for the court to sustain these demurrers, for the answers alleged that the purchaser had knowledge that the makers denied liability and of circumstances tending to show fraud in the contraction of the debt which the note evidenced, before he purchased the paper for value before its maturity. These facts, if proved, would make him a *mala fide,* and not a *bona fide,* purchaser.

Reversed and remanded.

COLLINS v. BLUFF CITY LUMBER COMPANY.

Opinion delivered May 11, 1908.

1. DEEDS—CONVEYANCE OF TIMBER AS NOTICE.—A deed conveying timber, when recorded, is constructive notice, to all persons holding under the same chain of title, of the grantee's right to the timber. (Page 205.)
2. ADVERSE POSSESSION—PRESUMPTION.—Where growing timber was conveyed to A, and subsequently the land was conveyed to B, who had record notice of A's title, B's possession of the land will, in the absence of a contrary showing, be presumed to be in subordination to A's right to the timber. (Page 205.)

Appeal from Grant Chancery Court; *Alphonso Curl,* Chancellor; affirmed.

E. H. Vance, for appellants.

Proof of continuous adverse possession of the land and timber for over seven years, under the claim of title, paying taxes thereon and exercising other rights of ownership of same, establishes adverse possession in this case, and the finding and decree should have been for appellants. 71 Ark. 273; Kirby's Digest, § 5056; 75 Ark. 395; *Id.* 514; 97 S. W. 447; 76 Ark. 25.

W. D. Brouse, for appellee.

The deeds to appellee, and its deeds reserving the timber, were all executed and on record before appellants had title to any of the lands. This was notice to appellants by which they were bound. Not only have they not discharged the burden resting upon them to show adverse possession, but their possession of the lands was not adverse to appellee's right to the timber, and this right could be exercised within the specified or a reasonable time. 43 Ark. 464; 29 Ark. 650; 37 Ark. 571; 50 Ark. 532; 75 Ark. 395; *Id.* 715; Tiedeman on Real Property, § 10; 73 Ark. 329; 69 Ark. 442; 28 Am. & Eng. Enc. of Law (2 Ed.), 542, 543; 1 *Id.* (2 Ed.), 875, 889, 789; 1 Cyc. 981, 984; Kirby's Digest, § 762; Martindale on Conveyancing (2 Ed.), § § 74, 277.

BATTLE, J. On the 29th day of September, 1906, the Bluff City Lumber Company, claiming to be the owner of the merchantable timber growing on certain lands described in its complaint, brought suit in the Grant Chancery Court against A. D.

Collins and J. S. Collins to restrain them from interfering with or molesting it in the cutting of the same. It alleged that it had a limited time in which to cut the timber, and was cutting it when the defendants forcibly interfered and prevented it from continuing to cut, and that it can not do so without the use of force.

A temporary restraining order was granted by the chancellor as asked.

The defendants jointly answered, and denied that plaintiff was the owner of the timber, and alleged that they were the owners of nearly all of the lands upon which the timber was growing and the owners of the timber; and alleged that they and their grantors had held seven years' peaceable possession thereof before the commencement of this suit.

After hearing the evidence the court found and decreed as follows:

"1. That on and prior to December 15, 1896, the plaintiff was the owner of the following lands, towit: N. E. N. E., section 28, S. E. S. E. section 21, N. W. S. E. section 21, and two acres in the S. W. N. E. section 21, located in the center of the south line of said 40, and that on said December 15, 1896, sold and conveyed to Maggie C. Campbell, except the timber thereon which was reserved by grantor, plaintiff herein, with privilege of cutting and removing same at any time within ten years from date, which privilege expired December 15, 1906.

"2. That said plaintiff purchased and became the owner of all of the timber on the following tract of land on February 17, 1896, towit: 8 acres on the south side of the N. E. S. W., section 21; all of S. E. S. W., section 21; S. W. S. E., section 21; N. W. N. E., section 21; and N. E. N. W., section 28.

"3. That said plaintiff purchased and became the owner of all of the pine and oak timber on the following tracts of land on February 24, 1896, towit: N. E. S. E., section 21, all of said lands being in Tp. 4, R. 12 W., situated in Grant County, Arkansas.

"4. That the source of the title to the timber in the plaintiff and the title to the lands in the defendants is common as to all except said N. E. S. E., section 21, as to which plaintiff has shown title in it.

"5. The court further finds that the deeds to the plaintiff for all of said timber were duly recorded in the recorder's office of this county before the purchase of the lands were made by the defendant, and before the purchase of the same by any of the intermediate grantors of said defendant, and that both said intermediate grantors and said defendants had knowledge, on account of the recording of said deed to plaintiff, of the plaintiff's title to said timber, and that the purchases of the defendant were all, therefore, made subject to the timber rights of said plaintiff.

"6. The court further finds that the right to cut and take away timber off of the lands set out in paragraph styled first in this decree expired on the said December 15, 1906, and that, while no time was specified in the deed to plaintiff for the timber on the other lands, taking into consideration the amount owned by plaintiff in that locality, its manner of cutting and removing same and the evident intentions of the grantors and grantees in the deeds to plaintiff for the other timber, as shown by the testimony in this cause, a reasonable time in which to cut and remove the timber off of the lands set out in paragraphs styled two and three in this decree would expire on December 15, 1906, being same time limited as to the other timber.

"7 The court further finds that the possession of the timber was not adverse to plaintiff's title and rights to the timber on said land.

"8. The court further finds that on September 26, 1906, the time of the granting of the injunction herein, and on September 29, 1906, the time of the issuance of summons and injunction by the clerk and at the time it was served on the defendants, plaintiff was entitled to the relief prayed for in its complaint.

"It is therefore considered, ordered, adjudged and decreed by the court that the plaintiff have and hold all timber that it has cut and removed from said lands, and that the temporary injunction heretofore granted be made perpetual against said defendants and in favor of said plaintiff as to same. It is further considered, ordered, adjudged and decreed that, as plaintiff's rights and title to any timber remaining on said lands on and since December 15, 1906, expired on that date, the tem-

porary injunction be dismissed as to that, and the title to the timber on said lands since that time be quieted in the defendants as against the plaintiff; and that the plaintiff have and recover of said defendants all of its costs herein expended and have execution therefor."

The defendants appealed.

The only contention of appellants here is that they held adverse possession of the lands in question and the timber growing thereon. The court found, and is sustained by the evidence, that the possession of the appellants was not adverse to appellee's title and right to the timber. Long before appellants acquired any title or claim to the land, appellee held and owned the timber under deeds properly filed and recorded. These deeds come within appellants' chain of title, and were notice of appellee's right to the timber. *Kendall* v. *J. I. Porter Lumber Co.*, 69 Ark. 442. If they held the land upon which the timber was growing, it is presumed, unless the contrary appears, that they held in subordination to appellee's right to the timber, such possession being consistent with the right to the timber. *Ringo* v. *Woodruff*, 43 Ark. 469. Mere possession is not sufficient to bar recovery. It must be adverse for seven consecutive years before the commencement of this suit. It was not shown to be adverse for the requisite time in this case.

Decree affirmed.

PULASKI COUNTY *v.* FIRST BAPTIST CHURCH.

Opinion delivered May 11, 1908.

TAXATION—CHURCH PROPERTY—EXEMPTION.—Under Const. 1874, art. 16, § 5, exempting "churches used as such," a lot adjoining the two lots on which a church is built, which belongs to the church but is unoccupied, and not used by the church, save that there is a well of water which is used for drinking purposes and some outhouses used as water closets, is not necessary for the use of the church, and is liable to taxation.

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

George W. Williams and *J. C. Marshall,* for appellant.

1. It is only by implication that the words "churches used as such" can include any land at all. Similar words have been held to include a reasonably sufficient territory around the church "for convenient ingress and egress, light, air, or proper and decent ornament." 147 Mass. 396. Yet it is also true that to be exempt the property must be actually, exclusively and directly used for religious purposes. 25 Am. & Eng. Enc. of Law, 163, 164. After taxing lot 3, there is still left a vacant space on the south side of the church sufficient for light, air, ingress, egress, etc., which is exempt. There is no proof that lot 3 is necessary for these purposes, and having been put to secular uses it can not at the same time be said to be used for church purposes or church grounds. 78 Ga. 541; 38 Ind. 3; 10 Kan. 214; 12 Minn. 280; 11 L. R. A. (Minn.), 175; 41 N. J. L. 117; 25 Ohio St. 229; 52 L. R. A. (Mass.), 778.

2. Taxation is the rule, exemption the exception. The burden is on the party claiming exemption to bring himself within the exception. 57 Ark. 445; 62 Ark. 481; 25 Am. & Eng. Enc. of Law, 157-159.

N. H. Nichols, for appellee.

Appellee claims exemption under the provisions of art. 16, § 5, Const., and Kirby's Digest, § 6887. The proof shows that lot 3 is used only for church purposes, without a view to profit, and, in view of the uses to which it is put, the very large membership of this church and the congregations assembling there, it is necessary to afford a "reasonably sufficient territory around the church for convenient ingress, egress," etc. 147 Mass. 396. What is a sufficient territory surrounding the church to be classed as exempt from taxation, since there is no statutory limitation, is largely a matter of discretion for the court's decision under the proof in the case. 101 S. W. 338; 76 S. W. 412; 17 Atl. 476.

HART, J. Appellee filed its petition in the Pulaski County Court setting up that it is the owner of lots 1, 2 and 3 in block 129, in the city of Little Rock, Arkansas, and asked that the same be exempted from taxation as being used exclusively for church purposes.

The county court exempted lots 1 and 2, and held lot 3 taxable. The circuit court on appeal held all three lots exempt, and an appeal was taken to this court.

The facts are as follows: The church is situated on the corner of Seventh and Gaines streets in the city of Little Rock, Arkansas. It is situated on the front portion of lots 1 and 2, and faces west. All the lots run east and west. Lot 3, the most southerly one, has a well of water in the middle which is used for drinking purposes, and some outhouses on the east end, which are used as water closets. They are used by the members of the church. There is a hydrant on the north side. The church membership consists of 1,500 persons.

Art. 16, section 5, of the Constitution of 1874 exempts the following property only from taxation: "Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity."

In thickly populated communities, such as exist in cities, it is well known that typhoid and other germs are more prevalent in well water than in water taken from the city mains. The water closets should have sewer connections, and, therefore, it is not necessary that they should be situated at a distance from the church building. The comfort and health of so large a congregation would be best promoted by the use of water from the city mains and by closets with sewer connections. There is ample room for that purpose on lots 1 and 2 on which the church building is situated. The church has a street in front of it and one on the side and an alley in the rear.

For these reasons, we do not think that lot 3 is necessary for the use of the church, and it is therefore liable to taxation.

Reversed and remanded with directions to enter judgment accordingly.

HILL, C. J., (dissenting). Section 5, art. 16, of the Constitution exempts the following property from taxation: "Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school

purposes, and buildings and grounds and materials used exclusively for public charity."

The General Assembly of 1883, declared as exempt from taxation the following property: "First. All public school houses and houses used exclusively for public worship, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit." Section 6887, Kirby's Digest.

If the Constitution be taken literally, only the church house would be exempt; but it has not been construed with that literalness, and it should not be. It was not the mere walls and roof, but the place of religious meeting that was exempted. The Legislature, meeting within less than ten years after the Constitution was framed, placed that construction upon it by the enactment of the above section. If the Constitution be taken literally, this act would be unconstitutional, for it exempts the grounds attached to the building necessary for the proper use and enjoyment of the same, which are not leased or otherwise used with a view to profit, while the Constitution only exempts *eo nomine* the church. This was giving a reasonable interpretation to the constitutional exemption. If this construction be placed upon the constitutional provision, in my opinion the property here fell within the statutory description of "the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit."

Therefore, I can not concur in the judgment.

WESTERN UNION TELEGRAPH COMPANY *v.* LILLARD.

Opinion delivered May 11, 1908.

1. TELEGRAPHS—RIGHT TO REFUSE TO SEND MESSAGE.—A telegraph operator cannot refuse to send a message, the object of which is to report the servants of a railroad company for neglect of duty in not keeping up the fire in a station. (Page 211.)

2. MASTER AND SERVANT—HOW RELATION PROVED.—The relation of master and servant between two persons may be shown by proving that the one performs services for the other. (Page 211.)
3. EVIDENCE—PAROL PROOF OF CONTENTS OF COLLATERAL WRITING.—The contents of a writing may be proved by parol where the writing is not the matter in issue, or where the writing was left in the hands of the adversary's agent. (Page 211.)

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

STATEMENT BY THE COURT.

This is a suit to recover the statutory penalty of $500 under section 7946 of Kirby's Digest for alleged wilful refusal of the defendant telegraph company to send a message tendered for transmission by the plaintiff, W. B. Lillard.

The message alleged to have been tendered and refused was as follows:

"Stamps, Ark., December 24, 1906, 5:40 P. M.

"Superintendent Cotton Belt Railway,

"Pine Bluff, Arkansas.

"No fire in depot. Is it agent's or passenger's place to make one? Wire answer.

"W. B. LILLARD."

The evidence adduced at the trial shows that the plaintiff, W. B. Lilliard, delivered the telegram in question, with the money required to send same, at the office of the telegraph company to a person seemingly in charge of the office, but who was in reality the porter at the station. That afterwards, but during the business hours of the telegraph company, the station agent came in and told the plaintiff, Lillard, when the message was given him by the porter, that it would not be sent. The telegraph operator came in before the office was closed for the day. The record is silent as to whether or not, the message was delivered to him, but it was not transmitted over the wire. The offices of the telegraph operator and of the station agent were in the same room, and, in the absence of the operator, the station agent acted in his place.

There was a verdict and judgment for $500, and defendant has appealed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. It is not shown that appellant's agent ever received the message for transmission or had any knowledge of it. It is further shown that appellant and the railroad company maintained separate wires to Pine Bluff. It is not shown that the employees of the railroad company were authorized to act for the telegraph company; but if the station agent had authority to receive telegrams in the absence of the operator, his wrongful act in destroying the message was beyond the scope of his authority, and appellant would not be liable. 84 Ark. 457; 40 Ark. 298; 59 Ark. 395; 65 Ark. 144; 77 Ark. 606.

2. The message being of an improper character, not in the usual course of business, of a nature calculated to place the agent at variance with his employer, was not tendered in good faith with the expectation that it would be sent, but must have been tendered with the expectation of laying the foundation for a suit, and he ought not to recover. 54 Ark. 354; 82 Ark. 128; 76 Ark. 125; Mechem on Agency, § 723.

3. No proper foundation was laid to prove the contents of the message. The original message was the best evidence; and, until its loss was proved, no other evidence could be received. Jones on Telegraph and Telephone Companies, § § 679 to 684.

L. A. Byrne, for appellee.

1. The message was given to the agent in charge of the telegraph office, who said he was agent, referred to a rate book, furnished the rate and received the money. About an hour afterwards the message and money were in the hands of the station agent, who stated he would not allow it to be sent. Shortly after, a man is found in the office at the batteries, who, on inquiry being made if a reply had been received, stated that no reply was due, as the telegram would not be sent. When one goes into a telegraph office to send a message, and finds a man in charge who acts for the company, the presumption is that he is the proper agent and acts with authority of his employer. 3 Ark. 578; 41 Ark. 83; 48 Ark. 177; 1 Am. & Eng. Enc. of Law (2 Ed.), 957.

2. So far as appellant is concerned, appellee's motive in sending the message is immaterial, and it can not set up this fact as a defense against the statutory penalty. 60 Ark. 221. The rule laid down in 76 Ark. 125 does not apply, that being a case based on an honest mistake. Here there is a willful refusal.

3. The contention that the trial court erred in admitting oral testimony to prove the contents of the message is without merit. The language of the telegram was not properly an issue.

HART, J., (after stating the facts.) 1. Appellant contends that the telegram was an improper message to transmit over the wires. A telegraph operator may refuse to send a message that is obscene, slanderous, blasphemous, profane, indecent or the like, but the telegram in question was not of such character and was entirely proper to be transmitted. Doubtless, the object of the message was to report the servants of the railroad company for neglect of duty in not keeping up the fire in the station, but the object of the sender can not affect the right to recover in a suit to enforce the penalty prescribed by the statute. *Railway Co.* v. *Smith,* 60 Ark. 221; *Railway Co.* v. *Trimble,* 54 Ark. 354.

2. There is nothing in the connection of appellant that the message was not delivered to an agent of the company. It is not important to consider whether or not the station porter was also the employee of the telegraph company, and as such impowered to receive messages for transmission over the wire; for the undisputed testimony is that, in the absence of the operator, the station agent received messages for transmission. This was sufficient to establish his agency. It would often be difficult to prove the relation of master and servant except by the fact that the one performs service for the other. *St. Louis, I. M. & So. Ry. Co.* v. *Hendricks,* 48 Ark. 177.

3. It is lastly contended that the trial court erred in admitting oral testimony of the contents of the telegram. This contention is without foundation; for the language of the telegram was not a matter in issue. Besides, appellee testified that he left the telegram in the possession of the station agent, and does not know what he did with it.

Affirmed.

EUREKA STONE COMPANY v. FIRST CHRISTIAN CHURCH.

Opinion delivered May 11, 1908.

1. MECHANICS' LIEN—RIGHT OF CONTRACTOR'S SURETY TO CLAIM.—One who is a surety for the contractor cannot claim a lien for material furnished by him at the request of the contractor. (Page 216.)
2. PRINCIPAL AND SURETY—ALTERATION OF CONTRACT—EFFECT.—A surety upon the bond of a building contractor is not released by a change in the original plans and specifications if such change was authorized by the terms of the contract or was not a material one. (Page 216.)
3. APPEAL—CONCLUSIVENESS OF FINDING OF FACTS.—A chancellor's finding of facts will not be disturbed unless against the clear weight of the evidence. (Page 216.)
4. PRINCIPAL AND SURETY—EFFECT OF EXTENSION OF TIME.—An extension of the time for the completion of a building by the land owner, granted without consideration after expiration of the time in which the building should have been completed, was a voluntary act, and did not discharge the obligations of the contractor's bond. (Page 217.)
5. SAME—FAILURE TO RESERVE PART OF CONTRACT PRICE.—Where a building contractor abandoned his contract before completing the building, so that the owner was required to finish it, the latter's right to recover the amount in excess of the contract price expended in completing the building will not be defeated because ten per cent. of the price was not reserved, as required by the contract, until completion of the building. (Page 217.)
6. MECHANICS' LIEN—CHURCH PROPERTY.—A mechanics' lien cannot be asserted against a church building. (Page 217.)
7. INDEMNIFYING BOND—PARTIES.—A bond, the object of which appears to be to secure a church against liability for mechanics' liens, will not be held to create a right of action in favor of those who furnish material to be used in its construction, though it stipulates "that the contractor shall pay all artisans, materialmen, etc." (Page 218.)

Appeal from Sebastian Chancery Court; *J. V. Bourland,* Chancellor; reversed in part.

STATEMENT BY THE COURT.

This was a suit by the Eureka Stone Company against the First Christian Church of Fort Smith, Arkansas, to fix a lien upon the property of the church for materials furnished the contractor, E. D. Heilman, and used by him in the construction of the church building under the contract between him and the trustees of the church, made on the 4th day of March, 1903.

August Reichert, Mechanics' Planing Mill, Atkinson-Williams Hardware Company and Will Schulte, who claim to have furnished to said contractor materials used in the construction of the building, were also made parties defendant to the suit.

The church filed its answer, in which it denies that plaintiff has, or is entitled to enforce, a lien upon the lot and building described in the complaint for and on account of any material furnished by it in the construction of said building.

Defendant also alleges that said contractor, when said contract was entered into, was required to and did execute his bond to the said defendant Christian Church, conditioned that he would fully perform and carry out this contract, and build and complete the church according to the plans and specifications which were made a part of the said contract, and would protect the said defendant from all liens of any kind whatever for labor or materials furnished in building the church.

Defendant says that the plaintiff and S. F. Stahl were the sureties upon this bond; and asks that they be made parties to this action.

The defendants, August Reichart, Mechanics' Planing Mill and Atkinson-Williams Hardware Company, each filed a separate answer and cross-complaint, in which they assert a lien against the lot and building of the church for materials furnished, and ask a judgment for the amount of their respective claims against the Eureka Stone Company and S. F. Stahl as sureties on the contractor's bond.

The Eureka Stone Company answered these several cross-complaints as applied to it. It denies that the terms of the bond executed by E. D. Heilman with it as one of the sureties provided that the bondsmen on said bond should pay all claims for labor and materials used in the construction of the church, and denies that it is liable on said bond for any amount whatever. The Eureka Stone Company also filed its answer to the cross-complaint of the church. It admits that it became a surety on the bond of E. D. Heilman for the construction of the church building, but alleges that it is not liable on said bond because the church committed certain breaches of said contract, which are set out in its answer, and which will appear in the discussion of this branch of the case in the opinion.

In his answers to the cross-complaints of the lien claimants, Heilman admits that he is indebted to them in the amounts set out therein. He denies that he is indebted to the church, but alleges that the church is indebted to him for extra work in the sum of $563.00. He also pleads that he is insolvent, and has been adjudicated a bankrupt.

Will Schulte filed a complaint to enforce a mechanics' lien, but did not ask a judgment against the plaintiff as surety on the contractor's bond.

The chancellor made the following findings: That the Atkinson-Williams Hardware Company did not serve notice of their intention to file their lien upon the property of the church as required by law, and were therefore not entitled to a lien. That part of the claim of Will Schulte was for payment of freight for stone that he hauled. That he was not entitled to a lien for the payment of freight, but was entitled to a lien for that part of his account charged for hauling. That the Mechanics' Planing Mill Company and August Reichert were entitled to a lien for the respective amounts claimed by them. That the last three named lien claimants were entitled to recover against the Eureka Stone Company, a surety on the bond of the contractor, for the amount of their respective claims. That the Eureka Stone Company was not entitled to a lien on said building for the amount of its claim. That the church had expended $376.25 above the contract price in completion of the building, and was entitled to judgment for that amount against the Eureka Stone Company as surety.

A decree was entered in accordance with the findings of the chancellor, except that the judgment against the Eureka Stone Company for the amount of the liens asserted was in the name of the church for the benefit of the claimants.

An appeal was taken by the Eureka Stone Company, and cross appeals were taken by the defendants.

Youmans & Youmans, for appellant.

1. Appellant was released as surety on the bond of the contractor on account of the failure of the church to comply with its contract, delay caused by it (66 Ark. 287), payment before completion of the building, change in estimates, and exten-

sion of time without consent of bondsmen. The failure to reserve ten per cent. until the completion of the building releases bondsmen. 73 Ark. 473; 74 *Id.* 600.

2. A church is subject to a mechanics' lien, unless expressly exempted by statute. 20 A. & Eng. Enc. Law (2 Ed.), p. 289; 29 Oregon, 150; 10 Pa. St. 413; 69 Ark. 68. Review 79 Ark. 550 and 17 *Id.* 483, and contend that even under those decisions churches are subject to lien.

Ira D. Oglesby, for appellee First Christian Church.

1. The evidence does not show facts sufficient to release the surety on the bond, either as to change of rentals, delay of payment or change in estimates. An extension of time without consideration, even before maturity of the contract, will not relieve sureties; certainly not after breach of the contract. 109 N. W. 793; 105 *Id.* 879; Ib. 1956.

2. A church is not subject to a mechanic's lien. 17 Ark. 483; 79 Ark. 550, 556, 532, etc.

Read & McDonough, for Mechanics' Planing Mill Co.

1. A church building is subject to our mechanics' lien statute. There is no exception in the law. A church is not a public charity, and does not come within the rule in 79 Ark. 569. The case in 19 Ark. 532, 550, is not applicable. 14 N. Y. 380; 10 Pa. St. 413; 20 A. & Eng. Enc. Law, p. 289, 329, 858; 62 Ala. 252; 49 Ark. 478; Phillips on Mechanics' Liens, § 171; Boisot on Mechanics' Liens, § 179; 30 La. Ann. 711; 103 Ind. 414.

2. Appellee is entitled to judgment on the bond, irrespective of the lien. 88 Pac. 687.

3. No exceptions are necessary in equity. 40 Ill. 100; 59 Iowa, 157; 32 S. W. 467; 5 Ark. 700.

4. The question of lien was not raised as to this appellee in the court below, and can not be raised now for the first time. 72 Ark. 539; 74 *Id.* 88; 75 *Id.* 312; 76 *Id.* 509.

5. The church is estopped to deny the lien. 35 Ark. 376; *Ib.* 293.

Winchester & Martin, for cross-appellants Schulte, Reichardt and Atkinson-Williams Hardware Company.

1. Furnishers of materials not named in the bond are nevertheless beneficiaries. 124 Iowa, 599. The bond was made for the protection of all parties performing labor or furnishing material.

2. A church is subject to a mechanics' lien. No exceptions are made. Kirby's Digest, § 4970, 4991; 49 Ark. 475; art. 9, section 3, Const.

HART, J., (after stating the facts.) For the reason here given and the additional reason hereafter given, the chancellor was correct in holding that the Eureka Stone Company was not entitled to assert a lien upon the building. It was the surety upon the bond of the principal contractor conditioned for the performance of the contract and the delivery of the building free from liens. "One who is a surety for the contractor can not claim a lien for material furnished by him at the request of the contractor. That would enable a man to exact payment for what he had promised should be paid for by another." Phillips on Mechanics' Liens, § 43a; Boisot on Mechanics' Liens, § 753.

The chancellor also found that the church paid out the sum of $376.25 in order to complete the building, and judgment was rendered for this amount against the Eureka Stone Company, the surety on the bond of the contractor.

The specific claims relied upon by the Eureka Stone Company to release it from liability on the bond are as follows:

First. Change of lintels.

Second. Metal ceilings.

Third. Delay in payments.

Fourth. Change in making estimates.

Fifth. Extension of time for completion of building.

Sixth. Payment before completion of the building.

The lintels provided for in the original plans and specifications were changed by direction of the architect, and such change was authorized by the terms of the contract. Besides, we do not regard the change as a material one.

The contention of appellant that the failure of the church to have the metal ceiling on hand discharged the bond is not well taken. The testimony clearly shows that the contractor was not ready for the metal ceiling until June, 1904, three

months after the time for the completion of the church had expired; and it is further shown that no delay was caused on account of the ceiling. The chancellor found in favor of the church on the facts on both the question of delay in payments and change in the estimates, and, according to the settled rule of this court, his findings of fact will not be disturbed unless against the clear weight of the evidence. A careful consideration of the testimony does not justify a reversal of his findings in that regard.

The extension of time for the completion of the building, granted by the church, was done after the expiration of the time in which the building should have been completed, was a mere voluntary act without any consideration to support it. Therefore it neither added to nor took away any obligations of the bond.

Appellant seeks to avoid its liability on the bond because ten per cent. of the contract price was not reserved until completion of the building. This provision is based upon the performance of the terms of the contract by the contractor. In the present case the contractor abandoned his contract long before the building had been completed. Moreover, the building was not completed until June, 1905, more than one year after expiration of the time of its completion as fixed by the terms of the contract. We are of the opinion that the church was entitled to recover the $376.25, the amount expended by it above the contract price for the completion of the building after the contractor had abandoned the work.

A majority of the court is of the opinion that a mechanics' lien can not be asserted against a church building.

Counsel for the lien claimants contend that the general rule is that a church is subject to a mechanics' lien under a statute giving such a lien on buildings, unless churches are expressly exempted from the operation of the statute, and that this doctrine is not in conflict with that announced in the case of *Grissom* v. *Hill,* 17 Ark. 483. They maintain that the decision in that case was based upon a clause contained in the deed conditioned against alienation, but a contrary interpretation has been placed upon it by this court.

In the case of *Fordyce* v. *Woman's Christian National Lib.*

Association, 79 Ark. 550, in discussing the case of *Grissom* v. *Hill,* the court said: "The clause in the deed above mentioned cut no figure in the case whatever; and what was said in the opinion as to the effect of the deed was pure surplusage because the trustees acquiesced in the decree rendered in the court below, and did not appeal."

True, the subject under discussion in the Fordyce case was whether the property of a public charity could be sold under execution, but the principle announced is the same; for our statutes do not make any exception in favor of the property of public charities in regard to execution liens, and it was held in the case of *Biscoe* v. *Thweatt,* 74 Ark. 545, and reaffirmed in the case of *McDonald* v. *Shaw,* 81 Ark. 235, that a church is a public charity. So, whatever may be the rule elsewhere, it may be considered as settled in this State that a church building is not subject to a mechanics' lien.

Cross-appellants, who are lien claimants, ask for judgment against the Eureka Stone Company, the surety on the bond of the principal contractor, for the amount of their debt. In the case of *Thomas Manufacturing Company* v. *Prather,* 65 Ark. 27, it was held that where a promise is made to one upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor for a breach of his promise. Hence the right of the lien claimants to recover on the bond depends upon the terms of the contract in connection with the conditions of the bond. The church is the only obligee named in the bond, and the only condition contained therein is that the principal contractor shall perform his contract and fulfill the stipulations thereof. The contract, so far as material to determine the liability of the bond for materials furnished, is as follows: "In determining the liability of the sureties on the bond to the materialmen, sentences or parts of sentences must not be considered apart from what follows and what precedes them." The intention of the parties is to be gathered from the whole instrument. If the intention was to secure the payment of materials furnished to the contractor, then the materialmen should recover. If, on the other hand, the fund only secured the church against claims and liens, then it becomes a bond of indemnity to the church, and materialmen are not entitled to recover. The materialmen

base their right to recover upon that clause of the contract which provides that the contractor shall pay all materialmen, but it will be observed that the subject in contemplation of the parties was the protection of the church against liens that might be asserted against the building; for that which immediately precedes as well as that which follows the clause in question manifestly shows that the object in view was to protect the church from the filing of liens, and to provide for their payment in case they were asserted.

Article fifteen of the contract, in which the expression in question occurs, is wholly taken up with the subject of liens. It provides that if, from any cause, a lien shall be filed, the amount of such lien may be withheld from the contractor until the claim is satisfied. A subsequent clause provides that the trustees of the church may settle with such claimants according to their judgment, pay the same without litigation, and that the whole cost of the adjustment shall be borne and paid by the contractor and his bondsmen out of any sums due or to become due the contractor. The expression, "and that the contractor shall pay all artisans, materialmen, etc.," in connection with what immediately precedes and follows it, can not be construed to mean an express covenant to pay for materials used in the construction of the building.

A majority of the court, from a consideration of the provisions of the bond, in connection with the contract it was given to secure, is of the opinion that the bond was taken to indemnify the church from claims that might be asserted against its building, and that it was not made for the benefit of those who might furnish material to be used in the construction of the building. The case of *Smith* v. *Bowman* (Utah), 9 L. R. A. (N. S.), 889, contains a clear and instructive discussion of this subject, with a full and complete review of all the authorities. Hence we are of the opinion that neither the materialmen nor the church for their benefit were entitled to recover against the surety on the contractor's bond.

The chancellor erred in holding that a church is subject to a mechanics' lien, and that part of the decree of the court fixing a lien on the church building and the property on which it is situated in favor of lien claimants is reversed.

The chancellor, also, erred in rendering judgment in favor of the church for the benefit of the lien claimants against the Eureka Stone Company, a surety on the principal contractor's bond, and the decree of the chancery court in that respect is reversed. In all other respects the decree is affirmed.

Chief Justice HILL is of the opinion that the bond secures the payment of material furnished to the contractors, and that the materialmen are entitled to recover on said bond because it was made for their benefit as well as to indemnify the church, and therefore dissents from that part of the opinion which holds that the surety on the bond of the contractor is not liable to the lien claimants for the amount of materials furnished by them to the contractor and used in the construction of the building, and concurs in the remainder of the opinion.

Mr. Justice WOOD and Mr. Justice MCCULLOCH dissent from that part of the opinion which holds that a church is not subject to a mechanics' lien, and concur in the rest of the opinion.

HILL, C. J., (dissenting.) As indicated in the opinion of Mr. Justice HART, I disagree with one conclusion reached by the majority of the court, and that is, that the bond is only one of indemnity against liens. Article fifteen says: "That there shall be no liens filed on said building or work, either for labor done thereon or for materials furnished in its construction, and that the contractor shall pay all artisans, materialmen and laborers doing work on or about said building or other work; and if, for any cause, such lien shall be filed by any person, then and in such case the contractor shall pay and satisfy the amount that may be due and owing," etc.

As seen, this contains various covenants, among others the direct covenant that the contractor shall pay all artisans, materialmen and laborers doing work on or about said building or other work, and I think it unwarranted to qualify that positive agreement by limiting it to pay for liens only. The payment or indemnity against liens is abundantly provided for, and I think also the payment of all debts incurred to artisans, materialmen and laborers is equally provided for, and that the obligation is as much an obligation to pay as it is an obligation of indemnity.

The result of these views is, I reach the same conclusion which the majority reach, so far as the Eureka Stone Company

is concerned, as it occupied the dual relation of debtor and surety; but as to the other debtors I dissent from the refusal to give them judgment on the bond. I concur in all other parts of the opinion and the judgment.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT *v.* COTTONWOOD LUMBER COMPANY.

Opinion delivered May 11, 1908.

SALE OF LAND—QUITCLAIM DEED.—The vendor in a quitclaim deed, in the absence of fraud, is not liable to his vendee because his title failed.

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

STATEMENT BY THE COURT.

The appellee took from appellant a quitclaim deed in which appellant, for the consideration of $1,440.66, "granted, remised and quitclaimed" unto appellee "all the right, title and interest of appellant to certain lands in Lee County." The deed was executed on the 15th day of June, 1899. After the delivery of the deed it was ascertained that 320 acres of the land described in the deed were in the river, and therefore practically not in existence. As early as July 15, 1899, the secretary of the board wrote to appellant as follows:

"I have been informed that the land sold you is all in the river. We were not aware of the fact at the time that this was true, as we went by the plats in our office, which were made some years ago. We will state, however, that we will make a refund of the amount paid as soon as we can ascertain the exact status of affairs." Signed, "H. R. McVeigh, Secretary."

In March, 1907, Mr. H. R. McVeigh wrote to the attorney of appellant a letter in which he says: "I remember very well making the sale to the Cottonwood Lumber Company as stated by Mr. Pretorious in his statement of the case. Also that some of the land was found to be in the river, and suppose copy of

the letter purporting to be from me is correct, as at that time, viz., the time of writing it, it was the custom to make refund where it was shown the Levee Board had no title whatever, or lands were not in existence. In some manner the matter ran on until Mr. Driver went out of office. I then brought the matter to the attention of Mr. Killough, his sucessor, who declined to make any refund, holding that, as we only gave a quitclaim, we were not in any way bound for the lands not in existence. At the 1902 annual meeting of the board Mr. Pretorious presented the matter to the board, and it was by the board referred to the advisory committee. They seem to have done nothing with it; at least, I find nothing in the minutes of that committee to show anything done by it as to this claim."

On May 3, 1905, the appellee sued the appellant, alleging that appellant sold appellee the lands descibed in the deed of June 15, 1899, and that it was found that 320 acres of the land were in the river. It was further alleged that "it was agreed between the parties that the amount paid for such lands as were in the river should be refunded; that the matter was referred to the executive committee of said board (levee board) at its meeting in 1902, but said committee has never taken up the matter, and the money remains unpaid."

Wherefore appellee "prayed for judgment in the sum of $320, the price of the land."

The appellant answered, denying the allegations of the complaint, and set up the statute of limitations of five years. Appellant also reserved in its answer a general demurrer to the complaint, which was not passed on. The cause was by consent tried by the court sitting as a jury.

The appellee introduced one William Pretorious, who testified as follows:

"I am president of the Cottonwood Lumber Company, and was such president at the time the lands involved in this action were sold to us by the St. Francis Levee District. The letter introduced in evidence, dated July 15, 1899, was received by me. The lands were not in existence at the time of the making of the deed. Mr. Edward Fritz went down and surveyed the lands soon after the purchase, and found the lands sued for were in the river. The claim was sent in, and the matter rocked

along until the board sent its engineers down and had the lands surveyed. They also reported that the lands were not in existence, and the board said they would fix the matter up as soon as there was money in the treasury. The board at a meeting did not agree to do so, but the secretary promised to do it. It went on from time to time till the secretary called for a quitclaim from the Cottonwood Lumber Company, which was sent them, they agreeing that they would refund the money out of the taxes of 1900. Then in 1901 Mr. Killough was elected president, and he said, as this matter was under the administration of Mr. Driver, he would have nothing to do with it, but would refer it to the next meeting of the board. I attended the next meeting of the board, which was the 14th day of May, 1902, and stated the whole case to the board, and on motion the matter was referred to the advisory committee, with directions to investigate and with power to act, which, however, they failed to do. I would see one or other of the committee from time to time, and they would promise that they would take the matter up at their next meeting. I delayed bringing this suit, depending upon these promises from time to time, and feeling satisfied the matter would be attended to some day, until we were compelled to bring suit, which was done within three years from the date of reference to the advisory committee."

The appellant objected separately to that part of the testimony of the witness, Pretorious, which details the agreement by any officer of the board, or to any letters written to the secretary, and that part which details the fact of the board referring the matter to the advisory committee, or to the statements of members of the advisory committee, or the fact that the said committee delayed action in the matter, or that appellee depended on such statements in delaying to bring its suit.

The court overruled the objections, and appellant excepted. The court also, over the objection of appellant, allowed the letters written by McVeigh to be introduced as evidence.

Appellant asked the court to declare the law as follows:

"1. The court declares the law to be that the statute of limitations in this case began to run from the date of the execution of the deed put in evidence.

"2. The court declares the law to be that there was no liability against defendant by reason of its quitclaim deed to refund the purchase price of the lands in question in this action.

"3. The court declares the law to be that neither the letters of H. R. McVeigh put in evidence, nor the verbal agreement of the said H. R. McVeigh, created any liability against defendant to refund the purchase money of the lands in question."

The court refused to so declare, and rendered judgment in favor of appellee for $306. Appellant duly prosecutes this appeal.

H. F. Roleson, for appellant.

1. The statute of limitations began to run from the date of the deed.

2. There was only a quitclaim deed, no warranty of any kind, and hence no liability.

3. Neither the letters of the secretary, nor his verbal agreement created any liability to refund the purchase money. They could not bind the board.

W. A. Compton, for appellee.

1. Ordinarily, a quitclaim deed does not support a recovery of purchase money, but there was a further contract which bound the board.

2. McVeigh's testimony was competent; he was an officer charged with the duty of selling land. Besides, the board afterwards recognized its liability.

3. The statute did not commence to run until the board refused to refund.

WOOD, J., (after stating the facts.) In the absence of fraud or covenants of title, a vendor of land is not liable to the vendee for the purchase money because the title failed. In such case the vendee voluntarily parts with his money for only such title as the vendor has. If he has none, the vendee gets none, and is without recourse. Such is the contract between vendor and vendee in a purely quitclaim deed. *Gouverneur* v. *Elmendorf,* 5 Johns. Ch. 79 (Kent.); *Stoddard* v. *Prescott,* 58 Mich. 542; *Inhabitants of Barkhamsted* v. *Case.* 5 Conn. 528; *Clark* v. *Sigourney,* 17 Conn. 511; *Gates* v. *Winslow,* 1 Mass. 65; *Peters* v.

Bowman, 98 U. S. 56; *Whitmore* v. *Farrington,* 76 N. Y. 452; *Thorkildsen* v. *Carpenter,* 120 Mich. 419; *Gibson* v. *Richart,* 83 Ind. 313; *Porter* v. *Cook,* 114 Wis. 60. See also *Diggs* v. *Kirby,* 40 Ark. 420.

The secretary was without authority to bind the board by any promise he might have made. The board made no promise, and the record fails to show a cause of action.

Reversed and remanded for new trial.

McCONNELL v. HOPKINS.

Opinion delivered May 11, 1908.

1. FRAUDULENT CONVEYANCES—BURDEN OF PROOF.—Where a husband voluntarily conveys land to his wife under circumstances which cast grave suspicion upon the good faith of the transaction, the burden is upon her to show that the conveyance was not executed for a fraudulent purpose. (Page 230.)
2. VOLUNTARY CONVEYANCES—PRESUMPTION.—Conveyances made to members of the household and to near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and when the embarrassment of the debtor proceeds to financial wreck, they are conclusively presumed to be fraudulent as to existing creditors. (Page 230.)
3. FRAUDULENT CONVEYANCE—CONCEALMENT OF DEED.—Where a husband's deeds to his wife were kept from the record, whether with fraudulent intent or not, the law will not permit her to assert her title, upon his subsequent insolvency, as against those who gave him credit on the basis of his apparent ownership of the property. (Page 230.)

Appeal from Sebastian Chancery Court; *J. Virgil Bourland,* Chancellor; affirmed.

STATEMENT BY THE COURT.

J. A. McConnell conveyed to his wife, R. S. McConnell, all the real estate he possessed except that which he claimed as his homestead. At the time of the conveyance he owed individual and partnership debts amounting in the aggregate to nearly one thousand dollars. He had just begun to erect a brick hotel, and he contracted debts in the construction of that to the amount of $3,000. He denuded himself of all his property that could be

reached by execution, conveying same to his wife. The deeds were executed July 7, 1903. They were not placed on record until October 6, 1905. In the meantime, J. A. McConnell had executed a note, with others, for $1,800 to Linnie Hopkins as guardian of Bertha Hill, a minor. The note was executed March 9, 1904. It was payable one year after its date, and bore interest at ten per cent. On the 11th day of July, 1905, the note, being due and unpaid, was reduced to judgment in the sum of $2041. Execution was issued and levied upon the lands in controversy as the property of J. A. McConnell. Before the day of sale, R. S. McConnell, or some one for her, caused the deeds to be placed of record.

The sale did not take place. Then the appellee brought this suit in equity against J. A. McConnell, R. S. McConnell and W. F. McConnell to set aside these deeds made by J. A. McConnell and by W. F. McConnell and wife (at the instance of J. A.), and sought to have the lands subjected to her execution, alleging that the deeds were made with the fraudulent intent to cheat hinder and delay the creditors of J. A. McConnell, and further alleging that R. S. McConnell held the property in secret trust for the use and benefit of the said J. A. McConnell, her husband.

There were allegations in the complaint to the effect that the conveyances were wholly voluntary, and that since the conveyances were made J. A. McConnell has continued in the possession and control of the property and has held it out to the world as his own. The complaint alleged the insolvency of J. A. McConnell and the other makers of the note.

The answer of J. A. McConnell denied that the property was sold to cheat, hinder and delay creditors, admitted the debt and the transfer to his wife; also admitted that he remained in possession and had the control and management of the property, but denied that he held out the property as his own. He alleged that the consideration for the conveyances was the natural love and affection for his wife and a desire to secure for her a division of the property which at the time of the conveyance was all in his own name.

R. S. McConnell, appellant here, sets up in her answer that she and her co-defendant, J. A. McConnell, have been married for thirty years, during which time she has worked hard, and

the property described in the complaint was partly paid for with her money, and in consideration thereof and the great love and affection her husband had for her all the property was conveyed to her to be held in her own right; that, so far as she is informed and believes, the property was transferred in good faith without intent to defraud creditors.

It will be observed that Mrs. R. S. McConnell does not deny her husband's continued possession of the property, does not deny that the conveyances were voluntary, and that J. A. McConnell was involved in debt at the time the conveyances were made, nor does she deny that plaintiff extended the credit on faith of J. A. McConnell's ownership of said property. She does not deny that J. A. McConnell is insolvent, that he has no other property subject to execution, that the other judgment debtors are each and all insolvent and have no property subject to execution; nor does she deny that J. A. McConnell has improved the property transferred to her and occupied and controlled the same.

Jesse A. Harp, for appellant.

1. The right to own separate property, whether by gift, grant, inheritance, devise or otherwise, is secured to a married woman by law. Const. art. 9, § 7. And a voluntary conveyance from a husband to his wife is not invalid as against creditors unless the husband is indebted at the time of making the conveyance. 50 Ark. 42.

2. Appellee's debt was not in existence at the time the conveyances were made, the indebtedness of appellant's husband at that time, as is shown by the evidence, being only from $800 to $1,000, and that was assumed by W. F. McConnell. There being then practically no indebtedness, and the contemplated indebtedness for erecting the hotel being protected by the statutes in favor of laborers, mechanics and materialmen, it will not be presumed that the parties to the transaction were acting with fraudulent intent.

3. Appellee has no equitable right in the property because her debtor, appellant's husband, has none, except a possible curtesy right. 30 Ark. 267; 33 Ark. 336.

Jos. M. Spradling and *Geo. W. Dodd,* for appellee.

1. A conveyance, fraudulent as to existing creditors because of actual fraudulent intent to hinder, delay or defraud either prior or subsequent creditors, is invalid as to either class of creditors. Kirby's Digest, § 3658; 59 Ark. 614; 64 Ark. 415; 66 Ark. 419. Not only are conveyances by an embarrassed debtor to a near relative looked upon with suspicion, but they are, when voluntary, *prima facie* fraudulent, and when the debtor's embarrassment proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors. 73 Ark. 174; 50 Ark. 46; 45 Ark. 520; 46 Ark. 542; 75 Ark. 562; 14 Am. & Eng. Enc. of Law (2 Ed.), 300. However meritorious it may be within itself, if a voluntary conveyance leaves a debtor without sufficient property to meet his existing liabilities, it is fraudulent and void. 14 Am. & Eng. Enc. of Law (2 Ed.), 302; 59 Ark. 614; 150 Mo. 403; 73 Am. St. Rep. 456; 76 Ark. 509.

2. The facts show that there was no change of possession after the conveyances, the grantor holding same without accounting for rents, or agreement so to do, and no notice given either actual or constructive until after the levy of the execution. The facts are evidence of fraudulent intent. 20 Cyc. 554; 33 Ark. 328; 74 Ark. 186. Where deeds are withheld from the record so as not to injure the credit of the grantor, they are fraudulent as to subsequent creditors, regardless of the actual intent of the parties. 20 Cyc. 552; 69 Ark. 224; 66 Ark. 98; 24 Am. & Eng. Enc. of Law (2 Ed.), 113; 27 S. W. 341; 39 Am. Dec. 250; 95 *Id.* 246; 47 N. Y. Supp. 576; 76 Am. St. Rep. 567; 20 *Id.* 705; 86 *Id.* 914; 90 *Id.* 545; *Id.* 456; 13 Col. 245; 73 Mich. 481; 39 S. E. 231.

A settlement on the wife on the eve of a new business undertaking, and with a view to provide against its contingencies, is unavailing against creditors, either new or old. 1 Dears. & B. 327; 37 Pa. St. 433; 16 Irish Ch. 1; 15 *Id.* (N. S.), 571; 35 Ill. 558; 113 Ill. 318; 34 N. J. Eq. 160; 44 Pa. St. 413; 14 N. J. Eq. 106; 80 Am. Dec. 229. The burden of proving the good faith of the transaction is upon the wife seeking to uphold the conveyance against creditors of the husband. 10 S. E. 482; 33 S. E. 303; 90 Am. St. Rep. 499, note; 54 Pac. 359; 57 Pac. 908; 67 S. W. 561; 68 Ark. 162; 73 Ark. 174.

3. The property ought to be charged with appellee's debt, because the debtor has spent all his time and means in improving the same since the conveyance and since the creation of the debt, thereby enhancing the value of the property more than the amount of the debt. 67 Ark. 105; 75 Ark. 562; 59 Am. St. Rep. 462; 38 Am. St. Rep. 271; 21 Cyc. 1327; Bump on Fraud. Conv. (4 Ed.), 218.

4. The property having been conveyed to be held in secret trust for the benefit of the grantor, the conveyances are conclusively fraudulent. 20 Cyc. 565, 566, and note 23; *Id.* 562; 31 Ark. 671; 8 N. H. 288; Bump on Fraud. Conv. 239.

WOOD, J., (after stating the facts.) The testimony clearly shows that J. A. McConnell, while in debt, and contemplating other debts to be contracted by him, conveyed all of his real estate, subject to execution, to his wife. He, however, remained in possession of the property, and continued to control and manage the same as before the conveyance. After the deeds were made he or she could have had same recorded at any time. But they did not do so until the property was levied upon and was about to be sold for his debt. The property continued on the tax books in his name, and he paid the taxes. He built the hotel after the transfer, borrowed money from various parties which was expended on the building, and contracted debts to the amount of $3,000 in its construction. These were all in his name. After the hotel was completed, he was the proprietor, and controlled and managed same. Mrs. McConnell only to a few friends communicated the fact that she owned the property. But there was in no respect a visible change of ownership. He rented the property and collected the rents. In short, to the outside world he appeared to be the owner of the property. The conveyance was entirely voluntary.

The appellee accepted the note because she considered J. A. McConnell solvent and the owner of the real property in his name. She would not have accepted the note without his name signed to it. She did not know as to the solvency of the other signers. He "had considerable property around him, and was handling considerable money, and was thought to be good for his debts."

It was shown, moreover, that J. A. McConnell after the conveyance spoke of the Grand View Hotel property as his own. But when the attorney of appellee was trying to get him to pay appellee's judgment, and when execution was threatened, he told the attorney that "he was not as sure as he thought he was." All this, and much more evidence in the record that it is unnecessary for us to review, convinces us that the judgment of the chancellor setting aside the conveyances was correct.

The law applicable to the facts proved in this record has been often declared by this court. Here was a voluntary conveyance by a husband to his wife under circumstances that, to say the least, cast grave suspicion upon the good faith of the transaction, and placed the burden upon appellant R. S. McConnell to show that the conveyance was not executed for a fraudulent purpose. See cases cited in appellee's brief and especially *Hershy* v. *Latham,* 46 Ark. 542; *Leonhard* v. *Flood,* 68 Ark. 162; *Wilks* v. *Vaughan,* 73 Ark. 174. In the latter case we said: "It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors."

The facts in the record warranted the conclusion that the deeds made by McConnell to his wife were by her kept from the record in accordance with an understanding and mutual plan on their part to give him good credit on the basis of his apparent ownership of the property, and then to defeat his creditors in the collection of their debts by spreading the deeds on the record in time to prevent the sale of the property for the payment of these debts. The law will not allow such subterfuges to circumvent creditors in the collection of their debts. Even if it could be said that the parties to the deed, under such circumstances, did not intend any actual fraud, the law will treat such conveyances as fraudulent and void any way, because the effect of such conduct operates as a gross fraud upon creditors. *Bunch* v. *Schaer,* 66 Ark. 104, and cases cited.

The court below found that the conveyances were made in

secret trust for the benefit of J. A. McConnell. Such finding is strongly supported by the evidence. And such conveyances are "conclusively fraudulent against creditors injured thereby." 20 Cyc. 562 and cases cited. *Sparks* v. *Mack,* 31 Ark. 671.

Decree affirmed.

ROAD IMPROVEMENT DISTRICT NO. 1 *v.* GLOVER.

86 231
86 565
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Opinion delivered May 11, 1908.

1. STATUTE—CONSTITUTIONAL QUESTION.—Courts will not pass upon the validity or constitutionality of a statute if the case can properly be decided upon any other clear ground. (Page 236.)
2. ROAD IMPROVEMENT DISTRICTS—NOTICE OF ASSESSMENT.—Though the act of March 4, 1907, providing for the creation of road improvement districts, does not expressly require that notice shall be given to owners of land therein sought to be assessed, such failure to require notice does not render the act unconstitutional or void, but such notice must nevertheless be given. (Page 236.)
3. SAME—NOTICE—DUE PROCESS.—Unless the Legislature has itself determined the question of benefits in an improvement district, a landowner is entitled to an opportunity to be heard before an assessment, which is a lien upon his property, can be validly established; and this requirement is not met by providing that he shall have notice when his property is proceeded against to enforce the lien assessed against it. (Page 240.)

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; affirmed.

E. D. Glover brought suit against Road Improvement District No. 1 of Pulaski County, against Charles E. Heckler, F. Kanis and Adam C. Penzel as directors of said district, against the collector of taxes of Pulaski County, and against the Hydraulic Sand & Stone Company, alleging that certain landowners of Pulaski County filed their petition in the county court of said county under the act approved March 4, 1907, praying for the formation of a road improvement district; that said court gave notice as required by said act of the hearing thereof, and, no objections being made at the hearing, the court found that

the petition was signed by a majority in value of the landowners in said district, as determined by the assessment for purposes of general taxation in force at the time, and made an order declaring the district to be and exist as a body corporate and politic, with the powers given by said act; that Charles E. Heckler, F. Kanis and Adam C. Penzel were duly elected and qualified as directors, and they determined to build a certain road, to be designated as "West Twelfth Street Pike"; that on January 2, 1908, bids for buildings said road were received, and a contract is about to be made with the Hydraulic Sand & Stone Company to build same for the sum of $23,718.30, of which the sum of $15,000 is to be paid in bonds of said district, bearing eight per cent. interest per annum and maturing in twelve years, the balance to be paid by the county court; that on November 26, 1907, it was found and ordered by said board that all lands in said district would be benefited by building said road, no notice of hearing or opportunity to be heard on this question having been given to any of the landowners, and neither the total benefits to the lands nor the particular benefits to each part thereof in said district was found by them; that said board, on January 3, 1908, levied a tax of two per cent. for twelve years on the lands in said district, and directed the sheriff to collect same at the time of collecting the general taxes; that the total value of all lands in said district, as determined by the general assessment, was and is $57,000, and the actual market value thereof is much greater; that in case it be held that said amount of bonds can not be legally issued, it is the avowed purpose of said board to reduce the amount of work to be done under the contract and issue bonds to the amount of $11,000, bearing interest at eight per cent. from date until paid and maturing in twelve years, and that, unless enjoined, they will do so; that plaintiff owns certain lands subject to the taxes levied in said district, and that same will either not be benefited by building said road, or will be benefited less than the taxes levied on it, and less in proportion than other lands in the district, and less than the liability of said lands for the payment of said bonds.

It is alleged further that all the proceedings and acts of said board are illegal and void because said act of 1907 is unconstitutional for the following reasons:

(1) It provides that the finding of said board as to what lands are benefited by building said road shall be final and conclusive, unless impeached for fraud, without requiring notice to the landowners of the hearing or any opportunity to be heard thereon, thus depriving them of their property without due process of law.

(2) That to build or repair a road said act requires a tax to be levied and collected on all the lands adjudged to be benefited in the district, without requiring it to be limited to the benefits or apportioned according to the benefits, and without designating the manner of apportionment, thus depriving them of their property without due process of law, and taking it for public use without just compensation.

(3) It provides that bonds issued shall be a first lien on all lands in the district, without limiting the lien to lands benefited or limiting the lien on particular tracts to the benefits thereof or apportioning it according to benefits, thus depriving the owners of their property without due process of law, and taking it for public use without just compensation.

(4) It provides that taxes and assessments levied shall become payable and delinquent for nonpayment at the times fixed by law in case of taxes levied for State and county purposes, contrary to article 5, section 22, of the Constitution.

(5) It provides that the said board shall enforce payment of taxes in the manner pointed out by sections 5691-5709, Kirby's Digest, as far as same are applicable, contrary to said article 5, section 22.

It is also alleged that all proceedings and acts of said board are illegal and void because—

1. Said board has determined that all lands in said district would be benefited by said road and levied taxes thereon, without giving the landowners notice or opportunity to be heard on these matters.

2. Said board has not determined the benefits to be received by the particular tracts nor limited the taxes to the benefits, nor apportioned the taxes according to benefits.

3. By entering into the contract first named and issuing $15,000 in bonds the board will have incurred or created a

liability exceeding twenty per cent. of the assessed value of the property in the district.

4. By entering into contract and issuing bonds to the amount of $11,000, as alleged, same bearing interest at eight per cent. per annum from date until paid and maturing in twelve years, the said board will have issued bonds in excess of twenty per cent. of the assessed value of the lands in the district, including interest on said bonds, and the commissions of the collector and treasurer will still further increase the excess.

The prayer was for an injunction.

Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action or to entitle plaintiff to the relief prayed, or to any relief, and on the ground that the proceedings and acts of the said board were not void for the various reasons stated in the complaint, which are again stated in the demurrer. The demurrer was overruled by the chancery court, and final judgment rendered, and appeal taken to this court.

J. C. Marshall, for appellants.

1. The act is not unconstitutional. Each tax payer has his day in court when sued for taxes, and he can then be heard on all his defenses. Act 1907, pp. 345, 348; 96 U. S. 97; 184 *Id.* 115; 59 Ark. 513. When the statute fails to require notice, this does not render it void, but notice may nevertheless be given. 33 Kans. 156; 149 U. S. 30. The provision that the board's finding shall be conclusive, etc., does not cut off a hearing in the courts, and would not render other parts of the act invalid if it did. 21 Ark. 40, 55-6; 52 *Id.* 107.

2. Assessments may be made either according to value of the lands or according to benefits. 69 Ark. 68, 78; 77 *Id.* 384; 81 *Id.* 562; 181 U. S. 394. The act must be understood to limit assessments to benefits. 71 Ark. 27.

3. Sections 7 and 8 of the act simply mean that the lands adjudged to be benefited by the road are held liable for the cost of construction, each tract to the extent of the taxes levied on it.

4. The extension of an act by reference to other acts only

affects remedies and methods of procedure, and does not render the act void. 121 Fed. 276; 49 Ark. 131.

5. The act limits the issue of bonds to not exceeding twenty per cent. of the assessed value of the lands. Interest, of course, is not included, only the excess over twenty per cent. would be void, if issued. Lands are not assessed at their market value, not much below. The intention, by analogy, was to follow Kirby's Digest, § 5683, Mansf. Digest, § 837. The case of 55 Ark. 148 was decided under an entirely different statute.

Ratcliffe, Fletcher & Ratcliffe, for appellee.

1. A special assessment can be supported only on the theory that the property assessed will be specially benefited. It must not exceed the benefit, and must be apportioned according to the benefit. 48 Ark. 370, 382-3; 69 *Id.* 76; 71 *Id.* 21, 27; 172 U. S. 269; Cooley on Taxation (2 Ed.), pp. 638, n. 3, 639, 661. The constitutional requirements of equality and uniformity apply, 48 Ark. 370, 382-3.

The Legislature, without a hearing, may fix the limits of a district, the amount of assessment, and levy according to assessed valuation. In such case it is presumed the Legislature took into consideration the question of benefits and determined that the lands would be benefited to the extent of the assessment and in proportion to assessed value. 172 U. S. 269; 125 *Id.* 345; 72 Ark. 119. The cases holding that assessments may be levied according to value as provided by the Legislature are based on the theory that the Legislature has decided that the benefits will be in proportion to the value. 72 Ark. 119; 77 *Id.* 383; 81 *Id.* 562, 565. If the act be construed as delegating to the directors the power to apportion the assessments according to the benefits, the taxpayers are entitled to a hearing upon the question of apportionment. 125 U. S. 345; 149 *Id.* 30; 59 Ark. 513. Section 11 of the act is void. It seeks to extend positive provisions of another law not relating merely to proceedure. Kirby's Digest, § § 5691, 5695-6, 5700, 5703-6-9, etc. All these provisions affect substantial rights, and can not be extended by reference merely. 49 Ark. 131; 121 Fed. 276.

2. If the act can be sustained by construction, the proceedings of the board are void, because not in accordance with the act. Kirby's Digest, 6974; 55 Ark. 148, 159.

HILL, C. J. The General Assembly of 1907 passed an act "to provide for the creation of improvement districts for the building, constructing, maintaining and repairing of public roads in the State of Arkansas," which was approved on the 4th of March, 1907, and applied to thirty-seven counties in the State. Pulaski County was one of the counties included in the act, and under its provisions the county court of Pulaski County created Road Improvement District No. 1, and directors were elected, the benefits determined and assessments levied, and a contract was about to be let for the construction of the improved road, when Glover, a landowner in said district, brought a bill to enjoin the execution of the contract, the levying and collection of the assessments.

The complaint was met by a general demurrer, which was overruled, and judgment entered on the complaint, and the district appealed. The complaint will be set out in the statement of facts. It will be seen therefrom that grave questions as to the constitutionality of the act are raised; and the questions therein raised and others have been presented to the court in briefs and oral argument, and have received consideration from the court.

But, under the settled practice of this and all other appellate courts not to pass upon the validity or the constitutionality of an act of a co-ordinate department of the government if the case can properly be decided upon any other clear ground, the court finds it unnecessary to pass upon any of the constitutional questions raised. *Railway Company* v. *Smith,* 60 Ark. 221; *Martin* v. *State,* 79 Ark. 236.

The complaint alleges: "That on November 26, 1907, it was found and ordered by said board of directors that all lands embraced in said district would be benefited by the building of said road, no notice of any hearing and no opportunity to be heard upon this question having been given to any of the owners of lands within said district, and neither the total amount of the benefit to the lands in said district nor the amount of the benefit to each part of said lands having been found."

In *Paulsen* v. *Portland,* 149 U. S. 30, it was said: "While not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can

be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature State, the council is its Legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for, when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus, in the case of *Gilmore* v. *Hentig,* 33 Kan. 156, it was held thus: 'Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, *held,* that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same.' See also *Cleveland* v. *Tripp,* 13 R. I. 50; *Davis* v. *Lynchburg,* 84 Va. 861; *Williams* v. *Detroit,* 2 Mich. 560; *Gatch* v. *Des Moines,* 63 Ia. 718; *Baltimore & Ohio Railroad* v. *Pittsburgh, Wheeling, etc., Railroad,* 17 W. Va. 812, 835."

In *Fallbrook Irr. District* v. *Bradley,* 164 U. S. 112, it was said: "The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.,* the amount of the tax which he is to pay. *Paulsen* v. *Portland,* 149 U. S. 30, 41. But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of directors in this case), the parties whose lands are thus included in the petition are entitled to a hearing

upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the Legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer* v. *Merchant,* 125 U. S. 345, 356, and *Walston* v. *Nevin,* 128 U. S. 578."

The doctrine of *Paulsen* v. *Portland* has been followed and approved frequently in the Supreme Court of the United States, and also in the State courts. See 12 Rose's Notes to U. S. Rep. 378, and 3 Supp. to Rose's Notes, 357.

It will be seen from the above excerpts that the Legislature may determine the benefits to be assessed against property owners; but when the Legislature, instead of doing so itself, delegates that power to a city council, board of improvement or other governmental agency, then such inferior council or board must give notice in order to comply with the "due process" provision of the State and Federal constitutions. It will be further seen that the lack of the requirement for such notice in the statute will not invalidate the statute, for the law will presume that the tribunal invested with this power will give notice before the assessments are determined; and therefore the courts read into such statutes the requirement that notice be given before assessments can be assessed, in order that they may be constitutional.

This is but another application of the principle of construction that courts will always sustain a statute, if one construction will make it constitutional and another will make it unconstitutional, by adopting the constitutional construction.

The admission that the allegation of the complaint above quoted is true admits that no notice was given to the property owners of any hearing before the assessments were levied, and therefore the assessment, and consequently all actions of the board based upon such assessments, are void. Before there could be a valid proceeding under this statute, such notice must be given to the landowners as will meet the requirements in the State and Federal constitutions of due process of law before assessments can be levied upon their property within the district.

The judgment is affirmed.

ON MOTION TO MODIFY JUDGMENT.

Opinion delivered May 23, 1908.

HILL, C. J. Appellant asks a modification of the judgment on the ground that the injunction is so broad that it will prohibit the district from proceeding under the act, and that the court, although it declined to pass upon the act, yet sustained an injunction against any proceeding under the act by the district.

But counsel are mistaken as to the scope of the injunction. It does not enjoin the district from proceeding under the act, but enjoins the commissioners from carrying out any contract or from letting any contract, or from issuing any bonds of the district with reference to a certain contract, or any other contract, or from levying any tax upon the propery within the district; and the collector was enjoined from attempting to collect any tax or enforcing any assessment upon the property within the district. While the language of the decree is somewhat broad as to the letting of any contract, yet it evidently means the specific contract mentioned in the complaint or any other based on the present proceedings. The court has held that the assessment, for reasons stated in the opinion, is void, and therefore all proceedings based upon it are void and should be enjoined. There is no injunction against the board proceeding under the act; and this court has declined to pass upon the act until there is a proceeding under it in conformity to law.

Counsel say that there are other questions raised which are too serious to permit of any further proceeding under the act without having them finally settled by this court, and say that if the board should go back and give notice as indicated in the opinion and proceed to make a levy, they would be met by another injunction, and would be back to this court asking to have the same questions settled which have been already presented. "Not a cent can be borrowed by the district," say counsel, "until these questions are finally settled by this court, and all the acts and proceedings of said board are held up, and have been for a long time, awaiting the action of this court on these questions. This suit is one to test the validity of the act."

It is not the duty of the courts to be an examiner of titles or an approver of bonds, but merely to determine litigated questions when properly presented before it; and a decent respect for the acts of a co-ordinate department of government always restrains them from passing upon the constitutionality of such acts if the decision can be placed upon any other clear ground.

Counsel also urge that a landowner is not entitled to two days in court before the question of benefits is passed on, and point out that under the act he would have a day in chancery court when his property is proceeded against to enforce the lien assessed against it; and it is argued that in that suit the due process of law requirement is met. The court is aware that there are some decisions which sustain this position, and considered them on the hearing, although it did not discuss them in the opinion. The purport of them is that, if no notice is provided before assessing the property, yet if the owner can be heard, in a suit to take the property for the tax, to assert the unconstitutionality of the proceedings against his property, this is a compliance with the due process provision.

It can just as reasonably be argued that, because a landowner can go into a court of law or equity and obtain relief against some unconstitutional proceeding against his property or some proceeding against him without notice which would affect his property, this right to invoke the jurisdiction of a court to prevent the unwarranted taking of his property is a compliance with the due process provision of State and Federal constitutions. This view is not sound, and begs the whole question. The question is not as to the remedy of a landowner against an illegal exaction, but is as to the method to establish a valid lien against the property.

Under the principles involved, especially as declared by the Supreme Court of the United States, which is the final arbiter upon these questions, the rule is deduced that a landowner is entitled to notice before an assessment, which is a lien upon his property, is established, and it can not be validly established until he has had an opportunity to be heard unless the Legislature itself determines the question of benefits—and even when it determines it there may yet be a judicial question left, as in

Coffman v. *Drainage District*, 83 Ark. 54, and *Norwood* v. *Baker*, 172 U. S. 269.

Motion for rehearing denied.

PARNELL *v.* STATE.

Opinion delivered May 11, 1908.

1. BURGLARY—RAILWAY CAR.—Under Kirby's Digest, § 1603, defining burglary as "the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft in the night time, with the intent to commit a felony," a railway car is made the subject of burglary, as well as a house or boat. (Page 242.)
2. SAME—SUFFICIENCY OF INDICTMENT.—An indictment for burglary which alleges that the accused "unlawfully, wilfully, maliciously, feloniously and burglariously did break and enter with felonious and burglarious intent to commit a felony," etc., is sufficient, although it fails to allege that the breaking was with force. (Page 243.)

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

J. B. McCaleb, for appellant.

1. The breaking and entering a railway car with intent to commit a felony is not burglary. Compare Gantt's Digest, § § 1346, 1347, 1348, 1349 and 1350 with Kirby's Digest, § § 1603 (being § 1346, *supra*, as amended in 1875), 1604, 1605, 1606 and 1607. Railway car is mentioned only in the declarative part of the statute, as amended above, and does not appear in the penal clauses of the act. Being a penal statute, it must be strictly construed, and no case can be brought by construction within it unless completely within its words. 38 Ark. 521; 40 Ark. 99; 53 Ark. 336; 73 Ark. 602; 3 Mass. 254; 4 Mass. 439; 6 Vt. 215; 1 Payne 32; 2 Story 369; 4 Johns. 296; 8 Blackf. 163; 25 Am. & Eng. Enc. of L. (2 Ed.), 760.

2. The indictment does not charge facts sufficient to constitute the crime of burglary, in that it does not charge that the breaking was done with force. 47 Ark. 488; Kirby's Digest, § 2227.

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

HILL, C. J. Parnell was convicted of the crime of burglary. The indictment charged that he had broken and entered a railway car with the felonious and burglarious intent to commit a felony, to-wit, the crime of grand larceny. It is contended that a railway car is not the subject of burglary. The statute against burglary as first enacted was:

"Section 1. Burglary is the unlawful entering a house, tenement or other building, boat, vessel or water craft, in the night time, with the intent to commit a felony; the manner of breaking or entering is not material, further than it may show the intent of the offender.

"Section 2. 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 specially named herein, with the intent to commit any felony whatever, he shall be guilty of burglary.

"Section 3. If any person shall in the night time wilfully and with or without force break or enter any house, tenement, boat or the like, with the intent to commit a felony, and shall then and there commit a felony or larceny, he shall be adjudged guilty of burglary, and also of felony or larceny, as the case may be." Chapter 44, Revised Statutes.

The punishment was a fine and imprisonment, and thirty-nine lashes well laid on the bare back. In 1838 this punishment was changed and made imprisonment in the penitentiary.

This statute was digested in Gantt's Digest as sections 1346, 1347, 1348, 1349. On December 24, 1874, the General Assembly amended section 1346 of Gantt's Digest, making it read as follows: "Burglary is the unlawfully entering a house, tenement, railway car, or other building, boat, vessel or water craft, in the night time, with the intent to commit a felony." Acts of 1874, page 77. These sections as amended appear as sections 1603 to 1607 of Kirby's Digest. It will be noted that the amendment only inserted in section 1346 of Gantt's Digest a railway car as an additional place where the crime of burglary could be committed. It was made a subject of burglary like a house or boat.

The argument is made that, a railway car not being inserted in section 1348 of Gantt's Digest (section 1605 of Kirby's Digest) as a subject of burglary, nothing was added to the crime, and that the insertion in section 1346 (1603 of Kirby's) was in the declaratory part of the statute, and not the substantive part. The error of the argument is in assuming that section 1346 of Gantt's Digest (section 1603 of Kirby's) is only declaratory or prefatory to the definitive act. That section, as originally enacted, defined the crime of burglary, and included 1347 of Gantt's Digest (section 1604 of Kirby's) as part of it, changing a common-law rule regarding it. The next two sections, with more minuteness, defined the crime and changed common law rules and added new elements. Following these four sections, which together defined burglary as a statutory crime, is the punishment prescribed for it. Some of the statute is declaratory of the common law, and some takes away common-law elements, and new features are added, and, taken together, constitute the crime of burglary in its various aspects as the Legislature saw fit to define it.

The only other matter presented is an attack upon the indictment, which does not contain the allegation that the breaking was with force.* This point was made in *Shotwell* v. *State,* 43 Ark. 345, wherein it was held that the language used in the indictment, "feloniously, wilfully and burglariously did break and enter," is equivalent to charging in the language of the statute that he "wilfully and maliciously and with force did break and enter." Chief Justice COCKRILL for the court said: "The effect of the omission of the statutory words 'with force' in this connection is immaterial. The verb 'to break' which is used in the indictment implies force, and its common-law meaning is well understood."

The court is asked to overrule this case, but the decision is right and is followed.

The judgment is affirmed.

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*The indictment in this case alleged that the accused "unlawfully, wilfully, maliciously, feloniously and burglariously did break and enter with felonious and burglarious intent to commit a felony, to-wit, the crime of grand larceny," etc. (Rep.)

YORK v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY CO.

Opinion delivered May 4, 1908.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.—Where a brakeman in the discharge of his duties was sent between two freight cars to uncouple them, and after doing so got his foot caught in an unblocked frog and was killed, the question whether he was guilty of contributory negligence in going between the cars to uncouple them should have been submitted to the jury. (Page 246.)
2. SAME—UNBLOCKED FROG AN ASSUMED RISK.—An experienced brakeman is held to have assumed the risk from the use of unblocked frogs. *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11, followed. (Page 246.)
3. SAME—PROXIMATE CAUSE.—Where a brakeman, in the performance of his duties, went between two freight cars in order to uncouple them, and his death resulted from his failure to extricate himself from that dangerous position, it matters not whether an unblocked frog, a hole or rock caused him to fall, as the default of the master in failing to equip the cars with automatic couplers was the proximate cause of his injury. (Page 247.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* judge; reversed.

William H. Arnold, for appellant.

1. The safety appliance act applies in this case. U. S. Stat. at L. 531, act Cong. March 2, 1893, § § 2, 6, 8. Deceased did not assume the risk in going between the cars to make the coupling, and in doing so he was not guilty of negligence. 116 Fed. 867 *et seq.;* 205 U. S. 1 *et seq.;* 96 Fed. 298; 138 Ala. 487.

2. Not only was it not negligence *per se* to go in between the cars to make the coupling, but it was a question for the jury, under the facts and circumstances shown in evidence, to say whether or not appellant was guilty of contributory negligence. 82 Ark. 11.

3. There was ample evidence to show that it was negligence on the part of appellee to maintain unblocked frogs, and no sufficient evidence that deceased assumed the risk thereof.

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

1. All the testimony, as well as the physical facts, show that deceased was on the outside of the rail at the time of the injury. If the coupler was defective, it was not the proximate cause of the injury.

2. Appellee used no other kind than the unblocked frog, which was, or should have been, known to deceased. He plainly assumed the risk of stepping into an unblocked frog when he entered the service. Cooley on Torts, Lewis Ed., 529; 54 Ark. 389; 82 Ark. 14.

HILL, C. J. J. C. York, a brakeman in the employ of the appellant railroad company, while in the performance of his duties on a freight train running from Memphis, Tennessee, to Wynne, Arkansas, and beyond, met his death while switching cars at Wynne. This is an action by the administrator to recover damages therefor; and at the conclusion of the trial the court directed a verdict for the defendant railroad company, and the administrator has appealed. These facts were developed:

York was sent to uncouple some cars which were making a flying switch, and the lever which worked the coupling from the outside of the cars was out of order and did not work, and he went between the cars to lift the pin with his hand, or else to reach across and get the lever on the other side (the witnesses differ as to which method he adopted). In some way he got the cars uncoupled while in between them, and while recovering his position outside of the cars he got his foot caught in an unblocked frog and was run over, death resulting from his injuries. The record is in some confusion as to exactly where he was when he was caught, but a jury could have found these facts: When the cars parted, York walked along holding to the car, going along with it (the car was moving slowly); and while so doing his foot was caught in the frog. He was walking backwards, with the motion of the car, when his foot caught in the frog, which was outside of the track that the car was moving upon. He had evidently got outside of that track; and, while it is not as clear as it should be, yet it may fairly be found that he was not clear of the cars, which extended beyond the tracks, when his foot was caught. It is inferred from the testimony that this frog was between the track upon which the car was moving and a track intersecting it, outside of the track upon which the car was moving. This would put York still between the cars, although outside of the track upon which the cars were moving, when his foot got caught. This view of the evidence harmonizes the apparently

inconsistent statements of the eye witnesses nearest to York when he was run over. These facts presented a question for the jury. They show a violation of the act of Congress of March 2, 1893, secs. 2 and 8 of which are as follows:

"Section 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars."

"Section 8. That any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

The failure to have a coupling which met the requirements of this act necessitated York going between the cars to uncouple them if he obeyed orders to do so. Had the act of Congress been complied with, he would not have been required to have placed himself in this dangerous position in order to uncouple the cars. The act expressly provides that performing the work, notwithstanding the default of the company, should not be taken as an assumption of the risk. That being true, the question narrows to one of contributory negligence in going between the cars to uncouple them. The court cannot say as a matter of law that he was guilty of contributory negligence in doing so. *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11; *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.,* 205 U. S. 1; *Kansas City, Memphis & Birmingham Rd. Co.* v. *Flippo,* 138 Ala. 487.

The cause of action can not be predicated upon the use of unblocked frogs. That matter has been thoroughly considered by this court in *Davis* v. *Railway,* 53 Ark. 117, and *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11.

The proximate cause appears to have been the failure of the company to furnish a coupler which would enable the brake-

man to uncouple the cars without going between them. When he, in the performance of his duties, went between them, in order to uncouple them, and his death resulted from his failure to extricate himself from that dangerous position, it matters not whether an unblocked frog, a hole or rock, or some other obstruction, caused him to fall. The default was in the company failing to equip itself with appliances that would enable him to uncouple the cars without going between them. The court erred in directing a verdict for the defendant.

Reversed and remanded.

OPINION ON REHEARING.

Opinion delivered May 23, 1908.

HILL, C. J. 1. Appellee questions the correctness of the facts stated in the opinion. The court found widely different conclusions drawn from the evidence by opposing counsel, and carefully read over, in consultation, more than once the evidence upon which the case turned, and the facts as stated in the opinion reflect the result of this careful investigation of the record.

2. It is argued that the court erred in declaring the defective coupling to be the proximate cause of the injury.

The loss of life and limb in coupling and uncoupling cars with link and pin, and other methods requiring brakemen to go between moving cars, became appalling, and the Safety Appliance Act, quoted in the opinion, represented an awakened national conscience on the subject. It was a recognition of the consequences to be expected to flow from coupling and uncoupling cars by going between them. The dangers incident to this service are common knowledge, and to remedy these dangers the act in question was passed, which intended to relieve brakemen of the necessity of performing these duties by going between the cars, and to require railroad companies engaged in interstate commerce to so equip their cars that this toll in life should not be taken for lack of safety appliances. To make the requirement effective, it was further provided that, should the company be in default in obeying the act, the brakeman

would not be held to have assumed the risk if he continued to perform his duties. If this provision had not been added, the act would have been wholly nugatory, for the brakeman would assume the risk whenever the company failed to equip itself as required by the act. This provision relieves the brakeman of the assumption of the risk so long as he is performing the duty required of him, but this will not relieve him of negligence in contributing to the injury nor permit him to unnecessarily prolong his stay between the cars. In other words, the act permits no dalliance with danger, but does permit him, without assuming the risk when the company is in default, to couple or uncouple cars by going between them, and an injury received while in the performance of this duty, either in the act of doing it or extricating himself, would be primarily due to the failure of the company to equip itself with automatic couplers, thus rendering necessary the brakeman's presence between moving cars.

"It is generally held that, in order to warrant a finding that negligence * * * is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee & St. P. Ry. Co.* v. *Kellogg,* 94 U. S. 469; *Scheffer* v. *Railroad Co.,* 105 U. S. 249; *St. Louis, I. M. & S. Ry. Co.* v. *Bragg,* 69 Ark. 402; *Ultima Thule, Arkadelphia & Miss. Rd. Co.* v. *Benton, post* 289.

Just such accidents as the one proved here are the natural and probable consequence of failing to provide automatic couplers, thereby forcing brakemen between moving cars in order to perform their duties.

3. It is urged that York was guilty of contributory negligence as a matter of law in walking backwards with the motion of the car. If York remained between the cars longer than was necessary for him to extricate himself after uncoupling them, he would certainly be guilty of contributory negligence and could not recover. But the court does not so understand the facts. Going backward with the motion of the car might, or might not, have been the best method to have escaped the moving

car from his position where he uncoupled. That is a question of fact.

The motion is denied.

CAMMACK *v.* NEWMAN.

Opinion delivered May 11, 1908.

TRIAL—OPENING AND CONCLUSION OF ARGUMENT.—In an action upon promissory notes where the defendants admit the execution of the notes, except that the date, which was a week day, was not correct, and aver that the notes were made, executed and delivered to plaintiffs on Sunday, the burden of proof was upon plaintiffs, and they were entitled to open and conclude the argument.

Appeal from Ashley Circuit Court; *Henry W. Wells,* Judge; affirmed.

J. C. Norman and *R. E. Wiley,* for appellants.

1. The burden was on defendants and they were entitled to open and conclude. Kirby's Digest, § § 3107, 6196; 82 Ark. 331; 32 *Id.* 593; 29 *Id.* 153; 59 *Id.* 140, 143; 61 *Id.* 627.

2. It was error to refuse to require plaintiff to produce the original books of account and to admit the duplicate accounts. No foundation was laid for the admission of secondary evidence.

George & Butler, for appellees.

1. The demand for the original books was unreasonable. Their admission was a matter within the discretion of the court, and no abuse is shown. Kirby's Digest, § 3074; 10 Ark. 428; 21 *Id.* 329; 5 *Id.* 208. The petition to admit the books was not verified. Kirby's Digest, § 3075.

2. The opening and closing is also a matter of discretion. The plaintiffs had to prove the date of the execution of the notes, and that it was a weekday, that defendants subsequently ratified them, if executed on Sunday, and that the charge and contract, if usurious, were not made with defendants but another. This threw the burden on them, and hence the right to open and close followed. 74 Ark. 607; 32 *Id.* 470.

HILL, C. J. Appellants present several matters for which they ask a reversal, and all have been considered, but there is only one of any moment, and that is the one which is stressed by the appellant: whether there was error in refusing to give appellants the opening and closing arguments in the trial.

The suit was brought by the appellee corporation against Cammack and Norman upon two promissory notes, which were attached as Exhibits A and B to the complaint, each for $684.01, and each dated the 5th of May, 1905. The case was tried upon the complaint and a substituted answer. The first two paragraphs of the latter were as follows:

"1. They admit that said plaintiff is a foreign corporation, and they also admit that it has complied with the laws of Arkansas permitting it do business in this State.

2. Defendants admit the execution of the notes sued on, but deny that they are a legal demand against them, because they say that said notes were made, executed and delivered to plaintiffs on Sunday."

Subsequent paragraphs of the answer set forth other defensive matter which is not material for consideration here. After the jury was impanelled and the pleadings presented, the defendants (appellants here) contended that the burden of proof rested upon them, as they had admitted the execution of the notes, and asked to assume the burden and be allowed to open and close the argument. The court overruled their motion to this effect, and the plaintiff (appellee) introduced the notes in evidence and proved that May 5th fell upon Friday.

Appellants rely upon *Roberts* v. *Padgett,* 82 Ark. 331, to sustain them in their contention that under the pleadings they were entitled to take the burden and consequently to open and conclude the argument. That case decided that the burden, being on the defendant under the pleadings at the start, remained on him till the end, and repeated the doctrine of many previous cases that the party upon whom the burden of proof rested had the right to open and close the argument. It undoubtedly sums up correctly the law upon this subject, and the court determines this case in accordance with the principles therein announced.

The question, therefore, is simply whether, under the pleadings above set out, the burden rested upon plaintiff to make out

its case; did the answer admit sufficient to entitle the plaintiff to recover without introducing any evidence, thereby shifting the burden to the defendants?

The notes on their face showed that they were executed the 5th of May, 1905, which day was Friday. The answer admits that the notes were executed, but does not admit that they were executed on the 5th day of May, 1905, or any other date which would make them valid, and denies their validity, and alleges that they were executed and delivered on Sunday. This was necessarily a denial that they were executed on the 5th of May.

The admission here is not broad enough to have entitled the plaintiffs to have recovered without introducing evidence. The admission only goes to part of the note—that is, that it was executed—and where this is coupled with the denial that it was executed and delivered on a week day, evidence would be necessary to make out a *prima facie* case. The *prima facie* case is made out when the note is introduced bearing date on a week day; for no presumption would be indulged against the truth of the date upon the note. Until the admission was as broad as the note itself, the plaintiff was entitled to introduce the note as evidence, so as to make out a *prima facie* case, for it took all, not part, of the note to make out such a case.

This seems to have been an effort, by a partial admission, to gain an advantage without making the admission equal to the evidentiary value of the note. The whole of the note, its date as well as its amount, tenor and terms, must be admitted before the burden would be shifted from the plaintiff, and consequently it was right for the plaintiff to introduce the notes and thereby make out a *prima facie* case entitling it to judgment as prayed.

Finding no error, the judgment is affirmed.

WHITTAKER v. TRAMMELL.

Opinion delivered May 18, 1908.

1. DEED—FAILURE OF CONSIDERATION—REMEDY.—Where the consideration of a deed is the grantee's undertaking to support the grantor, and the grantee fails to comply with such undertaking, the grantor's

remedy is either to sue at law for the amount of the consideration as it shall become due, or else to treat the contract as void, and sue in equity to cancel it. (Page 254.)

2. CONTRACT—BREACH—PARTIES.—Where a husband and wife conveyed their homestead to their son in consideration of his undertaking to support them during their lives, and the husband died, in case of a breach of such undertaking the cause of action was in the surviving wife. (Page 254.)

3. REAL PROPERTY—REVERSION.—Where a homestead was conveyed by a husband and wife to their son, upon condition that if the son die first the land should revert to the grantors, and the husband died before the son, there is no possibility of reversion in the husband's heirs, since, if the son should die before the wife, the estate would vest in her, and not go to his heirs. (Page 254.)

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

STATEMENT BY THE COURT.

This is a suit brought by appellees as the heirs at law of Thomas P. Whittaker, Sr., deceased, against appellant in the Sebastian Chancery Court to cancel and set aside a deed executed by Thomas Whittaker, Sr., and wife to appellant, Thomas Whittaker, Jr. The grounds upon which the relief is based are duress and undue influence.

The undisputed facts are that Thomas Whittaker, Sr., and wife executed a deed to their homestead to Thomas Whittaker, Jr., in May, 1901. The consideration expressed in the deed was $500, but the real consideration was that the grantee should support the grantors, who were his father and mother, during their natural lives, and was evidenced by a separate instrument in writing, which contains the following provision: "Said T. P. Whittaker, Jr., agrees to support the said T. P. Whittaker, Sr., and Maggie Whittaker, his father and mother, during their natural lives, in the event he outlives them; and, in case the said T. P. Whittaker, Jr., dies first, the land described in the above mentioned deed shall revert to the aforesaid father and mother."

Thomas Whittaker, Sr., died in August, 1902, and was 80 years old at the time of his death. Thomas Whittaker, Jr., lived with his parents up to the time of his father's death, and his mother now lives with him.

Appellees adduced evidence tending to show that appellant treated his parents unkindly, and that he threatened to leave them unless they conveyed the land in controversy to him. One of the daughters testified that her father's mind seemed to be very good for an old man, but that she did not think he was capable of attending to business such as making a deed. Opposed to this is the testimony of appellant, of his brother, of the widow of deceased and his family physician, to the effect that his mind was clear, and that he was rational up to the time of his death. His widow said that she and her husband talked the matter over for several years before the deed was executed. That the other children had all married off and left home. That her son never insisted upon the deed being made, and never threatened to leave home. That the deed was satisfactory to her and her husband when it was made, and that it is still satisfactory to her.

After his father's death, appellant took his mother to live with him on another farm he had purchased. He sold the land in controversy partly for cash and took the notes of the purchaser for the deferred payments.

His mother testifies that she is satisfied with this sale, and wants it to stand.

A decree was rendered, in which that part of the purchase price received by Thomas Whittaker, Jr., and the deferred payments due from the purchaser, on account of the sale of the lands in controversy, was impounded and ordered paid into the registry of the court, to be there held subject to the orders of the court.

An appeal was taken to this court.

T. B. Pryor, for appellant.

1. The decree is not responsive to the issues in the cause. It forced on appellant a relief (so-called) neither prayed for nor desired. 18 Ark. 85; 11 *Id.* 120; 22 *Id.* 10.

2. The only issue is whether the deed was void for failure to comply with the contemporaneous contract, which was the only consideration. This contract, at most, created a trust estate, and did not convey a fee simple title. Maggie, the mother, is the only *cestui que trust,* and upon the contingency suggested

by the court the title would revert to her, as the doctrine of entirety and survivorship obtains in this State. 61 Ark. 388; 63 *Id.* 289.

HART, J., (after stating the facts). The allegations of the complaint that the execution of the deed was procured by duress or undue influence were not sustained by the evidence. The chancellor did not so find. He seems to have proceeded upon the theory that the estate of Thomas Whittaker, Jr., was liable to be defeated in his lifetime upon condition of his failure to support his mother, and also that there is a possibility of reversion in the heirs of Thomas Whittaker, Sr., if Thomas Whittaker, Jr., should die in the lifetime of his mother.

Upon the first proposition, the law is that where the consideration of a deed is the grantee's undertaking to support the grantor, and the grantee fails to comply with such undertaking, the grantor's remedy is either to sue at law for the amount of the consideration as it would become due, or else to treat the contract as void, and sue in equity to cancel it. *Salyers* v. *Smith,* 67 Ark. 526.

In the present case, there has been no breach of the contract, and, if there had been, Margaret Whittaker, the surviving grantor, being *sui juris,* alone would have a right of action.

We do not think there is a possibility of a reversion in the heirs of Thomas Whittaker, Sr., deceased. Considering the deed and agreement as one instrument, the land was conveyed to Thomas Whittaker, Jr., with the reversion in his father and mother if he should die before either of them. The father being now dead, if Thomas Whittaker, Jr., should die before his mother, the estate would vest in her, and would not go to the heirs of Thomas Whittaker, Sr., deceased. Any other construction would defeat the purpose of the deed.

The deed was executed to provide a means of support to Thomas Whittaker, Sr., and his wife, in their old age, and for their mutual benefit. The land was their homestead, and could not be conveyed without her joining in the deed.

Margaret Whittaker expressed herself as satisfied with the conveyance made by her son, Thomas Whittaker, Jr., and the other heirs having no interest in the land are not in a position to complain.

Reversed and remanded with directions to dismiss the complaint for want of equity.

ROBERTSON *v.* MCCLINTOCK.

Opinion delivered May 18, 1908.

LEVEES—TAX SALE—PERIOD OF REDEMPTION.—The act of April 6, 1901, § 1, providing that lands sold for nonpayment of levee taxes in the St. Francis Levee District "shall be subject to redemption at any time within one year from the day of sale thereof," contemplates that the year allowed for redemption runs from the date of the sale by the commissioner, and not from the time the sale is confirmed.

Appeal from Lee Chancery Court; *Jesse C. Hart,* Chancellor, on exchange of circuits; reversed.

S. H. Mann, for appellant.

1. Under the provisions of Acts 1901, p. 153, owners of land have one year from the *date of the sale* only, and not from the confirmation of such sale. 74 Ark. 302; 65 *Id.* 521-2; 24 Cyc. 36; 67 Ark. 566; 66 *Id.* 490; 55 *Id.* 37.

P. D. McCulloch and *N. W. Norton,* for appellees.

The word "sale" is a technical word, and means a *completed* sale, *i. e.,* the date of the confirmation. 73 Ark. 344; 84 S. W. 703; 77 Ark. 242; 91 S. W. 303; 61 Ark. 80; 69 *Id.* 539.

GEORGE B. ROSE, Special Judge. The lands in suit were condemned by a decree of the Lee Chancery Court to be sold for levee taxes. The sale took place on June 17, 1905. It was at public auction, for cash, as required by the statute. Appellant bought and paid the purchase price. The sale was reported at the December term, 1905, but nothing was done until February 1, 1907, when appellees filed a petition, claiming to be the owners, and alleging that in October, 1906, they had made to the purchaser the necessary tender and had offered to redeem; and they asked that the right of redemption be accorded them. Their prayer was granted on May 27, 1907, and the purchaser has appealed. The sale was never confirmed.

The only question presented is whether the year allowed for redeeming runs from the date of the sale by the commissioner or from the date of confirmation.

The act under which the right of redemption is claimed is as follows:

"Sec. 1. That hereafter all lands sold under decree of foreclosure proceedings for non-payment of levee taxes, in the St. Francis Levee District, shall be subject to redemption at any time within one year from the day of sale thereof, by the owner thereof, or by his or her administrator or assigns.

"Sec. 2. That any owner of land desiring to redeem lands under the provisions of section one of this act shall tender the commissioners, or other officers making such sale, the full amount of money for which said land was sold and all accrued taxes thereon, with ten per cent. interest on the whole amount *from the day of such sale,* together with the cost apportioned against such lands, and upon payment to him of said sum the commissioner or other officer making such sale shall give to such owner a certificate certifying that said land has been redeemed, and the land so redeemed shall be entered on the tax books in the name of said owner."

Sec. 3 repeals all acts in conflict with this act. Act of April 6, 1901, Acts 1901, p. 153.

Our only purpose should be to inquire what the Legislature meant by the language employed. The sale referred to in the second section is the same sale that is described in the first. It is spoken of as "such sale." The second section may therefore supply a key to the first.

It is plainly the purpose of the second section carefully to guard the rights of the purchaser, who has come forward and paid his money to discharge the burdens due the public. Its language is emphatic throughout. He who seeks to redeem must pay "the *full* amount of money for which said land was sold and *all* accrued taxes thereon with ten per cent. interest on the *whole* amount from the day of such sale," etc.

The Legislature knew that the terms of the chancery courts throughout the St. Francis Levee District are held only once every six months, and that if interest should be paid the purchaser on redemption only from the time of confirmation, he

must lose interest on his money for several months. When it was so careful to see that he was protected, it is clear that it did not intend that he should suffer this loss. It gave him the highest rate of interest allowed in private contracts, with the evident purpose that if he did not get the land he should receive as much for his money as he could possibly get by lending it out; but, if interest would run merely from the date of confirmation, he could not receive more than six per cent., and if the land was redeemed immediately after the confirmation, he would receive no interest at all.

In this case the sale lay unconfirmed from the 17th of June, 1905, to May 27, 1907, so that if interest runs only from the date of confirmation the only reward of the purchaser for discharging the debt which the property owed the public would be the loss of two years' interest on his money. Appellees themselves recognize the injustice of this, alleging in their petition that they had tendered interest, which must have been from the date of the sale by the commissioner, since there had been no confirmation.

It is plain that in the second section of the act by "day of such sale" the Legislature intended the day when the lands were stricken off by the commissioner and the purchase price paid in cash. If the words have that meaning in the second section, how can we give them a different interpretation in the first?

The language used in the act under which the land was sold confirms us in this conviction. It is as follows:

"The court by its decree shall grant the relief as prayed in the complaint, and shall direct said commissioner to *sell* the lands described in the decree at the court house door of the county wherein the decree is entered, at public outcry, to the highest bidder, for cash in hand, after having first advertised such *sale* (such advertisement may include all the lands described in the decree) weekly for two weeks consecutively in some newspaper published in the county, if there be one, and, if no such newspaper, then that such advertisement be published in some newspaper of an adjoining county, and if all of the lands be not *sold* on the day advertised, such *sale* shall continue from day to day until completed, and said commissioner shall, by proper deeds, convey to the purchasers the lands so

sold, and the titles to said lands shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and insane persons the rights given them by section 12 of said act of February 15, 1893." Acts 1895, p. 91.

Here the words "sell," "sold" and "sale" are all applied to the action of the commissioner. By the terms of that act no redemption was allowed; and when the act of 1901 granted the right of redemption, it was from this sale made by the commissiner under the act of 1895 that it was granted.

It is true that there are in our reports many expressions to the effect that a judicial sale is not complete until confirmed by the court. This is true, but it by no means follows that the sale is a nullity until confirmation.

In some jurisdictions the commissioner is treated as a mere agent to take bids to be reported to the court. The highest bidder acquires no rights by his bid, and it is customary to open the bidding and to award the property to the man who will offer the highest price after the sale has been reported. The language employed in some of our earlier cases would indicate that this system was in the mind of the judge delivering the opinion, though the point was not decided.

It is now, however, the settled law of this State, as it is of most of the States, that the highest bidder at a judicial sale, to whom the property has been struck off by the commissioner, acquires vested rights, which must be respected by the court. *Colonial & United States Mortgage Co.* v. *Sweet,* 65 Ark. 152; *Banks* v. *Directors of St. Francis Levee District,* 66 Ark. 493; *George* v. *Norwood,* 77 Ark. 216.

Under these decisions, the confirmation is not the sale, but only what the word implies, the approval of something already done. The sale is made by the commissioner. Confirmation only gives the court's sanction to something that has already taken place, and authorizes the commissioner to execute the deed. The purchaser cannot take possession until he receives this, but it will not do to say that a sale which the court must confirm amounts to nothing.

If the sale has been unfairly made, or is for a shockingly inadequate price, the owner can object to the confirmation; but if he seeks to redeem instead, the redemption must take place

within one year after the lands have been stricken off by the commissioner. Otherwise the court, by neglecting to confirm the sale, could continue the right of redemption indefinitely, as was done in this case, leaving the purchaser with neither the land nor interest on his money. We feel sure that such was not the legislative intention.

The cause is therefore reversed, with directions to deny to appellees the right of redemption.

WILLIAMS v. BUCHANAN.

Opinion delivered April 20, 1908.

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1. APPEAL—ELECTION CONTESTS—CONCLUSIVENESS OF FINDINGS OF FACT.—Findings of fact by a circuit judge in the trial of a contested election are as conclusive as the verdict of a jury upon conflicting evidence. (Page 271.)

2. ELECTION CONTESTS—FINDING OF FRAUD—SUFFICIENCY OF EVIDENCE.—A finding that the fraudulent conduct of the election judges in a certain voting precinct was of such extent as to discredit their returns is sustained by evidence that in seven instances where voters directed their tickets to be made out for contestant the election officers made it out for contestee, that in six instances the election officers electionered with illiterate voters while making out their tickets, that in numerous instances one of the judges, instead of two, made out the ticket of a voter, that 255 votes were returned for contestant when 297 qualified voters testified for him, and that after the election the ballots of the precinct were stolen and could not be produced. (Page 268.)

3. SAME—PAROL PROOF OF VOTE.—Where the returns of a precinct are discarded, in an election contest, the parties are entitled to prove the number of votes in their favor by parol evidence. (Page 269.)

4. SAME—SUFFICIENCY OF PROOF OF FRAUD.—Where the evidence shows that five votes in a certain box were changed by one of the judges of election, that in three instances where voters directed the judges to make ballots for contestant they were made out for contestee, that many persons were allowed to vote who were not entitled to do so, and that in numerous instances one judge, instead of two, made out tickets for illiterates, a finding that the box should be discarded will not be set aside. (Page 270.)

5. SAME—CONTINUANCE.—Kirby's Digest, § 2861, providing that the county court shall determine election contests at its first term held

fifteen days after the election, does not preclude the county court from exercising its power to continue a case for good cause shown. (Page 271.)

6. SAME—PRACTICE ON APPEALS FROM COUNTY COURTS.—Under Const. 1874, art. 7, § 51, providing that "in all cases of contest for any county, township or municipal office, an appeal shall lie, at the instance of the party aggrieved, from any inferior board, council or tribunal to the circuit court, on the same terms and conditions on which appeals may be granted to the circuit court in other cases, and on such appeals the case shall be tried *de novo*," in an election contest in the circuit court on appeal testimony may be heard which was not introduced in the county court. (Page 271.)

7. SAME—POWER OF COURT OVER BALLOTS.—A court having jurisdiction of an election contest may make orders for preserving the ballots and using them as evidence; and, unless there is some abuse of the court's power in this respect, there is nothing for the Supreme Court to review. (Page 272.)

8. SAME—POWER OF COUNTY COURT.—The only result of election contests before the county court, or before the circuit court on appeal therefrom, under Kirby's Digest, § 2862, is to ascertain the result of the election and to certify the same to the Governor, "who shall commission the person declared duly elected by such order;" the court not being authorized to give a judgment of ouster in any case. (Page 272.)

9. APPEALS—COSTS ON REVERSAL.—Under Kirby's Digest, § 970, providing that "if any person shall sue out a writ of error or take an appeal to review the judgment of any circuit court, * * * if the judgment be reversed, the plaintiff in error, or appellant, shall recover his costs," all the costs of an appeal from the circuit court are adjudged against the appellee if the appellant succeeds in obtaining any substantial or material reversal of the judgment. (Page 277.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed in part.

Buchanan instituted a contest for the office of sheriff of Garland County against Williams, alleging that contestant was duly elected, and that various frauds were committed in the election, whereby contestee secured a certificate of election and was commissioned.

The court made various findings of fact, of which it will be necessary to set out only the second, third and fifth, towit:

"Second: That the judges in the election in Hot Springs Township voting precinct were guilty of wilfully fraudulent conduct in conducting said election by making out the votes of illit-

erate voters contrary to the directions of such voters, thereby making such voters vote for said Williams when they intended to and thought they were voting for Buchanan; that said judges in said Hot Springs Township precinct also wilfully violated the law by one of said judges making out the tickets or ballots of many illiterate voters in the absence of both of the judges and by the electioneering for said Williams in the voting room with the voters who came there to vote, the said judges fraudulently failed to count for Buchanan about forty votes which were cast for him, and that the fraudulent conduct of the said judges in said Hot Springs Township precinct was of such character and extent as to render the result of the said election in said precinct uncertain.

"Third: That the election judges in the Second Ward of the city of Hot Springs were guilty of wilfully fraudulent conduct in making out the ballots or tickets of voters contrary to the direction of such voters, so as to make said voters vote for Williams when they intended to and thought they were voting for Buchanan; that one of said judges fraudulently erased names from some of the ballots during the counting of said ballots after the polls were closed; that said judges also wilfully violated the election law by one of said judges making out the ballots or tickets of many illiterate voters when both of the other judges were absent; that said judges also wilfully and fraudulently allowed many persons to vote in said election who were not legal voters in said Second Ward precinct, and wilfully and fraudulently refused to allow witnesses to appear before said judges to testify as to the qualifications of illegal voters, and that the fraudulent conduct of said judges in said Second Ward precinct rendered the result of the election in said precinct uncertain.

"Fifth: That the contestant has proved by competent evidence that 297 legal votes were cast for him in said Hot Springs Tonwship precinct at said election, and that by ignoring and throwing out the vote of Hot Springs Township as certified by the election commissioners, which, as a matter of law, is done, and giving to Buchanan the vote cast for him in said Hot Springs Township without purging the First, Second and Third Ward precincts of the city of Hot Springs of the said

illegal votes cast for said Williams, and Buchanan has a majority of 184 legal votes in the county; and by throwing out the votes of Hot Springs Township as certified by said judges and commissioners and giving Buchanan the benefit of the said 297 votes which were cast for him in said township, and purging the First, Second and Third wards of the city of Hot Springs of the illegal votes which were cast for Williams in said precincts, and Buchanan's majority is 408. By throwing out the vote of Hot Springs Township and Second Ward of said city, as certified by the election officers, which as a matter of law is done, and giving to Buchanan the legal votes cast for him in said township, without purging the First and Third Ward precincts of the said illegal votes which were cast for Williams, and Buchanan's majority is 390, and by throwing out the votes of said township and the Second Ward as certified by the election officers and purging the First and Third Ward precincts of the said illegal votes which were cast for Williams and giving Buchanan the benefit of the legal votes cast for him in the township, and Buchanan's majority of legal votes in the county is 522. So that from every aspect of the case, as shown by the evidence, Buchanan was elected sheriff and *ex officio* collector of Garland County."

The court declared as a matter of law as follows:

"And as matter of law the court finds that the said S. A. Buchanan should have judgment against the said Williams for the possession of said office; that said Williams should be ousted therefrom, and that said Buchanan should recover against the said Williams the sum of $7,776.19 as his damages for being kept out of said office since the 31st day of October, 1906, to the first day of September, 1907, the date to which the proof in this case shows that said Williams has received and collected the salary and emoluments of said office; that the votes and returns of Hot Springs Township, and the Second Ward of the city of Hot Springs, as certified by the election judges and the election commissioners should be and are thrown out and ignored in determining the results of said election, because of the wilfully fraudulent acts and conduct of said election judges in conducting and holding said election, and that the vote proved by the respective parties hereto as cast for them in said voting pre-

cincts, independent of said certified returns, should be and are considered in arriving at the result of said election."

Contestee has appealed.

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

1. The evidence does not sustain the second finding of the court as to Hot Springs Township, nor the third as to the Second Ward of Hot Springs. No fraud is shown, only that several mistakes were made. It was shown to be untrue that any ballots were made out contrary to the directions of the voters.

2. Ballot boxes must remain in custody and care of the proper officers prescribed by law. Slight irregularities of officers as to keeping or disposition of ballots or boxes are not grounds for exclusion of ballots, if it is clear no prejudice has resulted. If it appears that the ballots have been tampered with, they should be rejected as evidence. Kirby's Digest, § 2838; 10 A. & E. Ency. Law, 732; 50 Ark. 85; 15 Cyc. p. 426-7; McCreary on Elections, § 471. When ballots have been tampered with, the original count must prevail. 25 Col. 308; 15 Cyc. p. 429, § 4; *Ib.* p. 430.

3. An inspection of the ballots should not be ordered until the evidence is all in, and it is shown with reasonable certainty that ballots were illegally cast and that an examination is material to the determination of the contest. 12 Penn. 575; McCreary on Elections, § 482; 10 Phil. (Pa.) 389. It is therefore error to admit any ballot boxes or ballots in evidence and thereby overcome the presumption in favor of contestee and the returns. The burden was on contestant to prove by whom and for whom the ballots were cast. Where the alleged illegality of ballots cast is *not clearly proved,* it is proper to dismiss the contest. 15 Cyc. pp. 416-417; 41 Ark. 111.

4. Misconduct of election officers or irregularities must affect the result, or the election is not vitiated. 10 A. & E. Enc. Law, p. 67 and notes. Fraud vitiates an election return, but the entire return of a precinct should not be rejected when possible to eliminate fraudulent votes. 15 Cyc. p. 368; 42 Kans. 54. The result must be changed. 61 Ark. 286; 58 *Id.* 169.

5. The judgment of ouster and for fees, etc., clearly er-

roneous. *Rhodes* v. *Driver,* 69 Ark. 606; 5 L. R. A. 403; 11 Nev. 382; 15 Cyc. 440.

6. The depositions before the county court should have been suppressed. 80 Va. 58; 9 Ind. 31; 82 Va. 827; 2 A. K. Marsh (Ky.), 236; 33 Ind. 305; 13 Cyc. 938-9; 6 Enc. Pl. & Pr. p. 536, 604, 632.

7. The findings of a judge in a contested election case have the same effect *as special findings of a jury.* 73 Ark. 190.

8. All evidence after the trial in the county court and afterwards should have been excluded. Kirby's Digest, § § 2860-1-2.

9. It was incumbent on appellee to show for whom all alleged illegal ballots were cast. 39 Atl. Rep. 686; 15 Cyc. note c and 419; 54 Pac. 71; 70 S. W. 852; 41 *Id.* 578.

10. The case was not tried at the *first* term of the county court after the election, and it abated. Kirby's Digest, § § 2860-1; 69 Ark. 501; 41 *Id.* 127; 70 *Id.* 240; 75 *Id.* 457; 128 Ind. 174; 34 Cal. 329; 331, etc., and p. 635.

Greaves & Martin and *Wood & Henderson,* for appellee.

1. The findings of the circuit court have the same force and effect as the verdict of a jury, and will not be disturbed by this court if there is any evidence to support them. 73 Ark. 190; 50 *Id.* 85; 53 *Id.* 161; 50 *Id.* 275, 308; 01 *Id.* 247. The evidence sustains the findings of the court on all material points. On the second finding, it is shown that the judges electioneered in the poll room. Kirby's Digest, § 2853. The finding as to the second ward in Hot Springs is also amply sustained, and this, if the court properly declared the law, ends the controversy, as it gives Buchanan a majority sufficient to elect him. Fraud discredits returns, and they should be discarded, and only the votes proved should be counted. McCreary on Elections, § 574; 41 Ark. 111; 53 *Id.* 161; 61 *Id.* 257; 69 *Id.* 501; 73 *Id.* 193; 10 Am. & E. Enc. Law. 774, 838; 53 N. W. 944; 66 *Id.* 388; 24 Pac. 26; 49 Am. St. Rep. 69; Paine on Elections, § § 592, 596; 25 L. R. A. 325.

2. The court properly refused to suppress the depositions filed in the county court. They were afterwards duly transcribed, signed, filed, etc., within a reasonable time. There is

nothing in the law limiting the time within which depositions must be transcribed, signed and filed.

3. Under our practice all appeals to the circuit court are tried *de novo,* and all depositions taken, whether in or after the trial in the county court, should be read. 69 Ark. 511. This case was properly decided on this point, and should not be overruled. The court properly ordered the ballot boxes opened. All the law requires is that the evidence show that the ballot boxes have not been tampered with. 20 Pac. 17; *Ib.* 95; 79 N. Y. 290; 31 Minn. 416; 41 N. E. 1116; 64 N. Y. 292; 32 S. W. 1022; 12 *Id.* 959; 42 N. E. 167.

4. The motion to dismiss in this court because the case was not tried at the term next succeeding the election should be denied. The word "shall" in Kirby's Digest, § 2861, is directory merely. 41 Ark. 127; 7 Words & Phrases, 6464-5.

5. The judgment is not excessive in amount nor unwarranted in scope. Kirby's Digest, § 2859, authorizes a judgment of ouster and for damages not exceeding the salary and fees, etc. This question was not before the court in *Rhodes* v. *Driver,* 69 Ark. 610. This was a trial *de novo* in the circuit court, and is regulated by statute. Kirby's Digest, § 1314; art. 8, § 51, Const. Ark. On appeal the court was bound to render judgment as if it had been exercising original jurisdiction. 33 Ark. 511; 34 *Id.* 244; 8 Houston (Del.), 163; 32 Atl. Rep. 225; 55 Tex. 273-277.

6. Kirby's Digest, § 2859, is a general provision applying as well to judgments of county courts as to circuit courts, and is so digested. *Rhodes* v. *Driver, contra,* is *obiter dictum.* If not, it should be overruled on this point.

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

On motion to retax costs: The judgment was reversed and judgment here in favor of appellant for costs is right. In ordinary cases the matter of costs is largely in the discretion of the court. Kirby's Digest, § 967. But in this case Buchanan is the only party to the action against whom a judgment for costs is authorized by statute. Kirby's Digest, § 2865, 2866, 2877. See also 68 Ark. 130. The court has no authority to give judgment

for costs in a contested election case unless there is a statute expressly authorizing it. A statute regulating the taxation of costs in civil actions will not be construed to give such authority. 15 Cyc. 440-441; McCreary on Elections, § 458. In special proceedings costs will not be allowed except by legislative enactment. 11 Nev. 386; 25 Ark. 235; 70 Ark. 240; 75 Ark. 456.

On the petition for rehearing: Election contests are political questions. McCreary on Elections, § § 454-5; 41 Ark. 240; 70 Ark. 240. For distinction between appeals from county court to circuit court in political matters and ordinary cases, see 33 Ark. 513, from which it appears that, unless there is an abuse of discretion, fraud or mistake on the part of the county court, its findings should be sustained. The determination of an election contest is a judicial function only so far as authorized by statute. 15 Cyc. 395. The rule under which this court affirmed the judgment in favor of Buchanan is merely technical, it is a harsh one, and the court may properly not adhere to it when its application will, as in this case, necessarily result in injustice. 43 Ark. 391; 44 Ark. 411.

Greaves & Martin and *Wood & Henderson,* for appellee.

The condition on which the appellant can recover costs is that the judgment be reversed. Kirby's Digest, § 970. In this case the judgment was not reversed, but, on the contrary, the most important part of it, the title to the office, was affirmed. In cases where the judgment of the lower court is affirmed in part and reversed in part, this court must necessarily have and exercise a discretionary power with reference to the apportionment of the costs. 49 N. Y. 660; 42 Pac. 129; 5 Enc. Pl. & Pr. 192, 202. This court has exercised that discretion in many instances. 66 Ark. 271; 70 Ark. 331; 69 Ark. 302.

The above statute, section 970, is no more mandatory than section 965, Kirby's Digest, yet this court, under the latter, has repeatedly held that the circuit court is vested with discretion to determine whether costs incurred by either party are unreasonable or unnecessary, and to award judgment accordingly. 65 Ark. 219; 17 Ark. 361.

HILL, C. J. Williams and Buchanan were opposing candidates for sheriff of Garland County. On the face of the returns

Williams had 2,495 votes and Buchanan 2,146. Williams was commissioned, and took charge of the office, and Buchanan instituted a contest in the county court which resulted in Williams's favor there. Buchanan appealed, and on trial *de novo* in the circuit court Buchanan was declared elected, and a judgment for the office and for its emoluments was rendered in his favor. Williams appealed. This court superseded the judgment pending the appeal. See *Williams* v. *Buchanan,* 84 Ark. 404.

1. The first question is the effect to be given to the findings of fact by the circuit judge in election contests. It has long been the settled law of this State that the findings of fact by a circuit judge in the trial of a contested election are as conclusive as the verdict of a jury upon conflicting evidence, yet such is not accepted as the law by the appellant herein. It is urged that, as the testimony is upon depositions, this court has the same opportunity of weighing its truth that the circuit court had, and that only persuasive effect should be given to the findings of fact; and again there is much of appellant's argument spent in attacking the credibility and weight of the testimony. These questions are not open now. The duty of this court in election cases was well stated by Chief Justice COCKRILL, in *Jones* v. *Glidewell,* 53 Ark. 161: "It is not the practice of appellate tribunals, and has never been the practice of this court, to enter anew into the investigation of issues of facts which have been tried in a law case by a circuit judge upon conflicting testimony. * * * But, while we will not enter upon an investigation to ascertain where the weight or preponderance of the testimony lies, it is our province to determine whether a given finding or verdict has testimony to sustain it; and where there is no conflict in the evidence, or the facts are specially found, the conclusion of law or judgment to be deduced therefrom is purely a question of law to be finally determined by this court."

This subject was reviewed in *Schuman* v. *Sanderson,* 73 Ark. 187, an election contest, where the same contentions were made by the appellant there that are made by the appellant here. After reviewing the previous decisions upon the subject, it was said: "The only question presented in appeals on law cases on the facts is whether the evidence is legally suffifficient to sustain the verdict or finding. Therefore the inquiry in this case is

merely whether there is in each instance evidence legally sufficient to sustain the finding, and the finding must be sustained if there is such evidence, notwithstanding a decided preponderance may be against it."

The trial court made various findings of fact as to the different precincts. Under any of these findings, Buchanan received a majority of the legal votes cast. It is not necessary for the court to discuss all of these findings, for if any one of them is sufficiently sustained by the evidence to give the election to Buchanan that ends the inquiry here. It is wholly immaterial whether Buchanan received a majority of 59 votes, as found in the first finding, or whether he received a majority of 522, as found in the fifth finding.

The court has carefully considered all the findings, but will only discuss the second finding, which relates to Hot Springs township precinct, and so much of the third finding as relates to the second ward of the city of Hot Springs. These findings will be set out in the Reporter's statement of facts. In each of these precincts the returns were discredited for fraud, and in the township precinct the votes proved outside the returns were counted.

The testimony adduced on behalf of appellee to sustain the finding as to the township precinct may be summarized as follows: In seven different instances where election officers were called on to make out tickets for illiterate or incapacitated persons, there was testimony tending to prove that the voter directed the ticket to be made out for Buchanan, and the election officer made it out for Williams. In some instances this mistake or fraud was detected and rectified; in other instances the vote was cast for Williams. These seven instances were proved by nine witnesses. In some of these cases the fraud or mistake extended to all of the independent ticket (which was the name of the ticket upon which Buchanan was a candidate) as well as Buchanan; in other instances a similar mistake or fraud was proved in regard to the candidate for county judge on Buchanan's ticket, where the ticket for Buchanan was properly made out. Seven witnesses testified to six instances of electioneering by the election officers while making out these tickets for the illiterate voters. Four of these instances of electioneering were

in favor of Williams, and two for the candidate on Williams's ticket for county judge. Numerous instances were proved of one of the judges making out a ticket, instead of two, as the law requires where the voter is illiterate or physically incapacitated from making out the ticket, and a few instances of a clerk, instead of two judges, making out tickets for the illiterate voters.

The judges returned 255 votes for Buchanan, and 297 qualified electors of the township testified that they had voted for Buchanan, and this was uncontradicted. There was also evidence tending to show that all of the judges were supporters of Williams. This has no weight other than to indicate that irregularities were not inuring to the injury of Williams.

In the progress of the case the ballot boxes were ordered opened, and the boxes of the Hot Springs township and the sixth ward of the city showed only excelsior and gunny sacks, the ballots having been abstracted. The court found this had been done after the result had been ascertained and declared by the election commissioners. There seems to be no evidence connecting either of these parties with the theft of the ballots, and the fact of the theft of the ballots in the precinct is only mentioned here to explain why the ballots were not in evidence to corroborate or refute much of this testimony.

Other facts of less weight than those mentioned were proved which were proper to be considered by the court. In view of this testimony, which the trial court accepted as the truth, it cannot be said by the court that there is no sufficient evidence to sustain the action of the court in discrediting and discarding the returns of that township and accepting only the evidence of votes proved.

Williams took no testimony to prove how many voters in the precinct voted for him. The election officers returned 491 for him. In the entire county the returns gave 2,498 for Williams and 2,146 for Buchanan. When Hot Springs township is thrown out it leaves the vote to stand: Wiliams, 2,004, Buchanan, 1,891. To Buchanan's vote must be added the 297 which he proved voted for him. As stated, Williams did not prove any voted for him; he relied upon the returns, and did not avail himself of the right to prove his vote. The returns being discarded, then, un-

der the law, only such votes as were proved can be counted. *Rhodes* v. *Driver*, 69 Ark. 501; *Freeman* v. *Lazarus*, 61 Ark. 247; *Jones* v. *Glidewell*, 53 Ark. 161. As shown by the above calculation, this gives the office to Buchanan by 184 majority.

The returns from the second ward of Hot Springs were discarded, and the evidence to sustain this action is substantially as follows: There were 695 votes returned. There was testimony adduced to prove that there were only 430 to 440 legal voters in the ward. Three witnesses testified to one judge changing ballots after the election. The ballots were examined in this box, and it was found that only five were scratched in the method indicated by these three witnesses. Some of these were explained by witnesses, so that the force of this testimony was minimized by the physical facts, yet it had some probative weight. There was testimony of four witnesses as to three instances where voters directed the election officers to make ballots for Buchanan which were found made out for Williams. There was testimony tending to prove that Williams's partisans were bringing to the polls many negroes and others who appeared to residents of the ward to be strangers. There was much evidence directed to proving that a large number of the voters did not live there, and were imported by Williams's partisans and voted regardless of challenges, and that the election officers knowingly permitted this. Numerous instances of one, instead of two, judges making out tickets for illiterates were proved. This testimony is sufficient to sustain the court in casting out the returns from this precinct. Neither side made proof of the votes cast in this ward, and therefore, the returns being discredited and rejected, the vote returned from that ward must be subtracted from the returns. This, with the finding as to Hot Springs township, gives Buchanan 390 majority in the county. It is futile to pursue the other findings, as it is immaterial whether they are sustained by or are contrary to the evidence.

There is much testimony adduced by the appellant tending to prove that the instances of wrong marking of ballots were mere mistakes unintentionally done, and many of the apparent irregularities were explained as innocent of wrongdoing, and that the election was fairly conducted and returned by the election officers. But, as heretofore shown, this court cannot go

into any of these questions, being confined solely to determining whether testimony legally sufficient to sustain the findings had been adduced.

2. Appellant insists that the county court lost jurisdiction of this contest because it was not tried at the first term of the county court to which the action was returnable. Section 2861 of Kirby's Digest, which is section 72 of the act of January 23, 1875, reads as follows: "Either party may, on giving notice thereof to the other, take depositions to be read in evidence on the trial, and the court shall, at the first term (if fifteen days shall have elapsed after such election, and if less than fifteen, then at the second term), in a summary way, determine the same according to evidence."

The argument is that the cause was not tried at the first nor the second term of the court, and the appellant did not request nor agree to a continuance, and that therefore the county court lost jurisdiction. The evident purpose of this section was to enforce a speedy trial in the county court of contests of the election of officers over which that court had jurisdiction. But it would be a strained and unnatural construction of this statute to hold that the Legislature intended by it to oust the jurisdiction of the only court which it had authorized to try these contests if the same were not tried at the first term, or, in the contingency therein named, at the second term after the election. The law necessarily contemplates unavoidable contingencies, illness of parties and witnesses, and similar causes which make it just to grant continuances and unjust to refuse them.

This is plainly a direction to the county court to proceed to trial summarily at the term therein mentioned; but it does not preclude that court, when it once has jurisdiction, from exercising its power to continue a cause for good cause shown to it. Without good cause shown, it is plainly the duty of the court to try it according to the directions contained in this statute.

3. It is contended that testimony could not be taken in the circuit court on appeal, and that all testimony had to be taken in the county court and the trial had in the circuit court upon the testimony presented to the county court. This is contrary to the settled practice in election contests, and also to all other appeals from the county court to the circuit court. Art. 7, §

51, of the Constitution provides that "in all cases of contest for any county, township or municipal office, an appeal shall lie, at the instance of the party aggrieved, from any inferior board, council or tribunal to the circuit court, on the same terms and conditions on which appeals may be granted to the circuit court in other cases, and on such appeals the case shall be tried *de novo*." Any statute or practice which would limit this right of trial *de novo* in the circuit court would be unconstitutional, and the court fails to find that any attempt has been made to do so in any of the statutes upon this subject.

4. A motion was made to suppress the depositions taken because they were not subscribed by the witnesses and certified as required by law, which motion was supported by affidavits. A response was filed setting forth that the signatures were waived, and explaining the other alleged irregularities, and supporting affidavits were filed. The stenographer by whom the depositions were taken thereafter took a carbon copy of the depositions, three copies having been made, and submitted the same to the witnesses, and obtained their signatures thereto, and filed the copies so signed as the depositions. Thereafter the court overruled the motion to suppress the depositions. The argument against these depositions is made without reference to the act of May 11, 1905, amending sections 3184, 3185 of Kirby's Digest. While this statute is not literally pursued, yet it is substantially complied with, and there is no question raised as to the authenticity of the depositions as finally filed with the signatures of the witnesses. The objection to the depositions is without merit.

5. In the course of the proceedings, the court ordered the ballot boxes opened in order that the ballots be used as evidence. A court having jurisdiction of an election contest may make orders for preserving the ballots and using them as evidence (Kirby's Digest, § 2838); and, unless there is some abuse of the power of the court in this respect, there is nothing for this court to review. No abuse of power in this regard is shown here.

6. This only leaves for consideration the form of the judgment. Judgment was entered in favor of Buchanan ousting Williams from the office of sheriff, and rendering judgment

against him for the sum of $7,776.19 as the net profits of said office from the 31st day of October, 1906, to the first day of September, 1907.

In *Rhodes* v. *Driver*, 69 Ark. 606, the statutes regarding contests for county officers were construed. After reviewing them thoroughly, the court said: "In defining the jurisdiction of the two courts, the act authorized the circuit court, in the event the contestant succeeded, to render a judgment of ouster, and for damages and costs, and in that event limited the county court to an order declaring the contestant elected, and, incidentally, to a judgment for costs. In the latter class, if the contestee refuses to yield possession of the office, the contestant is left to the remedy provided by the statutes for the possession of an office unlawfully held. Sandels & Hill's Digest, § § 7364-7372."

This construction of the statute renders erroneous this judgment for ouster and for damages, which are the emoluments of the office. But the appellee insists that what was said in *Rhodes* v. *Driver* in construing these statutes was *obiter dictum* and unsound, and asks a re-examination of that case. The court is unable to see wherein it was *obiter dictum,* as the court was called upon to construe the statutes on the subject in order to determine the question then before it. But, as the circuit court refused to follow that decision, presumably upon the ground that it was *obiter dictum,* and counsel earnestly insists that it be not followed, the court has re-examined the question.

Turning to the original act (January 23, 1875), which was a general election law, it is found that in section 67 a contest for the office of any supreme judge, commissioner of State lands, circuit judge, prosecuting attorney, chancellor or judge of the county and probate court shall be made in the circuit court, and provides the venue for such contests. Section 68 prescribes the procedure for such contests in the circuit court, and the last paragraph of that section reads: "If the contestant shall succeed in his action, he shall not only have a judgment of ouster, but for damages, not exceeding the salary and fees of the office during the time he was excluded therefrom, with costs of suit; provided, either party shall have the right of appeal, with or without supersedeas, as in other cases at law."

This paragraph is digested as section 2859 of Kirby's Digest, but as stated it is a part of section 68, and immediately follows so much of that section (which is section 2858 of Kirby's Digest) which prescribes the procedure in the circuit court for the contest of the offices named in section 67 (which is section 2856 of Kirby's Digest).

The next section, 69, deals with vacancies in office. Section 70 deals with special elections. Section 71 (which is section 2860 of Kirby's Digest) provides for the contest of county and township offices, and provides that they shall be before the county court, and prescribes the notice to be given and other matters of procedure. Section 72 (which is section 2861 of Kirby's Digest) is a direction as to the time of trial in the county court. Section 73 (which is section 2862 of Kirby's Digest) is as follows: "If the court shall be of the opinion that the person proclaimed elected is not duly elected, and the person contesting is elected, an order shall be entered to that effect, and a copy thereof shall forthwith be transmitted to the Governor, who shall commission the person declared duly elected by such order." Section 74 (section 2863 of Kirby's Digest) makes it the duty of the Governor to revoke the commission which has been issued to the person who was unsuccessful in that contest. Section 75 (section 2864 of Kirby's Digest) provides that "nothing in this act shall be construed so as to make void any act of the person so commissioned that would otherwise have been lawful." The next section takes up contest for members of the General Assembly. Thus it is seen that the act of 1875 took up each of these different classes of offices and provided a complete procedure for a contest for each class. And the procedure in one cannot be transported and tacked on to another without doing violence to rules of construction and grammar and also to the plain intent of the lawmakers.

It is insisted that section 2859 is general and applies to all contests, but, as seen, this cannot be the case, as it only appeared as part of the section prescribing the procedure for those contests which were to be brought in the circuit court; and had not the slightest reference to the contests elsewhere provided to be brought in the county court. For some reason, deemed by it good, the Legislature has not thought it wise to give to the

county court the power to render judgment for ouster and the emoluments of the office, but has given it jurisdiction merely to try contests for county and township offices in a summary manner, subject to appeal to the circuit court, where the trial must be had *de novo*. The only result of that trial in both the county and circuit court on appeal is to ascertain the result of the election and to certify the same to the Governor, and it is made the duty of the Governor to issue a commission and to revoke a commission pursuant to the result of the judgment in the premises. It is insisted that this is a cumbersome method of trying these contests, and that there should be but one suit to determine the contest and the ouster of office and emoluments. There is much force in this argument, but it is addressed to the wrong forum. Courts cannot make laws. They can only construe them. The Legislature has decided that it is not wise to give to the county court power to oust the contestant from office and to give judgment for anything other than the costs, leaving those matters to be worked out in subsequent suits if the contestee does not abide the result of the findings.

It has long been settled law that in all cases of appeal from the inferior courts to the circuit court, no greater jurisdiction is given to the circuit court than is given to the lower court in the first instance. It merely tries the case *de novo*, sitting as a justice, or county or probate court, so far as jurisdiction is concerned. The act in question was passed in 1875, and *Rhodes* v. *Driver* was decided on the second day of November, 1901, and these sections were then construed. It was therein shown that in these contests for county offices there could be no judgment other than a judgment finding the result, which judgment was to be the basis for the Governor to issue the proper commission and to revoke the commission of the person who had lost, and for a suit for the office and its emoluments. It was clearly pointed out that if the party after this contest did not surrender the office, then the party was remitted to his action for the office and for damages under actions provided by another statute.

If the people of the State had not been satisfied with the law found on the statute book, they could easily have changed it, especially after attention was called to it by this decision.

But they have seen fit to leave the laws as framed in 1875. The court is satisfied that *Rhodes* v. *Driver* was a correct construction of the statute, and declines to overrule it.

In view of the fact that the effect of this decision is to entitle Buchanan to recover of Williams the office and its emoluments, and the judgment herein reversed was for $7,776.19 as net profits for ten months' incumbency, the court calls attention of the trial court to section 23, art. 19, of the Constitution, forbidding any county officer receiving more than $5,000 net profits per annum, and sections 3543, 3547, 3549 of Kirby's Digest, making this provision effective as to county officers. *Griffin* v. *Rhoton,* 85 Ark. 89.

The result therefore is that the circuit court had sufficient evidence to sustain its findings that Buchanan was elected sheriff of Garland County and Williams was not, and to that extent the judgment is affirmed. It was the duty of that court to enter judgment in conformity with section 2862 of Kirby's Digest, and a certified copy thereof should be transmitted to the Governor pursuant to the requirement of that section, so that he may perform the duty imposed on him by sections 2863-2864. The judgment which should have been entered by the circuit court as the necessary result of its findings of fact will be entered here.

So much of the judgment as ousts Williams from office and renders judgment for the emoluments thereof is reversed.

ON REHEARING.

Opinion delivered May 23, 1908.

HILL, C. J. Appellant refers to *Dodson* v. *Fort Smith,* 33 Ark. 508, and contends that under it the findings of the county court should be sustained unless there was an abuse of discretion, fraud or mistake of the county court, and seeks to escape the force of the finding in the circuit court against him on the ground that the circuit court should only have reviewed the action of the county court so far as to see whether there was an abuse of discretion, etc. It is not necessary to question the force of this decision as an authority. Suffice it to say that it will not apply here, for the Constitution expressly provides

that an appeal shall lie to the circuit court from any inferior tribunal invested with jurisdiction to determine election contests of county officers, and on such appeal the trial shall be *de novo*. Art. 7, § 52, Const.

It is contended that the decision is a result of a technical rule, which does not give a trial here on the merits, and that the practice of affirming a judgment when there is evidence to sustain it should be overruled, and the case tried on its merits. The law has provided a trial *de novo* in the circuit court on appeal from the county court, and one here to decide the correctness of the proceedings of that court and to determine whether there was sufficient evidence to sustain its finding. This is not a technical rule, but a constitutional and legislative scheme for the determination of these cases; and, until there is a change in the law, it is not open to the court to refuse to obey it.

The motion is denied.

ON MOTION TO RETAX COSTS.

Opinion delivered May 23, 1908.

HILL, C. J. Buchanan files a motion to retax the costs and apportion the same so that only such costs as accrued on that part of the judgment which gave an ouster and for the emoluments of the office be adjudged against him. As these were the only parts of the judgment which were reversed, he contends that only the costs incident to these features should be adjudged against him. He shows that most of the transcript is taken up with testimony relating to the title to the office—and the copying of this evidence is the heavy item of the costs—and he contends that, as he prevailed on that issue, he should have the costs which were incurred on it.

If the court had discretion in the matter, a strong case for its exercise is made by the motion. The question really is, whether, under section 970 of Kirby's Digest, there is a discretion to apportion the costs where a judgment of the circuit court is in a material part reversed. The section reads as follows: "If any person shall sue out a writ of error or take an appeal to review the judgment of any circuit court, and the judgment of such court shall be affirmed, or the writ of error or appeal

dismissed, discontinued or quashed, or the plaintiff in error, or appellant, be non-suited, the defendant in error, or appellee, shall recover his costs; and if the judgment be reversed, the plaintiff in error, or appellant, shall recover his costs." Recently, in construing this section, the court said: "On appeals from judgment at law it is obligatory on this court to follow the statute." *American Soda Fountain Co.* v. *Battle,* 85 Ark. 213.

This seems to be the only direct construction of this statute. *Malpas* v. *Lowenstein,* 46 Ark. 552, is closely analogous. It arose under another section of the same act (the act of March 3, 1838), and the court said: "The issue raised by the pleadings in the main action was, debt or no debt, at the commencement of the suit. That issue the jury determined in favor of the defendant, and their verdict was approved by the trial court. This carried the costs of the ancillary attachment, as well as of the action. The burden of costs was not subject to be adjusted according to the discretion of the presiding judge, as in equity cases. But the statute provides that, when final judgment goes against the plaintiff, the defendant shall recover costs, and the attachment shall be discharged. Mansf. Digest, § § 1043, 378."

So far as the court has been able to ascertain, it has been the uniform practice of this court to adjudge all the costs of the appeal from the circuit court against the appellee where the appellant succeeds in obtaining any substantial or material reversal of the judgment. There are a few cases to be found where the court has decided that they did not fall within the statute, and has refused costs to the appellant where there has been a partial reversal. These have been cases that stood upon their own peculiar facts, taking them without the statute; but they all contain recognition of the general practice which prevailed. *Ozark Ins. Co.* v. *Leatherwood,* 79 Ark. 252, is such a case.

Notwithstanding the settled practice, the appellee insists that the court has discretion in the matter, and should exercise it here. Numerous cases are cited where the court has disallowed the costs of the appeal for defects in the abstract and brief or transcript; but these cases all depended upon the rules of the court, and not upon the statute, and afford no analogy in prac-

tice or principle to the question at bar. Appellee also cites *Davies* v. *Robinson,* 65 Ark. 219, and *Meadows* v. *Rogers,* 17 Ark. 361. But these cases go to the right of the circuit court to disallow unreasonable or unnecessary costs, which is also based upon another principle.

The only other authorities cited are 5 Enc. Plead. & Prac. 192, and *Ayers* v. *Western Railroad Corp.,* 49 N. Y. 660, and *Sugar Pine Lumber Co.* v. *Garrett,* 42 Pac. 129 (28 Ore. 168).

The Encyclopedia says that the discretion of the appellate court in adjudging costs is absolute except in so far as may be limited by statute. *Ayers* v. *Western Railroad Corp.,* 49 N. Y. 660, is a mere memorandum decision, apportioning costs without giving a reason therefor. But when the New York statute is looked to, the reason is found. It was held in *Chipman* v. *Montgomery,* 63 N. Y. 221, that where the statute did not permit discretion in the appellate court the right of the prevailing party to recover costs was absolute, but that the Code had provided a certain class of actions wherein the court was given discretion to apportion them.

In *Sugar Pine Lumber Co.* v. *Garrett,* 42 Pac. 129, 28 Ore. 168, the costs were apportioned because the statute permitted it. The Oregon statute on this subject reads as follows: "But when on an appeal to the supreme or circuit court a new trial is ordered, or a decision given modifying the judgment appealed from, the costs on appeal shall be allowed or not, in the discretion of the appellate court." Hill's Ann. Laws of Ore., 552. It is thus seen that none of these authorities sustain appellee's contentions. On the other hand, there are authorities sustaining *American Soda Fountain Co.* v. *Battle, supra.* In Wisconsin the statute provides that the prevailing party is entitled to the costs, and it is held that the statute is mandatory, and leaves no discretion in the appellate court. *Smith* v. *Wait,* 39 Wis. 512; *First National Bank* v. *Prescott,* 27 Wis. 616.

In Illinois it was held, where the statute expressly gives costs, and the case does not fall within a class where the statute authorizes apportionment, that it was error to apportion the costs. *St. Charles* v. *O'Mailey,* 18 Ill. 407. This is the rule in New York under a similar statute. *Chipman* v. *Montgomery,* 63 N. Y. 221.

The reason for these decisions is plain: The right to recover costs did not exist at common law, but rests upon statute only. *Wilson* v. *Fussell,* 60 Ark. 194; *State* v. *Gowen,* 12 Ark. 62. Therefore the statute must be pursued because it is the only guide which the court has, as it has no inherent right to award or apportion costs.

The rule is different in equity, because it has always been a principle of equity jurisprudence that the disposition of costs was in the discretion of the chancellor. *State* v. *Fort,* 18 Ark. 202; *Temple* v. *Lawson,* 19 Ark. 148; *Jones* v. *Graham,* 36 Ark. 383. And it will be noticed that the statute in question does not reach to appeals from the chancery court, but is limited to appeals and writs of error from the circuit court.

The court concludes that the practice of this court has been the right practice under the statute, and declines to deviate from it.

The motion is overruled.

Mr. Justice WOOD dissents.

MARTIN v. GREGORY.

Opinion delivered May 18, 1908.

LIMITATION OF ACTIONS—JUDGMENTS—FRAUDULENT CONVEYANCES.—Where a complaint sought to enforce a previous judgment and to set aside certain conveyances alleged to be fraudulent, the statute of limitations applicable to the judgment is ten years, but as to the conveyances there must be an actual and adverse holding by a fraudulent grantee for seven years before a creditor is barred of his right to set them aside and subject the property to the payment of his debt, so long as the debt itself is not barred by limitation.

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

D. Hopson and *Rose, Hemingway & Rose,* for appellant.

1. The suit having been brought in the name of corporations, which had no interest in the subject-matter of the suit, the complaint could not be amended by the substitution of other

parties. 34 Ark. 141; 41 *Id.* 167; 46 *Id.* 253; 47 *Id.* 548. A corporation and its directors and stockholders are different entities. 4 Ark. 304. Incorporating a partnership does not transfer its property, there must be a conveyance to the artificial entity. 1 Thomps. on Corp., § 1074.

2. The suits are barred by limitation. 46 Ark. 251; 37 Ala. 169; 92 *Id.* 314; 88 Ky. 291; 2 Md. Ch. 370; 6 Paige, 655; 164 U. S. 523; Kirby's Digest, § 5073; 23 Ark. 169; 31 Miss. 143; 49 Am. Dec. 738; 75 Mo. 460; 15 S W. 924.

3. The suit is also barred by the five and seven years' statutes. Kirby's Digest, § 5056; 31 Ark. 272; 56 *Id.* 494; 61 *Id.* 329; 47 *Id.* 80; 64 *Id.* 443. There was no lien on the lands. Kirby's Digest, § 4438; 1 U. S. Comp. Stat. p. 701.

4. The amended complaint was a new suit. 1 Enc. Pl. & Pr. 623; 17 Ark. 608; 59 *Id.* 446.

5. Fraud is never presumed, and the evidence must be satisfactory. 59 Fed. 73; 123 U. S. 219; 11 Ark. 378.

F. H. Sullivan and *G. B. Oliver,* for appellee.

1. The amendment to the complaint was proper. Kirby's Digest, § 6140, 6145; 64 Ark. 257; 47 *Id.* 548; 72 *Id.* 314; 79 *Id.* 179; 1 Enc. Pl. & Pr. p. 537, *et seq.*

2. The suit was not barred. It was a suit on a judgment rendered within ten years. Kirby's Digest, § 5073.

3. There must be an actual adverse holding of land for seven years to bar a creditor, if the debt be not barred. 74 Ark. 316; 76 *Id.* 514.

4. The evidence of fraud is ample. 75 Ark. 569.

HILL, C. J. On June 18, 1901, H. T. Simon, Gregory & Company and the Shafer-Swarts Shoe Company filed their complaint against the Martin brothers and their wives, in which they sued upon judgments rendered in favor of the plaintiffs in the United States Circuit Court on the 17th of December, 1892, and prayed that certain conveyances of lands which stood in the names of the wives of the said Martin brothers be set aside and said lands subjected to the payment of said judgments.

The case progressed until November 11, 1903, when an amended complaint was filed by the surviving partners of the firm of H. T. Simon, Gregory & Company, and by the surviv-

ing partners of Shafer-Swarts Shoe Company, as well as by the Wertheimer-Swarts Shoe Company. It appears from the allegations of said complaint that the former complaint was brought by corporations which had succeeded, respectively, to the co-partnerships of the H. T. Simon, Gregory & Company and the Shafer-Swarts Shoe Company, and that the former suit had been brought in the name of those corporations, whereas the judgments sued on were rendered in the name of the co-partnerships.

The amended complaint further alleged that subsequent to the rendition of the judgments in 1892 a suit in chancery was filed in the United States Circuit Court to foreclose a certain deed of trust, which had been given to secure the payment of certain notes on account of which judgments had been rendered on the 17th of December, 1892, which suit progressed to decree on the 18th of June, 1896, in which judgment was rendered in favor of said co-partnerships for the indebtedness then existing. This was the same indebtedness which had been reduced to judgment in 1892, plus the interest and costs accumulated thereupon.

The allegations of this amended complaint were proved. The case went to trial after a great amount of evidence was taken, and resulted in a decree for the plaintiffs, and the cancellation of the deeds attacked as fraudulent, and a subjection of the lands to the payment of the judgments sued upon.

The principal contention of the appellants, which is presented in many ways, is that, suit having been brought in the name of the corporations, the complaint could not be amended by the substitution of other parties without making the amended complaint a new suit, and, treating it as a new suit, that the judgments sued upon were barred by the statute of limitations.

Both of the judgments were in the name of the partnerships. These partnerships subsequently were merged into corporations, which of course were different entities in law, one an aggregation of individuals, the other an artificial person. The suit was brought by the corporations in 1901, and it was erroneously alleged by them that they procured judgments in 1892, whereas it was their predecessors, the co-partnerships, which procured the judgments declared upon. The amended com-

plaint set forth the true facts in regard to the same, and also set forth the judgments of 1896, as the basis of the action.

There is some difference of opinion among the judges as to whether the amendment was a new suit or whether it was but a correction of errors in the allegations of the complaint to conform to the evidence. It is immaterial to the determination of this case to decide which view is the correct one. If it was a mere correction of errors to conform to the evidence, and not a new suit, then it is not questioned that the statute of limitations of ten years had not run. If it was a new suit, it was based upon the second judgments for the same indebtedness, which were rendered in 1896, and this amended complaint was filed November 11, 1903, within the ten years.

Therefore, it is apparent that, if the ten-year statute is applicable to the action, in neither view of the amendment can the plea of limitation be sustained. The question therefore resolves itself into, what is the limitation applicable to the action? It is plain that these are suits upon judgments, and not suits to recover land. The limitation upon a judgment is ten years. Kirby's Digest, § 5073.

Separate and distinct from the suit upon the judgments is the further relief asked that certain conveyances be set aside so as to subject lands to the payment of the judgment sought to be recovered on the judgment sued upon. That relief would be barred in seven years if there had been any adverse holding of the lands by the grantees in the conveyances attacked. This court has recently had before it this precise subject; it was held that there must be an actual and adverse holding by the fraudulent grantee for seven years before a creditor is barred of his right to set aside a fraudulent conveyance and subject the property to the payment of his debt, as long as the debt itself is not barred by limitation. *Baldwin* v. *Williams*, 74 Ark. 316; *James* v. *Mallory*, 76 Ark. 509.

The evidence sustains the decree, which necessarily found that the lands had not been adversely held by the wives of the Martin brothers, but were in fact held by the Martins themselves. There was no adverse possession under the conveyances for seven years which would bar so much of the action which seeks to set them aside.

Mrs. Betolius B. Martin died pending the suit, and it is contended that there was no guardian *ad litem* appointed for the heirs of Mrs. Martin in the new suit, if it was a new suit, which was created by the amended complaint. But the record recites that the defendant were regularly served, and that the guardian *ad litem* for the minor heirs filed a proper answer for the heirs, denying every material allegation of the original complaint, and nothing inconsistent with said finding is found in the record.

It is earnestly insisted that the evidence does not sustain the decree to the effect that the conveyances were fraudulent. The court has carefully considered the evidence, and finds that the preponderance sustains the chancellor. It would serve no useful purpose to review it.

The judgment is affirmed.

SMITH v. SMITH.

Opinion delivered May 18, 1908.

INSURANCE—ACCEPTANCE OF POLICY.—One who held a policy of insurance for several months after he ascertained that it was not the policy he ordered will be deemed to have accepted it in the form it was issued and can not avoid payment of the premium.

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

J. T. Coston, for appellant.

1. D. A. Smith signed the amended application and is chargeable, as a matter of law, with knowledge of the contents of the policy, whether he read it or not. 105 S. W. 881; 91 U. S. 50; 71 S. W. 946; 87 Fed. 66.

2. There was a complete ratification by Smith. He received the policy; it was his duty to accept or reject within a reasonable time; having failed to speak, he thereby signified his election to accept. 99 S. W. 71.

Taylor & Little and *Mathes & Westbrooke,* for appellee.

There is ample evidence to support the decree. Appellee never saw the amended application, and never read it. He relied on the fraudulent representations of the agent that the policy was all right. The chancellor properly found fraud. 99 S. W. 71 is not conclusive. The rule therein was never intended to apply to any but fair and honest contracts, where a mistake is condoned by acceptance with knowledge or opportunity to know. Such is not this case.

McCULLOCH, J. Appellee, D. A. Smith, made application on September 14, 1903, to the New York Life Insurance Company, through appellants, Smith & Scivally, its soliciting agents, for a policy of insurance on his life, and executed to appellants his two promissory notes, each for the sum of $276.75 payable on November 1, 1903 and January 1, 1904, respectively, for the first annual premium on the policy. He paid the first note at maturity, and in May, 1904, judgment was rendered against him in the circuit court of Mississippi County in favor of appellants on the other note, and that judgment remains unsatisfied.

Appellee instituted this suit in equity on April 14, 1905, against appellants to recover back the sum paid in discharge of the first note, and to enjoin the enforcement of the said judgment rendered on the other note. He alleged in his complaint that the form of insurance policy which he applied for was what is known as a twenty-payment life policy; that he relied upon appellants as agents of the company to furnish him that form of policy, and gave his notes for the premium; that he paid the first one at maturity and suffered judgment at law to be rendered against him on the second, relying on the promise of appellants to furnish that form of policy; that the policy had not then been delivered, and that he discovered afterwards that the policy issued by the company to him was not the kind applied for, but was different in form and substance, being what is commonly known as an ordinary life policy with twenty years' settlement option.

Appellants answered, admitting that the form of policy originally applied for was a "twenty-payment life," but alleged that the company for some reason declined to issue that kind of policy to appellee, and issued in lieu thereof the kind known as

"ordinary life with twenty-year settlement;" that appellant amended his application so as to ask for the last-mentioned form of policy, and that it was delivered to him, and that he executed his written acceptance of same before he paid the first note.

The cause was heard on the pleadings and proof, and the chancery court granted the relief prayed for in the complaint.

The evidence does not, we conclude, warrant the decree granting relief to appellee. He signed a receipt, dated October 17, 1903, accepting the policy in the changed form. In his deposition he denies all recollection of having signed the receipt, but does not positively deny the genuineness of the signature. His statements on this point are equivocal. One of the appellants testifies positively that appellee signed the receipt, and other testimony establishes the fact that the signature is genuine. We find it to be established by the evidence that he signed the receipt accepting the policy. This receipt bears date October 17, 1903, before the first note, which he paid, matured.

Appellee admits that he received the policy and had his attention called to its changed form a short time—from one to four months—after judgment was rendered against him in May, 1904, on the last note. This was from seven to ten months before he commenced this suit. Meanwhile he made no objection to the form of the policy, and kept it in his possession. It was his duty to reject the policy, if he did not want it, as soon as he ascertained that it was not of the kind he ordered. Failing to do this, he is deemed to have accepted it in the changed form, and can not avoid payment of the premium. *Remmel* v. *Griffin,* 81 Ark. 269.

He claims that when the policy came to the possession of the agents, one of them represented to him that it was the kind of policy applied for, and that he left it with the agents and paid the first note, relying upon that representation. Even if that be true, he admits receiving the policy into his possession and obtaining actual knowledge of its contents long before bringing this suit or otherwise making objection to the policy. There is some conflict in the evidence as to difference in premium on the two kinds of policies, but the amount of annual premium recited in the policy which was delivered corresponds precisely with the amount of the two notes, and this is what he agreed to pay.

The decree is reversed, and the complaint is dismissed here for want of equity.

WESTERN DEVELOPMENT & INVESTMENT COMPANY *v.* CAPLINGER.

Opinion delivered May 18, 1908.

CORPORATION—LIABILITY ON CONTRACT MADE BY AGENT—RATIFICATION.—While, ordinarily, the burden rests upon one seeking to hold a corporation liable on a contract made by its agent to show that the execution of the contract was properly authorized, yet where the corporation permitted the other party to perform fully his part of the contract, and received whatever benefits were to accrue to it under the contract, it is estopped to deny that its agent exceeded his powers in making the contract.

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

Charles E. Warner, for appellant.

1. There is no evidence whatever, either that the contract was within the charter powers of appellant, or that its execution was authorized. Corporations have only such powers as are expressly conferred by charter, or necessarily implied therefrom. No powers can be implied except such as are necessary in carrying out and effectuating the objects and purposes of its creation. 22 Conn. 1; 13 Pet. 519; 2 Cook on Corporations, § 704; 62 Ark. 37; 74 *Id.* 190; 86 Fed. 742; 131 Mass. 258; 122 N. Y. 135; 165 U. S. 537.

2. Mere acquiescence in the unauthorized acts of its officers in a matter outside of its corporate powers can not give rise to an estoppel. 188 Ill. 39; 188 Ind. 37; 181 *Id.* 35; 63 N. H. 146; 68 N. E. 43.

3. The verdict was found on the statement of counsel, and therefore does not rest upon either the law or facts. Where a prevailing party is directly connected with the misconduct complained of, if such misconduct is shown, the court will not inquire whether it was prejudicial or not. 62 Me. 223; 17 Am. & Eng. Enc. Law, p. 1213, note 4; 57 Ia. 784; 15 Neb. 330.

T. B. Pryor, for appellee.

1. The record shows that appellant received the fruits of appellee's labor for one year, in the management of the hotel, but that it ratified the contract, and there was a settlement under it. 74 Ark. 193; 10 Cyc. 1081, 1156-7, 1163.

2. There was no misconduct of the jury and appellee's attorney. But, if there was, no objection was made at the time, or in the motion for new trial. The court passed on the incident, and no prejudice resulted.

McCULLOCH, J. Appellant, a domestic corporation, owned a hotel building at the undeveloped townsite of Excelsior in Sebastian County, Arkansas, and its president, in the name of the corporation, employed appellee on April 8, 1905, to take charge of the hotel and operate it until the opening of the town, which occurred in April, 1906, for one-half of the profits, and agreed that, if half of the profits should not amount to $100 per month, appellant would pay him an amount sufficient to make up that amount as salary.

Appellee operated the hotel under the contract, and now sues to recover the amount of monthly salary and also the alleged loss in operating expenses. He recovered judgment below, and appellant brings the judgment here for review, assigning, as grounds for reversal, certain alleged misconduct of appellee's counsel and the insufficiency of the evidence to show that the contract with appellee was authorized or that appellant ever ratified the contract.

It is contended that there is no proof that the corporation had the power under its charter to enter into such a contract, or that its president was authorized by it to make such a contract. No evidence was introduced as to the provisions of appellant's articles of incorporation or of the power expressly conferred upon the president. Ordinarily, the burden rests upon one seeking to hold a corporation liable on contract to show that the execution of the contract was properly authorized. *City Elec. St. Ry. Co.* v. *First National Bank,* 62 Ark. 33. But in the present case the evidence was sufficient to warrant a finding that the corporation ratified the contract. It had permitted appellee to fully perform his part of the contract, and had received whatever benefits were to accrue to it under the contract, and is therefore estopped to deny either that the execution of the con-

tract was beyond its charter powers or that its agent acted beyond the scope of his power in making it. *Minneapolis Fire & Marine Mut. Ins. Co.* v. *Norman,* 74 Ark. 190.

Appellant was engaged in the townsite business—laying out and developing a new town. It owned a hotel at this townsite, and appellee was placed in charge of it under contract of employment made with the president of the corporation. The other officers of the corporation were not only aware of the fact that appellee was operating the hotel for the corporation, but they carried guests there frequently who were entertained free of charge as guests of the corporation. The operation of the hotel was, in fact, a part of the development scheme, and an acceptance of appellee's services in operating the hotel under the contract was a ratification of the contract.

We think the evidence fully warrants the verdict.

The alleged misconduct of counsel for appellee—if it can be deemed misconduct at all—was not prejudicial. No objection was made at the time, and no exception saved.

No error is found in the record, and the judgment is therefore affirmed.

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ULTIMA THULE, ARKADELPHIA & MISSISSIPPI RAILROAD COMPANY *v.* BENTON.

Opinion delivered May 18, 1908.

1. NEGLIGENCE—PROXIMATE CAUSE.—In order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. (Page 291.)

2. SAME—WHEN QUESTION FOR COURT.—While the question of proximate cause is ordinarily one of fact for the jury, yet where the facts are undisputed, and not such as reasonable men would draw different conclusions from, then it is a question for the court. (Page 291.)

3. MASTER AND SERVANT—ACCIDENTAL INJURY.—Where an employee of a railroad company, while riding upon a flat car, was injured by the rebound of a stick of wood thrown by a fellow servant, such injury

was accidental, and not one of the consequences that ought to have been foreseen in the light of the attending circumstances in permitting employees to throw wood from the train. (Page 291.)

Appeal from Dallas Circuit Court; *Henry W. Wells,* Judge; reversed.

Paul G. Matlock and *Hardage & Wilson,* for appellant.

1. The act of negligence charged was not the proximate cause of the injury, and there can be no recovery. 76 Ark. 436.

2. Cooper and Crouch were fellow sercants. Besides, the deceased assumed the risk. 58 Ark. 125; 41 *Id.* 542; 41 *Id.* 382.

3. Deceased was guilty of contributory negligence. Negligence is a question of law and fact. 41 Ark. 542; 76 *Id.* 520.

4. He was not a passenger. 83 Ark. 22; 78 *Id.* 505; 76 *Id.* 106; 65 *Id.* 65.

R. C. Fuller and *Thornton & Thornton,* for appellee.

1. Deceased was a passenger. "The weight of authority and sound policy, we think, is that when a servant performs all of his work at a fixed place, and the master, either by custom or as a gratuity, carries him to and from his work, the servant doing no service for the master on the train, he is to be treated as a passenger." 58 S. W. Rep. p. 863; 59 Pa. St. p. 246; 7 Ind. 436; 166 Mass. 492; 38 Atl. 524; 63 Md. 433; 43 C. C. A. 19; 177 Mass. 365; 182 Pa. 479; 105 Tenn. 460; 108 Ky. 392; 32 Mo. App. 61; 5 Ind. 339; 19 Rep. 494; Hutchinson on Carriers, § 564; 33 Md. 542; 8 Kans. 505; 6 E. Ry. & Can. Cases; 5 Duer, 39; Whittaker's Smith on Negligence, p. 312.

2. The verdict is amply sustained by the evidence.

HILL, C. J. The undisputed facts are as follows: Crouch was an employee of the railroad, being the foreman of a track-laying crew, working seventeen miles from Dalark. The railroad company carried the construction crews to and from their work on its trains. It used flat cars upon which there were no seats, and the employees were accustomed to sit on the sides, with their feet hanging over. The employees frequently carried wood on the train, and threw it off as they approached their respective residences.

Crouch was riding on the train, with his legs dangling off the side of a flat car, when one of the employees threw some

wood off the car, and one stick rebounded and struck him on the leg, causing serious injury, and probably his death. His administrator sought to recover, and did so, in the lower court, upon the theory that he was a passenger, and that the company must protect him as such, and that it was negligent in its duties to its passengers on this flat car in permitting other employees to throw off sticks of wood.

If all of the appellee's contentions be conceded, still he is not entitled to recover. "It is generally held that, in order to warrant a finding that negligence * * * is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee, etc., Ry. Co.* v. *Kellogg,* 94 U. S. 469; *Scheffer* v. *Railroad Company,* 105 U. S. 249; *St. Louis, I. M. & S. Ry. Co.* v. *Bragg,* 69 Ark. 402. See also *Railway Company* v. *Fire Association,* 55 Ark. 163.

The question of proximate cause is ordinarily one of fact for the jury. But where the facts are undisputed, and not such as reasonable men would likely draw different conclusions from, then it is a question for the court; and such is this case.

The rebound of a stick of wood thrown from a flat car in such a way as to strike the legs of a man sitting upon the car is an accident, pure and simple, and not one of the consequences that "ought to have been foreseen in the light of the attending circumstances" in permitting employees to occasionally throw wood from the train.

The judgment is reversed and dismissed.

PINE BLUFF LODGE OF ELKS NO. 149 *v.* SANDERS.

Opinion delivered May 18, 1908.

1. MECHANICS' LIEN—ESTOPPEL TO ASSERT LIEN.—Where a building contractor gave bond signed by a guaranty company to secure the performance of his contract, and then gave the guaranty company an indemnifying bond to save it harmless from liability on the first-mentioned bond, and the owner subsequently released the guaranty

company, sureties on the indemnifying bond who furnished materials to the contractor will not be estopped to assert a lien on the building for such materials. (Page 297.)

2. SAME.—One who furnished materials for erecting a building for a Lodge of Elks will not be estopped from claiming a lien therefor because he was treasurer of the building committee of the Lodge, whose duty it was to pay the drafts or checks drawn by the chairman and secretary of the committee in favor of the contractor, materialmen and laborers as they were presented to him. (Page 297.)

3. SAME—CONTRACTOR'S BOND—RIGHT OF ACTION.—Where a building contractor executed a bond with surety to save the owner harmless from any pecuniary loss resulting from the breach of the contract on the part of the contractor, such bond was not intended to protect those who furnished material for the building. (Page 298.)

4. SAME—EFFECT OF ABANDONMENT BY CONTRACTOR.—Where a contractor abandoned his undertaking after partially performing his work, and the owner, in completing the work as originally designed, is obliged to incur expenses in excess of the contract price, he should be allowed credit, in a settlement with the lien holders claiming under the contractor, for such sums as he paid out independently of the contractor's debts; and when the aggregate of these sums has been deducted from the contract price, the residue should be prorated among such lien holders. *Long* v. *Chas. T. Abeles & Co.*, 77 Ark. 156, followed. (Page 299.)

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

STATEMENT BY THE COURT.

In 1902 Pine Bluff Lodge No. 149, Benevolent and Protective Order of Elks of the United States of America, and its trustees, F. C. Bridges, William D. Jones, Ben J. Altheimer, J. B. Trulock, E. C. Howell, and W. D. Hearn, were the owners of a parcel of land in the old town of Pine Bluff, Arkansas, and on May the 8th, that year, said Elks Lodge let a contract to W. Fleet Jones to build for it on said land a brick building to be called the Elks Home and Opera House. The contract price was $23,895.

Jones gave a bond to the Elks Lodge for the faithful performance of his contract with the United States Fidelity & Guaranty Company as surety thereon, and he also gave a bond of indemnity to the United States Fidelity & Guaranty Company with J. W. Sanders, L. L. Campbell and others as sureties

thereon to hold said Guaranty Company harmless as surety on the Elks Lodge bond. Jones then made a sub-contract with Weaver & Mitchell to furnish the material and do the brick work on the building, and Weaver & Mitchell made a contract with the Pine Bluff Brick Company to purchase from it all the common brick needed in the erection of the building. Weaver & Mitchell also made a contract with W. H. Westbrook, composing the firm of the Westbrook Grain & Commission Company, to furnish them lime, cement and other material for the building. The contractor, Jones, made contracts with J. W. Sanders, L. L. Campbell, McGaughy Hardware Company, Dilley Foundry, W. H. Westbrook, and Marsh & Riley to furnish him material for the building.

Under his contract Jones was to be paid eighty-five per cent. of the value of material and work put into the building from time to time as the work progressed, on the estimates of the superintendent. The Elks Lodge made payments to him from time to time on this basis. Under the contract the building was to be completed on or before October the 20th, 1902. It was not completed at that date, but the work was progressing and nearing completion, and Jones and the sub-contractors continued to work on the building till November 1, 1902, and on that day the superintendent gave Jones an estimate showing him to be entitled under the contract to a payment of $365.15. The Elks Lodge refused to pay the estimate to Jones, and on November 4th, Jones notified the building committee of the Elks Lodge that, because of the refusal to pay the amount due him on the estimate, his labor had become disorganized, and he would be unable to complete the contract. After this notice was received, the building committee of the Elks Lodge took charge of the building, used such of the material as Jones had on hand as suited them, and completed the building, not strictly according to the plans and specifications under which Jones was working, but making a few changes. They employed a new superintendent, bought other material, employed labor and finished the building, paying for all material and labor purchased and used by them after that date, but refusing to pay anything whatever on the balances due those companies and persons who had furnished material to Jones and his sub-contractors for use

in the building. Balances were due each material man and company above mentioned, and they gave their several notices that they would file liens upon the property, and pursuant to the notices they filed their accounts, duly verified and describing the property, within ninety days after the material had been furnished, and each of them brought suit against the Elks Lodge and its trustees to enforce their respective liens against the property. These suits were all brought within three months after the liens were filed, and later they were all consolidated into the one case at bar.

The remaining facts are sufficiently stated in the opinion.

There was a decree in favor of the plaintiffs, and defendant has appealed.

W. F. Coleman and *Bridges & Wooldridge,* for appellants.

1. Under the recent decisions of this court (77 Ark. 156 and *Central Lumber Co.* v. *Braddock,* 84 Ark. 560), and the interpretation of our statute (71 Ark. 35), plaintiffs are not entitled to recover anything.

2. The Brick Company failed to preserve its lien. 51 Ark. 316. Its lien not filed in ninety days. 20 Am. & Eng. Enc. Law, 361-402; 27 Cyc. 144.

3. Sanders and Campbell waived their right to claim liens by signing the bond to protect the lodge against loss, etc. 79 Pac. 485; Boisot on Mech. Liens, § 753; Phillips on Mech. Liens, § 43a. Sanders is also estopped by his other conduct as treasurer and member of the building committee. 160 U. S. 430; Jones on Liens, § 1293; 71 Iowa, 347; 1 E. D. Smith (N. Y.), 625; Boisot on Mech. Liens, § 718. Silence is acquiescence, and works an estoppel. Cases *supra;* Herman on Estoppel, § 1061.

4. The contract price should be distributed among laborers and sub-contractors when insufficient to pay all. 77 Ark. 156; Boisot on Mech. Liens, § 228, 231; 77 Ark. 160.

5. Where the bond provides for completion of building and delivery free from liens and not for payment of claims of sub-contractors, the latter have no rights under it. 20 Am. & Eng. Enc. Law, 493; 5 Wash. 496; 27 Cyc. 315.

6. All claims and setoffs should be deducted from the original contract price in arriving at the amount to be distributed

to the lien-holders. Phillips on Mech. Liens (3 Ed.), § 292, 114, 115; 27 Cyc. 333; Jones on Liens, § 1599; 65 N. Y. 292. Sub-contractors must take notice of all the terms of the original contract, and be governed thereby. Phillips, Mech. Liens, 62; Boisot, Mech. Liens, § 228; 27 Cyc. 93.

J. W. Crawford, W. T. Young and *White & Altheimer,* for appellee.

1. The testimony clearly shows that the Pine Bluff Brick Company filed its account and affidavit within ninety days after the last item of 7000 bricks were delivered on October 24th, while Jones was still at work.

2. Sanders and Campbell did not waive their rights because of indemnifying the surety company. 20 Am. & Eng. Enc. of Law (2 Ed.), 490. The lien is created by the statute. Kirby's Digest, § 4970. Even if they had made a direct contract with appellant, conditioned for the compliance by Jones, the contractor, with the terms of the contract, the rule of estoppel invoked would not be a proper defense, but the defense would be in the nature of counterclaim or set-off. 56 Mo. 487; 28 Mo. App. 540; 38 Pac. (Cal.), 639.

3. Sanders is not estopped because he was treasurer of the building committee and paid the drafts drawn on him in favor of the contractor. Estoppel in pais is based on fraud or culpable negligence, and no fraud, concealment, misrepresentation or carelessness is either alleged or proved. 53 Ark. 200; 36 Ark. 114; Bigelow on Estoppel (4 Ed.), 552 Bispham's Principles of Eq. 408-9; 56 Ark. 380; 82 Wis. 338; 67 Ill. 463; 28 Ky. L. Rep. 203; 27 Cyc. 276; 1 Am. & Eng. Enc. of Law (2 Ed.), 1070, 1074, 1081.

4. It was proper to deduct the amount collected by appellants from the Guaranty Company from the amount they had to pay out to complete the building. The Guaranty Company only did what Jones agreed to do, and what it had been paid by him to do in the event of his failure.

The contract price, less the amount paid by the owner independent of the contract to complete the building, is the sum the material man can look to for payment. 77 Ark. 160; 105 S. W. (Ark.), 583; Kirby's Digest, § 4975. Hence the claim that the $4,000 liquidated damages for failure to complete the

building within the specified time should be deducted from the contract price in fixing the *pro rata,* is untenable. The law is liberally construed in favor of the material man. 30 Ark. 568; 49 Ark. 478.

5. Appellees should have had decrees against the property for the full amount of their balances, because none of the contract price was retained by appellant until the completion of the building. Kirby's Digest, § 4975, *proviso.* That proviso is imperative, and, being a statute, is part of the contract. And appellants can not complain if they have made a contract prejudicial to their own interest, in case sub-contractors are left unpaid. 15 C. C. A. 281.

6. If it be held that only eighty-one per cent. of the claims is recoverable, then the chancellor erred in deducting the amounts paid to appellees by Jones from the amounts so found due; 15 C. C. A. 273; 68 Fed. 90; 8 C. C. A. 159; 3 Pomeroy's Eq. Jur. 1414; Story, Eq. Jur. 564b.

HART, J., (after stating the facts.) Appellant contends that the Pine Bluff Brick Company failed to file a statement of its account with the clerk in due time as required by law, and for this reason failed to preserve its lien. It bases its contention on the alleged fact that the last item on the account and the one that brings the account within the statutory period was furnished directly to appellant after the contractor had abandoned the work, and after it had assumed charge of the construction of the building. The item referred to was for 7,000 bricks, and its date is October 24, 1902. The abstract of tickets exhibited at the trial in the court below shows that 7,000 bricks were furnished by the Pine Bluff Brick Company to be used in the construction of the building, and that the date of delivery was October 24, 1902. The undisputed testimony shows that the contractor had charge of the work on that date, and that he did not abandon it until the 2d day of November following, when he turned it over to appellant for completion. The account of the Brick Company, duly verified, was filed in the clerk's office on the 20th day of December, 1902, less than sixty days after the last item of the account was furnished. Hence we are of the opinion that the finding of the chancellor in that regard is correct, and should be sustained.

2. It is urged by appellant that, because Sanders and Campbell were sureties on a bond given by Jones, the principal contractor to his surety, the United States Fidelity & Guaranty Company, to indemnify it from loss by reason of having become surety on his contractor's bond, they are estopped to assert a lien for materials furnished for the construction of the building in question.

The Guaranty Company became the surety of Jones, the principal contractor, to save appellant harmless from any loss it might sustain by reason of a breach of their contract by him. Before these lien claimants had filed their suits, appellant had made a settlement with the Guaranty Company, by which it had been released from further liability on the bond. There was no privity of contract between appellant and Sanders and Campbell. The latter did not execute a bond to secure the payment of whatever debt the Guaranty Company or its principal on the bond might owe to appellant, but executed a bond merely to indemnify the Guaranty Company against liability by reason of it having become the surety on Jones's bond as contractor. In such a case no equity could arise in favor of appellant, except through the insolvency of the Guaranty Company, and this contingency could never affect appellant, for the reason that it had already settled with it and could thereafter have no claim against it or its indemnitors. *Dyer* v. *Jacoway,* 76 Ark. 176. For this reason no estoppel could arise, and the finding of the chancellor in that regard was correct, and should be sustained.

3. Counsel for appellants say that Sanders is estopped now from claiming a lien for materials furnished because he was treasurer of the building committee of appellant. All the members of the building committee served as such without pay, and the duty of the treasurer was to pay the drafts or checks drawn by the chairman and secretary of the committee in favor of the contractor, materialmen and laborers as they were presented to him. The other members of the committee knew that Sanders was furnishing materials to be used in the construction of the building, and that he had not been paid therefor. They knew that the principal contractor had given bond for the faithful performance of his contract.

In the case of *Simonson* v. *Stachlewicz,* 82 Wis. 339, the court held:

"Statements made to the owner of a building or to his architect by subcontractors to the effect that the principal contractors were perfectly good and had always paid their bills cannot estop such subcontractors from asserting their lien on the building for materials furnished, although after such statements the owner had paid the principal contractors, if he was not misled by the statements or induced thereby to make such payment."

The record does not disclose any facts tending to show that the delay of Sanders in asserting his lien worked to the prejudice of appellants, or that it was misled thereby. He certainly did nothing to warrant a belief that he waived his lien, or that he did not expect to protect himself in due time by such remedies as the law affords.

The chancellor found that appellant was not misled by his acts and conduct, and we are of the opinion that his finding in that regard was correct, and that Sanders is not estopped from asserting his lien by reason of having been a member of the building committee.

4. After the principal contractor made default, the appellant took up the work of the construction of the building and finished it. There were some changes in the plans, but they were not material. The building was constructed substantially according to the original plans and specifications. After the completion of the building, appellant sued Jones, the principal contractor, and obtained judgment against him for $1,403.69 as damages, on account of the money it had paid out to complete the building in excess of the contract price, and also far $4,000 liquidated damages as provided in the contract on account of the delay in the completion of the building.

In consideration of $2,928.24 paid to it by the Guaranty Company, appellant released it from all liability by reason of being surety on the contractor's bond, and accepted the said amount in full satisfaction of the judgment against the principal contractor, in so far as the Guaranty Company was concerned.

The chancellor charged appellant with the amount collected from the Guaranty Company as surety of the principal contractor. This was in effect to hold that appellant took the bond for the benefit of the sub-contractors, and not as a protection

to itself, and was error. The bond in this case was not made for the benefit of the sub-contractors. Appellant was the sole obligee in the bond. Its condition is as follows: "Now, therefore, the condition of the foregoing obligation is such that the said principal shall well and truly indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants, and conditions of the said contract on the part of the said principal to be performed, then this obligation to be void."

In the case of the *M. T. Jones Lumber Co.* v. *Villegas,* (Tex.), 28 S. W. 558, the court said: "The bond given to the owner by the contractor could not possibly inure to the benefit of the materialmen. There was no privity of contract between appellant (materialman) and the bondsmen on the contractor's bond, and no cause of action existed in favor of appellant as to them."

The bond in the present case was not given to secure the payment of material furnished to the contractor to be used in the construction of the building, but was given to indemnify and save harmless appellant from any breach of the contract on the part of the principal contractor. It was in no wise intended to benefit or to protect the materialmen, and no right of action thereon exists in their favor.

In the case of *Long* v. *Chas. T. Abeles & Company,* 77 Ark. 157, it was held that "where a contractor abandoned his undertaking after partially performing his work, and the owner, in completing the work as originally designed, is obliged to incur expenses in excess of the contract price, he should be allowed credit, in a settlement with the lien-holders claiming under the contractor, for such sums as he paid out independently of the contractor's debts; and when the aggregate of these sums has been deducted from the contract price, the residue should be prorated among such lien-holders."

The amount to be distributed to the lien claimants will be fixed by deducting from the contract price as expressed in the contract the amount paid out by the Lodge to complete the building after the contractor had abandoned the work, and each lien-claimant is entitled to recover what he lacked, if any, of receiving his proportionate part.

For the error indicated, the cause is reversed and remanded with directions to enter a decree in accordance with this opinion.

HILL, C. J., not participating.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* BATESVILLE & WINERVA TELEPHONE COMPANY.

Opinion delivered May 18, 1908.

LIMITATION—LIABILITY OF PURCHASER OF RAILROAD—NOTICE.—Under the rule that short statutes of limitation are to be construed strictly, Kirby's Digest, § § 6587, 6588, providing that a company or individual purchasing a railroad from another company shall take "subject to all debts, liabilities and obligations" of the selling company, and that "all persons or corporations having claims against the purchasing company or individual under this act shall present the same to the purchasing company or individual within twelve months after receiving notice from the purchasing company or individual of the sale, or be forever barred," should be construed to require actual, and not merely constructive, notice.

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

STATEMENT BY THE COURT.

On November 1, 1904, the Batesville & Winerva Telephone Company sued the White River Railway Company for injuries sustained to its telephone lines by the negligent acts of the railroad company in the construction of said railway during the years 1901 and 1902. Judgment was rendered in favor of the telephone company for $550 and costs. The White River Railway Company appealed to the Supreme Court, and this court on December 17, 1906, affirmed said judgment. *White River Ry. Co.* v. *Batesville & Winerva Telephone Co.,* 81 Ark. 195.

The White River Railway Company sold to the St. Louis, Iron Mountain & Southern Railway Company all of its property, and made a certificate of sale, dated the second of February, 1903, and filed the same in the office of the Secretary of

State on the 19th of March, 1903, and filed the deed conveying the property to the appellant railroad company in the recorder's office of the different counties through which the line ran on the 28th of March, 1903. The deed contained the following clause:

"The further consideration for this conveyance is that said party of the second part will assume and pay, and by accepting delivery of this indenture agrees to assume and pay, all the indebtedness incurred by said party of the first part in the construction of its railroads and the acquisition of its property, and will assume all liabilities contracted by said party of the first part in connection therewith for labor and materials and for the acquisition of right of way and depot grounds and other real and personal property, as provided by the resolutions of the board of directors and stockholders, respectively, of the parties of the first and second parts, hereinafter referred to."

The chancellor found that the telephone company received no notice from the purchaser of the White River Railway Company of the sale to it, and only such notice was received as the law would imply by the filing of the deed and the certificate with the Secretary of State.

After execution and a *nulla bona* return against the White River Railway Company, the telephone company brought this suit against the St. Louis, Iron Mountain & Southern Railway Company, on the 6th of November, 1905, alleging that the defendant railway company is the owner and holder of the property of the White River Railway Company, subject to the debts, liabilities and obligations of the said White River Railway Company, and that the defendant railway company holds said property in trust for the payment of the debts of the said White River Railway Company, and that it is unable to collect its judgment against the White River Railway Company, and prays for judgment and enforcement of a lien to the extent of its judgment against the St. Louis, Iron Mountain & Southern Railway Company.

The telephone company prevailed in the chancery court, and the railroad company has appealed.

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

1. No demand having been made or presented within

twelve months and claimant having no notice, actual or constructive, the company is not liable. Kirby's Digest, § 7672; 76 Ark. 525 not in point. Possession is notice. 16 Ark. 340; 77 Ark. 309. Whatever is sufficient to put a purchaser on inquiry is notice. 15 Ark. 184; 16 *Id.* 340; *Id.* 543. A vendee affected by recitals in his deed. 29 Ark. 650; 43 *Id.* 464; 37 *Id.* 571; 50 *Id.* 322; 35 *Id.* 100; 25 Fed. 1140; 27 Atl. 984; 54 Pac. 710; 1 So. 773; 7 *Id.* 488; 81 N. W. 936; 33 So. 687; 45 S. E. 387, 579; 43 Conn. 53.

2. The suit is barred by the one-year statute of limitation. Kirby's Digest, § 6588.

McCaleb & Reeder and *Bradshaw, Rhoton & Helm,* for appellee.

1. The claim was presented within one year from the date of filing the deed. Kirby's Digest, § § 6587-8. Filing a complaint is an emphatic presentation of a claim and due and legal notice within the year. 32 L. R. A. 33; 32 Wash. 349.

2. Record of a deed is not notice to all the world. It is only notice to those claiming title under the same grantor, and has no reference to those not dealing with the title. 70 Ark. 256; 76 *Id.* 526.

3. There is a difference between the purchase of a railroad and the consolidation. Kirby's Digest, § 6587; 15 How. 307; 42 Mo. 63; 120 Mass. 397.

4. The purchasing company liable for the debts of the old company under the statute. Cases *supra;* 16 Neb. 254; 36 Minn. 505; 88 Tenn. 138.

5. Outside the statute, the appellant is liable under its deed whereby it assumed all liabilities of the old company. 23 L. R. A. 231; 84 Iowa, 462; 111 Wisc. 198; 23 Am. & Eng. Enc. Law, 774.

HILL, C. J., (after stating the facts). The question is whether the limitation of this action is one year under section 6588, Kirby's Digest. There might be a question of some interest as to whether, if said section is not applicable, the limitation of this action would be the three-year statute, under the first paragraph of section 5064, of the five-year statute under section 5069, or the five-year statute under section 5074. But

that is not important for the action was commenced within less than three years of the purchase by the St. Louis, Iron Mountain & Southern Railway Company of the White River Railway Company, and, the limitation against the White River Railway Company having been arrested by suit progressing to judgment, therefore the action was not barred under any statute unless by the one year provided in section 6588.

A purchasing company becomes bound for the liability of the selling company by statute, or by the terms of the purchase, or as trustee to discharge claims against it, or in all of these ways. See 23 Am. & Eng. Enc. of Law, 773, 775, and instances in notes; *Organ* v. *Memphis & L. R. Rd. Co.*, 51 Ark. 235; *Ratcliff* v. *Adler*, 71 Ark. 269.

On March 20, 1889, the Legislature passed an act to regulate the purchase and consolidations of railroads. Kirby's Digest, § § 6587, 6588. The first section broadly made the purchasing company liable for the debt, liabilities and obligations of the purchased company. These debts, liabilities and obligations would be barred according to the respective acts applicable to them. The next section then gives a privilege to the purchasing company to shorten the period of limitation by giving notice to all persons or corporations having claims against it under the act to present the same within twelve months or they would be barred. The question is, whether the notice therein referred to is actual or constructive, the statute itself being susceptible of either construction.

It is common knowledge that railroad companies keep a complete and detailed system of books, and have a department looking after claims that are incurred by or asserted against them. The purchasing company would therefore have means of knowing of all the liabilities of every kind of the purchased company, so far as was known by it, and could obtain, at least approximately, definite information of the debts and liabilities it was assuming. The purchasing company can then shorten the limitation against it by giving notice to persons having claims against the purchased company, and in the ordinary run of affairs would have the information necessary to do so. This is a valuable privilege, and with notice of it the creditors of the purchased company cannot be injured by it. If constructive

notice put the statute in operation, the creditors of the purchased company would have to be searching the county records or the record in the Secretary of State's office to find transfers, in order to prevent the ordinary period for assertion of claims being shortened by some sale of which they had no knowledge.

"A statute is to be construed so that it may have a reasonable effect, agreeably to the intention of the Legislature." *Wilson* v. *Biscoe*, 11 Ark. 44. The reasonable effect to be given this statute is to require that the notice be actual, and not merely constructive, to bring it into operation. This construction gives a fair statute, operating harshly upon no one, and it is to be presumed that such was the intention of the Legislature. This is consonant to the rule of construction that short statutes of limitation are construed strictly.

It is argued that the facts and circumstances of this case were sufficient to have amounted to actual notice. The case is tried here on the facts found by the chancellor, as all the evidence was not preserved; and the chancellor found that the plaintiff did not receive actual notice of the sale to the St. Louis, Iron Mountain & Southern Railway Company by the White River Railway Company.

Judgments affirmed.

MR. JUSTICE HART, having presided in the chancery court, was disqualified and did not participate herein.

GUNNELLS v. LATTA.

Opinion delivered May 18, 1908.

1. NEW PARTIES—WHEN NECESSARY.—Where an officer was sued to recover a sum of money taken from plaintiff's person when he was arrested on a charge of larceny, it was proper to make a party to the action one who claimed the money and to whom it was delivered when taken from plaintiff. (Page 306.)
2. ACTION—DISMISSAL.—Where, in a suit to recover money, a claimant was permitted to become a party defendant, it was error subsequently to dismiss the action as to such claimant. (Page 306.)

3. PLEADING—DEFENSE INURING TO ALL.—A separate answer of one defendant which sets up a defense common to a co-defendant will be held to inure to the latter's benefit. (Page 306.)

Appeal from Columbia Circuit Court; *George W. Hays,* Judge; reversed.

Stevens & Stevens, for appellants.

1. There was the statutory denial of Latta's allegation of ownership, and the court should have overruled the demurrer. Kirby's Digest, § 6098; 73 Ark. 344; 32 *Id.* 428.

2. If the money was won at craps, the title was in Robinson, and he had the right to possession. 47 Ark. 378; Kirby's Digest, § 3690; 3 Am. & E. Law, p. 762; 47 Mo. App. 574.

3. Great prejudice was done by the court's refusal to allow Robinson to plead in the action, so as to hold Gunnells harmless. 49 Ark. 100; 74 *Id.* 55; Kirby's Digest, § § 6006, 6011.

McKay & Lile, for appellee.

1. Gunnells was estopped to deny plaintiff's ownership of the money. He admitted he took the money from plaintiff, and that he had never returned it. 28 S. C. 247; 42 Ark. 62; 5 Cyc. 517; Pollock on Torts, 442; 14 Mich. 392; 41 Mo. App. 416. See 31 Ark. 103 and 27 Ky. 206 as to the defense the superior title of another.

2. Kirby's Digest, § 3690, has no application under the pleadings. *Id.* § 6006.

McCULLOCH, J. Appellee, John Latta, instituted this action in the circuit court of Columbia County against appellant, J. D. Gunnells, to recover the sum of $121.15, alleging in his complaint that the latter, as marshal of the town of Emerson, arrested him upon a warrant charging him with grand larceny, and took said sum of money from his person. He alleged further that said criminal charge against him had been dismissed by the grand jury.

Gunnells and one Robinson jointly filed a motion, alleging that Robinson asserted ownership of the money, and asking that the latter be made defendant and allowed to litigate his claim. The prayer of the motion was granted, and Robinson was made a party defendant. He filed his separate answer, alleging that he was the owner of the money taken from appellee by Gunnells,

that appellee had stolen it from him, and that the money was delivered to him (Robinson) after it was taken from appellee.

Gunnells also filed a separate answer, containing a denial of any knowledge or information sufficient to form a belief as to appellee's alleged ownership of the money, and alleging that Robinson claimed the money, and that the same had been delivered to him.

The court thereupon sustained a demurrer to Gunnells's answer, and rendered judgment against him in appellee's favor for the amount, and upon motion of appellee dismissed the action as to Robinson.

It was proper to make Robinson a party to the action, as he claimed the money, and it had been delivered to him. Kirby's Digest, § § 6006, 6011; *Smith* v. *Moore*, 49 Ark. 100; *Choctaw, O. & G. Rd. Co.* v. *McConnell*, 74 Ark. 54.

After he was made a party defendant, his claim to the money in controversy should have been adjudicated in the action. The effect of the court's ruling was to invite him in court at one door and turn him out at another without relief and without opportunity to have his rights adjudicated.

It was error to sustain a demurrer to Gunnells's answer. It contained a denial of appellee's claim of ownership of the money. While it did not contain any allegation as to Robinson's ownership, the latter's separate answer did contain such an allegation, and, as that was a matter of defense common to both defendants, it inured to the benefit of both. *Fletcher* v. *Eagle*, 71 Ark. 1; *Lowe* v. *Walker*, 77 Ark. 103.

Reversed and remanded with directions to overrule the demurrer to Gunnells's answer and the motion to dismiss the action as to Robinson, and for further proceedings.

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

Opinion delivered May 18, 1908.

RAILROAD—KILLING OF TRESPASSER ON TRACK—BURDEN OF PROOF.—In a suit to recover damages from a railroad company for killing plaintiff's intestate while lying on defendant's track, the question is not whether

defendant's servants could have discovered intestate's peril, but whether they did discover it in time to have avoided the injury by the exercise of care; and the burden is on the party alleging negligence in this respect to prove it.

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; reversed.

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

1. The burden was on appellee to show that Raines was alive when struck. The engineer's evidence and the circumstantial evidence of an experiment or demonstration were inadmissible and prejudicial. Where a trespasser is on the track, the inquiry is, not what the trainmen might have done, but what they did. 69 Ark. 382; 76 *Id.* 10; 77 *Id.* 401; 82 *Id.* 522; *Ib.* 267; 83 *Id.* 300.

2. There was error in the court's charge as to the measure of damages. 69 Ark. 382.

John C. Ross and *Henry B. Means,* for appellee.

1. There is evidence to show that the trainmen discovered Raines's peril in time to have avoided the injury.

2. The English courts hold that cross-examination of a witness may extend to all matters material to the case. The American doctrine is *contra,* and confines it to matters gone into on examination in chief. McKelvey on Ev., p. 334.

2. The experiment or demonstration testimony was admissible. 97 S. W. 1067, 1070.

3. The engineer had no right to indulge the presumption that Raines would get off the track. 46 Ark. 523; 25 Mich. 279; 36 Ark. 46; *Id.* 376.

4. The railroad is liable if the injury could have been avoided by the exercise of ordinary care. 89 Ky. 407; 86 Ala. 164; 37 N. Y. 360; 119 N. C. 751; 108 Me. 18; 36 Md. 366; 84 S. W. 1; 97 *Id.* 1067; 36 Ark. 42, 371; 46 *Id.* 513; 48 *Id.* 106; 49 *Id.* 257; 61 *Id.* 341; 65 *Id.* 429; 74 *Id.* 407.

T. M. Mehaffy and *J. E. Williams,* in reply.

The American rule as to cross-examination of witnesses is sustained by a bare majority of the courts in the United States. The English rule is sustained by nearly half of the American States, many of them of high standing. But it is clear, under

either rule, the procedure in this case was highly prejudicial. 7 Neb. 385; 9 So Dak. 301; 133 Cal. 285; 74 Vt. 331; 73 Conn. 743; 115 Iowa, 48; 92 Md. 483; 26 Ind. App. 307; 53 Atl. 720; 52 Conn. 818; 43 W. Va. 196; 175 Pa. St. 361; 25 Wash. 518; 33 Mich. 319; 124 Cal. 452; 97 Ala. 187; 91 Fed. 614; 206 Pa. St. 135.

2. The railway company was not liable unless deceased was wantonly injured after discovery of his peril. 1 Arizona, 139; 47 Ark. 497; 102 S. W. 103. For further authorities on the American rule, see 70 Ark. 420; 56 *Id.* 550; 11 Pick. 269; 2 Wend. 166; 19 Ga. 285; 26 Mich. 432; 10 *Id.* 460; 37 Ill. 465; 89 Ala. 563; 94 Mich. 343; 69 Fed. 808; 83 Md. 536; 142 U. S. 488; 110 *Id.* 47; 14 Cal. 19.

MCCULLOCH, J. Plaintiff's intestate was run over and killed by defendant's train, and she sues to recover damages on account of it. Deceased was lying on the track at a cattle guard —his body being between and nearly parallel with the rails. Whether he was dead or asleep or intoxicated the evidence does not disclose, as no one saw him move. No one was present at the time of the accident, and no eye-witness undertook to relate the circumstances except the engineer. The cattle guard where the body was lying was about half a mile of Gifford, a station on the road where the train had stopped. There was a curve in the track about 175 or 200 yards distant from the cattle guard. It was a passenger train with four coaches including the baggage coach.

The engineer testified that the train was running at the usual speed when he discovered an object on the track between one hundred and two hundred yards ahead—he said that he only estimated the distance from recollection, and could not be accurate—which he first thought was a newspaper, but a moment later he saw that it was probably some animate object, and that he blew the whistle and put on brakes, attempting to stop the train as soon as possible. The engine struck the man and ran the full length of the train before it stopped.

The law of the case is well settled by repeated decisions of this court. Deceased was a trespasser, and the servants of the railway company owed him no duty except to exercise ordinary care, after discovering his perilous position, not to injure him.

The question is not whether defendant's servants could have discovered the perilous position of the man, but whether they did discover it in time to have avoided the injury by the exercise of care. And the burden is on the party alleging negligence in this respect to prove it. *Chicago, R. I. & P. Ry. Co.* v. *Bunch,* 82 Ark. 522; *St. Louis & S. F. Ry. Co.* v. *Townsend,* 69 Ark. 380.

The testimony in this case fails to show that the man was discovered on the track by the engineer in time to avoid the injury. At most, it only shows that he could have been discovered by the exercise of proper care. The engineer testified that he sounded the whistle about the time he saw that the object ahead was probably a man, and plaintiff attempted to show by another witness the position of the engine far enough away from the cattle guard to enable the engineer to stop it; but the witness testified that he was inside his house and could not see the engine or train, and he only guessed at the location of the engine from the sound of the whistle. It was impossible for him to have located the engine with any degree of accuracy in that way. His estimate of the location of the engine was pure guess work, as he could not know for a certainty whether the engine was fifty or a hundred or two hundred yards from the cattle guard when the whistle was sounded. He said he "supposed" it to be at a certain point. This testimony is too vague to rest a finding of negligence upon, in the face of the positive testimony of the engineer to the effect that he adopted every effort to stop the train as soon as he saw the man lying on the track.

Reversed and remanded for new trial.

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

Opinion delivered May 18, 1908.

1. LIMITATION—LIABILITY OF COMPANY PURCHASING RAILROAD—NOTICE.—Under Kirby's Digest, § § 6587, 6588, providing that whenever any company or individual shall purchase any railroad from another company or individual such purchaser shall take and hold the same

subject to all debts, liabilities and obligations of the seller, and that all persons having claims against the purchaser shall present same within 12 months after receiving notice of the sale from the purchaser or be forever barred, *held* that where no notice was given as required by the statute the statutory bar of one year was inapplicable. (Page 313.)

2. SAME—BURDEN OF PROOF.—The burden of proof is upon one who pleads the statute of limitations. (Page 314.)

3. CONTRACT TO BUILD DEPOT—DEFINITENESS.—A contract which requires a railroad company to establish a depot upon certain land, without designating the exact location and the kind of depot to be built, is not too indefinite to be enforced, such matters being left to the discretion of the railroad company. (Page 314.)

4. SAME—CONSTRUCTION.—A contract to establish a "depot" on certain land is not complied with by constructing a side track and placing a box car where freight may be received and cars stopped when flagged; the term "depot" implying a permanent structure to be used as a receptacle for freight and passengers and to be of the kind usually erected at similar stations along the same railroad. (Page 315.)

5. EVIDENCE—PROVING CONSIDERATION OF DEED BY PAROL.—It is permissible to show by parol evidence that the real consideration of a deed for right of way was the erection of a depot on the ground. (Page 315.)

6. APPEAL—HARMLESS ERROR.—The improper admission of evidence was not prejudicial if the fact it tended to prove was otherwise established by undisputed evidence. (Page 315.)

7. AGENCY—RATIFICATION.—Where a railway company accepted a right-of-way deed with a clause in it providing for the erection of a depot on the land, it will be held to have ratified the acts of its agent in making such contract. (Page 316.)

8. APPEAL—TRIAL BEFORE COURT—PRESUMPTION.—Where a case is tried before the court sitting as a jury, the presumption is that the court considered such evidence only as was competent. (Page 316.)

9. CONTRACT TO BUILD DEPOT—BREACH—DAMAGES.—Where a right-of-way across certain land was conveyed to a railroad company in consideration of its placing a depot on the land, and the company fails to place the depot on the land, the grantor is entitled to recover the value of the land so taken and appropriated. (Page 317.)

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

STATEMENT BY THE COURT.

G. W. Berry was the owner of an undivided two-thirds interest in a tract of land through which the White River Railway

Company desired a right-of-way. On the 14th day of September, 1901, Berry and wife executed a deed conveying a right-of-way across said land to said company. The right-of-way was described in the deed as a strip of land "one hundred feet wide, the middle thereof to be the center of the track of the railroad, as it is now located over, through and across the lands hereinafter described, said lands through which the strip hereby conveyed extends, and also a strip 100 feet wide and 3,000 feet long for siding and depot." The consideration in the deed is as follows: "For and in consideration of the sum of two-thirds of $25.00 per acre for cleared land, timber land gratis, and depot on land." The railroad was constructed as located, a side track was laid upon the land, and the trains stop there when flagged. There is a section house there, situated about thirty feet from the tracks. It is two stories high, and has three rooms downstairs. A couple of foremen live in it with their families. There is a box car there, in which freight is stored. It has ample room for that purpose. There is no agent there to receive freight and to sell tickets to passengers. The deed was filed for record on the 3d day of January, 1902.

This railroad was purchased by the St. Louis, Iron Mountain Railway Company from the White River Railway Company on the 26th day of March, 1903.

Evidence was adduced at the trial to the effect that there were eighteen acres of appellee's land appropriated for right-of-way by the railway company, thirteen acres being cleared and the remainder timber land, and that appellee was damaged $1,500 by the location and construction of said railroad upon his land. Other facts appear in the opinion. This action was brought August 11, 1906, to recover damages for a breach of the contract, alleging that the railroad company failed to erect the depot as required in the deed. The case was tried before the court sitting as a jury. Appellant asked the court to find the facts and declare the law as follows:

"FINDING OF FACTS.

"I find that said contract (if ever made) was by parol, and made in the year 1901, and more than three years before the bringing of this suit.

"I find that such contract (if made) was made with one S. J. Cresswell, and that he professed to be acting under one H. Devereux, an engineer of the defendant, and fail to find that said Devereux had authority to authorize said Cresswell to make such contract."

"DECLARATION OF LAW.

"I. This action is barred by the statute of limitations of three years.

"II. That the contract relied on by plaintiff was void as against public policy.

"III. That there is no privity of contract between the plaintiff and defendant, and that no valid contract is proved, and the plaintiff cannot recover in this action."

The court refused to make the above finding of facts and declaration of law, to which refusal defendant duly saved its several and separate exceptions.

Thereupon the court, sitting as a jury, made the following finding: "And the court, after hearing the evidence in this case, argument of counsel, and being fully advised in the premises, doth find for the plaintiff damages in the sum of $642, with six per cent. interest from the 11th day of August, 1906, amounting to $22.87, making a total of the sum of $664.87."

Appellant filed its motion for a new trial, and, upon it being overruled, brought this case here by appeal.

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

1. The claim was not presented to appellant within twelve months. Kirby's Digest, § 6588. The White River Railway Company should have been made a party. 68 Ark. 171.

2. The clause "a depot on the land" has been complied with. As to what a depot is, etc., see 71 Ark. 189; 45 N. Y. 514; 42 S. E. 617; 37 Conn. 153.

3. If it was contemplated that there should be a principal depot or the only one within certain limits, it was void as against public policy. 6 Col. 1; 45 Am. Rep. 512; 31 Fla. 482; 64 Ill. 414; 130 *Id.* 559; 106 Ind. 55; 53 Io. 126; 61 Miss. 725.

4. An agent acting under a general authority and power to secure right-of-way has no authority to contract to locate

stations at particular places. 5 Tex. 176; 8 Am. & E. R. Cases, 723.

5. The court erred in the admission of testimony as to damages. 56 Ark. 612; 71 *Id.* 302; 47 *Id.* 501; 67 *Id.* 375; Sedgwick on Damages, § 1293; 59 Ark. 110; 74 Pa. St. 208-216.

6. The case was tried on the wrong theory as to the measure of damages. 75 Ark. 89; 106 Ind. 55; 87 N. Y. 382; 3 Atl. 444; 55 Am. Rep. 719.

W. S. Chastain and *Frank Pace,* for appellee.

1. The suit is not barred by the three-year statute. The special statute of one year never even got started. The question of limitation was not raised below; it cannot be raised here now. 75 Ark. 296.

2. The parties had authority to make a contract to locate a depot. This is fully proved.

3. No depot was erected as agreed, nor did the company raise this question below. 77 Ark. 31; 75 *Id.* 317. A section house is not a depot, nor is a box car, nor a flag station. 40 N. W. 613, 614; 39 Wisc. 485; 76 Wisc. 43.

4. No rights of the public were infringed. No effort was made to limit or restrict the number of depots. The contract was not void as against public policy.

5. As to the damages, the motion for new trial sets up only a general assignment. This is not sufficient. 77 Ark. 64; 34 *Id.* 721; 70 *Id.* 427; 73 *Id.* 530; 77 *Id.* 27, 418; 75 *Id.* 181. As to the elements of damage, see 51 Ark. 330; 54 *Id.* 140; 44 *Id.* 258, 260; 51 *Id.* 324. A party may treat the contract as rescinded and recover on *quantum meruit.* 7 A. & E. Enc. Law (2 Ed.), p. 153; 71 Ark. 189.

6. The company has waived all questions as to admissibility of testimony. 77 Ark. 261; *Id.* 31; 75 *Id.* 181.

HART, J., (after stating the facts). 1. Appellant claims that it is not liable in this action because the contract, if any was made, was between appellee and the White River Railway Company. Appellant also claims that the action is barred by the statute of limitations. These questions will be considered together.

The evidence shows that appellee made the contract in question with the White River Railway Company in September, 1901,

and that appellant became the owner of said railroad by purchase in March, 1903.

Section 6587 of Kirby's Digest provides that whenever any railroad company shall purchase any railroad from any other railroad company, it shall take and hold the same subject to all the debts, liabilities and obligations of the company from which said road was purchased. Section 6588 provides that all persons having claims against the purchasing company shall present the same to it within twelve months after receiving notice from the purchasing company of the sale. The complaint in this case states that appellant refused to perform the contract made by appellee and the White River Railway Company. It is not necessary to decide here whether the notice required to be given by section 6588 must be actual or constructive; for appellee testified that he did not have actual notice of the sale, and the record does not disclose whether or not appellant complied with the statutes in regard to constructive notice by filing a duly attested copy of the deed and confirmation of the sale of the railroad with the Secretary of State. Hence the present case stands as if appellee did not have any notice of the sale, either actual or constructive, and the action is not barred by the one-year statute of limitations prescribed by section 6588.

Was it barred by the three-year statute? The burden of proof is upon a defendant who pleads the statute of limitations. *Calhoun* v. *Moore*, 79 Ark. 109. The record does not disclose the precise time when the railroad was completed through appellee's land, but it was sometime during the year 1903. It is not to be presumed in any event that the railroad company would construct its depots in advance of the completion of the track of its line of railroad.

Berry had a right to depend on the railroad company to perform its contract until it repudiated it, or until it became apparent that the railroad company did not intend to execute it within a reasonable time. Therefore the action was not barred by the three-year statute of limitations.

2. Appellant contends that, because the deed did not designate the exact location and the kind of depot to be built, the contract was too indefinite to be carried out. This argument is not tenable. The stipulation of the deed under consideration

contains no restrictions, and, being general in its character, could never become a source of embarrassment to the railroad company in the future. Appellee had a right to assume that it would erect a depot in keeping with other depots on its line of road and commensurate with the necessities of the public, and that it would be located at the point deemed most advantageous to the railroad, having reference to the topography of the ground as well as the convenience of the pubic. These were matters properly left to the judgment of the railroad company.

3. Appellant also claims that it performed the contract on its part by erecting a depot. That is to say, it constructed a side track and placed a box car there where freight might be received, and cars stopped there when flagged.

In the case of *Arkansas Central Railroad Co.* v. *Smith,* 71 Ark. 189, the court said: "The term 'depot' usually includes not only the idea of stopping place, but also that of a building or something of the kind for protection and convenience of passengers and freight."

A box car is not a building. The latter implies a permanent structure, and not a part of the rolling stock of the company, which may me moved at will along the line of the railroad. We think that the word "depot," as used in the deed, was intended to mean a permanent structure of some kind to be used as a receptacle for freight and passengers, and was to be of the kind the railway company erected at similar stations along its line of railway.

4. Appellant contends that the court erred in admitting oral testimony that a part of the consideration for the deed was the erection of a depot upon appellee's land. It is permitted to show by parol evidence that the real consideration of a deed for right-of-way was the erection of a depot on the ground. *St. Louis & N. A. Rd. Co.* v. *Crandell,* 75 Ark. 90, and cases cited.

Moreover, this consideration was recited in the deed, and this court has repeatedly held that the improper admission of evidence is not prejudicial if the fact it tended to prove was otherwise established by undisputed evidence. *Pace* v. *Crandell,* 74 Ark. 417; *Waters-Pierce Oil Co.* v. *Burrows,* 77 Ark. 74; *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588; *Maxey* v. *State,* 76 Ark. 276; *Meisenheimer* v. *State,* 73 Ark. 407.

Appellant also urges that its right-of-way agents had no authority to contract for the erection of depots. The railway company accepted the deed with a clause in it providing for the erection of a depot on the land, and thereby ratified the acts of its agent.

5. Appellant urges as error that the court permitted one witness to testify about having received $500 as a compromise for not putting a depot on his land. Assuming this testimony to be incompetent, it is not prejudicial; for, as will be hereafter seen, there was sufficient competent evidence to sustain the findings of the court, and in a trial of a case before the court sitting without a jury, the presumption is that the court considered such evidence only as was competent. *Covington* v. *St. Francis Co.*, 77 Ark. 258.

6. Appellant asks for a reversal because it claims that the court erred in the admissibility of testimony as to appellee's damages, and because it adopted the wrong theory as to the measure of damages. Without going into the details of the testimony, it may be said that the same elements of damages were considered and allowed, and competent evidence in that regard was heard, by the court, as if appellee had brought his statutory action for compensation for land already taken and appropriated by the railroad company. This he was entitled to under the law without any contract, and, having released and given it up by virtue of his contract with the railroad company, the amount of it should unquestionably be treated as his measure of damages for the violation of the agreement.

This was the measure of damages allowed in the case of *Arkansas Central Rd. Co.* v. *Smith*, 71 Ark. 189, and the same rule is announced in the case of *Rockford, etc., Rd. Co.* v. *Beckemeier*, 72 Ill. 267, where it was said that any supposed damage to the farm on account of the failure to build the depot, growing out of anticipated increased value, is too remote to be considered a necessary consequence of the failure to build the depot.

This view is not in conflict with the elements of damage allowed in the case of *St. Louis & N. A. Rd. Co.* v. *Crandell*, 75 Ark. 89.

The Crandell case was a suit for damages by reason of removing a passenger station which had already been established

and maintained for more than one year. The depot had been located on the land of Mrs. Murray pursuant to a contract between Crandell and the railroad company. Crandell had paid Mrs. Murray the value of the right-of-way across her land. He was allowed to recover this, and also the loss in value of property built by him near the depot.

In the present case there had been no buildings erected at or near the proposed site of the depot. The land was cultivated as a farm, and there is no evidence that it was intended to be sold.

Appellee adduced evidence at the trial tending to show that he had been damaged in the sum of at least $1,200, and that he had been paid the sum of $325. He recovered judgment for the sum of $642. Hence it cannot be said that the evidence did not sustain the findings of the court.

Since writing the opinion, the court has held in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Batesville & Winerva Telephone Company, ante* p. 300, that actual notice is required by section 5688 of Kirby's Digest.

Affirmed.

OWEN v. STATE.

Opinion delivered May 25, 1908.

1. CONTINUANCE—CUMULATIVE EVIDENCE.—As a general rule, there is no abuse of discretion in refusing a continuance for the absence of a witness whose testimony would have been merely cumulative. (Page 319.)
2. VIEW—RIGHT OF ACCUSED TO ACCOMPANY JURY.—Accused cannot complain that he was not allowed to accompany the jury to view the scene of the crime if he was present when the view was ordered, and, being at large upon bail bond, could have accompanied the jurors, had he desired to do so. (Page 320.)
3. WITNESS—DISQUALIFICATION.—A witness is not disqualified because he pleaded guilty to a charge of an infamous crime if the court withheld sentence during his good behavior. (Page 321.)
4. APPEAL—GENERAL EXCEPTION TO SEVERAL INSTRUCTIONS.—A general exception to several instructions given will not be entertained on appeal if any one of them be good. (Page 322.)

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

STATEMENT BY THE COURT.

In April, 1907, the place of business of L. & E. Wertheimer, a corporation organized under the laws of the State of Arkansas, was burglarized and whisky and cigars to the value of $13.70 taken. Bose Owen was charged with the offense, and was indicted for burglary and grand larceny, charged in separate counts. He was tried and convicted in both counts. The case is here on appeal.

Nixon & Shaw, for appellants.

1. A continuance should have been granted. A defendant is entitled to process for his witnesses. Const. art. 2, § 10; 50 Ark. 162; *Ib.* 25; 54 *Id.* 243; 62 *Id.* 286, 564; 77 *Id.* 146; 71 *Id.* 180.

2. It was error to send the jury to view the vicinity of the crime without accompanying them to show the place, or sending some one for that purpose. Kirby's Digest, § § 2379-80; 30 Ark. 328. The defendant should have been allowed to accompany the jury. 51 Ark. 553.

3. The court erred in permitting Dellmon to testify, and in afterwards refusing to exclude his testimony. Bish. on Cr. Law, vol. 1, § 1166; Gr. on Ev. vol. 1, § 379; 1 Wharton on Cr. Law, 783.

4. The verdict is not sustained by the law nor the evidence. 37 Ark. 274; 41 *Id.* 173; 55 *Id.* 593.

5. There was error in the instructions. For the rule as to corroboration, see Kirby's Digest, § 2384; 30 Ark. 117; 37 *Id.* 67; 40 *Id.* 482; 43 *Id.* 367; 45 *Id.* 165; 50 *Id.* 523; 63 *Id.* 547; 64 *Id.* 247 and 121. As to circumstantial evidence, see 1 Greenleaf on Ev. § 13*a.*

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

1. A continuance was properly denied. All the alleged testimony was but cumulative.

2. The record shows that the jury were accompanied by two regular deputy sheriffs. Defendant was at large on bail,

and at liberty to follow the jury to the scene of the crime. His *voluntary* absence will not vitiate the verdict. Kirby's Digest, § 2339; 52 Ark. Ark. 285.

3. It is the judgment of a court that renders one infamous, not the guilt. 1 Bishop, Cr. Law (5 Ed.), § 975; Wigmore on Ev. § 521.

4. Objections to instructions were not separately and severally saved. 84 Ark. 73; 75 *Id.* 81; 80 *Id.* 528.

HART, J., (after stating the facts.) Appellant assigns as error the action of the trial court in refusing to grant his motion for a continuance.

His motion alleged that the absent witnesses, if present, would testify that the rope used at the residence of the defendant, Bose Owen, to clean out flues was a small grass rope not larger than three-eighths of an inch, and that no such rope was used in burglarizing Wertheimer's warehouse. The testimony for the State tended to show that the rope found in the warehouse on the morning after the alleged burglary was an inch rope. The evidence adduced by the defendant tended to show that the rope he used to clean out his flues was a half inch rope. Hence the testimony of the absent witnesses on that point would have been cumulative. Besides, Lizzie Owen, the sister of defendant, who testified in his behalf, stated that she thought the rope was still at the residence of the defendant. The production of the rope would have obviated the necessity of the testimony of the absent witnesses.

The motion for a continuance also alleged that said witnesses, if present, would testify that the defendant and his companions were drinking on the afternoon before the night of the burglary. Defendant adduced testimony to this effect at the trial, which was not contradicted. This testimony would, also, have been cumulative.

It is the general rule that there is no abuse of discretion in the trial court refusing a continuance for the absence of a witness whose testimony would have been merely cumulative. *Carroll* v. *State,* 71 Ark. 403; *Pratt* v. *State,* 75 Ark. 350; *Vanata* v. *State,* 82 Ark. 203.

The second proposition of the appellant assigned as error is in sending the jurors to visit the scene of the crime without

accompanying them for the purpose of showing them the place to be viewed, or sending some other person with them for that purpose. This assignment of error is not well taken.

Without going into details, it is sufficient to state that an examination of the record shows that sections 2379 and 2380 of Kirby's Digest, directing the manner of the view, were strictly followed.

Counsel for appellant, also, complains that the defendant was not permitted to accompany the jury to view the scene of the crime. On this point, we quote from the record as follows:

"At the time of the view and proceedings last above mentioned, the defendant and his counsel were present in the court room—the defendant being at large upon his bail bond. No order was made by the court directing the defendant to accompany the jury, nor did he request permission to do so, and no exception was made at the time on that account; but he left the court on his own volition two or three minutes after the jury had retired. Upon the hearing of the motion for a new trial in this case it was admitted in open court by Mr. T. Havis Nixon, one of defendant's counsel, that defendant remained in the court room until after the jury had gone out by advice of the counsel; he, Mr. Nixon, having directed him to sit still and say nothing."

Counsel for appellant base their contention upon the decision of this court in the case of *Benton* v. *State,* reported in 30 Ark. 328.

The court held that if, during the progress of a criminal trial, a view of the locality where the crime is alleged to have been committed is ordered by the court, the defendant must be permitted to accompany the jury. This view of the law proceeds upon the theory that the jurors, from their observation of the place and its surroundings, might receive a kind of evidence from mute things, and that, as by the bill of rights the accused must be confronted with the witnesses, if he was not present, such action on the part of the jury would be regarded as taking a substantive step in the trial during the absence of the defendant. But it will be perceived from the opinion in that case that the defendant was indicted for murder in the first degree, and that, after the order for the view was made, he was again remanded to the custody of the sheriff. While the record is silent as to

whether Benton asked permission to accompany the jury, we think the action of the court in remanding him to the custody of the sheriff was tantamount to a refusal to permit him to accompany the jury. To say the least of it, it affirmatively appears from the record in that case that Benton was absent when the view was made by the jury.

In the present case, the record shows that appellant was on bail, and that he was present at the commencement of the trial. This much appears from the record. If he was not present at any subsequent stage of the trial when any substantive step was taken, it devolved upon him to show that fact. *Bond* v. *State,* 63 Ark. 504.

The record does not disclose whether or not appellant accompanied the jurors to the scene of the crime; but the record does show affirmatively that an officer of the court, duly sworn as required by the statute, was sent with them to point out the place they were to view. If the appellant did not go, it would have been an easy matter to have shown that fact and embodied it in his bill of exceptions. Certainly, the court did not refuse to permit him to accompany the jury, and, for aught we know, he may have gone with them to the scene of the crime. The record shows that he was present when the jury left to go to the locality of the crime, and that in two or three minutes thereafter he himself left the court room. If he did not accompany the jurors, it was doubtless owing to the advice of his counsel. The record shows that his counsel advised him to remain in the court room while the jurors were passing out. Immediately afterwards the defendant left the court room, and, if he did not go with the jurors to the scene of the crime, we presume it was because he did not desire to go, or that he stayed away on the advice of his counsel. We think this may be considered as a voluntary absence on his part. In the case of *Darden* v. *State,* 73 Ark. 319, it was held that the defendant had no right to complain that testimony was taken during his voluntary absence from the trial.

Counsel for appellant next assigns as error the action of the court in refusing to exclude the testimony of Clarence Sellman.

The objection to him as a witness was that he had been

convicted of the crime of grand larceny several years before the crime in question is alleged to have been committed. In support of his objection, the following entry in the criminal record book of the circuit court of Jefferson county, Arkansas, was produced:

"State of Arkansas

v.

Clarence Sellman.

"On this day comes the State of Arkansas by G. C. Martin, and comes the defendant in his own proper person, and enters his plea of guilty to the indictment herein to the crime of grand larceny. Wherefore it is the judgment of the court that sentence be withheld herein during the good behavior of the defendant."

It is of no consequence here, and it is not necessary to decide, whether or not a circuit court has the power to indefinitely suspend or postpone sentence or judgment where there has been returned a verdict of guilty, or where the defendant has entered his plea of guilty, for the reason that it is not shown that sentence was subsequently pronounced. If the guilt of the party should be shown by his plea of "guilty," which has not been followed by judgment, the proof does not go to the competency of the witness. 1 Greenleaf on Evidence, (16th Ed.), § 375. The universal rule is that it is not the guilt that disqualifies the witness, but that it is the judgment itself that renders him infamous. 1 Bishop on Criminal Law (5th Ed.), § 975; 1 Wigmore on Evidence, § 521.

Counsel for appellant next contend that the court erred in its instructions to the jury. The language of the objection to them as shown in the bill of exceptions is as follows:

"To all of the above instructions, numbered one, six, nine and ten, the defendant duly objected and excepted." Appellant now admits that two of these instructions were correct, and they appear to the court to be a proper statement of the points which they embrace. A general exception to several instructions will not be entertained on appeal if any of them are good. *Young* v. *Stevenson,* 75 Ark. 81; *Kansas City Southern Ry. Co.* v. *Morris,* 80 Ark. 528; *Mathews* v. *State,* 84 Ark. 73.

We think the instructions given by the trial court are a full and comprehensive statement of the law applicable to every theory

of the case. Hence there was no error in refusing the instructions asked by appellant.

Appellant also insists that the verdict was contrary to the evidence. A careful consideration of the testimony convinces us that there was ample evidence to sustain the verdict.

Judgment affirmed.

BIGHAM v. DOVER.

Opinion delivered May 25, 1908.

EXECUTION—TWO JUDGMENTS—AMENDMENT.—A joint execution upon two separate judgments is void, and is not amendable by elimination of one of the judgments.

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

STATEMENT BY THE COURT.

Appellee bought a saddle for $12 at a sale under the following execution:

"County of Pope, Township of White.

"The State of Arkansas to any constable of Polk County: You are hereby commanded that of the goods and chattels of E. T. Bigham you cause to be made the sum of nine dollars ($9) which W. W. Cranford late before me, a justice of the peace for said county, recovered against him for his costs in a replevin suit and also costs in a suit wherein S. S. Crockett was plaintiff and W. W. Cranford and F. T. Bigham were defendants, and that you have said sum of money within thirty days to render to said W. W. Cranford for his costs aforesaid.

"Witness my hand as such justice this the 16th day of September, 1906.

"B. F. McMillan, J. P."

The sale was regular.

The execution was based on two judgments against appellant in the justice court, aggregating the sum of $9 for costs. The judgments were in favor of different parties. The judgments were valid. Appellants, claiming that the execution was

void, and that the sale thereunder was void, brought replevin against appellee for the saddle. The cause was tried by the court sitting as a jury, and the above appear as the undisputed facts.

The court found that the sale was valid, and that the title to the saddle was in appellee, but that appellant was entitled to the difference between $12, the amount for which the saddle was sold, and $5.50, the amount of the Cranford judgment, and rendered judgment accordingly. The appellant duly prosecutes this appeal.

Shaver & Pipkin, for appellant.

WOOD, J., (after stating the facts.) Our statute provides that: "An execution may issue upon any final judgment, order or decree of a court of record for a liquidated sum of money, and for interest and costs, or for costs alone." Section 3203, Kirby's Digest.

There is no law or rule of practice that authorizes a single execution for the amounts of two separate and distinct judgments. 17 Cyc. 932. A joint execution upon two separate judgments is not voidable merely, but void. *Merchie* v. *Gaines,* 5 B. Monroe (Ky.), 126; *Doe* v. *Rue,* 4 Blackf. Ind. 263. Such an execution is defective, not in form merely, but also in substance, and is therefore not susceptible of amendment. See *Blanks* v. *Rector,* 24 Ark. 496; *Hightower* v. *Handlin,* 27 Ark. 20; *Hall* v. *Doyle,* 35 Ark. 445; *Jett* v. *Shinn,* 47 Ark. 373; and *Downs* v. *Dennis,* 83 Ark. 71, as to executions that may or may not be amended. An execution based on a valid judgment, but which contains an excessive amount only, may, according to some decisions, be amended. *Hunt* v. *Loucks,* 38 Cal. 372; *Bogle* v. *Bloom,* 36 Kan. 512; *Otis* v. *Nash,* 26 Wash. 39. But this is not that case. The ruling of the court eliminating the amount of one of the judgments did not cure the error of taking and selling appellant's property under process that was absolutely void. Such error was prejudicial, and could not be cured by amendment. Appellee acquired no title by his purchase at a sale under the void execution.

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

HILL, C. J., and MCCULLOCH, J., dissent.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. *v.* RUSH.

Opinion delivered May 25, 1908.

1. CARRIERS—CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM TRAIN.—Where a passenger left her seat upon her station being called, and stepped down on the steps when the train had either stopped or was moving very slowly, and was thrown off and killed by a sudden movement of the train, the question whether she was guilty of contributory negligence was properly submitted to the jury. (Page 327.)
2. SAME—NEGLIGENCE IN MOVING TRAIN SUDDENLY.—While a railway company is negligent in starting a train suddenly without warning after a station has been called and the train brought to stop, it is not negligent in suddenly increasing the speed of a train which is moving slowly, unless a passenger is seen to be in a position of danger. (Page 328.)

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

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

1. The announcement of a station is not an invitation to passengers to alight. 76 Ga. 333; 88 Ala. 538; 92 *Id.* 237; 97 *Id.* 332; 15 Lea. (Tenn.) 254. The stopping of the train after station was called was not the proximate cause of the injury. 68 Pac. 1037. No recovery can be had where the passenger is at fault. 39 S. E. 427; 113 Ga. 1021; 139 Fed. 543.

2. Plaintiff was guilty of contributory negligence as a matter of law in attempting to get off a train in motion situated as she was. 37 Ark. 526; 46 *Id.* 423; 96 S. W. 562; 54 Ill. 135; 86 *Id.* 467; 78 *Id.* 88; 39 So. 767; 116 Ill. App. 507; 77 N. E. 569; 51 Atl. 83; 94 Md. 226; 46 S. E. 12; 56 Atl. 545; 55 *Id.* 545; 204 Pa. 474; 34 So. 110; 44 S. E. 1005.

3. It was error to let the jury pass on the question as to what a prudent person would have done. 69 Ark. 489.

4. Rush's testimony was hearsay. 61 Ark. 52.

5. Verdict is excessive. 57 Ark. 377.

McMillan & McMillan, J. D. Conway and *W. H. Arnold,* for appellee.

1. Carriers of passengers must be extremely careful not to mislead passengers into the belief that the halting of a train is meant as an invitation to alight; and if the conduct of the servants reasonably may produce that impression, and the pas-

senger so understand it and is injured, the carrier is liable. 83 Ark. 217; 78 Ind. 203; 3 A. & Eng. Rd. Cases, 436; Thompson on Negl. § 2881; 7 L. R. A. 323; 88 Ala. 538; 76 Ga. 770; 66 N. Y. 642; 44 Ark. 322; 96 S. W. 109, 653; 99 *Id.* 28.

2. It is not negligence *per se* for a passenger to leave a moving train. 46 Ark. 437; 37 *Id.* 526; 135 Mass. 21; 4 Ont. Rep. 201; 16 A. & E. Rd. Cases, 347. It is a question for the jury. 71 N. Y. 489; 79 Ark. 335; Hutch. on Carriers, (3 Ed.) § 1123; 82 Ark. 504; 67 *Id.* 531; 147 U. S. 571; 83 Ark. 22.

3. Veerdict not excessive. Kirby's Digest, § 6288; 4 Sutherland on Damages, § 1266; 1 Joyce on Damages, § 580; 102 Mo. 669; 22 Am. St. 800; 47 *Id.* 390; 57 Ark. 320; 60 Ark. 550; 76 *Id.* 184.

HILL, C. J. Mrs. Rush, wife of the plaintiff, who is appellee here, with her little daughter, six years old, took passage on a train of the appellant company at Arkadelphia, destined to Texarkana. She had never traveled on a railroad train before, and was exceedingly nervous and apprehensive during her journey. Before the train reached Texarkana, the ordinary notification in the coach was given, and Mrs. Rush was assured by the conductor and porter that they would help her off the train; but when the train was approaching the station the passengers left the car in which she was riding and went forward to debark from a forward car. Mrs. Rush evidently became nervous over this situation, and went forward with her child, and, finding the trap door to the vestibule open, and the train either stopped or running very slowly, descended upon the steps, evidently fearing that she was about to be carried beyond the station, and while there fell or was thrown by the movement of the train, and was instantly killed. This action was brought by her husband, and he recovered a verdict for $5,000, upon which judgment was entered, and the railroad company has appealed.

The case turns upon the correctness of the fourth and sixth instructions, which sum up the evidence upon which the plaintiff sought to recover, and which are as follows:

"4. If you find from the evidence that the train on which Mrs. Rush was a passenger was approaching Texarkana, her destination, the employees of the defendant announced the name of the station in the customary manner and opened the door

and raised the platform which formed and closed up the vestibule between the coach in which Mrs. Rush was a passenger and the coach next to it, and that thereupon the train slowed down, and that Mrs. Rush, believing that Texarkana had been reached and that the train was slowing down to stop at the station, left her seat and went to the door of the coach, and while the train was moving very slowly stepped down on the steps to be in readiness to step off when the train should fully stop, and that, instead of stopping fully, the train moved suddenly forward without notice or warning, in consequence of the negligent act of the employees of the defendant, and she was thereby thrown under the train and run over and killed, it would be for the jury to say, under all the facts and circumstances of the case shown in the evidence, whether the conduct of Mrs. Rush caused or contributed to her death. And, if you further believe that Mrs. Rush did, under the circumstances, what an ordinary prudent person would have done, then she was not guilty of contributory negligence, and plaintiff would be entitled to recover.

"6. If you find from the evidence that the deceased was a passenger on the defendant's road from Arkadelphia to Texarkana, and that when the train was approaching Texarkana the employees announced the name of the station in the customary manner, and that after passing the city limits the train came to a stop before it reached the depot, and the deceased went from her seat in the coach to the platform and steps of the car under such circumstances as would lead a reasonably prudent person to believe, and she did believe, that the train had stopped for passengers to Texarkana, and that she acted as a reasonably prudent person, and that in attempting to get off the train moved suddenly forward without sufficient time for her to alight, and that by reason thereof she was thrown from the steps of the car, then you will find for the plaintiff."

There was evidence to sustain the verdict based upon these instructions, and the question is, whether these instructions correctly state the law.

This court is fully committed to the doctrine that boarding or alighting from moving trains ordinarily presents the question of fact as to contributory negligence, to be determined by the

jury under the facts of each case, and that it is not necessarily negligence *per se* to do so. *Little Rock & F. S. Ry. Co.* v. *Atkins,* 46 Ark. 423; *St. Louis, I. M. & S. Ry. Co.* v. *Cantrell,* 37 Ark. 519; *St. Louis, I. M. & S. Ry. Co.* v. *Leamons,* 82 Ark. 504; *Ark. Cent. Rd. Co.* v. *Bennett,* 82 Ark. 393.

It was therefore proper to submit to the jury whether or not Mrs. Rush was guilty of contributory negligence in attempting to alight from a moving train, and in a proper case the finding of the jury upon that subject would be conclusive. But there is error in the 4th instruction in assuming that the railroad company was guilty of negligence in moving the train suddenly forward without warning before reaching the station. There was no invitation to the passengers to alight until the train had stopped. They were not justified in being upon the steps of the coach before the train had come to a stop. If Mrs. Rush went to the steps of the coach before the train stopped, and was standing upon the steps while it was still moving, and a sudden movement of the train was made, there can be no negligence of the company predicated upon this movement; for it can not be assumed by the train operatives that passengers would be in such a position on the steps of the cars that they would be thrown from the steps by any sudden movement of the train before it came to a stop at the station. If the train had come to a stop, and had not remained long enough for the passengers to debark, and she was about to be carried beyond the station, or the circumstances indicated that she would be carried beyond the station, then negligence might be predicated upon such movement. But this instruction is not based on that theory, but on the one that any sudden movement of the train before it reached the station which might dislodge a passenger on the steps is negligence. The company could move its trains as it saw proper, so long as such movements were not calculated to injure passengers who were in their proper places or in such places and positions as would naturally be expected of careful passengers, but it owed no duty to passengers who may have been riding upon the steps of the coaches while the train was running into a station, and before it reached the stopping place, unless they were seen there and their perilous positions discovered. If the fourth instruction had been like the sixth instruc-

tion, and only permitted a recovery upon the theory that the train had stopped, then the recovery should be sustained. But there was testimony of two witnesses upon this point, and one seemed to think that the train had stopped, and the other that it had not quite come to a stop; and evidently the fourth instruction was based upon the latter theory, and the sixth upon the other theory.

For error in giving the fourth instruction the cause is reversed and remanded.

TEXARKANA TELEPHONE COMPANY v. PEMBERTON.

Opinion delivered May 18, 1908.

1. MASTER AND SERVANT—DUTY AS TO APPLIANCES—ELECTRIC WIRES.—Electrical companies, in the maintenance of their wires, owe to their employees and others rightfully in vicinity of such wires the duty of exercising reasonable care, which varies with the circumstances of each case, and which in the case of wires carrying a dangerous current of electricity, requires the exercise of a high degree of care to keep them properly insulated and so suspended as not to endanger lives. (Page 333.)
2. SAME—NEGLIGENCE OF VICE PRINCIPAL.—A foreman under whom workmen are employed may be a fellow servant with the workmen when engaged in accomplishing with them the common task or object; but when discharging the duties toward the workmen which the law imposes on the principal he is a vice principal. (Page 333.)
3. SAME—NOTICE TO VICE PRINCIPAL.—Notice to a vice principal of a defective appliance is notice to the master. (Page 334.)
4. SAME—EFFECT OF PROMISE TO MAKE REPAIRS.—Where a master has promised to repair a defective appliance, the servant does not assume the risk of injury caused thereby within such 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 335.)
5. SAME—ASSUMED RISK.—Where plaintiff, a telephone lineman, was injured by his employer's line becoming crossed with an electric light wire, which he had the evening before assisted in tying down, a request that the jury be charged that if plaintiff "passed the point where the wire had been tied down the evening before, and saw, *or could have seen,* that said wire was still tied down, and

that no permanent change had been made, then he assumed the risk of said condition when he went to work at the point where he was injured" was properly modified by striking out the words italicized. (Page 335.)

6. DAMAGES—WHEN NOT EXCESSIVE.—A verdict for $6,600 for personal injuries is sustained by evidence that plaintiff lost an arm, had both feet permanently deformed and swollen, and experienced very great pain and suffering. (Page 336.)

7. JOINT TORT—EFFECT OF RELEASE OF ONE TORTFEASOR.—A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability. (Page 336.)

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

STATEMENT BY THE COURT.

This is a suit brought by Henry Pemberton to recover for personal injuries caused by reason of the negligence of the Texarkana Telephone Company in failing to repair certain dangerous wires within a reasonable time, as Pemberton was led to believe would be done.

About dark on the 19th day of November, 1906, the plaintiff and John Few, "trouble shooters" for the Texarkana Telephone Company, were sitting in the office of Roy Taylor, the wire chief of the company, after their day's work was done. Mrs. De Grazier called up the wire chief from her residence on Beech Street, and reported that there was a wire down in the street beyond her residence, crossed with an electric light wire. Burton, the line order foreman, had gone home, and, owing to the great damage that might result from a telephone wire being down in the street charged with 2,300 volts of electric light current, the wire chief asked the trouble shooters to go out and fix the wire temporarily, so that it would not be dangerous until it could be permanently repaired. Pemberton and Few went out to locate the trouble, and found that one of the wires of the Texarkana Telephone Company had "slacked" up against the electric light wire, and the electric light current was passing from its wire to the telephone wire, producing a bright light at the point of contact. Owing to the great danger of trying to cut down in the dark the telephone wire charged with this heavy current, they telephoned the wire chief the condition of the wire, and told him to bring a rope with which to temporarily tie down the wire.

The wire chief immediately carried them a rope. This was thrown over the wire and tied to a nearby fence until it could be fixed the next morning.

The plaintiff adduced testimony tending to show that it was not the duty of the "trouble shooters" to make repairs in the wiring of the telephone system, as they carried only pliers and a screw driver to be used in adjusting telephone instruments or making minor repairs, while the line order foreman had a wagon ladder, rope, wire and all apparatus necessary to make changes in or to repair the wiring. That all defects, either in the wiring or in the telephone, were reported to the wire chief. That he made out tickets showing as near as could be the location where the repairs were needed, and these were delivered to the employees whose duty it was to do that particular work. That the trouble men would go to the place designated on the ticket and make the necessary repairs. Then the wire chief was called, and they would not leave the place until their work was O.K.d by him over the wire. That the next morning, after the wire was tied down as above stated, the wire chief had a great deal of testing to do, and that Pemberton and Few did not get their trouble tickets showing where they should go to work until 9 o'clock, and as soon as the wire chief delivered his tickets to him Pemberton went to his duties as designated by the tickets. That his duty required him to climb a pole to put up his receiver to call up the DeGrazier line, and his left arm got up against a charged wire. That the current went through his body. That he was so badly burned that one arm had to be amputated; and that his feet are permanently injured. That the accident occurred about 11 o'clock in the morning. That he was standing on the messenger wire which was grounded. That this was the customary way of doing that particular kind of work, and that he probably would not have been shocked if he had not been standing on it. The accident occurred by reason of the rope, which had been used to tie the telephone wire the evening before, having become slacked, so that the telephone wire again had come in contact with the electric light wire.

The defendant adduced testimony tending to show that Pemberton had passed the place where the wires were in con-

tact on the morning of the accident, but this he denies, and also said that he thought the lines had been fixed as it was the custom to repair them at once when the lines were crossed with the electric light wires on account of the extreme danger caused by the heavy current.

There was a verdict for the plaintiff in the sum of $7,000. The court on its own motion reduced the verdict and judgment to $6,600, and defendant has appealed.

R. W. Rogers and *Webber & Webber,* for appellant.

1. The wire chief was not a vice-principal, and no promise of his bound the company.

2. The plaintiff was guilty of contributory negligence, and can not recover. 1 Labatt on Master and Servant, § 332; 77 Tex. 44; 51 Ark. 476; 76 *Id.* 436, 10; 82 Ark. 334. The wire chief was a fellow servant. 58 Ark. 71; 58 *Id.* 213; 58 *Id.* 226. The burden was on plaintiff to show that a negligent servant is not his fellow-servant. 2 Labatt, Master & Servant, § 512; 63 Ark. 477. Who are fellow-servants is a question of law where the facts are undisputed. 2 Labatt, Master & Servant, pp. 1352-1424; 77 Ark. 290.

2. The wire chief was "a mere foreman." 77 Ark. 290; 82 Ark. 334; 63 Ark. 477.

3. A servant having an opportunity to know of a risk assumes it. 1 Labatt, Master & Servant, § 401; 47 N. E. 117; 41 Ark. 549; 58 *Id.* 125.

6. No evidence to support verdict, and it is excessive.

W. H. Arnold and *G. G. Pope,* for appellee.

1. The wire chief was a vice-principal, and not a fellow-servant. 82 N. E. 202; 67 Ark. 213; 67 Atl. 1014; 82 Ark. 499; 58 *Id.* 168; 82 *Id.* 334; 104 S. W. 535.

2. Doctrine or rule of assumed risk and contributory negligence does not apply, and is not shown in this case. 154 U. S. 190; 81 S. W. 487; 50 *Id.* 601; 95 *Id.* 277.

3. A verdict can not be directed for defendant except when the proof is insufficient to support a verdict after the plaintiff's testimony is given its strongest probative force in plaintiff's cause of action. 76 Ark. 520.

4. The evidence fully justifies the verdict.

R. W. Rodgers and *Webber & Webber,* on motion to reverse and dismiss.

Plaintiff's settlement with the other company releases appellant from all liability. 3 Allen 474; 83 N. W. 1091; 83 Am. Dec. 154; 24 Am. Rep. 504; 93 N. W. 243; 58 L. R. A. 293; 17 Atl. 338; 15 Am. Dec. 534; 45 Ark. 290; 70 *Id.* 197; 1 Cyc. 329; 36 Am. Rep. 830; Cooley on Torts, 138; 73 Ark. 14.

W. H. Arnold and *G. G. Pope* in reply, on motion to dismiss.

No release has ever been executed, only a covenant not to sue the gas company. 83 S. W. 258; *Ib.* 1098; 70 Ark. 197; 45 *Id.* 290.

HART, J., (after stating the facts.) The defendant bases its objection to the first instruction given by the court, and to the refusal of the court to give the instructions asked by it, upon the ground that the record discloses no evidence to sustain the position assumed by plaintiff that the wire chief stood in the relation of vice-principal to the defendant. "Electrical companies, in the maintenance of their wires, owe to their employees, as well as to others who may of right, either for pleasure or work, be in the vicinity of such wires, the duty of exercising reasonable care, that is, such care as a reasonably prudent man would exercise under the same circumstances. We have already stated that reasonable care or ordinary care is a degree of care varying with the circumstances of each case, and which, in the case of electrical wires carrying a dangerous current of electricity, requires the exercise of a high degree of care to keep them properly insulated and so suspended as not to endanger lives. And this is the measure of an electrical company's duty to its employees. And it owes the duty not only of properly insulating its wires, but also of exercising reasonable care in their suspension, to prevent contact with other wires. 2 Joyce on Electric Law, § 663.

Corporations can only act through their agents. Therefore it devolved upon the company to have some one to perform its duties to its employees. Its system of conducting its business required all defects, either in the wires or the telephones, to be reported to the wire chief. All the troubles arising from the

telephone service were reported to him. His duty was to make tickets of these troubles and give them to the respective employees whose duty it was to make the necessary repairs. He was the directing agent, and the line foreman and the trouble men were under him. It was part of the system of work that they should only make repairs under the direction of the wire chief.

There must be some one acting for the master, else the business would soon be involved in hopeless confusion. The employees would work at cross purposes, and might daily be subjected to the hidden but very dangerous force of heavy electrical currents. In the present case it can not be denied that it was the duty of the master to use reasonable diligence in repairing the dangerous contact between the telephone and electric wires, and that the injury resulted because the repairs were not made.

It is evident from the testimony as shown in the record that the rules and regulations of the company required that the trouble men should work under the directions of the wire chief. We are of the opinion that this made him a vice-principal.

"It has been decided that a foreman under whom workmen are employed is a fellow servant with the workmen, when engaged in accomplishing with them the common task or object; but when discharging or assuming to discharge the duties towards the workmen which the law imposes on the principal he is a vice-principal." 2 Joyce on Electric Law, § 655.

The doctrine was recognized by this court in the case of *Western Coal & Mining Company* v. *Buchanan,* 82 Ark. 502, in which the court said: "The duty of inspecting a mine for gas is always a principal's duty, and its delegation to a servant does not make that servant a fellow servant of his co-workers; but he becomes, while in the performance of such duties of inspection, a vice-principal."

Notice to the wire chief (he being a vice-principal) of the dangerous condition of the wires was notice to the company. The line foreman whose duty it was to fix the wire left the office of the company on the morning of the accident before Pemberton left. The undisputed evidence shows that it would take the line foreman only a few minutes to cut the wire and relieve the contact. Whether or not Pemberton had reasonable grounds to

believe that the repairs would be made before the time of the accident was a question for the jury.

The following from Shearman & Redfield on Negligence is quoted as the correct rule in the case of *Western Coal & Mining Company* v. *Burns*, 84 Ark. 79: "Where a master has promised to repair a defective appliance, the employee does not assume the risk of 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."

In the case of *Archer-Foster Construction Company* v. *Vaughn*, 79 Ark. 20, it was held that a master is liable for the negligence of a vice-principal in failing to provide a servant a safe place to work, though such vice-principal was also guilty of concurring negligence as a fellow servant.

It is also contended that Pemberton was guilty of contributory negligence because he stood on the messenger wire which was grounded, but the uncontradicted evidence shows that this was the custom, and there was no danger in standing on it if it had not been for the contact with the electric light wire.

Appellant asked the court to give the following instruction:

"No. 8. You are instructed that if you believe from the evidence in this case that the plaintiff on the morning of his injury passed the point where the wire had been tied down the evening before, and saw, or could have seen, that said wire was still tied down, and that no permanent change had been made, then he assumed the risk of said condition when he went to work at the point where he was injured, and your verdict should be for the defendant."

The court gave it with the words "or could have seen" eliminated. It is now claimed that the court erred in not giving the instruction as asked by appellant, but this would have been practically telling the jury that it was the duty of appellee to have examined the condition of the rope and wire the next morning, regardless of whether a prudent person would have done so.

The other instructions asked by the appellant, and upon which its counsel predicates error, were on the fellow servant doctrine, which has already been discussed.

The amount of the verdict is sustained by the evidence. Plaintiff lost his arm. Both feet are deformed and swollen, and the jury had sufficient testimony upon which to find that the injury to his feet was permanent. Besides, his pain and suffering must have been very great.

Appellant filed a motion to reverse and dismiss this case, and for grounds states that, since the trial in the lower court and during the pendency of this appeal, plaintiff has compromised his claim against the Texarkana Gas & Electric Company, and executed to it a release or a covenant not to sue for the sum of $500. To this motion plaintiff filed a response in which he denied that he had released said company from liability, but admitted that he did enter into an agreement with it not to institute any suit against it on account of the injury which is the basis of this suit. He exhibits the agreement with his response. An examination of it shows that it is a covenant not to sue. Conceding but not deciding that the question may be raised for the first time in this court, we are of the opinion that the motion should not be granted for the reasons here given. In the cases of *Hadley* v. *Bryan,* 70 Ark. 197, and of *Pettigrew Machine Co.* v. *Harmon,* 45 Ark. 290, it was held that a covenant not to sue does not amount to a release. These were cases arising out of suits on contracts, but the same distinction is applied to joint tortfeasors. A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability. 1 Jaggard on Torts, p. 345.

Affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* NELSON.

Opinion delivered May 25, 1908.

TELEGRAPH COMPANY—SUFFICIENCY OF NOTICE OF CLAIM.—Under a stipulation that a telegraph company "will not be liable for damages or statutory penalties in any case where the claim is not presented within sixty days after the message is filed with the company for transmission," a notice which limited the amount claimed to compensation "sustained in actual money" will not permit of a recovery of damages for mental anguish.

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The letter mentions mental worry, but there is no claim for damages on that account. This case is controlled by *Telegraph Company* v. *Moxley,* 80 Ark. 554.

The items of cash expended were properly disallowed. 53 Ark. 434.

2. This State having proclaimed a quarantine against the State of Louisiana of which appellant had knowledge, his telegram was an invitation to the commission of a criminal act, and he is not entitled to recover damages. 11 Fed. 193; 75 Ga. 366; 83 Ga. 25; 47 Atl. 926; 118 Mich. 369; 72 Miss. 1025; 45 S. C. 344; 39 S. W. 599.

J. T. Cowling, for appellee.

1. The Moxley case, 80 Ark. 554, ought not to conclude this case because the facts are different. He made no attempt to present a claim for damages. Here the claim both for mental anguish and actual damages is fairly presented in the letter, when the whole of it is construed together.

2. Reference to the Governor's proclamation will show that obedience to instructions contained in the telegram would not have conflicted with the proclamation and executive order, and would have violated no law.

McCULLOCH, J. During the yellow fever epidemic of 1905 the plaintiff sent a telegraphic message from Foreman, Arkansas, to his wife at Montgomery, Louisiana, requesting her to procure a health certificate and come at once to Washington, Arkansas. The message was not delivered, and he sued the telegraph company for damages by reason of the alleged negligence. He claims certain expenses incurred in going to his wife and mental anguish suffered by reason of his wife being detained in the infected district until the quarantine regulations of this State prevented her from coming here.

The blank upon which the message was written contained the usual stipulation, that "the company will not be liable for damages or statutory penalties in any case where the claim is not

presented within sixty days after the message is filed with the company for transmission."

The only claim presented by plaintiff to the company within the time specified was contained in a letter addressed to the superintendent of the company which, after reciting the circumstances, is as follows:

"I have consulted three law firms; each one says I have a good cause against your company, and I simply write this letter as means of avoiding a law suit. I have never been in court except as a spectator; am thirty-seven years of age, and have been an itinerant Methodist preacher thirteen years. All in the world I want is loss I have sustained in actual money. My family just got home, and had to stay in detention camp eight days with guard, and I paid all expenses. I write you this letter for a twofold purpose: to notify you I have sustained at least $75.00, beside all mental worry and inconvenience both to myself, my wife and two children; and also to comply with requirements on back of telegraph slips. I do not care to go into court, and my lawyers have not authorized me to write this letter, but have stated to me that I have a good case against your company for damages."

The court, by peremptory instruction, refused to allow a recovery for amount of money alleged to have been expended by plaintiff, and the jury returned a verdict in favor of plaintiff for the sum of $250 damages for mental anguish.

The claim presented to the company was not sufficient, under the contract, to cover the element of damages for mental anguish. *Western Union Tel. Co.* v. *Moxley,* 80 Ark. 554. The writer did not agree to the conclusion reached by a majority of the judges in the case cited above, but it is settled now as the law and must be adhered to. The law there announced is undoubtedly decisive of the present case. In the opinion Mr. Justice RIDDICK stated clearly that mere notice given to the company of the negligence of its employees, with the circumstances thereof, is not sufficient compliance with the stipulation of the contract, and that there can be no recovery of damages not claimed in the notice. The plaintiff in his notice to the company expressly limited the amount claimed to compensation for

loss "sustained in actual money." His right to recover must therefore be limited to that element of damages.

Reversed and remanded for new trial.

JAMES v. WESTERN UNION TELEGRAPH COMPANY.

Opinion delivered May 25, 1908.

TELEGRAPH COMPANY—NEGLIGENCE IN TRANSMITTING MESSAGE—DAMAGES.—Where a telegraph company, in transmitting a message in which brokers were instructed to buy July cotton, by mistake made it read to buy January cotton, and the sender, when he discovered the mistake and that the brokers had purchased January cotton, instead of July, elected to stand on the contract as made and sold the January cotton at a profit, he was not entitled to damages from the telegraph company, as his claim of damages is too remote and speculative to warrant a recovery.

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

R. G. Harper and *Thornton & Thornton,* for appellant.

There is no evidence on which to base the first instruction given at request of appellee, and the court erred in giving it. 70 Ark. 441; 74 Ark. 19.

Gaughan & Sifford, for appellee.

1. There was evidence on which to base the first instruction, and it was correct. 56 Ark. 300.

2. The claim of damages is too remote and uncertain. 58 Ark. 29.

HART, J. On December 3, 1903, appellant, W. H. James, delivered to the agent of appellee, the Western Union Telegraph Company, at El Dorado, Arkansas, a telegram as follows, towit:

"EL DORADO, ARK., Dec 3, 1903.

"H. & B. Beer,
"N. O., La.
"Buy two July.
"W. H. James."

Meaning thereby to instruct them to buy for him two hundred bales of cotton on the New Orleans Cotton Exchange, for what is called July delivery.

Through an error of some agent of appellee, the message when delivered read: "Buy two January."

On the same day, upon receipt of the message, H. & B. Beer bought for appellant, on the authority of the telegram, (on the New Orleans Cotton Exchange) 200 bales of Januarys at 12.54 cents. Under the rules of the New Orleans Cotton Exchange this meant the purchase of 200 bales of futures, and contemplated the delivery of the cotton in January, if delivery was demanded.

On December 29, 1903, by direction of appellant, the contract for the purchase of the 200 bales aforesaid was closed by a sale of 200 bales of January cotton at 13.82 cents. This gave appellant a profit of between $1,300 and $1,400.

When appellant sent the telegram complained of, he had no intention to sell or close out on December 29, 1903. At the time appellant delivered the telegram for transmission, he had no date fixed in his mind on which he would close out, nor did he then give any directions to H. & B. Beer for closing out the purchase. After the 3d day of December, 1903, and before the date on which appellant would have been compelled to settle, had he bought July cotton, the market fluctuated considerably, so much so that on February 1, 1904, July cotton went to 18.14 cents and on July 5, 1904, to 10.20 cents.

Appellant brought suit for damages against appellee for failure to transmit the message as delivered to it by appellant. There was a verdict and judgment for appellee. The case is here on appeal.

Appellant contends that instruction No. 1 given at the instance of appellee is abstract, and asks for a reversal on that account. Conceding this to be true, appellant can not complain of an error that was not prejudicial to him. *Kelly* v. *Keith,* 77 Ark. 31.

Under the undisputed facts as set out in the record, there is no theory of the case upon which appellant is entitled to recover. The case is ruled by that of *Western Union Telegraph Co.* v. *Fellner,* 58 Ark. 29. In that case the court held:

"Failure of a telegraph company to deliver a message, whereby a purchase of property in the market was not consummated, will not entitle the sender to recover more than nominal damages, though the property advanced in value before the de-

lay was discovered, if no purchase was subsequently made, and there is no evidence that, if it had been made, the property so purchased would have been sold at a profit."

The case at bar is precisely the same except that, instead of a failure to send the message at all, a mistake was made in its transmission, which caused appellant's brokers to buy January cotton; but this does not alter the principle involved, for the decision in the Fellner case proceeds upon the theory that the damages are too remote, speculative and contingent to warrant a recovery.

Appellant, when he discovered that a mistake had been made in the transmission, and that H. & B. Beer had purchased for him 200 bales of cotton for January instead of July delivery, elected to stand upon the contract as made. On the 29th day of December, 1903, he closed out the transaction by directing a sale of the 200 bales of January cotton, and thereby made a profit of over $1,300. Hence he is not even entitled to nominal damages.

Judgment affirmed.

REEDER v. STATE.

Opinion delivered May 25, 1908.

1. LARCENY—GENERAL AND SPECIAL ALLEGATIONS OF QUANTITY.—Where an indictment for grand larceny alleges generally that accused stole 600 pounds of seed cotton of the value of $15, and alleges specifically that of the cotton stolen 200 pounds belonged to one, 140 pounds to another, etc., aggregating 610 pounds, the general allegation as to quantity is controlled by the special allegations, and the effect is to charge the taking of 610 pounds of cotton, of the value of $15. (Page 342.)
2. SAME—TAKING OF SEVERAL THINGS—SINGLE VALUE.—Where, in a single count of an indictment, several things are alleged to have been taken, and a single value is stated for all the goods, a conviction will be sustained if the taking of all the goods is proved. (Page 343.)
3. SAME—INSTRUCTION AS TO UNEXPLAINED POSSESSION.—It was error in a larceny case to instruct the jury that unexplained possession by the defendant of the property recently stolen is sufficient to warrant a conviction. (Page 343.)

Appeal from Clark Circuit Court; *Jacob M. Carter, Judge;* reversed.

John E. Bradley, for appellants.

1. The indictment is bad for duplicity. The value of each separate parcel of cotton should have been alleged.

2. The *corpus delicti* was not proved. 1 Hagg. Cons. Rep. 105.

3. No confession of guilt was shown. 53 Iowa, 69; 71 Conn. 293; 41 Atl. 820; 30 Tex. App. 498; 61 S. W. 16; 40 Ala. 54; 54 *Id.* 28.

4. Unexplained posession of property recently stolen is not sufficient to warrant a conviction. 83 Ark. 192.

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

Confesses error in this: It was error to instruct the jury that "possession of property recently stolen, unxeplained is sufficient to warrant conviction." 83 Ark. 192; 85 Ark. 138.

McCULLOCH, J. Appellant was convicted of the crime of grand larceny under an indictment containing two counts. The first count charges him with having stolen 600 pounds of seed cotton, of the value of $15, the property of J. M. Brown. The second count charges that at the same time and place he "did unlawfully and feloniously take, steal and carry away six hundred pounds of seed cotton of the value of $15, from the possession of J. M. Brown, 200 pounds of which was the property of John Morehead, 100 pounds the property of A. B. Cash, 140 pounds of which was the property of Jack Young, 50 pounds of which was the property of T. C. Pennington, 40 pounds of which was the property of John Cook, 40 pounds of which was the property of Coley McDaniel, 40 pounds of which was the property of Elias Cash, this being the same offense charged in the first count."

Appellant demurred to each count of the indictment, which was overruled, and error is assigned in said rulings.

No contention is made here as to the first count, but it is urged that the second is bad because the several amounts of cotton in which Brown is alleged to have had special ownership, when added together, make in the aggregate 610 pounds,

whereas the general allegation is that 600 pounds were stolen, and that there is repugnancy between the general and the special allegations. There might be something in this contention if the amount set forth in the general allegation exceeded the aggregate amounts set forth in the special allegation; but, as the latter exceeded the former, and as the allegation of value refers to the lesser quantity, the general allegation as to quantity is controlled by the special allegations, and the effect is to charge the taking of 610 pounds of cotton of the value of fifteen dollars.

It is also contended that this count of the indictment is defective because it fails to set forth the separate value of each lot of cotton taken. The rule which seems to be sustained by the adjudged cases is stated as follows: "Where in a single count several things are alleged to have been taken, the value of each article should properly be stated separately. If a single value has been stated for all the goods, a conviction is possible only if the taking of all the goods is proved, since, if the jury finds a part only of the goods taken, there is no value of such goods alleged. The indictment is, however, not invalid, and if the jury finds that all the goods named were stolen, a conviction will be sustained." 25 Cyc. p. 86.

The Attorney General confesses error of the trial court in giving an instruction telling the jury that unexplained possession by the defendant of the cotton recently stolen was sufficient to warrant a conviction.

The confession is well taken. The instruction was one on the weight of the evidence and was erroneous. *Duckworth* v. *State,* 83 Ark. 192; *Thomas* v. *State,* 85 Ark. 138.

Reversed and remanded for a new trial.

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

Opinion delivered June 1, 1908.

CONSTITUTIONAL LAW—REPEAL OF PRIOR STATUTE.—Under the rule that an unconstitutional act which in general terms repeals all acts in conflict with it will not be held to repeal a prior valid act in conflict with it, *held* that if act No. 160 of 1903, regulating the conveniences

for passengers at railway stations, be unconstitutional in exempting certain counties from its operation, the prior act, No. 91 of 1899, of which the latter act was a copy except as to the exemption, was left in force.

Error to Faulkner Circuit Court; *Eugene Lankford,* Judge; affirmed.

STATEMENT BY THE COURT.

The deputy prosecuting attorney of Faulkner County filed information against the St. Louis, Iron Mountain & Southern Railway Company, charging it with violation of the statute requiring it to keep its waiting room supplied with wholesome drinking water.

The railway company demurred to the information. This was overruled by the court, and the railway company filed a plea to the information as follows:

"Comes the defendant, and for its plea to the information herein says:

"1. It is not guilty.

"2. The act of April 23, 1903, under which the information is brought, is unconstitutional because it is a special act and not passed in accordance with requirements of section 25, article 5, of the Constitution of the State of Arkansas.

"3. The said act is unconstitutional in that it denies to it the equal protection of the laws, and that it withholds from it certain immunities which it grants to other persons of the same class.

"4. The said act is a special act, inhibited by the Constitution of this State.

"5. That said act is unconstitutional, being in conflict with section 18, article 2, of the Constitution of Arkansas."

The undisputed testimony shows that there was no water provided in the waiting rooms of the depot at Conway in Faulkner County for several days at the time specified in the information. The jury returned a verdict of guilty, and assessed a fine of one hundred dollars. The case is here on writ of error.

Lovick P. Miles, for appellant.

The act is void because it is provided therein that it shall not apply to certain counties in the State. 165 U. S. 154; 146

U. S. 39; 185 U. S. 325; 49 Ark. 335; *Id.* 293; *Id.* 167; 75 Ark. 542.

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

The act is constitutional. 84 Ark. 470.

HART, J., (after stating the facts). The railway company contends that the information was filed under the act of April 23, 1903, and that, as the act exempts the counties of Benton, Washington and Crawford from its provisions, it is unconstitutional for the reasons enumerated in its plea. The act of April 23, 1903, is almost an exact copy of the act of March 31, 1899, with the exception of the clause exempting the counties above mentioned. The act of April 23, 1903, does not in express terms repeal the act of March 31, 1899, but only repeals all acts or parts of acts in conflict with it.

The general rule on that subject is as follows:

"Where there is, by a general clause, a repeal of all acts and parts of acts inconsistent with the statute, and it is apparent that the repealing statute is to be substituted for the one repealed, the unconstitutional character of the repealing statute will also render void the repealing clause. And on the same principle a prior statute will not be impliedly repealed by inconsistency with a subsequent unconstitutional one." 26 Am. & Eng. Enc. of Law, 717.

In the case of *Union Saw Mill Co.* v. *Felsenthal,* 85 Ark. 346, it is expressly held that an unconstitutional statute which in general terms repeals all acts in conflict with it will not be held to repeal a prior valid act in conflict with it. Hence, conceding, without deciding the question, that the act under consideration is unconstitutional, it leaves in force a valid act on the same subject.

Judgment affirmed.

BEASLEY v. GRAVETTE.

Opinion delivered May 18, 1908.

PUBLIC DITCH—EXPENDITURE OF MONEY BEYOND COUNTY.—A drainage district, created in one county for the purpose of draining lands therein, may lawfully expend money in an adjoining county to carry the proposed ditch to its most feasible outlet.

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

W. A. Beasley and Eli Dixon sued W. B. Gravette individually and as treasurer of Poinsett County, and the Canal Construction Company, an Illinois corporation, and J. A. Bradsher, sheriff of Poinsett County, alleging

COMPLAINT.

"That petitioner, W. A. Beasley, is the owner of the following lands, situate in the county of Poinsett and State of Arkansas, to-wit: the southeast quarter of southeast quarter of section 16, township 10 north, range 7 east. That on the 23d day of July, 1906, a petition was filed in the county court of said county, praying for the establishment of a public ditch, for the purpose of draining the lands described above and other lands adjacent thereto. That upon due consideration of said petition the prayer thereof was granted, and the court appointed three viewers and a civil engineer for the purpose of locating said public ditch. That, after the filing and approval of the preliminary report of said viewers, they were ordered and directed to make and prepare a final report, as provided by law. That said viewers recommended and the court established the public ditch on the route indicated by red lines on the maps herewith filed as "Exhibit A" to this complaint, after which the court ordered and directed the said engineer to proceed to let the contract for the construction of said ditch on the route indicated by said red lines, and accordingly the said civil engineer did, on the 28th day of December, 1907, at the Bank of Marked Tree, in the town of Marked Tree, in the county of Poinsett, State of Arkansas, offer to let the contract for the construction of said ditch at public auction, when defendant Canal Construction Company became a bidder and bid thereon 11.40

cents per cubic yard, and, that being the lowest possible bid, said contract for the construction of said ditch was struck off and sold to said defendant, which contract was by the county court of said county, at the January, 1908, term, approved and confirmed by said court. That, after the approval of said contract, the court ordered and directed that bonds be issued, based upon the assessment in said district, bearing interest at the rate of six per cent. per annum, and directed defendant W. B. Gravette, as treasurer of said county, to proceed to sell said bonds, the proceeds of which are to be applied to the construction of said ditch, and in the payment of said contractor. That for the purpose of constructing said ditch the land described above and owned by the plaintiff was and is assessed at the enormous sum of $5 per acre, which assessment bears interest at the rate of six per cent. per annum for a period of thirty years. That by reference to said map it will be seen that about three and one-half miles of said ditch is located in Crittenden County, and will represent more than one-half of the cost of the construction of the entire ditch, but none of the lands located in Crittenden County are embraced in said district, or assessed for the location and construction of said ditch, but the entire costs of the location and construction of said ditch is levied against lands lying wholly within the limits of Poinsett County.

"Plaintiffs would further show to the Honorable Court that plaintiff Eli Dixon is the owner of the following described tract of land, situate in Crittenden County, Arkansas, to-wit: east one-half of southeast one-quarter of section 15, township 9 north, range 7 east, which lies adjacent to and immediately west of the line of said proposed ditch, and also other lands; and if said ditch is constructed on the route indicated by the map filed herewith as "Exhibit A," it will result in the overflow of said lands with the waters of Dead Timber Lake, and will render the same utterly worthless for any purpose whatever. That defendant W. B. Gravette has advertised said bonds for sale, and, unless restrained by this Honorable Court, he will, within a few days, sell the same, and thus fasten upon the lands of plaintiff W. A. Beasley a first lien for the payment of said assessment of $5 per acre and interest, the major portion of which will be expended in the construction of said ditch in Crittenden

County, no part of which is embraced in said drainage district. That immediately after the sale of said bonds the defendant Canal Construction Company will proceed with the construction of said ditch, unless restrained by this Honorable Court, and when said ditch is constructed it will result in the overflow of lands of plaintiff Eli Dixon in Crittenden County, as herein alleged.

"That the defendant J. A. Bradsher is the sheriff and collector of said Poinsett County, and the interest on said assessment having been extended on the tax books by the county clerk, the same is now in his hands for collection, and, unless restrained by this Honorable Court, he will proceed to have said lands sold to satisfy the same, which will result in great embarrassment and irreparable injury to the plaintiff W. A. Beasley.

"Wherefore the plaintiffs pray that the sale of said bonds and the construction of said ditch be perpetually enjoined, and that said assessment be canceled and annulled as a cloud on the plaintiff W. A. Beasley's title, and grant the plaintiffs general relief."

ANSWER.

Omitting the caption and style of the case, the following is a copy of the answer:

"Comes W. B. Gravette, individually and as treasurer of Poinsett County, Arkansas, and Canal Construction Company, a corporation of Chicago, and for their joint answer to the complaint filed in this cause, respectfully state to this Honorable Court: That they admit that petitioner, W. A. Beasley, is the owner of the tract of land set forth in said complaint; and that they admit that on the 23d day of July, 1906, a petition for a certain ditch, involved in this controversy, was filed in the county court of Poinsett County, as alleged; and that they admit that the organization of Drainage District Number Six, which was organized for the purpose of constructing the ditch involved in this controversy, was regularly formed, and that the proceedings in the county court of Poinsett County, Arkansas, were in all things regular, as admitted by implication in the complaint of plaintiffs; and that they further admit that defendant W. B. Gravette, as treasurer of Poinsett County, has been ordered to

sell bonds, as alleged in the complaint, and that plaintiff W. A. Beasley has been assessed the sum alleged upon his lands in Poinsett County; and that they further admit that plaintiff Eli Dixon is the owner of the lands described in complaint, situated in Crittenden County, Arkansas; and that they further admit that the map filed with the complaint and marked "Exhibit A" is a map of the said District Number Six, and that thereon is shown the proposed route of the ditch involved in this controversy; but defendants deny:

"First—That the assessment of $5 per acre upon the lands of said W. A. Beasley was excessive, and deny that he at any stage of the formation of this district, by answer or otherwise, indicated that he objected to this or to any other assessment made upon said lands.

"Second—Defendants deny that the lands of said Dixon in Crittenden County, Arkansas, will be in any way damaged by the construction of the proposed ditch, and file herewith and make a part of this answer a profile of said ditch, marked "Exhibit A," and ask that the same be made a part hereof, and respectfully ask the court to examine this profile, reading from left to right, and that this instrument, upon its face, shows that the high water mark of the part of the country involved in this question is below the surface of the lands involved in Crittenden County after the ditch leaves Dead Timber Lake, and that if the ditch is constructed, as shown by the said profile, it will be a matter of practical impossibility to overflow any lands in Crittenden County adjacent to the proposed ditch; and the plaintiffs state further that no assessment was made, or attempted to be made, on the lands in Crittenden County, for the reason that the lands in Crittenden County through which the proposed ditch is now located are high lands, and that, if an attempt had been made to assess these high lands, it would undoubtedly have been rejected by any court, and that hence the viewers did not make an attempt to assess the lands in Crittenden County, and for further answer these defendants state that the above facts were so well known that no other land owners in Crittenden County objected in any manner whatever to the construction of this ditch on the proposed route, other than they should receive proper payment for the lands used as a right-of-way.

"Defendants further represent to the court that Big Creek, into which the proposed ditch will empty, is a tributary of the Tyronza River, and that Dead Timber Lake flows into Tyronza River, and that this matter under consideration is simply a proposition to unite two of the tributaries of the Tyronza River in such a way as to hasten the exit of the water from the lands constituting Drainage District Number Six, a large part of which consists of lands now in cultivation, but that their cultivation has been attended with such great difficulty on account of the presence of water in the spring of each year, that the owners of the lands embraced in Drainage District Number Six united in the formation of that drainage district with a view of their mutual benefit.

"The special attention of the court is called to the map of Poinsett and Crittenden counties filed herewith and made a part hereof, and marked "Exhibit B," which clearly shows that the Dead Timber Lake and Big Creek both empty into Tyronza River, and that the proposed ditch is simply an attempt to shorten the route and hasten the flow of the waters that must finally find exit from both counties through the Tyronza River.

"Wherefore, these defendants pray Your Honor that the prayer of the complainants in this cause be denied, and that the defendants herein be dismissed with their reasonable costs."

STIPULATION.

"It is agreed and stipulated in this case:

"First—That the construction of the ditch on the route indicated on the map filed as 'Exhibit A,' to the complaint will cost less and be of more practical value and produce better results than any other route that could have been selected; in fact, it is the only route that would give relief to the land owners whose lands are assessed.

"Second—That it will be of no benefit to the land owners in Crittenden County, but it will result in flooding and overflowing the lands of Eli Dixon, and inflicting upon him great injury.

"Third—The major part of the costs of constructing said ditch will arise from the construction of the ditch in Crittenden County.

"Fourth—The right-of-way for the construction of the ditch in Crittenden County has been given by the land owners.

"Fifth—Exhibits filed herewith are admitted to be correct."

The chancellor heard the case upon the complaint, answer and stipulation of counsel, and dismissed the complaint for want of equity.

J. T. Coston, for appellants.

1. The county court could not assess lands in Poinsett County to construct a ditch in Crittenden County. Kirby's Digest, § § 1438, 1442-3; 26 N. E. 193; 67 Ill. 559.

2. Surface water can not be lawfully discharged through an artificial channel directly upon the land of another greatly to his injury. 25 Wis. 225; 55 N. W. 408.

R. L. Cowan, for appellee.

1. Beasley is estopped by his own acts. He has had his day in court. Kirby's Digest, § 1428.

2. Court had jurisdiction. Kirby's Digest, § § 1415, 1438-9, 1440; 105 N. W. 19. Courts of one county where a petition for a drain is filed, etc., have jurisdiction of lands affected in another. 97 Ind. 23; *Ib.* 389; *Ib.* 605; 100 *Ib.* 380; 107 *Ib.* 181; 6 N. E. 353.

HILL, C. J. The case was tried on the complaint, answer and stipulation of counsel, which will be found in the Reporter's statement. It will be seen that the county court of Poinsett County, proceeding under sections 1414, Kirby's Digest *et seq.,* created a drainage district for the construction of a ditch, the object of which was to drain certain lands in Poinsett County. The most feasible route to construct said ditch was to carry it into Crittenden County, where it found its outlet. The proceeding was under the act of 1903, before its amendment by the act of 1907, which act is found in Kirby's Digest, § § 1414 to 1450. Section 1438 provides for proceeding where a ditch is to be located in more than one county. This section requires that the applications be made to the county court of each county by petitions filed by those liable to be benefited. It is only those whose lands are liable to be benefited who can put in motion the machinery to establish a dual drainage district. Under the agreed statement of facts here, it appears that there were no

lands to be benefited in Crittenden County, and therefore it was impossible to proceed by the joint action of the two county courts, as provided in section 1438 *et seq.* See *Albert* v. *Gilbert,* 105 N. W. 19.

The question, therefore, narrows to whether, the district being created by the court of Poinsett County under § § 1414 to 1417, it can lawfully spend its money in Crittenden County to carry the ditch through it to its most feasible outlet? In Indiana there is a statute which authorizes the formation of drainage districts in either county where the proposed ditch runs through several counties, and the court treats the ditch as an entirety, and holds that it is competent to give either county jurisdiction of the proceeding, and that the appraisers appointed in one county may act in the other county. *Shaw* v. *State,* 97 Ind. 23; *Crist* v. *State,* 97 Ind. 389; *Buchanan* v. *Rader,* 97 Ind. 605; *Updegraff* v. *Palmer,* 107 Ind. 181.

The value of these cases, as there is no similar statute here, is in treating the ditch as an entirety, and that it may be subjected as an entirety to the jurisdiction of one county, although it extends into several. It may be questioned whether the viewers, under the act in question, could condemn the right of way and assess damages, as prescribed in section 1421 of Kirby's Digest, in another county without statutory authority therefor. But that is not an issue here, for the facts are that the right of way was acquired in Crittenden County without condemnation proceedings.

The question is simply, whether a part of a ditch can be lawfully constructed by a drainage district out of the county which created the district, where such district could not be formed or proceed under section 1438, and such extraterritorial ditch does not benefit the other county, but is a mere outlet for the proper drainage of the lands benefited in the county where the district is created.

The court can see no constitutional or statutory objection thereto. The question is not one of diverting taxes from one county and expending them for the benefit of another county, such as *Hundley* v. *Comm'rs,* 67 Ill. 559. (*Rector* v. *Board of Improvement,* 50 Ark. 116, proceeds on similar principles.) Nor one of proper apportionment of taxes, as was *Crooks* v.

State, 26 N. E. 193. It is merely a question of carrying a ditch without the jurisdiction of the county which created it in order to obtain the most feasible drainage of the lands benefited. All the benefit of the ditch is to the lands in Poinsett County. It was to the advantage of the landowners of the district to have selected the most practical route to carry off the surplus water, and no good reason can be seen to compel the ditch to be dug on a more tortuous, difficult and expensive route in order to remain in Poinsett County throughout its course. The case is analogous to a sewer being constructed without the limits of a city. Take, for instance, the cities of Little Rock and Fort Smith, lying on the Arkansas River, the proper outlet for the sewers being many miles below them. To properly construct the sewers and their outlet, a considerable sum must necessarily be spent without the limits of the cities. Yet certainly no valid objection can be found to spending money raised by assessments on property within the cities without the cities in order to carry off the sewage of the cities.

Beasley, one of the plaintiffs, also raises a question as to his assessment; but he has had his day in court as to that. Dixon, the other plaintiff, makes allegations which, if true, might entitle him to damages against the district; but they would not entitle him to an injunction under his allegations and the agreed facts.

The judgment is affirmed.

STATE v. SANDERS.

86 353
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Opinion delivered June 1, 1908.

GAMING—KEEPING A GAMING TABLE.—Where a person keeps a billiard table, and permits others to play upon it for so much a game, to be paid by the loser of the game, he is within the prohibition of Kirby's Digest, § 1732, which prohibits any person from keeping a table at which any money may be won or lost.

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

STATEMENT BY THE COURT.

Sanders was indicted by the grand jury of the Fort Smith District of Sebastian County for exhibiting a gambling device, contrary to section 1732 of Kirby's Digest. He was tried before the court without a jury, upon the following agreed statement of facts:

"Kelley pool is a game played on an ordinary pool table with fifteen pool balls, numbered from 1 to 15, inclusively, the players using ordinary pool or billiard cues for driving the balls into pockets with a cue ball which is not numbered. Before the game is started each player is given a small ball on which is a number, all such balls supposed to be numbered from 1 to 15 inclusively, just the same as the pool balls. The object of the game is for the player to pocket the ball on the table which corresponds in number with the small ball which he holds in secret, until he pockets his ball. If he pockets such ball, he wins the game. If some other player pockets the ball with this number, he is "dead" and cannot win, and the only consolation which remains to him is to remain in the game with the prospect of killing some other person. Defendant has a license from the city of Fort Smith to run or operate a pool room in the city limits, and does run and operate pool tables as set forth above. And that Kelley pool is played on said tables at times, and that other pool is played, and the loser pays for the cues."

The court found the defendant not guilty. The State moved for a new trial, and upon its denial brought the case here.

William F. Kirby, Attorney General, and *A. A. McDonald,* Prosecuting Attorney, for appellant; *William H. Rector,* of counsel.

Persons playing Kelley pool are guilty of gaming, and the person who sets up and exhibits a device for same is guilty of exhibiting a gambling device. 99 Ind. 450; 36 Ark. 67-8; 43 *Id.* 77; 85 Mich. 296; 32 Tenn. (2 Swan.) 287; 69 Ky. 376; 80 Mass. (14 Gray) 26; *Ib.* 390; 53 Iowa, 154; 39 *Id.* 42; 75 Ind. 586; 27 Ark. 360; 28 Howard (N. Y.) 247; 151 Mass. 118; 39 Mo. 420; 49 Pac. 934.

HILL, C. J., (after stating the facts). The question to be determined is whether, under the facts, the game of Kelley Pool

is a game at which money or property may be won or lost; and, if so, if the table kept for it to be played on is a "gambling device" within the meaning of section 1732 of Kirby's Digest.

1. Similar games and similar statutes have been before the courts, and what has been said by them is pertinent here. In the case of *State* v. *Book,* 41 Ia. 550, it was said: "The defendant kept certain tables on which divers persons were in the habit of playing at what is called the game of 'pin pool.' That this play is a 'game' there is no dispute, and there is no controversy about the fact that for the use of the tables and other instruments of the game the defendant charged and required the players to pay a certain sum of money for each cue (whatever that is). When, therefore, two or more persons played this game, they became jointly or severally bound to pay the sum or sums of money chargeable therefor. It is plain that, if they play the game or games in order to determine which of the players shall pay the entire sum or sums which they would be jointly or severally bound to pay, they play for the sum each one would be bound to pay, and it does not change the matter that they play the game in advance of paying therefor. The principle is the same as if the money had been staked or put up before the game was played. It is gambling in the one case as well as in the other. Nor is it any less gambling that the sum of money played for is small. To 'play at any game for any sum of money,' however small, comes within the statute." This was followed by *State* v. *Miller,* 53 Ia. 154.

In *State* v. *Leighton,* 3 Foster (N. H.) 167, the court said: "The defendants in this case made a profit from the use of the billiard tables. For the 'hire' of them they were paid a shilling a game. The persons who resorted there played for the hire. In substance, they played for a shilling a game. The loser paid and the winner received the sum. By an understanding among the players, the money was to be applied towards defraying the expenses of the tables, but still it was money won at play, and upon the chance of the play."

"Where a party keeps a billiard table, and permits persons to play upon it for twenty cents a game, to be paid by the loser of the game, he is guilty of keeping such table for gain within the meaning of section 8 of the act of March 12, 1831, 'for the

prevention of gaming', although such keeper of the table does not permit the players, as between themselves, to bet, and neither they nor other persons do bet on the issue of the game or games, in any other manner than that the loser of the game should pay the twenty cents for the use of the table." *Ward* v. *State,* 17 Ohio St. 32. These cases were followed in *Hamilton* v. *State,* 75 Ind. 586; and the Missouri court reached the same conclusion in *State* v. *Jackson,* 39 Mo. 420. This is the general rule. See 20 Cyc. 889, and cases cited in note 1.

There are some decisions to the contrary: *People* v. *Forbes,* 52 Hun, 30; *People* v. *Sargeant,* 8 Cowen (N. Y.), 139. The great weight of authority and the sounder reasoning, however, declare such games to be within the gambling statutes.

2. Therefore, only the inquiry remains, whether the keeping of this pool table was the keeping of a gambling device within the meaning of section 1732 of Kirby's Digest.

This exact question was raised in Texas, and the court held that the keeping of such a table would not be keeping a gambling device unless the keeper of the table had knowledge, or might by reasonable diligence have known, that the table was used by the players for gaming purposes. *Smith* v. *State,* 12 S. W. 412.

It is apparent from the statement of facts here that it was a part of the game, understood by the proprietor as well as the players, that the loser was to pay the tolls of the participants of the game. This made it a gambling game, and implicated all parties concerned. A gambling device is an instrumentality for the playing of a game upon which money may be lost or won; and the instrumentality is not necessarily intended solely for gambling purposes. 14 Am. & Eng. Enc. Law, 684-5; 20 Cyc. 882-4.

Certain gambling devices cannot be used for any other purpose, and, when designed for that purpose alone, they may be destroyed under the "burning statutes." *Garland Nov. Co.* v. *State,* 71 Ark. 138. But there may be gambling devices that are no less such, although not always so used, but which, from their nature, may be used for other purposes. *State* v. *Lewis,* 12 Wis. 434.

Under a kindred statute, the Alabama court said: "The

statute is aimed at the *use* to which the table is appropriated. Any table used for gaming, without regard to its appliances or adaptation to any particular game, is included in the statute; and if the defendant had the possession or custody of the table, authority over its use, and supervised the gaming, he was the keeper, or interested or concerned in keeping it." *Bibb* v. *State,* 84 Ala. 13.

The pool table in question was adapted for games that were not within the statute, or for games within the statute, depending upon the use to which it was put. In this case it was put to a use contrary to the statute, and, being exhibited for that purpose and maintained for his profit by the defendant, he is within the statute.

Judgment reversed and cause remanded.

DUCKWORTH *v.* STATE.

Opinion delivered June 1, 1908.

1. VENUE—CHANGE OF—CREDIBILITY OF AFFIANTS.—Under Kirby's Digest, § 2318, requiring that a petition for change of venue in a criminal case be supported by the affidavits of two credible persons, it was not error to deny a petition which was supported by affiants who swore recklessly that the minds of the inhabitants of the county were so prejudiced against defendant that he could not get a fair trial, when in fact their knowledge was limited to a few people in a small hamlet. (Page 358.)
2. SAME—DENIAL OF SECOND PETITION.—Where a petition for change of venue was filed, and was refused because the supporting affidavits were not made by credible persons, it was not error to deny without investigation a second petition filed on the same day where defendant made no showing of surprise over, or explanation of, the failure of the former affiants to sustain their affidavits. (Page 358.)

Appeal from Ashley Circuit Court; *George W. Norman,* Special Judge; affirmed.

William F. Kirby and *Dan'l Taylor,* for appellee.

HILL, C. J. This is the second appeal of Duckworth. A former conviction under the indictment was reversed. *Duck-*

worth v. *State,* 83 Ark. 192. On the second trial he was convicted of larceny, and his punishment was assessed at a year in the penitentiary; and from the judgment rendered thereon he has appealed.

1. The first question is as to the action of the trial court in refusing a change of venue. The petition for change of venue was filed the 28th of January, supported by the affidavits of T. W. Carlock, J. T. Davis and N. C. Thurman. The court examined each of these witnesses as to their knowledge of the matters concerning which they had testified in their supporting affidavits, and it developed that they had sworn recklessly in testifying that the minds of the inhabitants of the county were so prejudiced against the defendant that he could not obtain a fair trial, because their knowledge was limited to only a few people in a small hamlet. Under the decisions in *White* v. *State,* 83 Ark. 36; *Duckworth* v. *State,* 80 Ark. 360; *Price* v. *State,* 71 Ark. 180; and *Jackson* v. *State,* 54 Ark. 243, there was no error in overruling the petition.

2. When the court overruled the petition for a change of venue, the defendant's attorney withdrew from the case, and declined to have anything further to do with it. Other attorneys were selected by the defendant, and, after time given for consultation and preparation, the trial proceeded. The first step taken by these attorneys was the filing of a second petition for change of venue. It was to the same effect as the one heretofore passed upon, on the same day, and was supported by T. W. Carlock, W. R. Morrell, E. D. Days and Dennis Dailey. The latter three were not upon the former petition. The court declined to hear this petition, and overruled it without investigation.

The statute (sections 2317, 2318 of Kirby's Digest) permits a defendant to file a petition for a change of venue when he believes, for the causes therein mentioned, that he cannot obtain a fair and impartial trial in that county, and it requires the petition to be supported by affidavits of at least two credible persons, qualified electors and actual residents of the county, not related to the defendant in any way. There is nothing in the statute to indicate that a defendant is at liberty to continue filing petitions for a change of venue after one is acted upon. It

might occur that an examination of the compurgators would develop that they had sworn recklessly, and yet the defendant still be entitled to a further opportunity of presenting his petition, but then he should show that he was surprised by the testimony of his compurgators failing to meet the requirements of the law and offer to bring in others who would sustain his position. In such instances it might occur that a defendant would be entitled to a further hearing on his petition, and it might be an abuse of discretion for the court to refuse to permit him to further prosecute his right to a hearing upon his petition for change of venue, when a strong showing was made indicating an injustice to him if further opportunity was not given. But no facts appeared entitling this defendant to a second hearing. The circuit judge carefully examined the witnesses, and found that they had failed to answer to the statutory requirement of being credible persons in that they had sworn recklessly in this particular. The defendant then filed another petition, supported by the affidavit of four persons (one of whom had just been examined and found wanting in information as to the matter under inquiry), without any showing of surprise over, or explanation of, the failure of his former compurgators to sustain their affidavits. In the absence of such showing it was proper for the court to disregard such petition and treat it as he did, as matter merely for vexation and delay.

3. Error is alleged in the court failing to grant a continuance. An issue of fact was made to the due diligence of the defendant and his counsel in endeavoring to procure the attendance of his witnesses, and that issue of fact has been passed upon by the trial court, and there is no abuse of discretion shown. One of the witnesses appeared and testified in the trial, and the principal ones desired were daughters of the defendant, who resided in the county.

The instructions were more favorable to the defendant than he was entitled to receive under the law. Other matters were presented in the motion for new trial, but none are found to be of any moment. The court is of opinion that the defendant had a fair and impartial trial.

Judgment affirmed.

McCULLOCH, J., dissents.

HOBBS v. STATE.

Opinion delivered June 1, 1908.

1. INSTRUCTION—FAILURE TO MAKE REQUEST.—Failure of the court to instruct the jury as to reasonable doubt or other matters in a criminal case was not error where there was no request therefor. (Page 361.)
2. CRIMINAL PROCEDURE—WANT OF ARRAIGNMENT AND PLEA.—A conviction in a felony case will not be reversed because the defendant was put upon trial without a formal arraignment and plea of not guilty, if the record shows that the defendant received every right which he would have received had he been duly arraigned and pleaded. (Page 361.)
3. EVIDENCE—THREATS.—In a prosecution for assault with intent to kill a certain one of the R. brothers, it was admissible to prove that defendant had previously threatened to beat the R. brothers or some one of them not specified. (Page 363.)
4. APPEAL—INTERLINEATIONS ON TRANSCRIPT.—Lead-pencil interlineations upon a transcript, which are unauthenticated and unexplained, can not be regarded as part of the transcript. (Page 363.)

Appeal from Pope Circuit Court; *J. Hugh Basham,* Judge; affirmed.

U. S. Meade, for appellant.

1. Nowhere in the court's instructions was the defendant given the benefit of a reasonable doubt as to his guilt. Kirby's Dig. § 2386-7; 38 Ark. 304; 36 *Id.* 127; 20 *Id.* 166.

2. Defendant was never arraigned, nor did he ever waive arraignment nor pleaded. 39 Ark. 180; 34 *Id.* 275.

3. The declarations and acts of persons who happened to be with accused shortly before a crime should not go to a jury without an explanation and caution from the court as to the purpose for which they were admitted, and when they should be considered and when not. 77 Ark. 444; 32 *Id.* 220. A *prima facie* case of conspiracy must first be made before evidence of a conspirator can be made. Cases *supra.*

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

1. No request was made for an instruction upon a reasonable doubt, nor is the omission made ground for new trial. 71 Ark. 475; 47 *Id.* 196; 75 *Id.* 373; 76 *Id.* 163; 77 *Id.* 455.

2. While the record is silent as to arraignment and plea, yet, if omitted, it is not cause for reversal in the absence of prejudice. 55 Ark. 342; 18 S. W. 239; 72 Ark. 145.

3. Lead pencil interlineations, unauthenticated and unexplained, do not make a record for appellate court. 84 Ark. 95.

HILL, C. J. Dave and Sam Hobbs were jointly indicted by the grand jury of Pope County, charged with assault with intent to kill and murder one Bill Rolls. Harry Moore was at the same time indicted for the same offense. On separate trial, Dave Hobbs was convicted of aggravated assault, fined $50 and sentenced to six months in the county jail, and has appealed.

The first alleged error is the failure of the court to instruct as to reasonable doubt. The court gave but one instruction, and it was not excepted to, and the appellant did not ask for a reasonable doubt instruction to be given. "As the defendant asked for no instruction on that point, he has, under our practice, no right to complain that the court did not give it." *Scott* v. *State,* 77 Ark. 455. This principle was applied to the instruction on reasonable doubt in *Mabry* v. *State,* 80 Ark. 435.

Appellant also complains of the court not having instructed on other matters upon which he alleges the court should have instructed. "If the defendant or plaintiff desires other instructions, he may ask them; but if he fails to do so, and remains voluntarily silent, he cannot complain." *Holt* v. *State,* 47 Ark. 196.

The next alleged error is that the record shows affirmatively that the defendant was never arraigned, and that he did not waive arraignment, before being put upon trial. The record shows that the defendant demurred to the indictment, which was overruled, to which he excepted, and then both parties announced ready for trial, whereupon the trial proceeded. The appellant cites *Baker* v. *State,* 39 Ark. 180, and *Lacefield* v. *State,* 34 Ark. 275, to sustain his contention that if a defendant is tried without plea that is cause for arresting judgment, and, upon failure of the trial court to arrest it, for the Supreme Court to reverse it. These cases do sustain that position, and also *Perry* v. *State,* 37 Ark. 54, and *State* v. *Dillingham,* 43 Ark. 154. These decisions, although not expressly named, were in fact overruled by *Hayden* v. *State,* 55 Ark. 342, where the same point was raised and de-

cided otherwise. In that case, the defendant was represented by counsel and announced himself ready for trial, and was accorded every right that he could have availed himself of under the most formal record entry of his plea. The court said that the only object of his plea was to make an issue, and the whole record showed that an issue was made, and that the failure of arraignment or waiver of arraignment should be disregarded. Chief Justice COCKRILL, delivering the opinion, 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."

In *Brewer* v. *State,* 72 Ark. 145, it was also contended that the judgment of the trial court should be reversed because the defendant was put upon trial without a formal arraignment and plea of not guilty. Judge RIDDICK for the court said: "There are several decisons that support that contention in the earlier reports of this court, but those cases have been overturned by later decisions." He then quoted from *Hayden* v. *State, supra.* In *Lee* v. *State,* 73 Ark. 148, Mr. Justice RIDDICK again called attention to the fact that *Perry* v. *State,* and *Lacefield* v. *State* had been overruled by *Hayden* v. *State.*

In order that these cases may not longer be cited as authority, they are hereby expressly overruled.

While the sounder view is to hold it non-prejudicial error to fail to have arraignment and plea where the rights of the defendant are properly preserved, it is not meant to encourage any disregard of the statutes requiring arraignment of and pleading by defendants indicted for felonies. The law places this duty upon the trial courts, and they are not warranted in disregarding it. The statutes on the subject (sections 2272-8, Kirby's Digest) provided a simple and proper procedure to acquaint the defendant with the charge against him and receive his plea to it, and to see that he has counsel for his defense. It is an orderly and formal way to bring the defendant to the bar of justice, and to ascertain his defense, and thereby put the case

at issue. But where the record shows that the defendant has received every right which he would have received had he been duly arraigned and had pleaded, then there is no prejudicial error in not having him arraigned and receiving his plea; and, under the Code, this court is only authorized to reverse where the error has been prejudicial. Section 2605 of Kirby's Digest.

The next alleged error is in admitting testimony as to threats of the defendant that he would beat the Rolls boys. In some places the threat was against one of the Rolls, the witnesses not specifying which one; in another against the Rolls boys; and in another against the Rolls. This testimony was not like the testimony rejected in *Casteel* v. *State,* 73 Ark. 152, and *Deal* v. *State,* 83 Ark. 58, where the threat was of general malevolence, and not specifically against the party subsequently attacked. These threats were specific as to one or the other of two brothers, and generally included the attacked party, and the fact that they were directed to his brother also took away none of the malevolence towards the party subsequently attacked.

Various other objections are made to testimony of acts and words of Sam Hobbs and Harry Moore. The conspiracy of the defendant and these parties to do bodily harm to the Rolls was abundantly proved, and the testimony admitted was within the principle stated in *Lawson* v. *State,* 32 Ark. 220, and *Chapline* v. *State,* 77 Ark. 444.

Objection is made to the refusal of the court to admit testimony identifying a knife belonging to one of the Rolls. If there was any merit in the objection, it is not preserved in such a way that the court can regard it. The exceptions to the rulings of the court in this particular appear as lead pencil interlineations of a type-written record. These are unauthenticated and unexplained, and cannot be regarded as a part of the transcript. *Johnson* v. *State,* 84 Ark. 95.

Other matters have been presented, all of which have been considered by the court, and no error is found.

Judgment affirmed.

BROOKE v. STATE.

Opinion delivered June 1, 1908.

1. MUNICIPAL ORDINANCE—MAKING DRUNKENNESS A CRIME.—A city ordinance making it a misdemeanor for any person to appear in any public street in a drunken or intoxicated condition is valid. *DeWitt* v. *Lacotts*, 76 Ark. 250, followed. (Page 365.)
2. INSTRUCTION—NECESSITY OF DEFINITION OF DRUNKENNESS.—It was not error, in a prosecution for appearing in a public street in a drunken condition, to leave to the jury to determine the condition of the defendant as to drunkenness or sobriety, without defining these terms. (Page 365.)
3. DRUNKENNESS—SUFFICIENCY OF EVIDENCE.—Evidence, in a prosecution of one for being drunk in a public street, that accused was drinking, and showed some signs of the effect of strong drink, but that he was attending to his business in an orderly manner, and had not lost control of his faculties, was insufficient to sustain a conviction. (Page 365.)

Appeal from Conway Circuit Court; *J. Hugh Basham*, Judge; reversed.

J. A. Gillette, for appellant; *W. P. Strait*, of counsel.

1. The council had only such powers as were given the municipality by statute, and nowhere does the State law delegate the authority sought to be exercised. 45 Ark. 336; 49 *Id.* 165; 31 *Id.* 462; Act 1907, p. 290.

2. The court erred in its definition of drunkenness or intoxication, and the remarks of the prosecuting attorney were prejudicial. 94 Ala. 441; 93 Ga. 196; 11 Cush. (Mass.) 479; 130 Ill. 234; 10 A. & E. Enc. Law, p. 276; 89 Ala. 8; 111 *Id.* 482; 40 Ark. 511; 34 *Id.* 341; 54 *Id.* 284; 60 *Id.* 610; 98 Ill. 108; 39 Md. 258; 2 Kent, Com. 451; 7 Bush (Ky.) 276; 35 Conn. 170; 22 Mo. App. 488; 20 S. W. 744; 46 Mo. 414; 72 Tex. 312; 89 Va. 576; 26 Ala. 338; 2 Head (Tenn.) 289.

3. The verdict is palpably against the weight of evidence. 65 Ark. 278; 34 *Id.* 632; 10 *Id.* 492.

HILL, C. J. The city of Morrillton has an ordinance making it a misdemeanor for any person to appear in any public street in a drunken or intoxicated condition; and Brooke was arrested under it, and fined in the mayor's court, and again in the circuit court, and has appealed.

It is insisted that the ordinance in question is not valid. The argument is made that this ordinance goes further than the act of the General Assembly of 1907, which made it a misdemeanor for any person to appear at public gatherings in a drunken or intoxicated condition. Acts 1907, c. 112. It is true that the ordinance and the act do not cover identically the same offenses, and it is true the city could, by ordinance, adopt the act of the Legislature. But it is not compelled to do so in order to have a valid ordinance on the subject. In *DeWitt* v. *Lacotts,* 76 Ark. 250, the court sustained a similar ordinance as a valid exercise of the police power under section 5438 of Kirby's Digest. This decision is attacked; but the court is satisfied of its soundness and declines to overrule it.

The instructions of the court are criticised. The court did not attempt to give any definition of the term drunkenness as used in the ordinance, but left the condition of the defendant as to drunkenness or soberness to be determined by the jury under the evidence. It was said in *Midland Valley Ry. Co.* v. *Hamilton,* 84 Ark. 81, of the terms drunkenness and soberness: "In fact, it may 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." The instructions given were not misleading, and the verdict, if sustained by sufficient evidence, would stand.

The evidence on the part of the city proved that appellant was drinking, and that he showed some of the signs of the effect of strong drink; but he was attending to his business in an orderly manner, and had not lost control of his faculties. The Standard Dictionary gives the following definition of drunk: "Under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and, commonly, to evince a disposition to violence, quarrelsomeness and bestiality." This definition has received judicial approval, and is in accord with the authorities. *Sapp* v. *State,* 116 Ga. 182.

Tested by it, the evidence was not sufficient to sustain a conviction under this ordinance.

Reversed and remanded.

HOOD v. BELL.

Opinion delivered May 18, 1908.

FENCES—SUBMISSION OF QUESTION TO VOTERS—FINALITY.—The act of May 23, 1901, authorizing the submission to the voters in Hempstead County and certain other territory of the question of adoption of a fence law at a special election, "*provided,* the county court of either of said counties may deem such special election necessary, and in the event such special election be not ordered and held prior to the next general election for State and county officers, the question shall then be submitted to the electors in each of said counties failing to hold such special election," contemplated the submission of the question to the voters at a special election to be called by the county court, or, in default thereof, its submission at the general election; but when the voters once voted on the question of adoption of the statute, the result was final.

Appeal from Hempstead Circuit Court; *Jacob M. Carter,* Judge; reversed.

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

The vote on the question in 1902 was final and conclusive, and exhausted the authority to vote further on the question, unless plainly provided for in the act. 83 Ark. 443.

McRae & Tompkins, for appellee.

There is nothing in the act to negative the right to vote again. Cooley, Principles of Const. Law, p. 22-3 (Students' Series); 11 Cyc. 528; 99 U. S. 214, 218; 24 Conn. 174; 8 N. W. 591; 6 *Id.* 621.

McCULLOCH, J. This is an action in replevin to recover possession of a lot of hogs which were impounded pursuant to the terms of a statute passed May 23, 1901, to prohibit the running at large of hogs in Hempstead County and certain other territory mentioned in the statute. The point in the case is whether the statute in question was ever put in force in the territory where appellant's hogs were found running at large.

The act provides for submission to the voters, either at a special or general election, of the question whether or not it shall be put in force in the given territory, and that if it shall appear that a majority of the votes cast on the question are in favor of the law it shall be the duty of the county court or county judge

to make and enter an order declaring the law to be in force in the territory. The language of the statute bearing on the particular question before us is as follows: "Provided, the county court of either of said counties may deem such special election necessary, and in the event such special election be not ordered and held prior to the next general election for State and county officers, the question shall then be submitted to the electors in each of said counties failing to hold such special election."

The question of adopting the statute was submitted to the voters of Hempstead County at the general election in 1902, again at the general election in September, 1904, and at the presidential election in November, 1904, but did not receive a majority of the votes on the question at either of these elections. It was again voted on at the general election in 1906, and received a majority of the votes, whereupon the county judge made an order declaring the statute to be in force in the territory named.

It seems clear to us that the statute contemplated a submission of the question to the voters at a special election to be called by the county judge, or, in the event of his failure to call the election, that it be submitted finally at the next succeeding general election for State and county officers. The language of the statute does not reasonably admit of any other construction. It says that, "in the event such special election be not ordered and held prior to the next general election for State and county officers, the question shall *then* be submitted to the electors." This means the general election next succeeding the passage of the statute; and when the electors once voted on the question of adoption of the statute the result was final. Resubmission of the question to the voters was not provided for by the statute. No provision is made in the statute for giving notice of the election except in the event of a special election. Nor is there any provision for determining at what election the question shall be submitted, except the specific direction contained in the statute to the effect that if a special election be not called by the county judge then it shall be submitted at the next general election for State and county officers. Therefore it cannot be presumed that the Legislature intended that the question might be submitted every time and as often as the

election commissioners might see fit to print the question on the tickets at a general election.

It was doubtless within the power of the Legislature to provide for re-submission of the question of adoption of the statute by the voters, but a consideration of the language of the statute convinces us that such was not the intention.

Reversed and remanded with directions to enter judgment for appellant.

BROWN v. NELMS.

86 368
189 288
190 503

Opinion delivered March 23, 1908.

1. WILL—SUFFICIENCY OF MENTION OF CHILD.—A will in which the testator provides for all of his children as a class, without expressly naming them, is a sufficient mention of his children within Kirby's Digest, § 8020, providing that when any person shall make a will and shall omit to mention the name of a child he shall be deemed to have died intestate. (Page 383.)
2. ADMINISTRATION—RIGHT TO SELL LANDS FOR DEBTS—LIMITATION.—In the absence of circumstances excusing the delay, seven years is the shortest period of delay which will bar the right to sell lands of a decedent for the payment of debts. (Page 388.)
3. SAME—TIME FOR MAKING SETTLEMENT.—Kirby's Digest, § 224, requiring executors and administrators to make final settlement of their administration within three years from the date of letters, is directory merely, and does not divest the probate court of jurisdiction to complete the administration of estates after that time and to make any necessary orders to that end for the distribution of assets of the estate. (Page 389.)
4. SAME—SALE OF LANDS—VALIDITY.—Errors and irregularities in the allowance of claims against estates did not vitiate a sale of lands to pay debts nor deprive the probate court of jurisdiction to order the sale of such lands. (Page 389.)
5. SAME—EFFECT OF DEFECTS IN ALLOWANCE OF CLAIMS.—Kirby's Digest, § 3793, providing that "all probate sales of real estate, made pursuant to proceedings not in substantial compliance with statutory provisions, shall be voidable," does not mean that defects in the allowance of claims against estates will avoid a sale of real estate. (Page 389.)

6. SAME—VALIDITY OF SALE OF LAND.—An order of sale of a testator's land was not invalid because made at a term of the probate court subsequent to the one at which the petition was first presented. (Page 390.)

7. SAME—WHETHER NECESSARY TO REVIVE CLAIM.—Payment of claims against estates which have been allowed by the probate court may be enforced against a new administrator without revivor. (Page 390.)

8. SAME—EFFECT OF WASTE BY FORMER ADMINISTRATOR.—The fact that a former administrator had wasted assets of the estate sufficient to pay the debts did not deprive the creditors of the right to resort to the unadministered assets for the payment of their debts. (Page 390.)

9. SAME—PURCHASE AT ADMINISTRATOR'S SALE BY APPRAISER.—A purchase of land at a probate sale by one who acted as appraiser of it is voidable at the instance of the heirs, even after the sale has been confirmed. (Page 391.)

10. SUBROGATION—LIMITATION.—The right of an infant to be subrogated to a lien held by another must be exercised within the period of limitation allowed to the latter. (Page 393.)

11. PROBATE SALE—PAYMENT.—A probate sale of lands of an estate which was duly confirmed is not invalid because payment was made by credit on the probated claims of the purchasers, instead of in cash. (Page 395.)

12. HOMESTEAD—POWER OF OWNER TO DEVISE.—Const. 1874, art. 9, § 6, providing that the homestead of a decedent shall be exempt, and that the rents and profits thereof shall vest in the widow and his children during their minority, does not, so far as the children are concerned, prohibit the original owner of the homestead from disposing of it by grant or devise. (Page 395.)

13. DEED—EFFECT OF QUITCLAIM.—The fact that a deed in a chain of title was only a quitclaim did not, of itself, give notice of defects in the title or of secret equities in the grantor. (Page 398.)

14. POWER—WHEN SALE REFERABLE TO.—Where a testator in his will impowered his widow as trustee to sell property for certain purposes, but did not name her as executrix, and she undertook to sell the property individually and as executrix, but not as trustee under the will, her conveyance will be construed with reference to the power in the will, if that is necessary to give it full effect. (Page 399.)

15. APPEAL—PRESUMPTION FROM ABSENCE OF EVIDENCE.—Where the decree appealed from recites that the cause was heard upon evidence which is not brought up in the transcript, it will be presumed on appeal that the chancellor's decree was warranted by the evidence. (Page 400.)

16. BETTERMENT ACT—CONSTRUCTION.—Where an appraiser of land sold by an administrator purchased such land at the administrator's sale in good faith, and acquired and held possession thereunder, believing that he had the legal and moral right to do so, he will be held to be a *bona fide* occupant of the land within the betterment act (Kirby's Digest, § § 2754-8), entitled to recover the value of the improvements made and taxes paid by him on the land, and liable only for mesne profits which have accrued within three years next before the commencement of the suit in which they may be claimed. (Page 401.)

17. SAME—RECOVERY OF IMPROVEMENTS AGAINST INFANT OWNER.—That the owner of land recovered from a *bona fide* occupant is an infant does not prevent such occupant from recovering the value of improvements made by him. (Page 404.)

18. TRUST—REIMBURSEMENT—SETOFF.—Where an heir seeks to hold a purchaser of lands of the estate liable as a trustee, the purchaser will be entitled, in the enforcement of the trust, to recover the price paid for the land, but the heir will be entitled to setoff against the purchaser's claim for reimbursement mesne profits for the full period of the latter's occupancy, upon the principle that where the occupant has been reimbursed out of the profits of the land he can not make further claim for the same payment. (Page 405.)

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

STATEMENT BY THE COURT.

This is an appeal from a decree of the chancery court of Crittenden County which involves, so far as concerns the disposal of the case here, separate controversies between the plaintiffs below and the various defendants, though there are some questions in common to be disposed of.

Josiah F. Earle resided in Crittendon County, and owned a large body of lands situated there. He died in the year 1884, leaving surviving his widow, Louisa R., and four children, Louisa, Jerry, Ben R. and Ruth. The two children first named died intestate and without issue during the lifetime of their mother, leaving the other two, Ben R. and Ruth, as their heirs at law.

Josiah F. Earle left a last will and testament, which was duly probated and contained the following disposition of his property without otherwise mentioning the devisees: "I give

my wife one-half of all my property and one-half to my children. I authorize and direct my wife to sell all the real property and re-invest in some better county for herself and children. I direct that she control and manage and sell the same, and re-invest when she can get a fair price to satisfy her—the same as if she were sole owner. I owe but little, and wish that little paid out of my life policy."

Louisa R. Earle died intestate in the year 1891, leaving surviving her two children, Ben R. and Ruth, as her heirs at law; and during that year the said Ben R. Earle was appointed administrator of her estate and also guardian of the person and estate of his sister, Ruth. He executed separate bonds as administrator and as guardian, with John R. Chase and A. H. Ferguson as his sureties; and executed to Chase a mortgage on all his interest in lands in Crittenden County to indemnify the sureties against loss by reason of their liability as sureties on his said bonds. The mortgage was not filed for record until November 13, 1895. On January 16, 1894, the probate court revoked the letters of administration held by Ben R. Earle, and on October 15, 1894, issued letters of administration in succession to W. W. Swepston on the estate of said Louisa R. Earle, deceased. The probate court made an order directing Swepston, as administrator of the Louisa R. Earle estate, to sell, for the payment of the debts of the estate, certain lands owned by said Louisa R. Earle by inheritance from her father and her undivided half interest in certain lands devised to her by the will of Josiah F. Earle. The sale was made by the administrator on the date named in the order of court, after the lands had been appraised.

W. N. Brown, Jr., became the purchaser of one of the tracts at the sale; L. Pickett, who subsequently conveyed to Brown, became purchaser of certain other tracts; J. F. Rhodes became the purchaser of certain other tracts, and J. M. Williams as trustee for Stone & Tyler became the purchaser of other tracts. These sales were duly reported to the probate court by the administrator, and the sales were by the court confirmed, and deeds were executed to the respective purchasers pursuant to orders of the court. The undivided interest of Ben R. Earle in some of the J. F. Earle lands were sold under levee tax decrees, and pur-

chased by W. N. Brown, Jr. On February 8, 1894, Ben R. Earle executed to T. W. Paxton a deed conveying his interest in certain other tracts of the J. F. Earle lands to secure the payment of a debt of $684.26 to the Edgewood Distilling Company. This deed was executed subject to the lien of a judgment for about $300 in favor of one W. P. Conner against Ben R. Earle, rendered on October 21, 1892. S. A. Martin and E. E. Williford became sureties on a bond to stay this judgment, and on expiration of the stay execution was issued and levied on said interest of Ben R. Earle in the tracts of the J. F. Earle lands conveyed, as aforesaid, to Paxton as trustee. The lands were sold under the execution, and Martin and Williford became the purchasers for the amount of the judgment and costs. The sale was made on December 1, 1894, and on May 2, 1895, Ben R. Earle conveyed, by quitclaim deed, his interest in the lands to Martin and Williford. This deed is alleged to have been intended by the parties as a mortgage. Martin afterwards quitclaimed to Williford, and the latter conveyed the lands on January 3, 1897, to George P. Diehl for a cash consideration of $389.50. On July 22, 1897, the sheriff of the county executed to Diehl, as assignee of Martin and Williford, a deed to the lands pursuant to the execution sale. Diehl was acting for the Edgewood Distilling Company, and the title he took under the deeds to him is conceded to be for the use and benefit of that company.

On September 23, 1890, Louisa R. Earle conveyed a quarter section of the Josiah F. Earle lands to W. R. Barksdale. The deed recites that it was executed by said Louisa R. Earle in her own right and as executrix of the estate of Josiah F. Earle, and that the purchase price of the land was to be used in the purchase of a home for herself and children in Memphis, Tennessee.

In 1895 the Edgewood Distilling Company and T. W. Paxton, trustee, instituted suit in the chancery court of Crittenden County against Ben R. Earle to foreclose said trust deed executed by him to Paxton as trustee to secure the payment of indebtedness to Edgewood Distilling Company. S. A. Martin and E. E. Williford were made parties defendant, and the complaint prayed that said execution sale of the Ben R. Earle lands be cancelled on account of alleged fraud and irregularities in the sale.

On October 4, 1895, W. W. Swepston as administrator in succession of the estate of Louisa R. Earle, deceased, instituted suit in said chancery court against Ben R. Earle and the sureties on his bond as administrator of the estate of Louisa R. Earle to surcharge and falsify the accounts of Ben R. Earle as such administrator, and to recover the amount alleged to be due by him to the estate.

On August 21, 1899, C. L. Lewis, as guardian of Ruth Earle, instituted suit in said chancery court against George P. Diehl, J. M. Williams, trustee, and Stone & Tyler, for partition of the lands held by them as tenants in common. The complaint set forth the last will and testament of said Josiah F. Earle and the devise of one-half of said lands to Louisa R. Earle and the remainder of the child of the testator. It also alleged that Diehl was the owner of the Ben R. Earle fourth interest in certain tracts of said lands through the deed from Ben R. Earle to Martin & Williford. The complaint also set forth a claim of homestead rights in said lands, and prayed that the same be set apart, and that an accounting of rents and profits be had.

On November 29, 1902, Ruth Earle Nelms (*nee* Earle) instituted suit in said chancery court against the respective parties in interest, praying in her complaint the following relief:

1. That the interests of plaintiff in the several tracts of the Josiah F. Earle lands be ascertained and fixed, and her title quieted and confirmed, and all adverse claims of title cancelled, and that she have an accounting of the rents and profits, and decrees against the defendants liable, for the sums they owe on account of the rents; and also for waste committed.

2. That the amount due her from the estate of Louisa R. Earle on account of her administration of the estate of Josiah F. Earle, and of her guardianship of plaintiff as a tenant in common of the lands, be ascertained and fixed, and that plaintiff have a decree therefor against the administrator of the estate of Louisa R. Earle, and the sureties on her bond as administratrix, and the sureties on her bond as guardian, for their liabilities, and that the sums for which she might obtain decrees be declared liens superior to all other liens on all the lands of which Louisa R. Earle was the owner at the time of her death, and that such lands be sold for the payment thereof.

3. That the amounts owing plaintiff by Ben R. Earle on account of his administration of the estate of Louisa R. Earle, and on account of his administration of the estate of Josiah F. Earle, and as her guardian, and as tenant in common with her of the land, be ascertained and fixed, and that she have decrees therefor against Ben R. Earle, and the sureties on his bond as administrator, and as guardian, according to their respective liabilities, and that the amounts decreed her to be declared liens superior to all other claims and liens on the lands of Ben R. Earle.

4. That plaintiff be decreed the benefit of the mortgages made by Louisa R. Earle to John R. Chase, as trustee, and by Ben R. Earle to John R. Chase, as trustee, and that the mortgages be foreclosed for the payment of what is decreed due her.

5. That an account be taken with Swepston, and the amount he owes plaintiff be ascertained and fixed, on account of his administration of the estate of Louisa R. Earle, and his sales of the land belonging to that estate, and for rents collected belonging to plaintiff, and on the other accounts stated in the complaint, and that she have a decree against him and the sureties on his bond as administrator, and also decrees for the sums owing Ben R. Earle on the same accounts assigned her by him.

6. That an acount be taken between plaintiff and Lewis as her guardian, of his guardianship, and that the amount he is owing her be fixed, and she have a decree for the same against him and the sureties on his bond.

7. That all the sales of all the lands belonging to the estate of Louisa R. Earle, made by Sweptson as administrator (1) to L. Pickett; (2) to William N. Brown, Jr.; (3) to John F. Rhodes, and (4) to J. M. Williams, as trustee for Stone & Tyler, be set aside and cancelled, and it be ascertained what amounts of rents the several purchasers owe on account of the lands, both to plaintiff and Ben R. Earle, and that plaintiff have decrees against them, respectively, for the sums found to be due.

8. That the sale of the south half of section 17, township 5 north, range 8 east, to J. M. Williams, trustee, be set aside and cancelled on the ground that the same was the homestead

of Josiah F. Earle at his death, and was not liable to be sold during the minority of plaintiff.

9. That the mortgage by Ben R. Earle to T. W. Paxton, as trustee, be decreed void and of no effect as to plaintiff, or her liens and claims upon the lands in it, and that such mortgage, and the quitclaim deed made by Ben R. Earle to Williford and Martin, and the quitclaim deed made by Williford to George P. Diehl and the Edgewood Distilling Company, and the deed made by the sheriff to George P. Diehl, all be cancelled, and the amount of the rents received by George P. Deihl or the Edgewood Distilling Company be fixed, and that she have decrees against them therefor and for any waste committed.

10. That the sales under the decrees for the levee taxes, at which Pickett and Brown became the purchasers, and the deeds made them, respectively, by Holloway as commissioner, be all decreed void and set aside.

11. That the deed from Louisa R. Earle to William R. Barksdale be construed and its effect declared, and that it be decreed that Barksdale took no title to the lands, and that the deed be cancelled.

These four cases were, by an order of the court, consolidated and tried together. W. N. Brown, Jr., died during the pendency of the suit, and as to his interest it was revived in the name of his widow and administratrix, Ida E. Brown, and his two children.

The decree rendered by the court was in favor of the plaintiff, Ruth Earle Nelms, against the widow, administratrix and heirs of W. N. Brown, Jr., setting aside the sales of land by Swepston as administrator of the estate of Louisa R. Earle, deceased; and against the plaintiff as to the lands purchased by W. N. Brown, Jr., at levee tax sale, and also against the plaintiff as to a tract of land held by the Southwestern Improvement Association, grantee of W. N. Brown, Jr., the court holding that Josiah F. Earle had no title to that tract.

The decree was also in favor of the plaintiff against the Edgewood Distilling Company and George P. Diehl, setting aside the conveyance to them by Ben R. Earle and E. E. Williford. In all other respects the decree was against the plaintiff, dismissing the complaint for want of equity. A reference

to a master was made to state an account of the rents and profits received by W. N. Brown, Jr., and by Edgewood Distilling Company and George P. Diehl; and upon report of the master decrees were rendered in favor of the plaintiff for amounts of rents received by those parties, respectively, after giving credits for amounts to which they were found to be entitled.

The plaintiff, Ruth Earle Nelms, appealed from so much of the decree as was adverse to her claim, and the widow, administratrix and heirs of W. N. Brown, Jr., and Edgewood Distilling Company, and George P. Diehl also appealed.

R. G. Brown and *N. W. Norton,* for appellants Brown and Southwestern Improvement Company.

1. Ben R. Earle was barred by the five year statute at the time suit was brought; and Ruth Earle was likewise barred in so far as she claimed through him. As a creditor of her mother's estate, and in regard to any matter of her mother's guardianship, she was barred by the statute of non-claim. 33 Ark. 658; 45 Ark. 495.

2. Ruth Earle cannot be heard to object to the sale made by the administrator Swepston. 31 Ark. 76, 83; 19 Ark. 499; 6 Eng. 519; 12 Ark. 84; 13 Ark. 507; 25 Ark. 52; 35 Ark. 205; 38 Ark. 78; 52 Ark. 342; 70 Ark. 88. The fact that Brown and Pickett were appraisers of the land does not render the sale void as to them. There is no prohibition in the statutes against appraisers purchasing land which they have been appointed to appraise. 76 S. W. 52; 8 Ohio, 52.

R. G. Brown and *W. D. Wilkerson,* for appellants, on the construction of the will:

This question is raised for the first time here by appellees, which should estop them; but (1) complainant was born after the execution of the will. Her rights are fixed by Kirby's Digest, § 8019. (2) The words in § 8020, "omit to mention the name of a child, if living," cannot bear the narrow and restricted meaning contended for by appellee. A will is to be liberally construed, so as to effectuate the intention of the testator, unless contrary to public policy. Where it provides for all of the children, without naming any, it is a substantial compliance with the statute. 23 Ark. 569; 31 Ark. 145; 70 Ark. 483; 8 Johns.

44; 1 Mees. & W. 113; 100 U. S. 239; 5 L. R. A. 342 and note; 61 N. E. 596; 25 Mo. 70.

Moore, Smith & Moore, W L. Terry and *D. D. Terry,* for appellee Nelms; *Randolph & Randolph,* of counsel.

1. The children were not named in the will, and therefore they were entitled to the same respective shares as if no will had been made. Kirby's Digest, § 8020; 23 Ark. 569; 31 Ark. 145; 70 Ark. 483. The widow took no property disposed of by the will beyond what the law gave her as such widow. When she died, the lands she held in dower descended in accordance with the will, or, since Josiah F. Earle had died intestate as to the children not named, in accordance with the law for descent and distribution of intestate's estates. Kirby's Digest, § § 2687, 2710. At the death of Jerry W. Earle and Louisa R. Earle (Williamson), their shares vested in Ruth and Ben R. Earle, in fee. 15 Ark. 550; 69 Ark. 238; 31 Ark. 103; 52 Ark. 55; 70 Ark. 371.

2. If it be conceded that Stone & Tyler were creditors of the estate of Louisa R. Earle, with their claims probated, they are not in the position of *bona fide* purchasers for value without notice. They were parties to the proceeding of Swepston in the probate court to sell the lands belonging to Mrs. Earle's estate, and the purchases made by Williams, their trustee, may be defeated by the defects, or even in the errors of the proceeding of Swepston as administrator. 54 Ark. 239. As to validity of probate sales of real estate without notice, etc., see Freeman on Void Jud. Sales, § § 15, 16. Notice of intention to make application on the first Monday in May, 1895, to the probate court to sell land will not authorize the filing of the petition in July, 1895, nor the continuance of such petition until the October term, 1895, nor the order of sale at the April term, 1896, when there has been no continuance to that term. Freeman on Void Jud. Sales, § 7; 13 Ark. 250; Black on Tax Titles, § 61; 27 Ark. 417; 48 Ark. 151; 50 Ark. 390; Cooley on Taxation (1 Ed.), 361.

3. On the question of homestead for Ruth Nelms: see art. 9, § § 3, 4, 6, 10, Const.; Kirby's Digest, § § 3898, 3899, 3882. In the sense of the Constitution and statutes, a child, whether male or female, is a minor until 21 years of age, and the home-

stead exists, notwithstanding the head of the family to whom the homestead belonged made a will, because, in case of the death of the widow, "all of said homestead is vested in the minor children of the *testator* or intestate." It is inalienable as against minor children, and the sale by Swepston in July, 1896, was void as to Ruth Earle. 47 Ark. 445; 49 Ark. 75; 56 Ark. 567; 69 Ark. 1; 77 Ark. 186; 73 Ark. 266; *Id.* 8. At the death of Josiah F. Earle, his children were entitled to immediate entry upon that part of his land constituting his homestead, and as to the estate of inheritance neither Ben R. nor Ruth, as the surviving children, devisees or heirs at law, had a right of action as owners until the youngest, Ruth, became 21 years of age. 53 Ark. 400. They could not waive or forfeit, while minors, any right of homestead. 29 Ark. 633; 37 Ark. 316. On the question of rents and accounting, see 47 Ark. 445; 49 Ark. 76; 51 Ark. 335; 61 Ark. 271; 54 Ark. 9.

4. The court erred in dismissing the complaint and cross-complaint as to the southwest quarter section 32, township 8 north, range 6 east, on the ground that Josiah F. Earle had no title. He died seized of the lands, which was sufficient title as against all defendants in this action. Ida Erb Brown and the Southwestern Improvement Company denied in their answers the title of Ruth and Ben R. Earle, but they set up no title in themselves or any one else. No issue was therefore raised by the general denial. 73 Ark. 221; *Id.* 344; Kirby's Digest, § § 6098 (2), 6137.

5. It was error to dismiss the complaint and cross-complaint as to north one-half section 13 and northeast quarter section 14, conveyed by Louisa R. Earle to Barksdale. Perry on Trusts (1 Ed.), § § 475, 490, 499, 655; 2 Head, 221; *Id.* 239; 68 Ark. 414; 1 Caldwell, 416; 13 Pickle, 72; 134 U. S. 241; 134 U. S. 589; 77 Ark. 182; 51 Ark. 61.

6. Ruth Earle had the right to redeem from the levee tax and other tax sales. Act No. 19 of Acts 1895; 74 Ark. 572; 34 Fed. 702; 10 Pet. 1; 10 Wall. 464; 161 U. S. 334. And the chancery court has jurisdiction to grant relief against the tax titles, etc. 130 U. S. 505; 77 Ark. 575; 1 Pomeroy, Eq. Jur. § § 181, 231, 249; 41 Ark. 59; 61 Ark. 456; 52 Ark. 132; 74 Ark. 433. Ruth and Ben R. Earle, being citizens of Crittenden County,

were entitled to personal notice of the suits for levee taxes, the same being for the levee taxes of 1893 and 1894, and having been brought before the act of 1895 (Acts 1895, pp. 88-93) was passed. Acts 1893, p. 32, § 13; 59 Ark. 535; 44 Minn. 97; 50 Miss. 468; 27 Ark. 473; 189 U. S. 429. No notice was given to them. Kirby's Digest, § § 4424, 4425; 77 Ark. 477.

7. That part of the decree "quieting and confirming" the title to the west third of northeast quarter, section 32, in the Southwestern Improvement Company was erroneous. It is shown that there was a receipt given to the guardian of Ruth Earle for the amount of the levee taxes due by her, and the decree declared that her lands were redeemed. If the taxes were paid, there could have been no sale of the lands; and if the court decreed that they had been paid, there could have been no deed made under the sale reported. 77 Ark. 519; Kirby's Digest, § 7181; 59 Ark. 15.

8. Both the tracts of land decreed to Rhodes belonged to J. F. Earle in his life time, and Swepston as administrator had no authority to sell any interest in them. Lands are assets for the payment of debts only *sub modo*. The personal property must first be exhausted or at least be shown to be insufficient. That lands are not to be sold for the payment of debts where the personal property is sufficient for that purpose is clearly implied from the statute, and such a holding is in accordance with weight of authority. 63 N. Y. 438; 5 Paige, 254; 74 Ill. 134; 89 Ill. 119; 3 Munf. 514; 71 N. C. 66; 12 R. I. 156; 85 Ill. 428; 83 Ind. 353; 26 W. Va. 484; 62 Miss. 390; 1 Yerg. 285; 2 Swan, 156; 8 Baxter, 483; 4 Lea, 522; 2 Pickle, 539; 2 Tenn. Chy. 331; 3 Haywood, 299. See also Kirby's Digest, § § 24, 154-156; 53 Ark. 559; S. & H. Digest, § 157; 46 Ark. 260; 47 Ark. 222. No distribution of personal assets remaining in the hands of the administrator can be made until the probate court has established that the debts of the estate have been paid, and has ordered the administrator to make distribution. S. & H. Dig., § § 160, 161; 47 Ark. 222; 5 Ark. 468; *Id.* 608; *Id.* 629; Kirby's Digest, § § 79, 186, 187, 189; 8 Ark. 9; 49 Ark. 91; 27 Ark. 235; 30 Ark. 775; 42 Ark. 25. The mere order of sale, not based on petition by administrator for sale of lands, where no notice of intention to apply for sale was given, where no debts or claims had

been probated, and where more than five years had elapsed since administration should have been closed (Kirby's Digest, § 224), will not have the effect of passing title under the sale made as against the heirs at law, and especially not where the facts establish fraud practiced as against the estate and heirs, and the purchasers are shown to have paid inadequate prices, and were chargeable with knowledge or notice of facts showing that the sales should not have been made. 37 Ark. 155; 46 Ark. 373; 56 Ark. 633; 70 Ark. 185; 63 Ark. 405; 55 Ark. 562; 56 Ark. 419; 62 Ark. 439. It is shown that all claims against Mrs. Earle's estate could have been paid out of personal assets in hand when Swepston became administrator, if the creditors had used any efforts to make collections. Their laches will release the lands from sale. 7 Johns. Chy. 90; Buswell on Lim. & Adv. Poss., § § 18, 19, 328, 330, 333, 387; 19 Ark. 16; 57 Ark. 583; *Id.* 142; 46 Ark. 25; 64 Ark. 345; 35 Ark. 137; 58 Ark. 580; 55 Ark. 85; 61 Ark. 527; *Id.* 575. The sales made by Swepston being void, they could not be made valid by confirmation. His deeds to purchasers were never approved or ratified by the probate court. 2 How. (U. S.) 25; 1 Wall. 627; 2 Wall. 609; 94 U. S. 711; Freeman on Void Jud. Sales, 146, § 44; 6 Wall. 643; Kleber's Void Jud. & Ex. Sales, § § 442, 491; 55 Ark. 562; 66 Ark. 492; Drake on Attachments, § 89a; 74 Ark. 82. On the question of inadequacy of price so gross as to amount to fraud, see: 19 How. 303; 4 Johns. Chy. 118; 9 How. 55, 81-83; 98 U. S. 85; 141 U. S. 471; 117 U. S. 180; 161 U. S. 334; 20 Ark. 381; *Id.* 652; 32 Ark. 391; 56 Ark. 544; 57 Ark. 352. Brown and Pickett having agreed before becoming appraisers to attend the sale and buy the lands, and having appraised the lands at an inadequate price, of which fact Rhodes was cognizant, unquestionably the sales to each of the three should be set aside for fraud. 33 Ark. 576; *Id.* 299; *Id.* 195; 34 Ark. 72; 61 Ark. 575; 45 Ark. 505; 55 Ark. 91; 58 Ark. 84; 46 Ark. 25; 75 Ark. 41. See also, 196 U. S. 415; 13 Ark. 507.

9. Ruth Earle is entitled to full subrogation of the Ben R. Earle mortgage to Chase, and of the Louisa R. Earle mortgage to Chase. 2 Brandt on Suretyship, § 324; Sheldon on Subrogation, § 155; 1 Jones on Mortg., § § 726, 883a; 23 Ark. 604; 39 Ark. 577; 45 Ark. 299; 33 Ark. 658; 45 Ark. 495; 74

Ark. 520; 23 Ark. 163; 31 Ark. 392; 32 Ark. 406; 32 Ark. 443. For distinction between mortgage to secure liability and one made to indemnity surety against loss: 108 U. S. 263; 76 Ark. 176; 34 Ark. 280; 67 Ark. 200; 92 U. S. 306.

10. Swepston, as administrator *de bonis non,* had nothing to do with the property of Louisa R. Earle which had been lost, wasted, etc., by Ben R. Earle, administrator, and no right to sue on his, Earle's, bond as administrator. 34 Ark. 144; 109 U. S. 258.

11. As to the jurisdiction of the chancery court to make a complete settlement of Swepston's administration in the suit, and to ascertain the amount owing by him, etc., see 34 Ark. 63; 42 Ark. 186; 7 Wall. 125; 33 Ark. 575; 45 Ark. 505; 50 Ark. 217; 48 Ark. 544. From personal liability for wrongful acts and defaults as administrator, Swepston cannot protect himself by any statute of non-claim or of limitations. 18 Ark. 495; 22 Ark. 1; 46 Ark. 26.

W. D. Wilkerson, for appellees Stone and Tyler.

1. Mere irregularities will not avail to set aside a sale, or render the sale void, where it has been confirmed by the court. 31 Ark. 83; 19 Ark. 299; 6 Eng. 519; 12 Ark. 84; 13 Ark. 507; 25 Ark. 52; 39 Ark. 206; 52 Ark. 341; 72 Ark. 339. On the charge of fraud in the sale and participation therein by the purchasers: The proof clearly shows that the sale was *bona fide* made, that it was largely attended, that different bidders competed in the bidding; also that the land was duly appraised and, so far as Williams, trustee, is concerned, was sold for more than the appraised value, and for what was at the time a fair price. At the time the sale was ordered the administration was not closed, and the debts were not all paid; and on the removal of Ben R. Earle it was Swepston's duty to finish the administration. 42 Ark. 25.

2. After Louisa R. Earle had administered the estate, she would be liable as trustee only, and as such she would be indebted to the estate, if indebted at all, and not as executrix. Her bond to Chase was to indemnify him as security for her as executrix. 17 Ark. 533; 45 Ark. 495; 23 Ark. 163; 51 Ark. 1; 24 Am. & Eng. Enc. of L., 863; 22 Ill. 546; 42 Ark. 186.

3. The allowance of the Stone & Tyler claims against Mrs. Earle's estate had the force and effect of a judgment. If erroneously allowed, the remedy was by appeal. Even if barred by the statute of non-claim, and erroneously allowed, the allowances are not void for that reason. 35 Ark. 205. Even if there had been no appraisement, this would not render the sale void, if confirmed by the court. 38 Ark. 79.

4. Where, as in this case, the testator devises all of his lands to his wife and children, the estate being entirely solvent, and they enjoy the same for thirteen or fourteen years, and by virtue of which will they receive much more than they would by claiming homestead, in such case the election and acceptance by the widow of this provision of the will would be in lieu of homestead. The terms of the will clearly indicate an intention that the bequests are made in lien of homestead. Thompson on Homestead and Exemptions, § 544; 54 Pac. 1046; 77 N. W. 551; 12 S. W. 933; Sandels & Hill's Digest, § 2520 *et seq.;* 29 Ark. 418; 52 Ark. 193; 37 Vt. 419; 52 Ga. 407; 65 Miss. 495; 4 Lea (Tenn.), 674.

W. D. Wilkerson, for Edgewood Distilling Company and Geo. P. Diehl; *Archibald R. Watson,* of counsel.

1. There is no valid reason for attacking the execution sale under the Connor judgment. The execution of the quitclaim deed by Ben R. Earle not only served the purpose of cutting off his equity of redemption, but it was also made necessary because he had, between the time of the levy of the execution and the sale thereunder, executed a deed of trust to Paxton. That the execution sale was actually made is affirmatively shown in the testimony; moreover, the sheriff's deed, regular in form, is evidence of the fact. Kirby's Digest, § 3298.

2. Earle's quitclaim deed to Martin & Williford extinquished his liability to them. It was purely optional with him whether he should pay back the money to them and claim a reconveyance of the property, or let it stand and claim an extinguishment of the debt. Such a transaction does not create an equitable mortgage. 40 Ark. 146; 75 Ark. 551. A parol promise by Martin Williford to reconvey, if made, would be void under the statute of frauds. 37 Ark. 145; 57 Ark. 632; 56 Ark. 139; 55 Ark. 414; 13 Ark. 593.

L. P. Berry and *A. B. Shafer,* for W. W. Swepston *et al.*

1. A will containing the clause, "I give my wife one-half of all my property and one-half to my children," without naming them, is a sufficient compliance with the statute to prevent intestacy as to the children. Kirby's Digest, § § 8010, 8015, 8019, 8020, 8021; 39 L. R. A. 689; (Mass.) 12 *Id.* 3, c. 7; 3 Mass. 17; 24 Mo. 311; Steele & Campbell's Ark. Dig., Wills & Test., § 4; 3 Mo. 594; 17 Mo. 411; 25 Mo. 71; 70 Ark. 483-489; 115 Am. St. Rep. 579, note; 39 Am. Dec. 740.

2. As to the power of the execution to dispose of the property under the will, see 68 Ark. 409.

McCULLOCH, J., (after stating the facts). This appeal involves separate and distinct controversies between Ruth Earle Nelms, the plaintiff below, and the several defendants, and they will be treated separately in this opinion, though there are some points in common between the various parties to the different controversies.

Ruth Earle Nelms v. *W. N. Brown, Jr.*

The first question presented, and one which is a common matter of concern to all the parties, is a construction of the last will and testament of Josiah F. Earle. Most of the lands purchased by Brown and Pickett at the sale by Swepston as administrator in succession to the estate of Louisa R. Earle were those inherited by Louisa R. Earle from her father; but Brown also purchased her half interest in one tract devised by the will of Josiah F. Earle.

It is contended on behalf of appellee Ruth Earle Nelms that the devises contained in the will of Josiah F. Earle were void, and that he died intestate because of the omission of the names of his children from the will.

The will purports to devise one-half of the testator's property to his wife and the other half to his children, without naming them. Is the provision for the children, as a class, a sufficient naming of them to comply with the statute concerning the execution of wills?

The statute is as follows: "Whenever a testator shall have a child born after the making of his will, either in his lifetime or after death, and shall die, leaving such child, so after born, unprovided for in any settlement, and neither provided for nor

in any way mentioned in his will, every such child shall succeed to the same portion of his father's estate, real and personal, as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised or bequeathed to them by such will." Section 8019, Kirby's Digest.

"When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections." Section 8020, Kirby's Digest.

This feature of the statute has not been passed upon by this court, though it was referred to in *Bloom* v. *Strauss,* 70 Ark. 483, and the court expressly declined to decide the question. In that case the will contained neither mention of the children's names nor provision for them.

In the present case the will of Josiah F. Earle contains a substantial provision for his children, naming them as a class, but does not mention their names individually.

Reliance is expressed by counsel in the case of *Branton* v. *Branton,* 23 Ark. 569, as sustaining the contention that making provision in a will for children as a class is not equivalent to naming them and does not constitute a valid testament as to the children whose names are omitted. We do not think the case sustains that contention, though the opinion contains *dicta* indicating that that was the construction to be placed on the statute. In that case the testator bequeathed all of his property to his wife, and made no reference in his will to his children, either by providing for them or by mentioning them by name or as a class. It was contended in support of the

validity of the will that the statute was intended only to provide for children whose names were accidentally omitted, either from oversight or forgetfulness, and that the terms of the will in question manifested an intention on the part of the testator to disinherit his children. The court rejected that contention, and held that the will was invalid. In disposing of the case, the court said in the opinion that the law makes compulsory provision for children, as in intestacy, unless the testator "shall express a contrary intention toward any child and its children by naming it, or them, in the will." This construction of the statute would invalidate a bequest of practically all the property of a testator to his children because of a failure to mention the names of the children, individually, in the will. We cannot believe that the lawmakers intended any such construction to be placed on the language used, and we should not attribute to them an intention to restrict the power of alienation by so technical a requirement, unless that intention plainly appears from the language used. We think it is manifest that what was intended by the statute was to declare intestacy as to children of a testator, and thus provide compulsory provisions for them, unless the testator expresses a contrary intention in the will toward the children. Such an intention may be expressed by the testator in his will by providing for them as a class without naming them separately, or by naming them without providing for them. Either method is equivalent to the other, and either the one or the other clearly excludes any intention on the part of the testator to omit his children from the testament. It would, we think, be disregarding entirely the purpose of the statute, and would be putting form over substance, to say that the names of children must be individually mentioned in a will which provides substantially for each and all of them.

A section of the Revised Statutes declares that "all general provisions, terms, phrases and expressions used in any statute shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out." Kirby's Digest, § 7792.

It is therefore our duty to construe the terms of the statute under consideration consistent with a reasonable interpretation

of the language used, so as to carry out the real intention of the Legislature.

"Wills," said Judge WALKER in *Cockrill* v. *Armstrong*, 31 Ark. 581, " are always liberally construed, and every conclusion which may be legitimately indulged in order to reach a just and equitable conclusion is not only permissible but is required. Words and sentences are to be considered and construed so as to reach the real intention and purpose of the testator. So strong is the presumption that a father would not intentionally omit to provide for all his children that, in case the name of one or more of the children is left out of the will, by statute it is held to be an unintentional oversight, and the law brings them within the provisions of the will, and makes them joint heirs in the inheritance."

The statutes of this State declare, in general terms, what was already the inherent right of mankind, that all persons of sound mind and of mature age may devise all of his or her property by last will and testament. The statute having reference to omitted children was designed to apply only to presumed intestacy, and to provide a rule whereby intestacy may be conclusively presumed. It would therefore be unreasonable to say that a testator who has made substantial provision in his last will for his children is presumed to have intended intestacy as to them because he failed to mention their names.

There is a paucity of authority on this precise question because of the dissimilarity of our statute in this particular from those of other States.

The view taken by the Missouri courts fully sustains the view we have expressed. A statute of that State concerning wills, enacted in 1815, was similar to our statute, and provided that "when any person shall make his or her last will and testament, and omit to mention the name of any child or children," etc., the testator shall be deemed to die intestate as to such child or children. In 1825 the Legislature changed the statute so as to read that "if any person shall make his or her last will and testament, and die leaving a child or children, or the descendants of any such child or children (in case of their death), not provided for in such will, although such child or children be

born after the death of the testator, every such testator, so far as regards any such child or children, or their descendants, not provided for as aforesaid, shall be deemed to die intestate."

Construing the statute last quoted above, the Supreme Court of Missouri in *Block* v. *Block,* 3 Mo. 407, held that if a testator declares in his last will that one of his children, stating the name of the child, shall take no part of his estate, that was a sufficient provision under the statute for the child, and that the testator would not be deemed to have died intestate as to such child. The court said that when the child was mentioned in the will and excluded that was a provision within the meaning of the statute.

The Legislature of Missouri subsequently changed the statute so as to read that "if any person make his last will and die leaving a child or children, or descendants of any such child or children (in case of their death) not *named nor provided for* in such will," etc., "he shall be deemed to die intestate," etc. In *Beck* v. *Metz,* 25 Mo. 70, the court had under consideration a will which, after a devise to the wife of the testator of all his property, contained the following clause: "In every other respect I leave it entirely to the will and judgment of my said wife, Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our child or children as with reference to the said Joseph Frederick Beck." The testator left one child surviving whose name was not mentioned in the will except in the general terms quoted above; and the court held the language quoted above *named* the child within the meaning of the statute. The court, speaking through Judge Ryland, said: "The testator expressly mentions his child—'as well with reference to our child.' They had but one, the daughter. The wife had one by a former husband; even he is named. Now, this mentioning his child and the giving the power to his wife to provide for this child by disposing of the estate according to her own judgment must be considered, within the spirit of our statute, as a naming or providing for his child. He can not be said to have omitted to mention his child. True, he did not name her by her name, but she is sufficiently designated, they having but a daughter."

In *Hockensmith* v. *Slusher,* 26 Mo. 237, the court held that

a bequest to a son-in-law, though he was not designated as such in the will, was a *naming* of the daughter of the testator within the meaning of the statute. The court said: "The statute extends only to a case of entire omission, and the mention of a child without a legacy or other provision for him is sufficient to cut him off from a distributive share of the estate; and whenever the mention of one person, by a natural association of ideas, suggests another, it may reasonably be inferred that the latter was in the mind of the testator and was not forgotten or unintentionally omitted."

The same conclusion was reached in *Woods* v. *Drake,* 135 Mo. 393, where it was held that a bequest to children, naming them by name, of an adopted daughter, without mentioning her by name, was sufficient to amount to a mention of her name.

The Supreme Court of Oregon in *Gerrish* v. *Gerrish,* 8 Ore. 351, construing a statute of the State which was copied from the Missouri statute quoted herein, followed the construction laid down by the Missouri court, and held that the mention in a will of children as a class was sufficient naming of them within the meaning of the statute.

We do not have to go as far as the Missouri courts have gone in order to sustain the will in the present case. We hold that the provision in the will of Josiah F. Earle for his children was sufficient compliance with the statute, and that all the devises contained in the will were valid.

An attack is made upon the validity of the sales of land made by Swepston as administrator in succession of the estate of Louisa R. Earle on numerous grounds, some of which are not of sufficient importance to discuss. As shown in the foregoing statement of the facts, Ben R. Earle was appointed administrator of said estate in the year 1891, and in 1894 (more than three years thereafter) his letters were revoked, and Swepston was appointed administrator in succession.

The order of sale was made by the probate court upon the petition of the administrator, and it is contended that the order was void because not made within three years from the date the administration began. It is conceded that an order of sale may be made after three years on petition of creditors, but not on petition of the administrator. We find no such distinction or

limitation in the statute. The statute provides generally that, if the personal estate of a decedent shall be insufficient to pay the debts, it shall be the duty of the executor or administrator to apply to the probate court by petition for sale of real estate to raise funds for that purpose. There is no restriction as to time, but this court has repeatedly held that, in the absence of circumstances excusing the delay, seven years is the shortest period of delay which will bar the right to sell lands of a decedent for the payment of debts. *Mayo* v. *Mayo,* 79 Ark. 570, and cases cited therein.

No distinction is made in any of those cases between the power of the probate court to order sales on petition of the executor or administrator and on petition of creditors. The statutes further provide (Kirby's Digest, § 204 *et seq.*) that any creditor may, after demand made upon the administrator and his refusal to comply, petition the probate court for sale of the decedent's lands for the payment of debts; but no time is specified within which this may be done, and no time is specified to elapse before it may be done.

Executors and administrators are required by statute to make final settlement of their administration within three years from the date of letters (Kirby's Digest, § 224); but this statute is only directory. It does not divest the probate court of jurisdiction to complete the administration of estates after that time and to make any necessary orders to that end for the disposition of assets of the estate.

The validity of the probate sales is also challenged on the ground that some of the claims against the estate were probated after the expiration of two years from commencement of administration. It cannot be denied that there were, when the order of sale was made by the court, valid and subsisting claims against the estate which had been duly probated within the two years prescribed by law. The record shows this. Petition was made to the probate court by the administrator in succession for sale of the lands, the order was duly made, the sales were made and reported to the court, and the court confirmed them. Errors and irregularities in the allowance of claims did not vitiate the sale or deprive the court of jurisdiction to order the sale of lands. The act of 1891 (Kirby's Digest, § 3793) providing that "all

probate sales of real estate, made pursuant to proceedings not in substantial compliance with statutory provisions, shall be voidable," whatever it may mean, does not mean that defects in the allowance of claims against estates will avoid a sale of real estate. The proceedings referred to in that statute are those pertaining to the sale, and not to the allowance of claims whenever the court has acquired jurisdiction of the *corpus* of the estate. *Jackson* v. *Gorman,* 70 Ark. 88.

The order of sale was not invalid because made at a term of the probate court subsequent to the one at which the petition was first presented. The court acquired jurisdiction to hear and determine the prayer of the petition, and jurisdiction was not lost by lapse of the term. It was not even an irregularity to grant the prayer of the petition at a subsequent term.

It is contended that, before an order of sale could be made on petition of Swepston to pay debts probated during the administration of his predecessor, Ben R. Earle, the judgments of allowance must have been revived against Swepston as administrator in succession. Payment of claims against estates, once allowed by the probate court, can be enforced without revivor against a new administrator. Notwithstanding a change in the administration, they continue, until paid, as subsisting judgments against the estate, and can be enforced, as such, without revivor. Prior to the adoption of the Constitution of 1874 which abrogated it, there was a statute authorizing issuance of execution for the enforcement of judgments against executors and administrators as such. It was held under that statute that judgment against an administrator must be revived against his successor before execution could issue against the latter. *Meredith* v. *Scallion,* 51 Ark. 361; *Adamson* v. *Cummins,* 10 Ark. 541. But, as we have already said, the provision of the Constitution of 1874 conferring upon probate courts exclusive jurisdiction over the estates of decedents (art. 7, § 34) abrogated that statute and vested in that court exclusive power to enforce claims established against estates of decedents. *Meredith* v. *Scallion, supra.*

The fact, if established, that Ben R. Earle, while acting as administrator, had wasted assets of the estate sufficient to pay the debts did not, as contended by appellee, deprive the creditors of the right to resort to the assets unadministered for the payment

of their debts, and to procure sale of the land. *Conger* v. *Cook,* 56 Iowa, 117; In re *Bingham,* 127 N. Y. 296; *Smith* v. *Brown,* 99 N. C. 377.

The principal attack upon the probate sales to Brown and Pickett is grounded upon the fact that they were appraisers of the real estate to be sold.

The statute provides that, before an executor or administrator of an estate shall sell lands, he shall cause the same to be appraised by three disinterested householders of the county, and that the appraisers, before they enter upon their duties, shall make and subscribe an affidavit "that they will well and truly, according to the best of their abilities, view and appraise the lands." Kirby's Digest, § 196, 197. The statute further provides that the lands shall be reserved from sale unless sold for two-thirds of the appraised value thereof. Kirby's Digest, § 199.

Nothing is found in the statute forbidding appraisers from becoming purchasers at the sale; and if they are prohibited by any principle of law it must result from some inconsistency in their relations as appraiser and purchaser, and not from any positive statutory inhibition. Is there any such inconsistency? They have no duty to perform concerning the sale except to appraise the property, and that duty is fully performed before the sale occurs. But it is an important duty, and one which the statute requires shall be performed by wholly disinterested persons. The disqualifying interest which the statute forbids may be either in the sale or the purchase, and one who expects to become a purchaser at the sale has such an interest. It is true that an appraiser may at the time he performs his duty harbor no intention to become a purchaser at the sale, and may therefore be entirely disinterested at that time, and may conceive the design to purchase after he completes the appraisement; but, as that design may be hidden in his own breast, how can it be shown when he conceived it? In making the appraisement he performs an important and substantial service for the protection of the estate, and we deem it to be the soundest policy to hold that when he accepts the office he disqualifies himself from becoming a purchaser. That rule works no hardship to the appraiser, and it shuts the door to opportunity for concealed fraud.

The rule which forbids one who has a duty to perform with reference to such a sale rests upon sound public policy, and not upon the actual perpetration of fraud. One of the forbidden class who purchases will not be heard to say that he intended no wrong and perpetrated no actual fraud.

The only authority which we find directly in point is a decision of the Supreme Court of Ohio, and the reasons therein stated are, we think, unanswerable:

"The disability of the appraisers in the present case, if it exists," says the court, "arises under those general principles of equity which prevent those from acquiring a title to whose discretion or agency the management of a sale is confided. The application of the doctrine to trustees, executors, attorneys, and agents is familiar in all the books. A majority of the court unite in the opinion that the principle of exclusion attaches to every person to whose integrity and judgment is committed the execution of any step needful in making the sale. Where the law creates fiduciary relations, it seeks to prevent the abuse of confidence by insuring the disinterestedness of its agents. It holds the relation of judge and party, of buyer and seller, to be inconsistent. The temptation to abuse power for selfish purposes is so great that nothing less than that incapacity is effectual, and thus a disqualification is wrought by the mere necessity of the case. Fullness of price, absence of fraud, and fairness of purchase are not sufficient to countervail this rule of policy. To give it effect, it is necessary to recognize a right in the former owner to set the sale aside in all cases on repayment of the money advanced * * * The appraiser of land is interposed between the buyer and seller in judicial sales to prevent sacrifices, at undue prices, to the detriment of those interested in its value. If he were permitted to profit by his position, the law would lose its strongest security for his integrity." *Armstrong* v. *Heirs of Huston,* 8 Ohio, 552.

It has been decided by this court that a confirmed sale of land by an administrator or executor is valid without any appraisement at all having been made (*Bell* v. *Green,* 38 Ark. 78); but the confirmation does not heal the incapacity of the purchaser. The sale is voidable at the instance of the heirs, and may be avoided after confirmation. This must ordinarily be done, of

course, within a reasonable time; but the plaintiff was an infant at the time of the sale, and she commenced this suit to set aside the sale within a reasonable time after she attained her age of majority, and she is entitled to do so as to her interest in the land which she inherited from her mother. She inherited one-half of her mother's land, and Ben R. Earle inherited the other half. She claims, and the chancery court decreed to her, a lien on the Ben R. Earle interest, by subrogation to the rights of his mortgagees, the sureties on his bond as her guardian and as administrator of the Louisa R. Earle estate, for the amount found to be due by him as such guardian and administrator.

The defendants pleaded the five-year statute of limitation under the probate (judicial) sale. Ben R. Earle, as well as the mortgagees themselves, were barred at the time of the commencement of this suit. Was Ruth Earle Nelms, the infant, also barred of her right to subrogation? We hold that she was barred.

It is said that the right of subrogation is peculiarly a doctrine of equity jurisprudence, and is founded on natural justice and the facts and circumstances of each particular case. 27 Am. & Eng. Enc. Law, p. 203; 4 Pomeroy's Equity Jurisprudence, § 1419. The doctrine is variously applied: to sureties who pay debts of their principal and may be subrogated to the securities, liens, etc., held by the creditor; to creditors who may be subrogated to securities and liens held by sureties; to persons interested in incumbered estates who pay off the incumbrances; and to persons paying or advancing money to discharge incumbrances on other's property, under an agreement that he may hold the discharged incumbrance as security for repayment. One entitled to subrogation is substituted in the place of the original holder of the right, with no greater rights or equities than he had. *Rodman* v. *Sanders,* 44 Ark. 504. "The rights acquired by a party entitled to subrogation cannot be extended beyond the rights of a party under whom subrogation is claimed. Subrogation contemplates some original privilege on the part of him to whose place substitution is claimed; and where no such privilege exists, or where it has been waived by the creditor, there is nothing on which the right can be based. While a surety who pays the debt of his principal is subrogated to the rights of the holder of the

claim, he takes such rights subject to all disqualifications and limitations which attached to them in the hands of his predecessor." 27 Am. & Eng. Enc. of Law, p. 206.

A surety who pays the debt of his principal and seeks subrogation to the securities held by the creditor, or a creditor who seeks subrogation to the lien of securities held by a surety, must take steps to enforce his right of subrogation within the period of limitation which would have barred the right of enforcement while in the hands of the original holder of the securities. There can be no subrogation to a lien, the enforcement of which is barred by limitations. *Rodman* v. *Sanders, supra;* Sheldon on Subrogation, § 176.

The subrogated right to enforce a lien is a derivative right, and must be exercised within the period of limitation allowed to the original holder of the lien. Exceptions may take a case out of that rule, as in *Neff* v. *Elder*, 84 Ark. 277, where one who purchased land in ignorance of a defect in the title and whose money was used in paying off a valid incumbrance was held to be entitled to be subrogated to the lien on discovering the defect in his title, and that the statute did not bar his right before he discovered the defect. The plaintiff could not be subrogated to greater rights under the mortgage executed by her brother, Ben R. Earle, than the mortgagees themselves. Her minority does not enlarge her right over those possessed by those to whom she seeks to be subrogated.

The validity of the levee tax sales to Pickett and Brown under decree of court is attacked on the alleged ground that Ben R. Earle, whose interest in the land was sold, was a resident of the county, and occupied the land, but was not personally served with process. *Van Etten* v. *Daugherty,* 83 Ark. 534. Ruth Earle Nelms also claims a lien on the land by right of subrogation. The five years' statute of limitation is pleaded as to these lands, and for the reasons already indicated we hold the statute bar to be complete.

It results from the views herein expressed, that the chancery court erred in its decree in so far as a lien in favor of Ruth Earle Nelms is declared on the interest of Ben R. Earle in the lands purchased by Pickett and Brown at the probate sale of Swepston, administrator, and to that extent must be reversed. In

all other respects the decree settling the controversies between the plaintiff and W. N. Brown, Jr., and the Southwestern Improvement Company is correct, and will be affirmed.

Ruth Earle Nelms v. *Stone & Tyler.*

J. M. Williams as trustee for Stone & Tyler, who were creditors of the Louisa R. Earle estate, purchased at Swepston's sale as administrator the interest devised to Louisa R. Earle under the will of Josiah F. Earle in certain tracts of land.

The sale is attacked on all the grounds set forth in the attack on the sales to Pickett and Brown except as to the appraisement made by those parties; and in addition thereto the validity of the sale is attacked on the ground that the claim of Stone & Tyler against the estate was improperly allowed, and that Stone & Tyler paid the purchase price by crediting the same on their judgment, instead of paying the money according to orders of the court.

The allowance of the claims of Stone & Tyler against the estate can not be drawn in question collaterally in the attack on the validity of the sale by the administrator, there being valid claims duly allowed against the estate and the probate court having jurisdiction to order the sale. *Jackson* v. *Gorman*, 70 Ark. 88. Nor did the fact that payment was made by credit on the probated claim of the purchasers, instead of payment in money, invalidate the sale. Only creditors who were prevented from obtaining satisfaction of their probated claims on account of the excessive payment to Stone & Tyler could complain of this, and their remedy, if any, was against the administrator. The sale was reported to the probate court and duly confirmed, and it does not appear that the interests of any other creditor were prejudiced by this method of accounting for the purchase price of the land.

The lands purchased by Stone & Tyler in part constituted the homestead of Josiah F. Earle, and it is claimed that the sale of the Louisa R. Earle interest in the land was void on this account. The land, it will be noted, was not sold to pay debts of the J. F. Earle estate, but the half interest devised to Louisa R. Earle under the will was sold by her administrator.

The Constitution provides that the homestead left by a

decedent shall be exempt from sale for debts of the decedent, and that the rents and profits thereof shall vest in the widow for life and children during minority. Const. 1874, art. 9, § 3. This provision of the Constitution does not, however, prohibit the original owner of the homestead from dismembering it by grant or devise—at least, so far as his children are concerned. Whether or not he can do so in so far as it affects the homestead rights of the widow we need not decide, as that question is not involved. The homestead right of children is a transmitted or wholly derivative one, and may be cut off by grant or devise of the parent. There is some conflict, we are aware, in the authorities on this question, but the previous decisions of this court lead to the conclusion herein expressed.

The Supreme Court of Mississippi held that the provision in the exemption laws for the enjoyment by the widow of exempted property did not interfere with the husband's right to dispose of the property by will. *Turner* v. *Turner,* 30 Miss. 428. The same court in *Morton* v. *McCanless,* 68 Miss. 810, said: "The whole object of the exemption laws of 1865 was to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist."

This court in *Merrill* v. *Harris,* 65 Ark. 357, quoted with approval the above language, and said: "Such is the view we take of it. The Mississippi law on the subject, while different from ours in some particulars, yet is so far like ours as to render the same principles applicable in all essential particulars."

In *Merrill* v. *Harris,* the question was as to the power of the probate court to order the sale of the homestead for the benefit of a minor on petition of the guardian. This court held that the language of the Constitution exempting the homestead during minority of the children did not forbid the sale of it under orders of the probate court for their benefit. Chief Justice BUNN, in the opinion, said: "The Constitution does not, in terms, seek to do more than protect from the grasp of the creditor. There is neither expressly nor by implication a restriction upon the powers of the probate court in respect to this class of the property of minors."

We think the same principle controls in the present case.

The framers of the Constitution manifestly had in mind only the exemption of the homestead from sale for debt either during the lifetime of the owner or after his death during the lifetime of his widow or minority of his children. There is no purpose manifested to restrict the power of alienation, and only by virtue of supplementary legislation is it that any restriction is placed on the right of alienation, and this reached only to the requirement that the wife must join in and acknowledge the execution of a conveyance by the husband of a homestead. Kirby's Digest, § 3901. It would be engrafting upon the constitutional provision with reference to exempt property something which the framers thereof did not intend, and which the language does not warrant, to hold that it prevented the parent from disposing of the homestead by will. The statutes of this State have ever given unlimited power of alienation by last will and testament except as to marital rights of the spouse; and it requires clear language in subsequent enactments in order to restrict the right. We do not find anything in the Constitution inconsistent with the power of alienation.

The decree of the chancellor as to Stone & Tyler is correct and will be affirmed.

Ruth Earle Nelms v. *John F. Rhodes.*

Rhodes purchased lands at Swepston's sale as administrator, and there is an attempt to show collusion between him and Pickett and Brown, but the chancellor found against that contention, and we think that the evidence supports the finding. The decree in favor of Rhodes will therefore be affirmed .

Ruth Earle Nelms v. *Edgewood Distilling Company* and *George P. Diehl.*

Ben R. Earle mortgaged his interest in certain tracts of the lands to the Edgewood Distilling Company. The same lands were afterwards sold under execution against him, and were purchased by Martin and Williford, the sureties on his stay-bond. He also conveyed the lands by quitclaim deed to Martin and Williford. Martin subsequently conveyed his interest to Williford, and Williford in turn conveyed to Diehl, who was agent for Edgewood Distilling Company. The last-mentioned

deed contained a special warranty of the grantor against any incumbrances on the land done or suffered by her.

It is shown that the deed from Ben R. Earle to Martin and Williford, though absolute in form, was executed either as security for repayment of the amount which they were required to pay for him in satisfaction of the stay bond, or under an agreement that the lands should be reconveyed to him on repayment of that amount. We need not determine whether the deed was intended to be a mortgage or conditional sale, under the doctrine announced by this court in *Hays* v. *Emerson,* 75 Ark. 551. We dispose of this branch of the case on other grounds. It is undisputed in the evidence that Diehl and the Edgewood Distilling Company had no actual notice of the secret agreement between Ben R. Earle and Martin and Williford concerning the conveyance of the land, and no facts are shown to have been brought to their attention from which they would be chargeable with notice of that agreement. The price paid by Edgewood Distilling Company, when added to their mortgage debt, to which the land was subject, is not shown to be so grossly inadequate as to put them upon notice of any frailty in the title conveyed. The fact that a deed in the chain of title was only a quitclaim did not, of itself, give notice of defects in the title or secret equities of the grantor. *Miller* v. *Fraley,* 23 Ark. 735; *Bagley* v. *Fletcher,* 44 Ark. 153; *Chapman* v. *Sims,* 53 Miss. 154; *Moelle* v. *Sherwood,* 148 U. S. 21; *United States* v. *Cal. & Oregon Land Co.,* 148 U. S. 31.

The mortgage executed by Ben R. Earle to the sureties on his bond as administrator and guardian, to the lien of which Ruth Earle Nelms claims the right of subrogation, was not filed for record until after the execution of his deed to Martin and Williford. Therefore the title conveyed by the latter takes precedence over the mortgage.

The decree against Edgewood Distilling Company and George P. Diehl was erroneous, and must be reversed.

Ruth Earle Nelms v. *William R. Barksdale.*

Louisa R. Earle conveyed a quarter section of the J. F. Earle lands to Barksdale, and the plaintiff seeks to have this conveyance set aside in so far as it affects her interest in the land.

Learned counsel have not, in their brief, favored us with an assignment of the grounds of their attack upon this conveyance, but we assume that it is because the deed of conveyance does not expressly refer to the powers contained in the will of J. F. Earle, and that the grantor undertook to convey as executrix, and not as trustee under the will. The grantor, Louisa R. Earle, purports to convey in her individual right and as executrix of the will of J. F. Earle; and it recites that the purchase price is to be used in the purchase of a home for herself and her children. She was not named in the will as executrix, but the will authorized her to control the property and to sell it for re-investment or to provide a home for herself and children. It is well settled now that a conveyance containing no reference to a power should, when necessary to give full effect to the conveyance, be construed as an execution of the power. *Lanigan* v. *Sweany*, 53 Ark. 185; Martindale on Conveyancing, § 135; 1 Sugden on Powers, pp. 247, 367; 4 Kent's Com. p. 335; *Campbell* v. *Johnson*, 65 Mo. 439. The only exception is "where there is an interest and a power existing together in the same person over the same subject, and the act be done without reference to the power, it will be applied to the interest and not to the power, *unless an interest to execute the power may be found.*" Martindale on Conveyancing, § 135. This court in *Lanigan* v. *Sweany, supra,* even limited this exception by laying down the rule that if such a conveyance "would have some effect if referred to an interest, but would not have full effect without reference to a power, it should have effect by virtue of the power."

The deed in this instance shows an intention to execute the power, but the grantor made the mistake of describing herself as executrix, and not as trustee. It is manifest, from the language of the deed, that she intended to execute the power contained in the will, and the deed should be so executed.

The decree on this branch of the case should be affirmed.

Ruth Earle Nelms v. *W. W. Swepston* et al.

The complaint against Swepston and the sureties on his bond as administrator, and C. L. Lewis as guardian and his sureties, involves an investigation of their respective settlement

accounts filed in the probate court and the various records, papers and accounts in that court relating to the administration and guardianship.

The parties, before the trial below, entered into the following written agreement, which was filed as a part of the record in the case: "It is further agreed that the record of the administration of the estate of Louisa R. Earle, by W. W. Swepston, as administrator, remaining in the probate court of Crittenden County, including the bonds given, the inventories filed, appraisements, accounts of sales, settlements, the allowances and classification of claims against the estate, and all orders of the probate court, and as to all other matters, or any part of such record, may be read in evidence by or on behalf of either party without filing copies in this suit, and that where copies have been filed by either party of said records, or any portion of the same, such copies shall be taken to be true, subject, however, to the right of either party to produce the original in evidence, or show the copy filed to be incorrect."

The final decree recites that the cause was heard upon "the agreements of counsel on file and the several records, deed and writings therein mentioned, consisting of parts of the original records of the probate court of this county * * * and the original tax sale records of this county, which said original probate and tax sale records were brought into open court, and orders and judgments and parts thereof and extracts therefrom read orally in open court without filing copies thereof, under the agreement of counsel above mentioned," etc. No bill of exceptions appears in the record identifying and bringing upon the record the various records and documents read orally in court and upon which the chancellor based his decree. The clerk had no authority to copy into the transcript records and documents read to the chancellor at the trial, but which had not been made a part of the record in the case either by bill of exceptions or by filing copies. We are, therefore, unable to determine from the transcript whether the decree is right or wrong, as we have not before us the evidence which the chancellor had. We must, until it is shown to the contrary, assume that the decree was warranted by the evidence.

It is therefore ordered that the decree against the widow, administratrix and heirs of W. N. Brown, Jr., deceased, and the Southwestern Improvement Company, to the extent indicated in this opinion, and against the Edgewood Distilling Company and George P. Diehl, be reversed with directions to enter a decree in accordance with this opinion. In all other particulars the decree of the chancery court is affirmed.

Mr. Justice BATTLE dissents from so much of the opinion and judgment as holds that the will of Josiah F. Earle was valid as to his children without having named them, and also as holds that the devise by Josiah F. Earle of the homestead was valid. He agrees to the opinion on all other questions, and concurs in all of the judgment not affected by the questions stated above.

ON PETITION TO MODIFY JUDGMENT.

Opinion delivered June 15, 1908.

McCULLOCH, J. We are now asked to consider certain questions incidental to the main issues in the case which escaped our attention on the former consideration but which were briefly called to our attention in the argument.

The principal one is that as to the amount chargeable against the estate and heirs of W. N. Brown, Jr., and the Southwestern Improvement Company of the rents and profits of the lands decreed to Mrs. Nelms. The chancery court decreed an undivided half of the lands to her and the rents and profits thereof for five years before the commencement of the suit. We held that she was entitled only to an undivided one-fourth of the lands, and remanded the case with directions to enter a decree for that interest only. This necessarily calls for a change in the decree for rents, reducing it from one-half to one-fourth of the rents of the land.

Shall the decree for rents and profits be confined to a period of three years and before the commencement of the suit?

The provisions of the statute known as the betterment act (Act March 8, 1883, Kirby's Dig. secs. 2754-7) restricting the right of recovery to three years' rent are invoked; and, on the other hand, it is contended that Mrs. Nelms, on account of her minority, is not barred by this statute.

The title of the statute is "An act for the better quieting of titles," and the sections essential to a determination of the present question read as follows:

"Section 1. That if any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved, or shall peaceably improve, any land which, upon judicial investigation, shall be decided to belong to another, the value of the improvement made as aforesaid and the amount of all taxes which may have been paid on said land by such person and those under whom he claims shall be paid by the successful party to such occupant, or the person under whom, or from whom, he entered and holds before the court rendering judgment in such proceeding shall cause possession to be delivered to such successful party.

"Sec. 2. That the court or jury trying such cause shall assess the value of such improvements in the same action in which the title to said lands is adjudicated; and on such trial the damages sustained by the owner of the lands from waste and such mesne profits as may be allowed by law shall also be assessed, and if the value of the improvements made by the occupants and the taxes paid as aforesaid shall exceed the amount of said damages and mesne profits combined, the court shall enter an order as a part of the final judgment providing that no writ shall issue for the possession of the lands in favor of the successful party until payment has been made to such occupant of the balance due him for such improvements and the taxes paid; and such amount shall be a lien on the said lands, which may be enforced by equitable proceedings at any time within three years after the date of such judgment.

"Sec 3. That in recoveries against such occupants no account for any mesne profits shall be allowed unless the same shall have accrued within three years next before the commencement of the suit in which they may be claimed."

It will be seen that none of the provisions of the statute are applicable except in favor of an occupant such as is described therein, that is to say, a "person believing himself to be the owner, either in law or equity, under color of title." The question which first engages our attention is whether or not Brown's occupancy was of the character described in the statute. He

was one of the appraisers of the property sold by the administrator and purchased it at the sale. He had knowledge, of course, of the fact which disqualified him from becoming a purchaser and which rendered his purchase voidable. We conclude, however, from the testimony in the case that he was innocent of any actual intention to defraud in the appraisement and purchase, and that the charges in this respect against him were unfounded. He manifestly purchased in good faith, believing that he had the legal and moral right to do so. This court had never before decided that being an appraiser disqualified a person from purchasing at a judicial sale of land. The question was one of grave doubt, and gave us much difficulty in solving it. We were able to find only one reported case on the question from the courts of the country—the decision referred to in our former opinion.

The statute says that the occupant who, "believing himself to be the owner, either in law or equity, under color of title, has peaceably improved or shall peaceably improve any land," etc. This means that he must be, in fact, a *bona fide* occupant, and this court, in a case decided soon after the passage of the statute, quoted with approval the following definition of the term "*bona fide* occupant" given by Mr. Justice Washington in *Green* v. *Biddle,* 8 Wheat. 79: "He is one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is questioned by some other person claiming a better right to it." *Fee* v. *Cowdry,* 45 Ark. 410.

This court, in defining the meaning of the words declaring in what cases the statute applied, said: "Good faith, in its moral sense, as contradistinguished from bad faith, and not in the technical sense in which it is applied to conveyance of title, as when we speak of a *bona fide* purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement that he must believe himself the true proprietor. It must be an honest belief and an ignorance that any other person claims a better right to the land." *Beard* v. *Dansby,* 48 Ark. 183.

In *Bloom* v. *Strauss,* 70 Ark. 483, the court held that a last will and testament, defective on its face, is color of title, within the meaning of the betterment act, and that a *bona fide* occupant

thereunder could claim the benefit of the statute. Mr. Justice RIDDICK, speaking for the court in that case, said: "Now, though the defect in this will appeared on its face, still its invalidity is not so obvious as must necessarily have been noticed by a person of ordinary information not skilled in the law; and Strauss, while holding under it, was holding under color of title, within the meaning of the betterment statute."

Chief Justice COCKRILL in delivering the opinion of the court in *Shepherd* v. *Jernigan,* 51 Ark. 275, concerning the provision of this statute said: "If, however, the defendant has improved the land in good faith under the belief that he was the sole owner, he is entitled to pay for his improvements by the terms of the betterment act. Constructive notice of the title, such as is implied from the registry of the deed, is not of itself sufficient to preclude an occupant from its benefits."

The statute contemplates actual good faith in order to invoke its benefits. An occupant cannot, on the one hand, "shut his eyes, and say he believed in good faith that he had title, when he was informed that he did not have" (*White* v. *Stokes,* 67 Ark. 184); nor, on the other hand, will constructive notice of the infirmity of his title cut off his assertion of good faith and deny him the benefits of the statute.

We are of the opinion that the facts of this case bring it within the terms of the statute.

The statute has been held to apply to those under the disability of infancy as well as to adults. *Beard* v. *Dansby,* 48 Ark. 183; *Shirey* v. *Clark,* 72 Ark. 539; *Tobin* v. *Spann,* 85 Ark. 556.

In *Tobin* v. *Spann, supra,* being a suit brought to disaffirm a conveyance made during infancy and recover the land conveyed, we held that there could be no recovery of rents which accrued before disaffirmance, but that three years' rent could, under the betterment statute, be set-off against the claim of the occupant for improvements. The present case is somewhat different, as Mrs. Nelms is entitled to recover rents and profits prior to commencement of her suit.

It is contended that the statute, as far as the restriction upon recovery of rents is concerned, is a statute of limitation, and that it falls within the general statute excepting infants, while labor-

ing under that disability, from the operation of statutes of limitation. Act April 17, 1899, Kirby's Digest, § 5075.

We are of the opinion, however, that this is not a statute of limitation with which we are now dealing. It is one to adjust the equities between the owners of lands and persons who have occupied the same under color of title, believing themselves to be the owners—*bona fide* occupants. The Legislature, in the title to the act, declared it to be, "An act for the better quieting of titles." It does not purport to fix a period of limitations within which actions to recover lands or the rents and profits thereof may be brought, but it provides that one who occupies land in good faith under color of title shall be paid the value of improvements and amount of taxes paid on the lands, less three years' mesne profits. In other words, that when the occupant holds in good faith under color of title the owner can recover the land and mesne profits for three years, and the occupant can recover the value of his improvements and amount of taxes paid. This is the theory upon which the constitutionality of the act was upheld. *Fee* v. *Cowdry,* 45 Ark. 410. In the case just cited, the court said: "Upon the principle that the Legislature may interfere with the private rights for the purpose of adjusting 'the equities of the parties as near as possible according to natural justice,' the betterment laws of many States have been sustained." The Legislature could undoubtedly pass a statute of this character containing no exceptions as to infants. "That such exceptions are commendable, and evince a proper, just and humane regard for the rights and interests of a large and helpless class of landowners, cannot be controverted. But they are within the powers of the Legislature to grant or withhold, and its exercise of the power cannot be restrained or varied by the court to subserve principles of justice and humanity." *Sims* v. *Cumby,* 53 Ark. 418.

The statute applies in the present case, and the chancery court erred in allowing for rents which accrued more than three years before the commencement of the suit.

Taxes paid by the occupant and also the amount of purchase price paid for the land at the administrator's sale, together with interest thereon, should be credited to the occupant. But, inasmuch as the right of the occupant to have credit for said pur-

chase price results from the fact that the payment contributed to the assets of the estate and is not covered by or dependent upon the terms of the betterment act, mesne profits for the full period of occupancy, without restriction as to him, may be set-off against the purchaser's claim for reimbursement. This, upon the principle that where the occupant has been reimbursed out of the profits of the land he can not make further claim for the same payment.

Mrs. Nelms obtained a substantial recovery by the suit, and was entitled to decree for costs in the court below. We will not disturb the adjustment of cost made by the chancellor between her and the Brown interest, as it is not shown to be an unjust distribution of the cost.

The former judgment of this court having been set aside for the purpose of considering the petition to modify the judgment, the judgment heretofore rendered will now be re-entered, but with further directions to render a decree concerning improvements, taxes, etc., and rents in accordance with this opinion.

HILL, C. J., (dissenting). The three years in the betterment act is, in my opinion, a limitation on the right of recovery of rents to cases where it applies. Consequently, an infant may bring his suit without regard to it, under the saving provision in his favor of section 5075, Kirby's Digest. This saving of his action by reason of his infancy should be read into the limitation in the betterment act as it is read into all the other statutes of limitations.

TURNER v. OVERTON.

Opinion delivered June 1, 1908.

1. LIMITATION OF ACTIONS—PERMANENT AND ORIGINAL NUISANCE.—When a nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated, and the statute of limitations begins to run upon the construction of the nuisance. (Page 408.)
2. SAME—CONSTRUCTION OF DITCH.—Where defendants by constructing a ditch straightened the channel of a creek so as to accelerate the

flow of its water, and thereby caused the lands of a subjacent proprietor to be overflowed and the soil to be washed therefrom, the injury was permanent and original, and the statute of limitations began to run from the time the ditch was constructed. (Page 409.)

Appeal from Clay Circuit Court; *Frank Smith,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant, W. V. Turner, was and had been, for several years prior to the institution of the present suit, the owner of a four hundred acre tract of land east of Greenway, in Clay County, of which 125 acres were cleared and cultivated in 1905. Quick Creek runs through his farm from west to east, making many meanderings therein. In the spring of 1902, appellees dug a ditch 2,066 feet long along the section lines above appellant's farm for the purpose of straightening the channel of the creek. When first completed, the ditch was six or seven feet wide at the top, about two feet wide at the bottom and four or five feet deep. The ditch was designed to take the place of the old bed of the creek, which was very crooked. It did not carry all the waters of the creek until 1905. In January, 1906, the ditch had an average size of twenty-four and one-half feet in width and six and four-tenths feet in depth. When first constructed, the ditch was of about the same capacity as the old channel of the creek, but on account of being straight its current was much swifter. There were about twelve overflows during the year 1905. The creek overflowed its banks on appellant's land, and the action of the water washed the soil from some of his land and cut deep gullies across other portions of it. The worst part of the overflow and the swiftest current was on that part of appellant's land nearest the outlet of the ditch. Appellant testified that overflows never occurred on that part of his land prior to 1905, and that the land overflowed there when the creek was only half bank full.

Appellant brought this suit to recover damages, alleging that the overflow was caused by the construction of the ditch accelerating the flow of the water in the creek.

Appellees answered, making a general denial, and pleading the statute of limitations of three years.

There was a jury trial and verdict for the appellees. The case is here on appeal.

L. Hunter, Huddleston & Taylor and *R. E. L. Johnson,* for appellant.

1. Each proprietor upon running water flowing in a definite channel, constituting a watercourse, has the right to insist that the water shall continue to run as it has been accustomed; and no person has a right to alter the usual flow of such watercourse in any manner injurious to others above or below him. 39 Ark. 463; 44 Ark. 360; 81 Ga. 637; 30 Am. & Eng. Enc. of Law (2 Ed.), 378. Appellees were wrongdoers *ab initio,* and are bound absolutely by the condition of the creek's channel as it was when the wrongful acts complained of were committed. They are chargeable with knowledge that the straightened channel of the creek would accelerate the flow of the water, and knew that by digging the ditch the increased flow of water would be cast upon and damage appellant's land. 69 S. W. 782; 73 Md. 41.

2. The action is not barred. The facts conclusively show that the ditch when dug was not necessarily injurious, but that it might or might not become so. 76 Ark. 542; 56 Ark. 612; 57 Ark. 387; 72 Ark. 127; 80 Ark. 235; 82 Ark. 387.

Moore, Spence & Dudley and *Lamb & Caraway,* for appellees.

The action is barred by the statute of limitations. 52 Ark. 245; 56 Ark. 612; 57 Ark. 387; 72 Ark. 127; 76 Ark. 542; 80 Ark. 235; 82 Ark. 387.

HART, J., (after stating the facts). The appellees have pleaded the statute of limitations of three years in bar of this action. The suit was commenced on the 23d day of December, 1905, and the undisputed testimony shows that the ditch complained of was constructed during the spring of 1902.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, the rule is stated as follows:

"Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the con-

struction of the nuisance. * * * But when such construction is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of."

This rule has been repeatedly followed by the court, being applied according to the facts in each individual case. *Railway Company* v. *Yarborough,* 56 Ark. 612; *Railway Company* v. *Cook,* 57 Ark. 387; *St. Louis, I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360; *St. Louis, I. M. & S. Ry. Co.* v. *Stephens,* 72 Ark. 127; *St. Louis S. W. Ry. Co.* v. *Morris,* 76 Ark. 542; *Chicago, R. I. & P. Ry. Co.* v. *McCutchen,* 80 Ark. 235; *St. Louis, I. M. & S. Ry. Co.* v. *Hoshall,* 82 Ark. 387.

Counsel for appellant in their brief contend that appellees were wrongdoers *ab initio,* and that they are chargeable with knowledge that the straightened channel of the creek, made so by the construction of the ditch, would so accelerate the flow of the water as to materially injure the land of appellant.

Conceding this to be true, the damage was original and susceptible of immediate estimation. In other words, they claim that the injury to the land resulted from the construction of the ditch. Therefore it necessarily follows that the cause of action was barred at the institution of the suit. The physical facts bear out this view. The evident object of digging the ditch was for the purpose of straightening the channel of the creek across the lands through which it runs, and thereby draining the lands. It was obvious that water would flow faster through a straight than through a crooked channel. That the velocity of the water in the channel of the ditch was greater than that in the old channel of the creek must have been perceptible from the first. That the swifter current would cause the banks of the ditch to be worn away, and thus make it deeper and wider, was also apparent. The present and future effect upon the land could have been ascertained with reasonable certainty, and the injury complained of was permanent in its character.

Therefore, we are of the opinion that the action is barred

by the statute of limitations. Having held that the action is barred by the statute of limitations, it is not necessary to determine the other questions presented by the appeal.

Judgment affirmed.

FONDREN v. NORTON.

Opinion delivered June 1, 1908.

ATTACHMENT—INTERVENER GIVING MONEY IN LIEU OF BOND—EFFECT.—Where, in a suit for the purchase money of a chattel, an order was issued directing the constable to take possession of the chattel, as provided by Kirby's Digest, § 4967, and a stranger who had possession thereof delivered to the constable a sum of money in lieu of a bond and kept the chattel, and thereafter interpleaded for it, it was error to treat the money as absolutely liable for whatever judgment might be rendered against the defendant, instead of as a pledge for the return of the chattel in the event it should be liable for a judgment for the purchase money.

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

J. M. Prewett, for appellant.

The court's declarations of law are erroneous. If the deposit of the money was in effect the giving of a retaining bond with W. A. Fondren as surety, which is not admitted, still J. W. Fondren would not thereby be cut off from the right to controvert the existence of grounds of attachment. Kirby's Digest, § 372. And in no event could judgment be rendered against W. A. Fondren, the surety on the bond, in this action. 36 Ark. 91. Even under the court's declaration of law the money deposit became, not a retaining bond, but an interpleader's bond (Kirby's Digest, § 425); and on this theory no judgment could be rendered on the bond against the interpleader in advance of a hearing of the interplea on its merits.

S. H. Mann, for appellee.

The court properly declared the law. 36 Ark. 91; 39 Ark. 460; Kirby's Digest, § 4968.

BATTLE, J. Norton, being the owner of a promissory note executed by J. W. Fondren to B. D. Hatcher for $40 of the purchase money owing for one black stallion, named Black Hawk, brought an action on the same against J. W. Fondren before a justice of the peace of St. Francis County. A summons for the defendant was issued, with order indorsed thereon, directing the constable to take possession of the horse and hold him subject to the order of the court. The constable found the horse in possession of W. A. Fondren, and served the writ on him on the 9th day of January, 1906, the day it was issued, and took from him the horse, and, W. A. Fondren depositing with him the sum of $50 in lieu of bond, returned to him the horse.

W. A. Fondren claimed to be the owner of the horse by purchase from J. W. Fondren in March, 1905, about ten months before this action was brought. On the return day of the summons W. A. Fondren interpleaded for the horse; and recovered judgment for the same before the justice of the peace; and the action was taken by the plaintiff to the circuit court. In the circuit court the issues in the case were tried by the judge, sitting as a jury, upon an agreed statement of facts, and the court declared the law as follows:

"1. The money in lieu of bond became such bond as the statute required in such cases, and was an absolute and unqualified bond to perform the judgment of the court.

"2. That, after the deposit and discharge of property, plaintiff relinquished all right to property and could rely solely on the bond.

"3. Plaintiff, having secured judgment against the original debtor, was entitled to the deposit of the money in satisfaction of his judgment."

And rendered judgment in favor of plaintiff against W. A. Fondren and ordered the constable to satisfy the judgment for $44.05 recovered against the defendant and the costs of the interplea with the $50.00 deposited with him, and to pay the residue thereof, if any, to W. A. Fondren, who appealed.

The statute provides that when the officer shall seize property in cases like this the defendant may give bond for the retention as in cases of orders of delivery of personal property. Kirby's Digest, § 4968. "Such a bond, in effect, as well as in

terms, is absolute, to perform the judgment of the court." *Mayfield* v. *Creamer*, 39 Ark. 460. The constable in this case was not authorized to receive money in lieu of such bond. He had no right to release the horse except upon the condition prescribed by the statute. The money being received without authority, it did not become a substitute for the bond prescribed by the statute. The constable was liable to plaintiff for any damages he suffered by the return of the horse to W. A. Fondren, and the horse was still subject to seizure.

It is evident that W. A. Fondren did not intend that the money should be appropriated to the payment of any judgment recovered against J. W. Fondren. He could have accomplished the same end by paying the note sued on more expeditiously, and with less money than $50, the amount deposited, and saved interest. He obviously intended that the money should be held for the return of the horse, in the event it should be held liable for any judgment that should be recovered for the purchase money for which the note sued on was given. So the money was used in the manner it was without the authority of law or consent of parties.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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

Opinion delivered June 1, 1908.

1. CONSTITUTIONAL LAW—PROTECTION OF CORPORATIONS.—While a corporation is not a "citizen" within section 2 of article 4 of the Constitution of the United States, and section 1 of Fourteenth Amendment, and section 18 of article 2 of the Constitution of Arkansas, securing the privileges and immunities of citizens, it is a "person" within the meaning of the provision of the Fourteenth Amendment that no State shall deprive any person of life, liberty or property without due process, nor deny to any person within its jurisdiction the equal protection of the laws. (Page 423.)

2. SAME—VALIDITY OF DISCRIMINATION AMONG RAILROADS.—Acts 1907, c. 116, providing that railroad companies shall equip their freight trains

with a crew consisting of not less than an engineer, a fireman, a conductor and three brakemen, is not unreasonably discriminatory in exempting from its operation all railroad companies whose lines are less than fifty miles in length. (Page 424.)

3. RAILROADS—THREE BRAKEMAN ACT—CONSTRUCTION.—Acts 1907, c. 116, § 2, in providing that "this act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles in length," intended to eliminate such short lines operated as independent lines, although owned by the company owning the larger line; but if a short line is used as a continuous line with the main line or in any other way as a part of it, and not as a separate line merely connecting with it, then it is part of the main line, and the act applies. (Page 428.)

4. INTERSTATE COMMERCE—VALIDITY OF STATE REGULATION.—Acts 1907, c. 116, requiring railroad companies to equip certain freight trains with at least three brakemen, in so far as it relates to interstate commerce, is not in conflict with any acts of Congress on that subject, and is valid until Congress legislates on the same subject. (Page 431.)

5. CONSTITUTIONAL LAW—DUE PROCESS.—Acts of 1907, c. 116, requiring railroad companies to equip certain freight trains with at least three brakemen, is not arbitrary or unreasonable within the due process clause of the Fourteenth Amendment. (Page 434.)

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

STATEMENT BY THE COURT.

This appeal involves two cases, but only one will be stated, as there is no material difference between them. The Prosecuting Attorney of the Sixth Judicial Circuit filed complaint against the defendant, Chicago, Rock Island & Pacific Railway Company, a foreign corporation alleging a violation of act No. 116 of 1907, which is as follows:

"Sec. 1. No railroad company or officer of court owning or operating any line or lines of railroad in this State and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of not less than an engineer, a fireman, a conductor and three brakemen, regardless of any modern equipment of automatic coupler and air brakes, except as hereinafter provided.

"Sec. 2. This act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles

in length, nor to any railroad in this State, regardless of the length of said lines, where said freight train so operated shall consist of less than twenty-five cars, it being the purpose of this act to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train consisting of twenty-five cars or more to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor and three brakemen, but nothing in this act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this act.

"Sec. 3. Any railroad company or officer of court violating any of the provisions of this act shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. *Provided,* the penalties of this act shall not apply during strikes of men in train service of lines involved.

"Sec. 4. All laws and parts of laws in conflict herewith are repealed, and this act shall take effect and be in force thirty days after its passage."

The answer was in six paragraphs, and was as follows:

I.

"For answer defendant says: It admits that it is a corporation engaged in the railroad business and in the transportation of freight over railroad lines in the State of Arkansas. It admits that on the 5th day of May, 1907, it operated and ran a freight train, containing more than twenty-five cars, in Pulaski County, without having equipped the same with as many as three brakemen. It admits that said train was a freight train, No. 42, engine No. 1836, and that said train was operated in an easternly direction from Argenta, Arkansas, to Hopefield, Arkansas, and over a railroad of more than fifty miles in length, but defendant states that said train was engaged in carrying interstate commerce, and was, in fact, being operated from the city of Argenta, in the State of Arkansas, to the city of Memphis, in the State of Tennessee; that Hopefield is an intermediate station between Argenta and Memphis, and it was therefore necessary for said train to pass through Hopefield on its journey from Argenta to Memphis, as aforesaid. It denies that

the operation of said train, in the manner aforesaid, without having equipped said train with as many as three brakemen, was in violation of law; and denies that by so operating said train it became indebted to the State of Arkansas in the sum of $500.00 or in any other sum.

II.

"And for further defense defendant says: That the act of Arkansas, No. 116, entitled, 'An act to prescribe the minimum number of employees to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act,' approved March 28, 1907, under which it is sought to recover from the defendant in this suit, is unconstitutional and void for the following reasons:

"(a) Said act, in requiring that each freight train consisting of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length, grants privileges and immunities to companies and officers of court operating freight trains of less than twenty-five cars in length which are not granted to companies and officers of court operating freight trains of more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains of more than twenty-five cars in length which are not granted to conductors and brakemen employed on freight trains of less than twenty-five cars in length, and is therefore contrary to and in conflict with section 18, article 2, of the Constitution of Arkansas.

"(c) Said act, in applying to freight trains of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains of more than twenty-five cars in length and to conductors and brakemen employed by companies and officers of court operating freight trains of less than twenty-five cars in length, and is, therefore, contrary to and in conflict with section one of the Fourteenth Amendment to the Constitution of the United States.

III.

"(a) Defendant states that there are in the State of Arkansas many companies and officers of court owning and

operating lines of railroad more than fifty miles in length and operating thereon freight trains of more than twenty-five cars, and that there are many companies and officers of court owning and operating lines of railroad less than fifty miles in length and operating thereon freight trains of more than twenty-five cars. That, while this defendant owns and operates more than fifty miles of railroad, it also owns and operates, in the State of Arkansas, many branches less than fifty miles in length, over which it operates freight trains of more than twenty-five cars; that the operation of said freight trains over said branches is in all respects similar to the operation of freight trains over lines of railroads of companies and officers of court owning and operating railroads less than fifty miles in length.

"(b) Said act, in applying to companies or officers of court owning or operating lines of railroad more than fifty miles in length, and exempting companies or officers of court owning or operating lines of railroad less than fifty miles in length, grants privileges and immunities to companies and officers of court owning and operating lines of railroad less than fifty miles in length which are not granted to this defendant and to other companies and officers of court owning and operating line of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed by companies and officers of court owning and operating lines of railroad more than fifty miles in length which are not granted to conductors and brakemen employed by this defendant and other companies and officers of court owning and operating lines of railroad less than fifty miles in length, and is therefore contrary to and in conflict with section 18, article 2, of the Constitution of Arkansas.

"(c) Said act, in applying to companies or officers of court owning or operating lines of railroad of more than fifty miles in length and exempting companies or officers of court operating lines of railroad of less than fifty miles in length, is a denial of the equal protection of the laws to this defendant and other companies and officers of court operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States.

"(d) Said act, in applying to this defendant and to other companies and officers of court operating lines of railroad more than fifty miles in length and exempting companies and officers of court owning and operating lines of railroad less than fifty miles in length, is a denial of the equal protection of the laws to conductors and brakemen employed by companies or officers of court owning and operating lines of railroad less than fifty miles in length, and is therefore contrary to and in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV.

"Defendant alleges that it operates within the State of Arkansas six hundred and fourteen miles of railroad; that said line of railroad consists of main track and several branches of less than fifty miles in length; that it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are of more than twenty-five cars in length; that some of said trains are operated upon its main line, and some of said trains are operated upon its branches of less than fifty miles in length; that the fines imposed by said act of Arkansas, No. 116, approved March 28th, 1907, are such that if defendant failed to comply with said act on each of its freight trains over twenty-five cars in length operated in the State of Arkansas, the fines to which it would be subject would amount to a large sum, towit, about $12,500 per day, and, if continued during the time necessary to test the validity of said act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said act are therefore so excessive and burdensome as to deprive the defendant of its right to have the validity of said act tested by the courts, and have the effect of depriving the defendant of its property without due process of law and of denying to it the equal protection of the laws; that said act is therefore contrary to and in conflict with article two, section nine, of the Constitution of Arkansas, and of section one of the Fourteenth Amendment to the Constitution of the United States.

V.

"Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could

be coupled and uncoupled without the necessity of brakemen going between the cars, and could be stopped by the application of the air brakes by the engineer of said train, without the intervention or assistance of the conductor or brakemen, as required by act of Congress and the order of the Interstate Commerce Commission made thereunder; that it had employed on said train a conductor and two brakemen, and that the employment of another brakeman on said train was unnecessary, because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said act, in attempting to require the defendant to employ three brakemen on said train, attempted to require the defendant to expend a large amount of money for a useless and unnecessary purpose and to deprive the defendant of its property without due process of law, and is therefore in violation of and in conflict with section one of the Fourteenth Amendment to the Constitution of the United States.

VI.

"(a) Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used solely for the transportation of freight from points in the State of Arkansas, and points in other Territories and States west of the State of Arkansas, to Memphis, in the State of Tennessee, and other points beyond the State of Arkansas, and therefore was engaged in moving interstate traffic into and through the State of Arkansas, and that said act, in requiring the defendant to equip said train with three brakemen, is an attempt to regulate commerce among the several States, and is therefore contrary to section eight, article one, of the Constitution of the United States, and is contrary to and in conflict with the act of Congress, approved March 2d, 1893, and amended April 1, 1896, entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic coupler and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," and the act of Congress approved June 11, 1906, entitled "An act relating to liability of common carriers engaged in commerce between the States and between the States and foreign

nations to their employees," and the act of Congress, approved June 29, 1906, entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and other acts of Congress, which were pased pursuant to the power vested in Congress by said section eight, article one, of the Constitution of the United States.

"(b) Defendant states that said act is void, because the subject-matter thereof has been legislated upon by the Congress of the United States, by the acts hereinbefore referred to."

The State demurred to paragraphs I, II, III, IV and VI of said answer, and the demurrers were sustained.

The case was then tried on the defense set out in the 5th paragraph of the answer. The defendant adduced testimony tending to prove the truth of the allegations therein made and to show that the legislative requirement to employ three brakemen on its freight trains required a large expenditure of money for a useless and unnecessary purpose.

On the other hand, the State introduced testimony tending to prove that the employment of three brakemen was necessary for the safety of the trainmen and of the public in the movement of freight trains as operated on defendant's railroad. This testimony was given by experienced train men. They explained that there is an increased amount of work to be done since the adoption of the air brakes and automatic couplers, notwithstanding the brakemen are relieved of the duty of stopping trains (except in emergencies) by hand brakes. This is due to the increased tonnage of the trains, the increased capacity of cars, the increased number of cars in trains, the increased power of heavy engines, and the additional reports required to be made by conductors and inspections to be made by conductors and brakemen. In addition to these reasons, it is a daily occurrence for drawheads to pull out, owing to the heavy draught of the engines and the lack of corresponding strength of drawheads to meet them; and this usual happening requires the service of two, and frequently three men to properly chain up the cars, especially in the night-time. Much of the conductor's time is taken up with making his reports, and he cannot, under the

present system, give as much time to the physical handling of the train as under the old system.

When there is a break in the train, or for any other cause it is stopped between stations, it is at once the duty of the conductor to send a brakeman back to flag approaching trains from the rear, and frequently it is his duty to send another brakeman forward to flag trains approaching from that direction. The necessity for signalling for these purposes frequently reduces the force to the conductor, engineer and fireman, unless three brakemen are provided. Safe operation and the rules of the company require that the engineer and fireman remain at their post in the engine.

Trains are frequently stopped at public crossings, and are frequently switched across public crossings; and oftentimes it occurs that the safety of the public requires the posting of signal men at these crossings. In switching, the services of brakemen are required to work the automatic couplers and connect and disconnect the air hose, and in the opinion of these witnesses the safety of the train crew is promoted by having three brakemen to do the switching, in addition to which the train movements are made with more certainty and dispatch and with less danger of accidents, and the freight is handled more speedily.

Other reasons are given why the emergencies and hazards of the business require the employment of three brakemen to promote the safety of the train men handling the train, of train men and passengers on other trains, and the public crossing the tracks. It was shown that the St. Louis, Iron Mountain & Southern Railway Company, which operates the largest mileage of any railroad in the State, uses three brakemen, except on one branch, and the other railroads operating in the State use two brakemen.

The court found for the State against the railroad company in both cases, and the railroad company has appealed.

Buzbee & Hicks, for appellant.

1. The act is unconstitutional because repugnant to art. 2, § 18, Const. Arkansas, and Fourteenth Amendment, § 1, Const. United States. 75 Ark. 542; *Waters Pierce Oil Co.* v. *City of Hot Springs,* 85 Ark. 509; 118 U. S. 356; 165 U. S. 150; 174 U. S. 96; 183 U. S. 79; 184 U. S. 540; 81 Ark. 304; 185 U. S. 203; 207 U. S. 497.

2. It is unconstitutional because it undertakes to regulate interstate commerce, and is repugnant to art. 1, § 8, Const. U. S.; 93 U. S. 102; 95 U. S. 487; *Id.* 465; 9 Wheaton, 1; 162 U. S. 197, 212; 196 U. S. 1; 31 U. S. Stat. at Large, 1446; 22 How. 227; 93 U. S. 274; 94 U. S. 238; 96 U. S. 387; 124 U. S. 465; 129 U. S. 148; 158 U. S. 98; 167 U. S. 633; 207 U. S. 494.

3. The act, as applied to interstate commerce, is arbitrary, unreasonable and contrary to art. 1, § 8, and the due process clause of § 1 of the Fourteenth Amendment, Const. United States. 95 U. S. 465; 201 U. S. 321; 202 U. S. 543.

William F. Kirby, Attorney General, *Lewis Rhoton,* Prosecuting Attorney, and *W. L. Terry,* for appellee.

1. Appellant's first contention is based upon a misconception of the act, *i. e.,* that the classification is based upon ownership, and is therefore an unlawful discrimination, and consequently invalid, whereas it is clearly based upon the length of the road and the number of cars in the train, which is a legitimate basis of classification. The act is therefore not repugnant to the clauses of the State and Federal constitutions referred to. If one construction would render the act invalid and another would make it valid, it is the duty of the court to give it that construction which will make it valid. 64 L. R. A. 644; 201 U. S. 501. See, also, 94 U. S. 164; 125 U. S. 692; 186 U. S. 264; 32 L. R. A. 857; 33 *Id.* 319; 207 U. S. 88. A statute dividing railroads into classes according to their length operates uniformly on each class. 125 U. S. 680; 54 Ark. 114; 156 U. S. 661; 65 Ark. 248. If the Legislature has the right to classify at all, it has the right to say where the line of demarcation shall be drawn. The equal protection guaranteed by the 14th Amendment does not prohibit classification. 174 U. S. 103; 113 U. S. 27; 127 U. S. 210; 169 U. S. 385; 64 Ark. 90. Art. 2, § 18, Const. Arkansas does not apply to corporations. 172 U. S. 561; 204 U. S. 362. And the 14th Amendment does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both

in the privileges conferred and the liabilities imposed. 120 U. S. 71; 165 U. S. 182. While not without limit, the power of the State to distinguish, select and classify objects of legislation must necessarily have a wide range of discretion. 170 U. S. 294. The question is not whether the Legislature might have adopted some other classification, but whether the one adopted is purely arbitrary, and bears no relation to any legitimate purpose sought to be secured. 207 U. S. 354. Even if there were reason to doubt the efficiency of the legislation, still that was a matter for the Legislature to determine. 165 U. S. 632.

2. Appellant's contention that the act is an attempt to regulate interstate commerce is an erroneous assumption and is not supported by reason or authority. 163 U. S. 308; 173 *Id.* 290. Congress has never undertaken to legislate as to what shall constitute a full crew on a freight train engaged in interstate commerce; hence the State is free to act. 196 U. S. 13; 173 *Id.* 292; 205 *Id.* 10; 95 *Id.* 465; 124 U. S. 471; 207 *Id.* 494; 85 Ark. 284; 207 U. S. 328; 173 U. S. 291, 296.

3. The following propositions are sustained by authority: (1) The police power resides in the State, and is not yielded to the Federal government. Cooley on Const. Lim., p. 831; 169 U. S. 683. (2) States may enact police regulation concerning interstate commerce unless in conflict with a law of Congress. 5 How, U. S. 579. (3) The interference must be direct, not merely incidental. 183 U. S. 518; 179 *Id.* 349; 166 *Id.* 430; 158 *Id.* 104; 173 *Id.* 297; 124 *Id.* 473; 173 *Id.* 297. (4) The matter of regulating appliances of cars, qualification of trainmen and crews is not one requiring a uniform rule, but may be regulated by the State. 165 N. Y. 629; 124 U. S. 465; 128 *Id.* 96. (5) So long as Congress has not legislated, States may exercise their rights under the police power. 191 U. S. 477, 490; 128 *Id.* 99; 169 *Id.* 133; 166 *Id.* 430; 141 *Id.* 61; 78 Fed. 695; 17 Wall. 560. (6) The State has the right to secure the safety of passengers on interstate trains while within its borders. 124 U. S. 465; 165 U. S. 629; 128 U. S. 96; 27 Vt. 140; 163 U. S. 142; 169 *Id.* 133. (7) The rules prescribed by the State for the management and operation of railroads are not regulations of commerce. 169 U. S. 133-7;

124 *Id.* 465; 128 *Id.* 96; 163 *Id.* 299; 173 *Id.* 285; 133 Ind. 69-80. (8) As to the regulation of pilots and State laws, see 12 How. 290-315; 21 How. 184-7; 2 Wall. 450-9; 195 U. S. 332-341; 14 Fed. 792-794. (9) If within the legislative power, courts cannot inquire into the wisdom or policy of the act. 58 Ark. 414; 128 Ind. 555; 145 *Id.* 439; 147 *Id.* 633; 64 L. R. A. 643.

HILL, C. J., (after stating the facts). The railroad company contends that the act is unconstitutional for three reasons, which will be disposed of in the order presented by counsel for appellant.

1. That the act is unconstitutional because repugnant to sec. 18, art. 2 of the Constitution of Arkansas, and sec. 1 of the 14th Amendment to the Constitution of the United States.

Section 18, article 2 of the Constitution of Arkansas reads as follows: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Section 2 of article 4 of the Constitution of the United States provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It has long been settled that a corporation is not a citizen within the meaning of this clause of the Constitution. *Paul* v. *Virginia,* 8 Wall. 168; *Pembina Consolidated Silver Mining Co.* v. *Pennsylvania,* 125 U. S. 181; *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557; *Blake* v. *McClung,* 172 U. S. 239.

It is also provided in section 1 of the Fourteenth Amendment that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and it has also been held that this clause does not reach to corporations. *Norfolk, etc., Ry. Co.* v. *Penn,* 136 U. S. 114; *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359; *Waters-Pierce Oil Co.* v. *Hot Springs,* 85 Ark. 509.

The reasoning which takes corporations out of the "privileges and immunities" accorded citizens of one State in the several States equally excludes corporations from the protection of section 18 of art. 2 of the State Constitution.

But corporations are persons within the meaning of the 14th Amendment, which provides that no State shall deprive

any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. *Blake* v. *McClung,* 172 U. S. 239; *Santa Clara County* v. *Southern Pacific Ry. Co.,* 118 U. S. 394; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150; *Smyth* v. *Ames,* 169 U. S. 466.

The argument against the act under the equal protection clause is two-fold: (a) That the classification of railroads over and under fifty miles in length is arbitrary and without just relation to the object to be accomplished; and (b) that the 3d paragraph of the answer, to which a demurrer was sustained, alleged that many companies owned and operated lines of railroad in this State less than fifty miles in length, and that the defendant owned and operated many branch lines of less than fifty miles in length, over which it operates freight trains of more than twenty-five cars, and that the operation of its freight trains over said branches is in all respect similar to the operation of freight trains over many short lines of railroad which are operated by companies owning less than fifty miles of railroad; and consequently the act is offensive to the constitutional provision requiring the equal protection of the law to all persons under like and similar circumstances.

(a.) In discussing the duty of a court to whom is addressed an appeal to strike down legislation as so arbitrary that it amounts to a denial of the equal protection of the law, Mr. Justice Holmes well said: "There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the Legislature is the only judge of the policy of a proposed discrimination. * * * When a State legislature has declared that in its opinion public policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that

legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a decree as the courts." *Missouri, K. & T. Ry. Co.* v. *May,* 194 U. S. 267.

Applying this principle here, can the court clearly see that there is no fair reason for this law which would not require with equal force its extension to all railroads, irrespective of their length, where the freight trains consist of more than twenty-five cars? It will be noticed that the act does not apply to any line of railroad, however long, unless the freight trains shall consist of more than twenty-five cars. It thereby permits both long and short lines to run short freight trains without being amenable to this act; and this question is whether the classifications of the railroads into long and short lines, divided at the point of fifty miles, is a just and reasonable one.

That there is a marked difference in the management, control and operation of long and short line railroads is a matter of common knowledge, known to all observers. Great trunk lines have been constructed through the country that are highways of interstate and international commerce. Both freight and passenger trains pass back and forth upon them every few minutes, and great speed is attained in their movement. On the other hand are found many short lines which supply the needs of small communities, and upon such lines there are but few trains, and those of light weight and of few coaches and cars in comparison with the magnificent passenger and tremendous freight trains moved upon the large trunk lines. Bringing the comparison more nearly home, there are found in this State important through lines, upon which are moved many passenger and freight trains daily; and there are also found many short lines of railroad, some owned and operated by independent companies and some operated as branches and feeders to the larger companies by whom they are owned or controlled. Upon these small roads the necessity of protecting trains from collision from either end is materially less than upon the great lines where the trains are more numerous, heavier and accustomed to greater speed. The movement of a train is necessarily less fraught with danger where there is no other train upon the line, or but few, than upon a line where trains are moving every few minutes, or every few hours. Short lines are usually lightly constructed, and

carry light rolling stock in comparison to the great systems. These and other matters of common observation of the difference between long and short lines of railroad can afford reasons why the Legislature should leave untouched the short lines of railroad with legislation designed to promote safety in operation of long freight trains.

To approach the question in another way: In *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150, Mr. Justice Brewer for the court said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Is there some difference between lines over and under fifty miles in length which bears a just and proper relation to the requirements placed upon them by this act? In one sense, there can be no substantial difference between a railroad forty-nine miles long and one fifty-one miles long; but if there is a just distinction between long and short lines of railroad that will bear classification at all, then it is unobjectionable and necessary to draw the line somewhere, although it may, at the given point, be arbitrary.

The Supreme Court of the United States in *New York, N. H. & H. Rd. Co.* v. *New York,* 165 U. S. 628, dealt with this point. There was a statute of New York applying to railroads over fifty miles in length, forbidding them to heat their cars with stoves or furnaces kept inside of the cars or suspended therefrom; and the court through Mr. Justice Harlan said: "But it is contended that the statute is repugnant to the clause of the Fourteenth Amendment forbidding a State from denying to any person within its jurisdiction the equal protection of the laws. This contention is based upon that clause of the statute declaring that it shall not apply to railroads less than fifty miles in length. No doubt, the main object of the statute was to provide for the safety of passengers traveling on what are commonly called trunk or through lines, connecting distant or populous parts of the country, and on which the perils incident to traveling are

greater than on short local lines. But, as suggested in argument, a road only fifty miles in length would seldom have a sleeping car attached to its trains; and passengers traveling on roads of that kind do not have the apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger coaches, on account of the burning of cars in case of their derailment or in case of collision. In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable." There can be no distinction in principle between that legislation and this, and the classification there, identical with this, was sustained on the difference between the danger of operation on trunk lines and local lines.

Cotting v. *K. C. Stock Yds. Co.,* 183 U. S. 79, is pressed upon the court as authority declaring void the classification here made. While the principles involved in the Cotting case were the same as those involved here and in the New York case, *supra,* the facts required a different application of them. In the first place, the subject of regulation here and in the New York case was common carriers on public highways, which are burdened with obligations which do not rest upon individuals and corporations not thus employed, as pointed out in the Cotting case; and, in the second place, the act there was so framed as to apply to one company, although there were other companies engaged in like business and similarly situated in the State of Kansas. The classification was made to depend solely upon the amount of business, and fell upon one company alone, while other companies similarly situated, different only in the amount of business transacted, escaped. There was no question therein of public safety or the safety of men engaged in public service.

Other cases cited can easily be differentiated from this case and the New York case; but the differences are not important, for the principles invoked in all of them are the same. The difficulty is in the application of them to the given statute, and this was well explained in *Atchison, Topeka, etc., Rd. Co.* v. *Matthews,* 174 U. S. 96: "While cases on either side and

far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to the subject sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. * * * In some of them the court was unanimous. In others it was divided; but the division in all of them was, not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line."

It is not for the court to say whether the classification is wise or unwise, but merely whether it has a reasonable relation to the object sought to be accomplished, provided that the object is one with which the Legislature had power to deal. If the classification is not arbitrary, but within reasonable limits as heretofore defined, then the courts must sustain it. The court regards this act as falling within that class.

(b.) The 3d paragraph of the answer, to which a demurrer was sustained, alleged that the defendant owned and operated many branch lines less than fifty miles in length, over which it operates freight trains of more than twenty-five cars, and that the operation of said freight trains over said branches is in all respects similar to the operation of freight trains over other lines of railroad of less than fifty miles in length which are owned and operated by companies owning less than fifty miles of railroad; and that the act is for this reason offensive to the provision requiring the equal protection of the law to all persons under like and similar circumstances.

The determination of this defense depends upon the construction of the act. If the act places the branch lines of appellant railroad company which are less than fifty miles in length, and which are operated similarly in all material respects to independent lines, within its terms, and leaves without its terms the short lines of railroad which are operated similarly to said branch lines but owned by independent companies (and the de-

murrer to the 3d paragraph of the answer admits this to be true), then said act would fall on the other side of the line, and be governed by *Yick Wo* v. *Hopkins,* 118 U. S. 356, and *Cotting* v. *Kansas City Stock Yds. Co.,* 183 U. S. 79. If it does not place such branches within its terms, then there is no discrimination between them and other short lines independently operated, and the matters set forth in the 3d paragraph go for naught.

In construing the act, the court must bear in mind that "where one construction will make a statute void for conflict with the Constitution, and another would render it valid, the latter will be adopted, though the former at first view is otherwise the more natural interpretation of the language." 2 Lewis's Sutherland on Statutory Construction, § 498. The Supreme Court of the United States stated the same principle as follows: "But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt the construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution." *Grenada Co. Supervisors* v. *Grogden,* 112 U. S. 261. These authorities were recently approved by this court, which thus stated the principle: "It is the duty of the court to give the statute such construction, if reasonably consistent with the language employed, as will render it constitutional and valid." *Western Union Tel. Co.* v. *State,* 82 Ark. 309.

The first section of the act prohibits any railroad company (or officer of court), owning or operating any line or lines of railroad and engaged in the transportation of freight over its said line or lines from equipping its freight trains with less than a full crew as therein described. This lays its mandate upon the company which is engaged in the transportation of freight and which owns or operates a line or lines of railroad, regardless of other safety equipment of its trains.

The second section eliminates all railroad companies whose line or lines are less than fifty miles in length, and eliminates all freight trains on any line, regardless of length, where the train consists of less than twenty-five cars. And then, to be sure that

the intent is plain, the act declares its own purpose to be "to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train consisting of twenty-five cars or more to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor and three brakemen." This legislation is pointed at two things: long lines of railroad and long freight trains. The length of the road is immaterial if the train is short—one which the Legislature thought could be safely handled by the ordinary crew with two brakemen. If the freight train was long, then a further consideration moved the Legislature; such freight trains might be safely handled on a small line, where the traffic was light, the hazard of the service small, and the danger from collision with other trains remote; but they could not be safely handled with such crew upon long lines, not on account of the length of the line *per se,* but on account of the well known heavier traffic and greater train movement upon long lines, in consequence of which the danger is thought to be greater. If, as admitted by the demurrer to the third paragraph, there are many independent short lines in the State similar in operation to the branch lines of the appellant company, then the only distinction between them and the branch lines of a company of longer mileage would be in the ownership.

Does the elimination in the second section mean railroads less than fifty miles, or does it mean the elimination of companies whose roads are less than fifty miles in length? It must be confessed that the act is not clear on this subject, and it is fairly open to either construction, and each has been plausibly presented. In obedience to the rules of statutory construction heretofore stated, where an act is fairly susceptible of either of two constructions, one of which would render the act invalid, it is then the duty of the court, out of deference to the Legislature, to adopt that construction which will render it valid. To adopt the construction that the act eliminates from its operation railroad lines which are less than fifty miles in length because they are owned by a company not owning more than fifty miles of road, and does not eliminate lines which are less than fifty miles in length and operated separately but in all respects similar to the other lines, because they may be owned by some company

owning longer lines in the State, would be plainly unconstitutional under the authorities heretofore reviewed.

It may be argued that the Legislature intended to treat these short lines and branches of the larger lines as part of the large systems. If the railroad companies operate them as part of their systems, certainly they are within the act, and the similarity with the short independent lines does not then exist. If the railroad companies operate them separately as independent lines are operated, then there can be no just reason in principle for a distinction between them and the separate lines. Such distinction would then be based solely upon ownership. This legislation can only be supported on account of its supposed promotion of the safety of the public and the employees of a public service corporation, and a distinction based on ownership is wholly untenable.

The proper construction to place on the act, and that renders it valid, is: If the short line is in fact used as a continuous line with the main line, or in any other way as a part of it, and not as a separate line merely connecting with it, then it is a part of the line. But if it is a mere connecting line, separately operated—operated as an independent short line is operated—although owned by the company owning the larger line, then it would not be within the statute.

2. It is said that the act is unconstitutional because it is an attempt by the State to regulate interstate commerce, contrary to the power vested in Congress in section 8, article 1, of the Constitution of the United States. In paragraph six of the answer are set forth various statutes which have been passed by Congress in regulation of interstate traffic. Briefly stated, they are the "Safety Appliance Act," the "Employers' Liability Act" (recently declared unconstitutional in *"The Employers' Liability Cases,"* 207 U. S. 463) and acts amendatory of the Interstate Commerce Act. The contention is made that these acts have excluded State regulation upon the subject-matter of the act in question.

In the regulation of interstate commerce there are three powers: The exclusive State power, exclusive National power, and the concurrent power.

First, those in which the power of the State is exclusive.

These "concern the strictly internal commerce of the State; and while the regulations of the State may affect interstate commerce directly, their bearing upon it is so remote that it cannot be termed, in any just sense, an interference." This embraces construction of highways, turnpikes, railroads and canals between points in the same State, and the regulation of toll for the use of the same, and the bridging and the regulation of non-navigable streams and control of navigation of strictly internal waters and other strictly internal transportation. Second, where Congress has not acted, in its silence the States may act on subjects local in their nature, but which incidentally affect or facilitate commerce; and this is the concurrent power. It involves regulation of pilots; quarantine and inspection laws and the policing of harbors; the improvement and bridging of navigable streams (subject to an overseeing by Congressional legislation that the improvement does not interfere with interstate and foreign commerce); the establishment of ferries; in a word, that "immense mass of legislation" usually referred to as the police power of the State, which may affect incidentally or facilitate foreign or interstate commerce, and regulate, for the protection of the health, morals or general welfare of the State, the instrumentalities of commerce, so long as Congress itself does not cover the subject with regulations which conflict with the State regulations. Third, where the laws are from their nature national in character, instead of being of a local nature and affecting interstate commerce but incidentally, the silence of Congress indicates that it wills that such commerce shall be free and untrammeled by State legislation, to this extent—quick or dead—the power of Congress is exclusive. *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204; *Gulf, C. & S. F. Ry. Co.* v. *Hefley,* 158 U. S. 98; Judson on Interstate Commerce, secs. 22-23.

The question here is, first, to what class this act belongs? and second, does it conflict with any act of Congress, or is the silence of Congress on the subject in the class in which the silence of Congress is as potent as its action?

Smith v. *Alabama,* 124 U. S. 465, answers as to the character of these laws. It is therein said: "It is among these laws of the States, therefore, that we find provisions concerning the

rights and duties of the common carrier of persons and merchandise, whether by land or water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. * * * The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which, until displaced, covers the subject."

This explanation of the character of legislation permitted the State in regulating the instrumentalities of interstate commerce shows that the act in question belongs to the concurrent class—that is, that field of legislation in which it is competent for both the State and Nation to enter; but the legislation of the State must give way to that of the Nation when they conflict, as stated in *Smith* v. *Alabama*: "It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

It is insisted that because, in the acts set forth in the answer, Congress has legislated on safety appliances and other means to promote the safety of freight trains engaged in interstate commerce, the action of the State upon this subject is excluded because the non-action of Congress upon this precise question is equivalent to positive action by Congress that there shall be no legislation over the subject except what it enacts when it once touches the subject. But this argument has been rejected by the Supreme Court of the United States, in *Missouri, K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613. The court said: "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." And again, in the same case, the court said: "These cases all proceed upon the ground that the regulation of the

enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that, even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States, or by some valid act of Congress, must be respected until Congress intervenes."

In *Gulf, C. & S. F. Ry. Co.* v. *Hefley,* 158 U. S. 98, the same thought was thus expressed: "Generally, it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation."

There is no direct interference with the legislation of Congress relied upon by the act in question. Each may stand, each cover its own field; and there is no apparent ground of conflict possible in the operation of the two acts, for they do not reach the "precise subject-matter."

3. It is contended that the act as applied to interstate commerce is arbitrary and unreasonable, and is contrary to the due process clause of section 1 of the 14th Amendment. These contentions are embraced in the 2d, 4th and 5th paragraphs of the answer. As far as the 4th paragraph is concerned, that has been disposed of by the construction placed upon the act. So much of the second paragraph as is herein relied upon is presented in another form in the 5th paragraph, the substance of which is that the requirements of the act constitute an unnecessary and burdensome expense, and are an arbitrary and unreasonable interference with the interstate commerce and the right of the company to regulate its own affairs.

Much testimony was taken under the 5th paragraph, the substance of which is in the statement. It is not for the court to determine which side of that controversy has the best of the argument; that was for the Legislature. If it is a fair subject

of controversy whether the act is promotive of the safety of employees of a common carrier on a public highway, and of the passengers and travelers on said highway, then the action of the legislative department in the premises is conclusive, and this evidence clearly shows that it is a matter within the legislative discretion. It is only where the burden on the carrier is arbitrary and without any corresponding benefit to the public that the courts can interfere. This subject was recently discussed at some length by this court in *La. & Ark. Ry. Co.* v. *State,* 85 Ark. 12.

Appellant cites *Houston & Tex. Central Ry. Co.* v. *Mayes,* 201 U. S. 321, to sustain its contention that the act is an unreasonable interference with interstate traffic. There is much difference between the act condemned there and the one here. That act was not dealing with the safety of train employees or the public, but was upon the subject of furnishing cars. The turning point of the decision was that the act made no exception in case of sudden congestion of traffic and actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places beyond its line, and made no allowance for interference of traffic by wrecks or other accidents. The act in question has no such unbending provisions. It does not apply to any train which consists of less than twenty-five cars nor to short independent or branch lines, and only requires upon the long lines and the long trains one more brakeman than the appellant company now has employed, which number another road, of larger mileage than appellant road in this State, now employs; and further provides that the penalties of the act shall not be incurred during strikes of men in train service of the lines involved.

The court fails to find any constitutional objection to the act.

Judgment affirmed.

TUCKER v. STATE.

Opinion delivered June 1, 1908.

1. CRIMINAL PROCEDURE—EFFECT OF DEFECT IN AFFIDAVIT AND WARRANT OF ARREST.—A conviction in a misdemeanor case had before a justice of the peace will not be reversed because the affidavit and warrant of arrest describe the offense charged in a defective manner, since they performed their respective offices when the accused was brought before the justice for trial. (Page 437.)
2. MASTER AND SERVANT—ENTICEMENT OF SERVANT—CONSTRUCTION OF STATUTE.—Acts 1905, p. 726, providing that "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 be fined, etc., does not intend to punish one who knowingly gives employment to a laborer during the unexpired term of his contract with another, but the employment must be an interference with the laborer's performance of his prior contract with another, or an enticement of the laborer from his employer, or an inducement to him to leave the employer's services. (Page 438.)
3. SAME—EMPLOYMENT OF MINOR.—A contract of employment of a minor under fifteen years of age, not made in the manner required by Kirby's Digest, § 5023, is nevertheless within the mischief of Acts 1905, p. 726, making it a misdemeanor to "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." (Page 439.)

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

S. H. Mann, for appellant.

1. The information is not sufficient to charge any affirmative act on the part of the appellant to entice or induce the boy to leave his employer, and is therefore not in compliance with the statute.

2. If it be held that the information comes within the terms of the statute, then it is in conflict with the Constitution. Art. 2, § 21, Const. As to the validity of such legislation, see 63 Cent. Law Journal 43 and cases cited. See also 58 Ark. 407.

3. It is in evidence that Sweet did not contract with the boy's mother, she being an idiot as he testified, but with an older brother, and it is not shown that the brother had authority to bind the boy by contract for services. Moreover, appellant denies that he employed him, and his purchase from the boy of a few buckets of mussels would not constitute an employment within the prohibition of the statute. 84 Ark. 412.

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

1. Appellant's objections to the affidavit and warrant of arrest are without merit. The affidavit need only furnish to the justice reasonable grounds for believing the truth of the charge. Kirby's Digest, § 2114. See also, *Id.* § 2110; 45 Ark. 536; 32 Ark. 124; 29 Ark. 299.

2. The statute is constitutional. 84 Ark. 412.

3. The evidence is amply sufficient to sustain the verdict.

McCULLOCH, J. Appellant was tried before a justice of the peace and convicted of a misdemeanor under an affidavit and warrant of arrest charging him with having wilfully interfered with and knowingly employed one Neely Johnson, a laborer, who was then under contract with one Sweet. On appeal to the circuit court he was again convicted, and has brought the case to this court on writ of error.

The court overruled a demurrer to the affidavit, which is the basis of the prosecution, and this is assigned as error. It is contended that the affidavit is defective because it does not contain the allegation either that the accused "enticed away" or "induced" the laborer to leave his employer or the leased premises. The demurrer was properly overruled. The affidavit and warrant of arrest need only describe in general terms the offense charged (Kirby's Digest, § § 2110, 2506), and have performed their respective offices in bringing the accused before the justice for trial. *Kinkead* v. *State,* 45 Ark. 536.

The statute which appellant is alleged to have violated was enacted May 6, 1905 (Act 1905, p. 726), amendatory of section 5030, which was a section of a statute passed in 1883 regulating labor contracts and the rights of the several parties thereto. The present statute reads 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 said 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."

It is contended that that part of the statute which declares it to be an offense to "knowingly employ" a laborer under contract with another person is void because it operates as a restriction upon freedom of action and the right to contract. Learned counsel for appellant argues in his brief that, if this feature of the statute be upheld, there is no limit to legislation in this respect, and that the lawmakers might as well enact a statute to the effect that, so long as a laborer is indebted to another by note or account, no one else can employ him without the employer's consent. If the statute was susceptible of that construction, we would be inclined to agree with counsel as to its invalidity, though there is authority for sustaining the validity of a statute having that effect. *Tarpley* v. *State*, 79 Ala. 271. But we do not agree with him as to the construction to be placed upon the language used. The words "knowingly employ" are used in the statute in connection with other words which imply that the employment must be done as an interference with the laborer's performance of his prior contract with another or as an enticement of the laborer away from his employer or an inducement of the laborer to leave the services of his employer. It is not intended as a punishment for merely giving employment to a laborer during the unexpired term of his broken contract with another person. Giving the statute this interpretation, it is plainly valid, and is very wholesome legislation. *Hightower* v. *State*, 72 Ga. 482; *Hoole* v. *Dorrah*, 75 Miss. 257; *State* v. *Harwood*, 104 N. C. 725; 20 Am. & Eng. Enc. L. p. 182; 26 Cyc. p. 1586.

Counsel is mistaken in assuming that the purpose of the

statute is solely to afford protection to the employer or landlord, and that the public at large is not interested in its enforcement. It tends towards the preservation of peace and good order, the prevention of bloodshed, disorder and strife, as well as to protect private rights.

It is next contended that the laborer, Neely Johnson, was a minor under fifteen years of age, and, as there was no binding contract between him and Sweet, no offense was committed by appellant in hiring him or interfering with the performance of the agreement to labor for Sweet. The act of 1883, a section of which the present statute amends, provides that "the contract of a minor, when approved by the parent having control of such minor, or, in case there be no parent, when approved by his guardian, or the contract of any minor over fifteen years of age having neither parent or guardian shall be binding." Kirby's Digest, § 5023.

The boy Johnson was under fifteen years of age, had no guardian, and his only surviving parent was an idiot, incapable of making a contract or of approving the contract of her child. The contract for service of the boy was made by Sweet with his elder brother, but the boy ratified it by his conduct and made it his contract until he saw fit to disaffirm and avoid it. The contract was not made in conformity with the statute. The question, therefore, arises is it an offense under the statute to interfere with the performance of a contract not made in conformity with the statute?

This section of the statute, before the amendatory act of 1905 was enacted, in terms only applied to contracts made in conformity with the terms of the statute. But the act of 1905 omitted that expression, and made its terms apply to all contracts "with another person for a specified time."

The contract between Sweet and the minor was valid, and it was voidable only by the latter. We think that, until the contract was actually avoided by the minor, it was a criminal offense under the statute for any one to interfere with his performance of the contract or to entice him away, or to knowingly employ him by way of inducement to him to break his contract. The contract, until disaffirmed and avoided by the minor, created the relation of employer and employee, and it was as much a viola-

tion of the statute to interfere with and cause the breach of that kind of a contract as it is to interfere with the performance of a contract made in conformity with the statute. The criminal part of the statute, we think, applies to all contracts, and a contract with a minor is valid and binding until disaffirmed. The interference with the performance of such a contract is within the mischief sought to be corrected by the statute. *Tartt* v. *State,* 86 Ala. 26; *State* v. *Harwood,* 104 N. C. 724.

It is also urged that the evidence does not show that appellant employed the boy or interfered with the performance of the contract with Sweet, and is insufficient to sustain the verdict. While the evidence is not altogether satisfactory, we think there was enough evidence of a substantial character to justify a finding by the jury that appellant interfered with Sweet's contract with the boy by hiring the latter away before the termination of the contract.

Affirmed.

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

Opinion delivered June 1, 1908.

APPEAL—DISMISSAL OF MISDEMEANOR CASE FOR WANT OF BRIEF.—As the statute (Kirby's Digest, § 2622) fixes the time when appeals in criminal cases stand for trial, a dismissal of an appeal in a misdemeanor case will not be reinstated because appellant's attorney was not notified when his case was set for trial.

Appeal from Sebastian Circuit Court; *Daniel Hon,* Judge; motion to reinstate denied.

B. R. Davidson, for appellant.

William F. Kirby, Attorney General, for appellee.

PER CURIAM. This was dismissed on call Monday, May 25th, the first day of the May term, and appellant's attorney, when notified of the dismissal, filed a motion for re-instatement, alleging that he had overlooked the fact that the cause was set for trial or subject to be called on the 25th of May, and had received no calendar of the court containing the style

of the case and the date that it would be called. In an affidavit supporting the motion, the attorney states that on receipt of the calendar commencing March 2, 1908, he carefully examined the index and noted the causes that were set down in which he was interested, and, receiving no subsequent calendar, did not know that the case was to be subject to call on this date.

This court has not in its history issued a calendar containing criminal cases. Appeals in criminal cases are made by statute to take precedence over all other business of the court, and stand for trial at the first term succeeding the lodging of the transcript in the clerk's office, except felonies, which stand for trial on the tenth day after the transcript is filed. Kirby's Digest, § § 2622-2624.

The calendar issued by the clerk of the court, referred to by counsel, contains setting of all the civil cases, but set no cases for Monday, May 25th, and in lieu thereof contained this notice:

"This being the first day of the May term, A. D. 1908, all criminal cases on the docket will be peremptorily called. Under section 2624 of Kirby's Digest, all felonies stand for trial ten days after being lodged in the clerk's office."

This case was brought here by writ of error issued April 16, 1908, which was returned with the transcript and filed on April 20, 1908. On the 25th of May, pursuant to said notice, the criminal docket was peremptorily called, and, on motion of the Attorney General, this appeal was dismissed for want of prosecution.

Moreover, the writ of error sued out by appellant and issued by the clerk of this court was returnable the first day of the next term of the Supreme Court, "which will be held on the fourth Monday of May, A. D. 1908."

Stronger reasons for refusing to re-instate this case exist than existed for the refusal to re-instate the appeals in *Emerson* v. *Edge,* and *Crossett Lumber Co.* v. *Rolfe,* 80 Ark. 510, because the defaults there were due to a failure to examine the calendar, or to get a calendar, to ascertain when the cases were set, while the setting of this case was fixed by law, and not dependent upon a calendar.

Motion overruled.

McCALL v. HELENA.

86 442
188 213

Opinion delivered June 1, 1908.

MUNICIPAL COURTS—JURISDICTION OVER MISDEMEANORS.—Under Kirby's Digest, § 5634, providing that the police court "shall have concurrent jurisdiction with justices of the peace over all misdemeanors committed in violation of the laws of the State within the corporate limits of such city," a police court has jurisdiction of a prosecution for carrying a pistol unlawfully in the city, although there was no city ordinance making it unlawful to carry a pistol.

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

W. G. Dinning, for appellant.

Nowhere in the evidence is it shown that there was any ordinance making it unlawful to carry a pistol as a weapon. Courts do not take judicial cognizance of city ordinances. 68 Ark. 483; 80 *Id.* 264.

Edwin Bevens, city attorney, for appellee.

Police courts have concurrent jurisdiction with justices of the peace over misdemeanors committed in the city limits. Const. art. 7, § 43; Kirby's Digest, § § 5634-5; 68 Ark. 244. The police had jurisdiction to try him under the State law (68 Ark. 244), and is presumed to have followed the law until the contrary is shown. 72 Ark. 590.

BATTLE, J. Dug. McCall was arrested for unlawfully carrying a pistol in the city of Helena, and was tried and convicted of that crime in the police court of that city. He appealed to the Phillips Circuit Court, and was again convicted. He then appealed to this court.

The only reason he gives why the judgment of the circuit court should be reversed is, there was no evidence adduced in his trial to prove that there was an ordinance of the city of Helena making it unlawful to carry a pistol. None was necessary. There is a statute of the State making it a misdemeanor to carry pistols; and section 5634 of Kirby's Digest provides: The police court of any city of the first class "shall have concurrent jurisdiction with justices of the peace over all misdemeanors committed in violation of the laws of the State within

the corporate limits of such city, * * * and all fines imposed in the police court shall be paid into the city treasury."

Judgment affirmed.

DUNNIVAN v. HUGHES.

Opinion delivered June 1, 1908.

1. REFORMATION—ATTACHMENT DEED.—An attachment sale of land can not be reformed for a misdescription in the certificate of purchase of the land intended to be sold if the proceedings upon which the sale was based contained the same misdescription. (Page 446.)
2. SALE OF LAND—BOND FOR TITLE—BREACH.—Where, at the time a vendor of land executed his bond for title, he was without title to or interest in the lot, and the vendee never acquired possession of it, the vendor is liable in damages for a breach of such bond. (Page 446.)

Appeal from Craighead Chancery Court; *Edward D. Robertson,* Judge; reversed.

Hawthorne & Hawthorne, for appellant.

The facts do not justify a decree of reformation in this case. 37 Mo. 364; 55 Mo. 500; 37 Ind. 138; 66 Ind. 488; 67 Ind. 164; 68 Am. Dec. 596; 85 Ark. 62.

F. G. Taylor, for appellee.

The court was authorized to decree a reformation under the facts in this case. 28 Ark. 372.

BATTLE, J. On the 7th day of July, 1906, M. A. Dunnivan instituted this action against W. J. Hughes in the Craighead Circuit Court, and alleged that he entered into a contract with the defendant on the 11th day of January, 1906, whereby he agreed to purchase the following described real estate in the town of Jonesboro, to-wit: 79 feet off of the west end of lot 6 in block 2 of Flint's Addition to the city of Jonesboro, being 79 feet by 194 55-100 feet, for the sum of $300, of which plaintiff paid the defendant $100 in cash, and executed to him his promissory note for $200, payable six months thereafter; that the defendant at the time of the purchase executed to plaintiff a bond

for title whereby he agreed to convey to plaintiff the aforedescribed property "by a sufficient warranty title," upon payment of the purchase money. That the defendant was not at the time of the execution of the bond, and is not now, and has not been at any time, the owner of said property. The plaintiff is entitled to recover the $300 and $200 damages, the same being the difference in the value of the lot as sold to plaintiff and its market value, "the plaintiff's title to the land sold having wholly and totally failed." And he asked for a judgment for damages.

The defendant answered and admitted that he entered into the contract with plaintiff for the purchase of real estate, and described it, and admitted that it was described in the bond as alleged in the complaint, but averred that it was incorrectly described. That he (defendant) purchased the property at a sheriff's sale under an order of court in an attachment proceeding in the case of M. I. Hughes against J. W. Scott; that on the fifth day of January, 1905, the sheriff levied the writ of attachment in such proceedings upon the lot, and described it as the north half of lot 6 in block 2 of Flint's Addition to the town of Jonesboro, when in fact he actually levied on the lot described in answer, and incorrectly described it in the levy, in the advertisement thereof for sale, and in the certificate of purchase executed to the purchasers. Defendant admits that he sold the lot to plaintiff for $300, the sum of $100 of which was paid in cash, and tendered a deed to plaintiff for the lot sold when he paid the remainder of the purchase money. Defendant asked that the cause be transferred to the Craighead Chancery Court; that the description of the lot in the bond for title and in the proceedings in attachment be corrected to correspond to the facts, and for judgment against the defendant for the unpaid purchase money.

The cause was transferred to the Craighead Chancery Court; and the plaintiff replied to the answer.

"The facts most favorable to the defendant were about as follows: M. I. Hughes instituted an action in the Craighead Circuit Court against J. W. Scott, who appears from the proceedings to have been a non-resident of the State. An attachment was issued and delivered to the sheriff on the 3d day of January, 1905, and levied on the north half of lot six (6) in

block two (2) of Flint's Addition to the city of Jonesboro. The notice was posted on the south half of lot six (6) in said block two (2). A judgment was rendered on constructive service against Scott at the March term, 1907, of the court, and the north half of lot six (6) in block two (2) of Flint's Addition to the town of Jonesboro was ordered sold for cash.

"The sheriff advertised the lot to sell as described in the judgment, and posted a notice of sale on the south half of lot six. The sheriff, as shown by the certificate of purchase, sold the north half of lot six (6) in block two (2) of Flint's Addition to Jonesboro to W. J. Hughes on the 17th day of April, 1905, for $175.

"No deed has been made to Hughes, and there is nothing to indicate that he paid the purchase money, other than the order of the court directing the sheriff to sell for cash, and it seems the sale was never reported.

"On the 11th day of January, 1906, the defendant sold the north half of lot six in block two of Flint's Addition to Jonesboro to the plaintiff, received $100 cash and two promissory notes for $100 each, payable in six months. The proof shows the lot was vacant, and that the defendant furnished a surveyor who went with the plaintiff to locate the land. When they discovered the bond for title did not cover the land, the plaintiff declared it was the wrong description, and that he would drop the matter.

"The Jonesboro Sand-Cement Brick Company, a corporation of which the plaintiff was president, on the 16th day of March, 1906, purchased the south half of lot six (6) in block two (2) from Basil Baker, who had previously purchased from J. W. Scott. In the meantime, and at the February term of the court, 1906, P. C. Barton and Lyman Hinson, after giving M. I. Hughes, the defendant, Hughes, and plaintiff, Dunnivan, notice, had the judgment directing the sale of the north half of lot six in block two of Flint's Addition to Jonesboro vacated and and set aside. This order was made some 30 days before Baker conveyed to the Jonesboro Sand-Cement Brick Company. The Jonesboro Sand-Cement Brick Company soon after its purchase took possession of the property and constructed a cement house thereon for manufacturing purposes. There was no effort made

on the part of the defendant to perfect his title until the plaintiff instituted this action in July, 1906."

The court ordered and decreed that the attachment proceedings in M. I. Hughes v. J. W. Scott in the Craighead Circuit Court for the Jonesboro District, towit: the return on the writ of attachment, the judgment sustaining the attachment, which was rendered at the February, 1905, term of said court, the advertisement of the sale of land levied upon and ordered sold, and the certificate of purchase of property under the sale to the defendant, W. J. Hughes, the purchaser at the sale, and the bond for title executed by the defendant in this cause to the plaintiff, Dunnivan, be reformed so as to correspond with a description the court found to be correct; and rendered judgment in favor of the defendant against the plaintiff for the unpaid purchase money, and ordered the lot sold to satisfy the same if it (judgment) was not paid in thirty days. Plaintiff appealed.

The chancery court was without authority to reform the attachment proceedings. *Tatum* v. *Croom*, 60 Ark. 487; *Landon* v. *Morris*, 75 Ark. 6; and note to *Bartlett* v. *Judd*, 78 Am. Dec. 136, and authorities cited. The appellee at the time he sold to appellant was without title to or interest in the lot, and thereafter remained in that condition. The lot sold was vacant, and appellant never had possession of it. Appellee is liable for damages for a breach of his bond for title (*Bellows* v. *Cheek*, 20 Ark. 424); and appellant is entitled to his remedy at law therefor.

The decree of the chancery court is reversed, and the cause is remanded with directions to the court to transfer it to Craighead Circuit Court.

JOHNSON v. AUSTIN.

Opinion delivered June 1, 1908.

REFORMATION OF INSTRUMENT—DEED OF GIFT.—A deed of gift can not be reformed without the consent of all parties.

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

W. C. Adamson, for appellants.

1. There is no evidence to show that Mary Austin knew the effect of having her husband's name joined in the deed, but on the contrary the facts and circumstances go to show that she did not understand its purport and effect. A trust will result, though the title is taken in the name of the grantee with the consent of the person paying the consideration. 15 Am. & Eng. Enc. of L. (2 Ed.), 1135 and cases cited; 85 Fed. 896.

2. The burden was on the defendant to show that his wife intended for him to take a beneficial interest in the property. 40 Ark. 62; 81 Ark. 48; 64 Ark. 155; 47 Ark. 111. See also 15 Am. & Eng. Enc. of L. (2 Ed.), 1136, 1138.

Fulf, Fulk & Fulk, for appellee.

Fraud and misrepresentation are alleged, but the chancellor on hearing the testimony found no evidence to support the allegation. Had appellee not voluntarily entered a disclaimer as to a one-half interest, he would necessarily have been decreed the entire tract

BATTLE, J. Jordan Kirkpatrick, in his lifetime, purchased and paid for certain lots in the town of Argenta, in this State, and caused the same to be conveyed to his wife, Mary Kirkpatrick. He died leaving his wife, Willie Johnson, Amanda Morris and Frances Jackson, children by his wife, Mary, surviving. About ten years after the death of her husband, Mary married one Ausborn Austin. She exchanged the lots in Argenta with one William Amrhein for a sixty-acre tract in the country, which was conveyed to her on the 21st day of November, 1903. Afterwards Amrhein discovered that in executing the deed he had, through mistake, reserved twenty acres off the south side of the tract, instead of off the east side as he intended. They agreed to correct the mistake, and she conveyed the entire property to Amrhein, and he conveyed, at her request, the property he at first intended to convey to Mary Austin and her husband, Ausborn Austin. This last deed was executed on the 13th day of April, 1905. Mary Austin died on the second day of October, 1906, leaving no will, and leaving the children by her first husband her only heirs. On the 22d day of January, 1907, Willie Johnson, Amanda Morris and Frances Jackson brought this suit in the Pulaski Chancery Court

against Ausborn Austin, asking that the defendant be declared a trustee for their benefit, or that the deed of April 13, 1905, be reformed so as to make Mary Austin or her heirs the sole grantee therein. The defendant answered, alleging that the deed was executed to him and his wife at her request.

After hearing the evidence adduced by the parties, the court found as follows: "And the court further finds at the commencement of this cause and before any testimony was read to the court the defendant made a disclaimer in open court, stating that it was the intention of his wife that he should be only a tenant in common with her, and that after her death her children, the plaintiffs in the cause, should have one-half of the property in controversy, and the defendant the other half," (describing property). And decreed that "the defendant have an undivided one-half interest in the land, and the plaintiff the other half, each one one-sixth."

The deed executed by Amrhein to Mary Austin and Ausborn Austin was, in effect, a deed of gift by Mary to her husband. There was no competent evidence to prove that it was procured by fraud or undue influence. It was not subject to reformation without the consent of all parties. (*Smith* v. *Smith,* 80 Ark. 458; 24 Am. & Eng. Enc. of Law, page 653, par. b, and cases cited.) The effect of it (the conveyance to Austin and his wife) was the vesting of an estate in entirety in them, and the husband surviving became the sole owner of the land; and, as the deed cannot be reformed or set aside, the result is that appellants have no right to complain of the decree; and, as appellee does not appeal, the presumption is that he does not wish to modify or set aside the decree, and it is consequently affirmed.

HART, J., disqualified and not participating.

HAMBY v. BROOKS.

86 448
187 63

Opinion delivered June 1, 1908.

1. EVIDENCE—HEARSAY.—Where, in an action upon a claim in favor of a widow against her deceased husband's estate, the defense was that the money sought to be recovered was used by deceased in

purchasing a lot for his wife and in building a home thereon, it was not error to exclude statements made by deceased at the time he acquired possession of the plaintiff's money that he intended to use the money in buying and improving land for plaintiff. (Page 450.)

2. HUSBAND AND WIFE—ADVANCEMENT.—Where a widow sued her husband's estate for money had and received for her benefit, proof that he purchased a lot in her name and expended money in improving it will not justify a presumption that he intended to repay his wife, as it will be presumed that the sum so expended was a gift. (Page 451.)

3. STATUTE OF LIMITATIONS—HUSBAND AND WIFE.—The statute of limitations does not run against claims existing between husband and wife during the continuance of the marital relation. (Page 451.)

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

Appellant *pro se.*

1. It was error to exclude the testimony of Regan, Hinton and Carrington. Brooks being dead, appellant was entitled to have every circumstance going to sustain his contention, however slight, to go to the jury for what it was worth under proper instructions.

2. The item of $225 was due more than three years before Brooks died, and is barred by the statute of limitations.

Roscoe R. Lynn, for appellee.

1. The evidence offered and excluded does not sustain appellant's contention, and he was not prejudiced by its exclusion. Moreover, the testimony as to Brooks's declarations was clearly inadmissible. There is no proof that he was his wife's agent. 44 Ark. 214; 56 Ark. 221; 46 Ark. 229. If he was her agent, he could not testify against her if living. Hence his statements could not be proved after his death. Kirby's Dig. § 3095; 62 Ark. 26; 76 Ark. 435. His declarations are mere hearsay.

2. The item of $225.00 is not barred. The statute only runs from date of actual demand. 25 Cyc. 1209. The statute does not run because the wife could not sue the husband at law. 30 Ark. 17; 31 Ark. 678; 66 Ark. 113; 56 Ark. 297. She could sue in equity only. 67 Ark. 15. And equity is not bound to apply the strict rules of the statute of limitations. 81 Ark. 296; 83 Ark. 160. It is a question of laches, therefore, and

not of limitation, and this court will not hold that the wife was guilty of laches because she did not bring suit against her husband within three years. 39 N. J. Eg. 511.

As a matter of public policy, the statute of limitations does not run against claims existing between husband and wife during the continuance of the marital relation. 19 Am. & Eng. Enc. of L. 186; 47 Ark. 558; 25 Cyc. 1255; 105 Ind. 410; 49 N. E. 965; 28 Atl. 722; 174 Pa. St. 408. See, also, 64 Ark. 384; 66 Ark. 118.

McCULLOCH, J. Appellee, Mae C. Brooks, presented and filed her claim on verified account in the aggregate sum of $950, exclusive of interest, against the estate of her deceased husband, J. T. Brooks. The case was tried in the circuit court on appeal from the probate court, and, after all the testimony had been introduced, the court instructed the jury to return a verdict in her favor for the full amount claimed. Judgment was rendered accordingly, and the administrator appealed to this court.

The account sued on contained three separate items, as follows:

1.	Amount collected by J. T. Brooks on 12 notes executed by one Bringle to plaintiff and proceeds used under promise to pay same to plaintiff on demand	$ 600.00
2.	Amount paid by plaintiff for J. T. Brooks on life insurance premium under promise to repay same to plaintiff on demand	225.00
3.	Amount proceeds sale of horse belonging to plaintiff collected by J. T. Brooks under promise to pay on demand	125.00
	Total	$ 950.00

The undisputed evidence introduced established the claim. The defense offered by the administrator to the first item of the account was that the amount collected by Brooks was used by him in the purchase of a lot for his wife (appellee) and in building a house thereon; and to the second item that it was barred by the statute of limitations.

The defense offered to the first item was, in effect, a plea of payment, and it devolved upon appellant to establish the

defense by preponderance of the testimony. He assigns as error the exclusion of certain testimony of witnesses Regan, Hinton and Carrington. The substance of the excluded testimony of Regan was a statement made to him by Brooks at the time he purchased the notes in question from the latter to the effect that he intended to use the proceeds of the notes in purchasing a lot from Hinton. The *ex parte* statements made by Brooks as to what he intended to do with the money which the evidence shows he had promised to repay to appellee on demand were not binding on her, and were not admissible as evidence in the case. They were purely hearsay, and were properly excluded.

Appellant offered to prove by Hinton that he sold a certain lot to Brooks for a cash consideration of $500 and executed the deed in the name of appellee. Appellant also offered to prove by Carrington that he built a house on the lot in question for Brooks in consideration of the sum of three hundred and ten dollars. This was excluded by the court. If there had been any evidence offered tending to show that Brooks repaid the money due appellee by purchasing the lot and building the house, and that she authorized him to expend the money in that way, the evidence would have been competent for the purpose of showing that he purchased the lot and caused the building to be constructed and paid for same. The mere fact, however, that he purchased the lot, taking title in her name, and built a house thereon, raised no presumption of payment, and would not have been sufficient to warrant a finding of repayment of the money due. The exclusion of the testimony was therefore not prejudicial. When a husband purchases property, and has it conveyed to his wife, or expends money in improving her property, the sum so expended will be presumed to be a gift. The law will not imply a promise on her part to repay the amount, nor will it raise a presumption that he intended thereby to create a trust in his own favor. Neither will there be a presumption that he intended thereby to repay a debt which he owed his wife. *Ward* v. *Ward,* 36 Ark. 586; *Milner* v. *Freeman,* 40 Ark. 62; *Chambers* v. *Michaels,* 71 Ark. 373; *O'Hair* v. *O'Hair,* 76 Ark. 389; 21 Cyc. p. 1297.

The second item of appellee's account was not barred by the statute of limitations. The statute does not run against claims

existing between husband and wife during the continuance of the marital relation. This upon the ground of public policy, "which discountenances controversies between husband and wife and encourages inaction as to claims *inter sese* during the existence of the marital relation." See 19 Am. & Eng. Enc. Law, p. 186, and numerous authorities there collated.

No prejudicial error is found in the record, and the judgment is therefore affirmed.

STURDIVANT v. REESE.

Opinion delivered June 1, 1908.

1. APPEAL WITH SUPERSEDEAS—EFFECT.—Taking an appeal with supersedeas does not have the effect of vacating a judgment, but only of staying proceedings thereunder. (Page 454.)
2. COMMISSIONER OF COURT—EFFECT OF PAYMENT TO.—Payment of funds, under orders of the court, to a commissioner appointed by the court is equivalent to a deposit in court, of which the court has exclusive jurisdiction to order a distribution. (Page 454.)
3. ELECTION—PURSUING DIFFERENT REMEDIES.—Procuring a judgment on a supersedeas bond will not preclude a party from pursuing another remedy which he has, namely, an application to the trial court for distribution of a fund in court, as the two remedies are not inconsistent, although there can be but one satisfaction of the debt. (Page 455.)

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

W. C. Rodgers, for appellants.

1. On appeal to this court the trial of a chancery case is *de novo*. 73 Ark. 187; 75 Ark. 72; 76 Ark. 153; 105 U. S. 265. Such being the case, when the former appeal was taken, that procedure necessarily took the cause entirely out of and beyond the control of the lower court, and brought the same entirely into this court for trial as though it had never been tried, and it has never been remanded for any

purpose. The judgment on the supersedeas bond was *in lieu of the decree of the lower court* directing the money to be paid.

2. Appellee will not be permitted to pursue inconsistent remedies. By adopting the judgment of this court and compelling the defendant to execute a stay bond against the execution issued under that judgment, he places himself in such a position that he cannot consistently seek to enforce the order of the lower court. He should be held to his election. 30 Ark. 453; 64 Ark. 213; 65 Ark. 380; 69 Ark. 271; 75 Ark. 40; 76 Ark. 270; 78 Ark. 569; 78 Ark. 501.

W. P. Feazel, for appellee.

The chancery court had jurisdiction over its commissioners and the fund in their hands. Kirby's Dig. § 1231; 66 Ark. 43. The appeal with supersedeas does not vacate or extinguish the judgment of the lower court, but only suspends the execution of the judgment until the determination of the case in the Supreme Court. 5 Ark. 390; 9 Ark. 139; 76 Ark. 485. And judgment on the supersedeas bond does not merge or extinguish the judgment appealed from, so as to prevent its enforcement. 31 Am. St. Rep. 265.

McCULLOCH, J. This appeal grows out of a continuation of the litigation set forth in the case of *Sturdivant* v. *McCorley,* 83 Ark. 278. In that case we adjudicated the rights of Mrs. McCorley, holding that she had a lien on a fifth of certain lands which had been sold for partition in another suit then pending in the chancery court of Howard County and could, by intervention in that suit, recover one-fifth of the proceeds of sale then held by the commissioners of the court.

While the money arising from said sale remained undistributed in the hands of the commissioners of court, Mrs. McCorley filed her intervention in that suit, asking that the one-fifth of the funds to which this court held she was entitled be paid over to her. She died during the pendency of the matter, and the cause was revived in the name of an administrator, and at the November term, 1907, of the Howard Chancery Court an order was made directing that the commissioners pay over to said administrator one-fifth of said funds. From that order and decree W. A. J. Sturdivant, the defendant in this suit, appealed

to this court, and gave a supersedeas bond in statutory form. This court affirmed the decree and order appealed from, and rendered judgment here against the appellant and the sureties on his supersedeas bond. Execution was issued on the judgment from this court, and the same was stayed by execution of a stay bond.

The administrator then filed another motion in the cause in the chancery court, asking that the commissioners be required to pay over to him the funds which the chancery court, and this court on appeal, had adjudged. The court made the order in accordance with the prayer, directing the commissioners to pay over the money within twenty days from the date of the order, and an appeal from that order was granted by the clerk of this court, on the application of the three commissioners and W. A. J. Sturdivant, the defendant.

It is contended on behalf of appellants that the chancery court lost jurisdiction of the cause when the former appeal to this court was taken, and that it had no power to make further orders concerning the funds.

We cannot give our approval to that contention. The appeal and supersedeas had the effect only of suspending the execution of the decree appealed from, and did not vacate it. *Miller* v. *Nuckolls,* 76 Ark. 485.

The decree of the chancery court awarding the funds in the hands of the commissioners to appellee and directing the commissioners to pay the same over to him was affirmed by this court, and the chancery court could properly enforce it. Kirby's Digest, § 1231. The commissioners are officers of the court, and funds held by them as such are subject to the orders of the court. The court did not by the former appeal lose control of funds in the hands of its commissioners, and after the affirmance of the decree appealed from still possessed the power to order distribution of the funds. Even in the absence of any statute on the subject, the court would inherently possess such authority. It would be anomalous to say that a court loses power to require its commissioners to distribute funds which have come into their hands as officers of the court and by virtue of the orders of the court. Payment under orders of the court to a commissioner or other functionary appointed by the court

is equivalent to a deposit in court, and the court has exclusive jurisdiction to order a distribution. 13 Cyc. p. 1038.

The procurement of a judgment here on the supersedeas bond was not an election to pursue that remedy and an abandonment of all other remedies. Appellee was not put to an election of remedies. The judgment on the supersedeas bond followed as a matter of course upon affirmance of the decree, but the right to have paid over the funds in the hands of the commissioners of the court below which had been decreed to Mrs. McCorley's administrator was not thereby lost or barred. The two remedies are cumulative and not inconsistent. It is only where two or more remedies are inconsistent that the election to pursue one is an abandonment of others. *Craig* v. *Meriwether*, 84 Ark. 298.

Though there can be but one satisfaction, as many remedies, consistent with each other, as the law affords may be pursued at the same time.

Affirmed.

CAIN v. STATE.

Opinion delivered June 1, 1908.

JUSTICE OF THE PEACE—DUTY TO FILE TRANSCRIPT IN CRIMINAL APPEALS.—Under Acts 1905, c. 151, § 2, requiring justices of the peace to file a certified transcript of their records in the circuit court within ten days after appeals are prayed in criminal cases, and providing that they may be compelled to comply with that section by rule or attachment, an appeal should not be dismissed because the transcript was not lodged with the circuit clerk within the required time.

Appeal from Yell Circuit Court; *J. Hugh Basham*, Judge; reversed.

U. S. Meade, for appellant.

1. The court erred in dismissing the appeals on motion of the prosecuting attorney. Acts 1900, p. 375, § 2; 41 Ark. 194; 40 *Id.* 448.

2. It is the duty of the court to correct errors in entering a judgment, even after the expiration of the term. 33 Ark. 218.

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

HART, J. On the 16th day of April, 1907, Lee Cain was convicted before a justice of the peace in the Dardanelle District of Yell County of the crime of selling whisky to a minor, and fined $25.00. On the same day he appealed to the circuit court. On September 4, 1907, the justice filed the transcript of the judgment in the office of the circuit clerk. On the 10th day of September, 1907, a day of the September term of the Yell Circuit Court for the Dardanelle District, on motion of the prosecuting attorney, his appeal was dismissed. The defendant excepted, and the case is here on writ of error.

Because of the action of the court in dismissing the appeal of the defendant, the Attorney General confesses error. Section 2 of the act of April 11, 1905, makes it the duty of the justice, and not of the appellant, to file the transcript in the circuit clerk's office. Acts 1905, p. 376. This was done before the first term commencing after the conviction was had. Appellant was present on the first day of the term, objecting to a dismissal of his appeal and demanding a trial.

Therefore the cause was dismissed without authority of law, and the judgment is reversed and remanded for further proceedings on the appeal from the judgment of the justice of the peace.

SNYDER v. STATE.

86 456
87 530

Opinion delivered June 1, 1908.

1. APPEAL—RECORD—STENOGRAPHER'S NOTES.—Notes of the court stenographer, filed in a case and copied in the transcript, will not be considered on appeal unless they have been approved by the circuit judge and made part of the bill of exceptions. (Page 457.)

2. INSTRUCTION—PROVINCE OF JURY.—It was not error to refuse to instruct the jury in effect that they did not have the right to reject the testimony of any impeached witness which has been corroborated by other evidence. (Page 458.)

3. SAME—NECESSITY OF REQUEST.—It is not the duty of the court to instruct the jury on its own motion as to the doctrine of reasonable doubt in a criminal case. (Page 460.)

Appeal from Johnson Circuit Court; *J. Hugh Basham,* Judge; affirmed.

J. T. Bullock and *Brooks, Hays & Martin,* for appellant.

1. The remarks of the prosecuting attorney in his opening statement were improper and prejudicial.

2. The prosecuting witness was certainly impeached. Kirby's Digest, § § 3138, 2382.

3. Instruction (C) alone was given, and the jury were not told to consider it with the others. Defendant was deprived of the benefit of a reasonable doubt. 20 Ark. 166; 66 *Id.* 449; 62 *Id.* 478; 74 Miss. 780; 73 *Id.* 873; 119 N. C. 793; 17 So. 456; 66 S. W. 184, 1101; 64 *Id.* 270, 965; 36 *Id.* 645.

4. For distinction between reasonable doubt and presumption of innocence, see 10 Enc. of Ev. 625; 156 U. S. 432. It was error to refuse instruction 3.

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

Taking the instructions as a whole, they are correct. 64 Ark. 247; 66 *Id.* 588; 83 *Id.* 81, 61.

BATTLE, J. Sam Snyder was indicted for unlawfully and feloniously carnally knowing and abusing Willie Burris, a female under the age of sixteen years, and was convicted, and his punishment was assessed at five years' imprisonment in the penitentiary. He appealed to this court.

There is no bill of exceptions in the case. The stenographer's report of the evidence is in the transcript, but it was not approved by the judge presiding at the trial of appellant, and is no part of the record. Section three of the act entitled "An act to provide a court stenographer for the Fifth Judicial District of Arkansas" (in which appellant was tried and convicted), approved March 3, 1903, provides as follows:

"It shall be the duty of said stenographer, upon demand of either party to a cause, to furnish within twenty days after the trial, or twenty days from date of demand, a longhand typewritten copy of the oral proceedings of the trial, which shall be certified by him as correct, and, when approved by the judge presiding at the trial, shall be filed as a part of the record in the cause, and shall be used as a part of the bill of exceptions and

as a part of the transcript in the Supreme Court without necessity for another copy thereof."

When approved by the presiding judge and filed, it shall be used as a part of the bill of exceptions. It can be made available on appeal only by being made a part of a bill of exceptions. There are in the transcript what purport to be instructions of the court, but they are not made a part of the record by bill of exceptions, and cannot be considered by this court. Every attack of appellant upon the judgment of the trial court rests upon grounds which can be presented to this court only by bill of exceptions. Without it the judgment must be affirmed; and it is so ordered.

ON REHEARING.

Opinion delivered June 22, 1908.

BATTLE, J. Appellant, Snyder, moves the court to set aside its judgment of affirmance, and for cause states that a bill of exceptions was filed in time, but that the clerk of the circuit court had failed to include it in the transcript filed in this court; and he further asked that the clerk of the trial court be required to file in this court a full and complete transcript.

But this is unnecessary. Assuming that the bill of exceptions had been filed, we find no reversible error in the proceedings of the trial court. *J. F. Hartin Commission Co.* v. *Pelt*, 76 Ark. 177.

Appellant complains of the refusal of the court to instruct the jury at his request as follows:

"1. The credit of a witness may be impeached by showing that he or she made statements, either in or out of court, contrary and inconsistent with what he or she has testified on the trial concerning any matter material and relevant to the issues; and when such witness has been thus impeached about the matters relevant and material to the issues, you have the right to reject all the testimony of such witness except in so far as the testimony of such witness has been corroborated by other credible evidence."

The court committed no error in refusing the instruction. By it he asked the court to instruct the jury that they did not

have the right to reject the testimony of any such witness which has been corroborated by other credible evidence. This is not true.

He complains because the court gave no instructions as to the effect of the impeachment of a witness by contradictory statements. But the court did instruct the jury as follows: "You are the sole judges of the credibility of the witness and the weight that should be given their testimony. With that the court has nothing to do. * * * You may judge of the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, and the reasonableness or the unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against the defendant, or any circumstance tending to shed light upon the truth or falsity of such testimony, and it is for you at last to say what weight you will give to the testimony of any and all witnesses. If you believe that any witness has wilfully sworn falsely to any material fact in this case, you are at liberty to disbelieve the testimony of that witness in whole or in part, and believe it in part and disbelieve it in part, taking into consideration all the facts and circumstances of the case." This charge was sufficient to inform the jury as to their power to weigh the testimony of the witnesses and give it such weight as they believe it deserves.

Appellant contends that the court gave no instruction upon reasonable doubt. The jury were virtually told that they could not convict the appellant until his guilt was established beyond a reasonable doubt. Upon this subject the court instructed them as follows: "He (defendant) starts out in the trial with the presumption of innocence in his favor, and that presumption follows him throughout the trial or until the evidence convinces you of his guilt beyond a reasonable doubt."

Again the court instructed them as follows: "You have been told that you should give the defendant the benefit of a reasonable doubt. A reasonable doubt is not any possible or imaginary doubt, because everything that depends upon human testimony is susceptible of some possible or imaginary doubt. To be convinced beyond a reasonable doubt is that state of the case which, after an entire consideration and comparison of all

the testimony, leaves the minds of the persons in that condition that they feel an abiding conviction to a moral certainty of the truth of the charge."

But would it have been the duty of the court, if it had not done so, to instruct the jury, on its own motion, as to a reasonable doubt? This court has held it would not. *Allison* v. *State,* 74 Ark. 444; *Mabry* v. *State,* 80 Ark. 349.

Motion denied.

STORTHZ v. WILLIAMS.

Opinion delivered June 8, 1908.

CANCELLATION OF INSTRUMENT—FRAUD.—Where a sale of land estimated to be worth from $900 to $2,500 was procured from an ignorant person for a consideration of $300, through representations as to its value known to the vendee to be false, the sale was fraudulent and will be cancelled upon the vendor repaying the purchase money less the rents received by the vendee.

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

Eben W. Kimball, for appellant.

1. Inadequacy of consideration, when amounting only to hardship, furnishes no ground of equitable relief; and when there is no fraud, courts will not relieve from the consequences of contracts voluntarily and understandingly entered into. 24 Pa. St. 360; 21 Gratt. (Va.), 75; 104 Mass. 420; 35 Tex. 225; 17 Mo. 237; 41 N. Y. 329; 5 Pet. (U. S.) 263; 17 Va. 9; 69 Ill. 394; 21 Ala. 371; 4 Ind. 66. Where no fraud is shown (the burden is on the pleader to prove it), mere inadequacy of price is not sufficient to rescind a contract. 1 Wharton on Contracts, § § 165-6; 1 Perry on Trusts, 186; 71 Ark. 599. When the means of information are at hand and equally open to both parties, and no concealment is made or attempted, a misrepresentation by one party to a contract furnishes no ground for equitable interference. 83 Ark. 403; 1 Wharton on Contracts, § 256. It is now too late to interfere. 55 Ark. 148, 155.

2. No demand was made before suit to return the property, nor was tender made of the amount paid or a deed to be executed. 15 Ark. 286, 291; 17 *Id.* 240, 603; 62 *Id.* 274; 59 *Id.* 259; 54 Cal. 161; 1 Wharton on Contracts, § 285 and 919 (2). The fact that the bargain was hard and unreasonable is not enough to induce a court of equity to interfere. 16 A. & E. Enc. p. 699, and note p. 698. The other party must be made whole. 24 *Id.* p. 621.

Lee Miles and *J. D. Wade,* for appellee.

1. The sale should be rescinded because of the wilfully false representations of the agent of Storthz, the inadequate consideration and the *undue influence* and *fraud* by one holding a *fiduciary* relation to appellee. 69 Ill. 394; 57 N. H. 374; 64 Tex. 679; 49 Mich. 290; 29 S. W. 242; 35 *Id.* 186; 111 Mo. 1; 11 Ark. 66; 15 *Id.* 599; 17 *Id.* 498; 22 *Id.* 102; 47 *Id.* 339; 74 *Id.* 239; Bispham, Eq. (6 Ed.), art. 206, 219.

2. The most flagrant element of fraud is the violation of the fiduciary relation existing between the guardian, West, and appellee. 40 Ark. 30; 5 Blackf. (Ind.) 509; Bisph. Eq. (6 Ed.), art. 232.

3. A tender was made. 74 Ark. 68; 74 *Id.* 70.

BATTLE, J. Rosa Williams acquired one-half of lot one in block seventy in the city of Little Rock, through the will of her aunt, Tobitha Smith, of whom Evelyn West had been administratrix or executrix. Rosa Williams was a non-resident of Little Rock, and Storthz knew not her whereabouts. He desired to purchase the lot, and employed D. F. Rose for that purpose. Rose employed Evelyn West to find and induce her to sell to him. He did so because she said she could control Rosa. In 1903 Rosa visited Little Rock, and saw Evelyn, who sent her (Rosa) to D. F. Rose, saying he was a real estate agent and wanted to buy her lot, and was a gentleman, and would do what was right. She told him that Evelyn West had sent her to him. He asked what interest she had in the lot, and she said one-half, and he then asked what she wanted for it, and she replied $1,000, and he "laughed at it," and told her it would be sold for taxes, and she might be forced to put down a sidewalk, and the lot would be sold to pay expenses. She wanted to go to see her

agent, Harp, to ascertain the value of the lot, and Rose persuaded her not to go. He told her the whole lot was not worth $500. He testified in this case that at that time it was worth $5,000; that the improvements were worth $1,500, and the lot without them was worth $4,000. He induced her to accept $300 for her half of the lot, saying he had offered that much because Evelyn had sent her to him. She furnished him with an abstract of title to the lot, and an attorney examined it, and Storthz said it was all right. Storthz paid her $293, reserving seven dollars to pay for the abstract, and she executed a deed to him on the seventh day of July, 1903.. Rose testified that Storthz soon after this refused to take $2,500 for one-half of the lot, and said that he had purchased "too cheap." He admitted that he had given $1,030 for the other half of it.

At the time of this purchase Rosa Williams was about twenty years of age, was ignorant and inexperienced, and up to within three or four days of this time had not been in Little Rock for at least five years, and probably eight years. The value of the lot at this time was variously estimated by witnesses at from $1,800 to $5,000, the average estimate being about $3,000, which according to the evidence seems to be a reasonable estimate.

On the 10th day of December, 1903, Rosa Williams brought suit against Levi Storthz in the Pulaski Chancery Court to set aside the deed executed by her to the defendant, for the possession of the lot and for rents thereof while in his possession, and offered to return to him the money she received from the lot. The defendant answered and denied that he was guilty of any fraud in the purchase of the lot, and that she had tendered to him the purchase price he had paid her, and alleged that she had spent the same.

After hearing the evidence, the court found as follows: "that on the 7th day of July, 1903, the plaintiff, Rosa Williams, in consideration of the sum of $300 to her paid by the defendant, Levi Storthz, executed to the defendant a warranty deed to an undivided half of lot one, block seventy, in the city of Little Rock; that possession of the land was delivered by the plaintiff to the defendant, and he is now in occupancy thereof, and has made improvements thereon, necessary to the use of the tenements

thereon; that the plaintiff was a young negro girl, now 22 years of age, a stranger in the town and inexperienced as to the values of real estate; that false and fraudulent representations were made to her by parties who knew them to be false, which induced her to make the sale of the premises; that the sum of $300 was an inadequate price for the premises, or the interest which plaintiff possessed, and that the interest of the plaintiff was an undivided one-half of the lot; and that, after balancing accounts, one-half of the expenditures for improvement of the property paid by the defendant Storthz, with interest calculated, together with the purchase price paid to the plaintiff by the defendant, two hundred and ninety-three dollars, is sixty dollars and eighteen cents more than one-half of the rents of the property with interest." And the court adjudged and decreed that the deed executed by the plaintiff to the defendant be set aside and cancelled, and the interest in one-half of the lot be divested out of the defendant and invested in plaintiff, and that plaintiff have judgment for costs, and defendant have lien on the lot for the $60.18 to be paid by plaintiff in the registry of the court within ninety days, which she did. Defendant appealed.

Appellant concedes that the only question to be decided by this court is, "was the sale by appellee to the appellant void because of fraud alleged to have been practiced upon the appellee at the time of the sale?"

Appellee had no right to rely on the representations of the agent of appellant as to the probability of the property being sold. That was not a matter peculiarly within his knowledge, and was a matter of conjecture. But the evidence shows a plan to acquire the interest of appellee in the lot at much less than its value. She was a non-resident of Little Rock, and had been for many years, was young, inexperienced as to value of real estate, and densely ignorant. Evelyn West, an old acquaintance, was employed to find and send her to Rose, the agent of the appellant, and in performance of her undertaking she found Rosa and informed her that Rose was a real estate agent, a man informed as to the value of town lots, that he wanted to purchase her lot, was a gentleman, and would deal fairly, honestly and justly—would do what was right, and, thus prepared to be deceived and defrauded, sent her to him, and he proceeded to com-

plete the scheme by representing that the lot was not worth exceeding $500, which he swore was worth $5,000, and to prove his intention to do right, as Mrs. West said he would, offered $300 for her half, $50 more than its value, because Mrs. West had sent her to him; persuaded her not to see her agent; pressed his offer to an acceptance without the opportunity of an inquiry, and closed the bargain by an earnest paid to bind the contract, and then allowed her to go where she would.

It is true that "the rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for cancelling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation." 2 Pom. Eq. Jur. (3d. Ed.) § 926. But Mr. Pomeroy says: "Where the inadequacy does not thus stand alone, but is accompanied by other inequitable incidents, the relief is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed: The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstance of oppression. When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to

throw the heavy burden of proof upon the party seeking to enforce the transaction or claiming the benefit of it to show that the other acted voluntarily, knowingly, intentionally, and deliberately, with full knowledge of the nature and effects of his acts, and that his consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation or necessities. If the party upon whom the burden rested should succeed in thus showing the good faith of the transaction, it would be sustained; if he should fail, equity would grant such relief, affirmative or defensive, as might be appropriate." 2 Pom. Eq. Jur. (3 Ed.), § 928 and cases cited.

According to the rule stated by Mr. Pomeroy and the facts in this case as stated in this opinion, appellee is entitled to the relief she seeks.

Decree affirmed.

HART, J., being disqualified, did not participate.

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

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Opinion delivered June 8, 1908.

1. MASTER AND SERVANT—FATAL INJURIES—FAILURE TO SECURE SURGICAL AID.—Where a brakeman received injuries which were necessarily fatal without fault on the railroad company's part, the company will not be liable for damages, though its conductor failed to use reasonable diligence to provide surgical assistance promptly. (Page 469.)
2. APPEAL—REVERSAL—DISMISSAL.—Where appellee's counsel concedes that the case could not be more fully developed on another trial, and the evidence is found to be insufficient to sustain a recovery, the cause will be dismissed. (Page 469.)

Appeal from Pope Circuit Court; *J. Hugh Basham*, Judge; reversed.

STATEMENT BY THE COURT.

The deceased, F. L. Allen, was a brakeman on a freight train on appellant's road. On the 9th day of October, 1906, at Plummerville in Conway County, while engaged in switching,

the engine and one car of the freight train were backed over and upon said Allen, crushing, cutting and lacerating his right leg from the upper part of the thigh down to the knee. The accident occurred about 2:10 o'clock A. M. Immediately the conductor, with the station night watchman to show him the way, went to the house of Dr. A. R. Bradley, the local surgeon of appellant company at that point, to secure surgical attention. He was informed, when he arrived at Dr. Bradley's, that the doctor was in the country waiting upon a woman in a labor case, and that his return was uncertain. On their way back to the station, the night watchman told the conductor that the person who answered their summons at Dr. Bradley's was a young physician. The conductor did not return to secure his assistance, but went on to the station, and, after doing some necessary switching which occupied forty minutes, he placed Allen on the train and proceeded to Morrillton, the next station. The distance was five miles, and fifteen minutes were taken to make the run. Upon their arrival at Morrillton at 3:20 o'clock A. M., the conductor immediately applied for and found Dr. Adams, the company's surgeon at that point. Preparations were at once made for an operation, which began at 4 o'clock A. M., but the injured man did not recover, and died about 10 or 10:15 o'clock on the same morning.

Dr. Adams testified that the thigh was crushed, beginning just as high up as the thigh goes, commencing at the crest of the ilium, the hip bone, and extending from there down to below his knee. That all of the muscles, flesh, blood vessels and everything else were mashed or torn off. That the leg was broken into divers small pieces up to the "middle third" of the thigh. "That at this point of the leg (indicating about the upper third) the flesh was left on that, so that when the leg had to be taken off, the bone only had to be sawed off a short piece above the break, and upon a line with this mashed place here, and the flaps were obtained from below, the posterior, back part of the leg, and thrown over and stitched up here, so when we got through he had just about that much of a stump left (indicating). This crushing continued diagonally on down below the knee." The wheels of the car had struck him on the right leg, just on a line with his hip bone in front.

The testimony shows that about ninety per cent. of injuries of the character above described are fatal, and that death ensues from either the severe shock or from loss of blood, or from both causes combined.

The testimony shows that the injured man complained of being cold after he received the injury, and that he was covered up, and a fire built in the caboose to warm him. The conductor sat by his side on the way to Morrillton, and ministered to his wants as best he could. Other facts appear in the opinion.

Appellee brought suit for the benefit of the widow and next of kin against the appellant for damages on account of the injury and death of said F. L. Allen, and alleged as a cause of action the failure on the part of appellant to provide her intestate promptly with medical or surgical attention, which resulted in his death.

The allegations of the complaint were denied, and the cause was tried by a jury, and a verdict in favor of appellee for $4,500 was returned.

The case is here on appeal.

Lovick P. Miles, for appellant.

1. There was no cause of action under the act of March 6, 1883. She abandoned the right to recover on account of the original injury, and elected to sue solely upon the neglect to secure and render medical or surgical attention, such neglect being relied on as the proximate cause of death. For this appellee could not maintain a suit for the benefit of the widow and next of kin. 53 Ark. 117; 68 *Id.* 1; Tiffany on Death by Wrongful Act (Ed. 1893), § 63, citing 13 R. I. 651; 40 Ga. 52; 38 *Id.* 199.

2. Appellant was under no such legal obligation to provide surgical attention as would make it liable in case of failure to procure it. 65 Ark. 35; 53 *Id.* 377; 92 Ala. 258; 48 Kans. 654; 57 Am. Rep. 160; 52 Kans. 433.

3. The evidence does not warrant a recovery. It is not shown that the failure of the company was the proximate cause of death, nor that the deceased would have lived if attention had been immediately procured. The question of proximate cause and the legal sufficiency of the evidence are questions of law for the court. 33 Ark. 350; 55 *Id.* 510; 56 *Id.* 279; 58

Id. 157; 69 Id. 402; 76 *Id.* 434; 115 Mass. 304; 47 Ark. 97; 63 *Id.* 658, 76 Ia. 744; 83 Ark. 584.

4. No actionable negligence on the part of the conductor was shown.

Charles C. Reid, W. P. Strait and *W. L. Moose*, for appellee.

1. There was such a cause of action as appellee could maintain under the act of March 6, 1883. Kirby's Digest, § 6285; 53 Ark. 125, 126; 89 Miss. 321; 98 Ind. 73; 29 Md. 288.

2. Appellant was under such legal obligation to provide surgical attention to deceased as would involve it in legal liability in case of failure to provide it. 28 Mich. 289, 65 Ark. 300; 53 *Id.* 377; 98 Ind. 358; 82 Ill. 73; 89 Miss. 321; 29 Md. 441; 41 La. Am. 59; 70 Miss. 563; 79 *Id.* 361; 141 Ind. 73; 28 Mich. 289; 52 Ohio St. 564; 41 Md. 288; 33 Kans. 554.

3. The evidence warranted a recovery from any standpoint, and a verdict for appellant should not have been directed. 99 S. W. 200; 91 Ala. 496; 96 Ind. 346; 41 La. Ann. 59; 89 Miss. 89; 70 *Id.* 569; 83 Ala. 376; 3 Thompson on Negl. (2 Ed.), 2782; 83 Ark. 81; 73 *Id.* 570; 2 Bish. Crim. Law, § 639.

4. There was actionable negligence shown in the conduct of the conductor in charge. 88 Miss. 25; 87 *Id.* 237.

HART, J., (after stating the facts). It is conceded that there is no actionable negligence which caused the original injury, and appellee bases her right of recovery in this action upon the failure of appellant company to use reasonable diligence to provide surgical assistance promptly in accordance with the urgency of the need, thereby causing the death of appellee's decedent. This statement puts the issue squarely, and the langage used is that of appellee's counsel. Assuming, without deciding the question, that the freight conductor was in the emergency shown in this case clothed with the powers and charged with the duty to provide surgical attention to deceased, so as to involve appellant in legal liability in case of failure to provide it, the uncontradicted evidence shows that the death of the injured man resulted from the original accident, and not from the delay that resulted in carrying him to Morrillton before surgical assistance was procured. All of the physicians testified that a large majority of cases like the present one are neces-

sarily fatal, ninety per cent. being the estimate made by most of them. They said his chances of recovery would have been enhanced, had he received surgical attention sooner, but none of them expressed the opinion that he would have recovered, or that death ensued from the delay in procuring a surgeon. It is manifest that the death of the injured man did not result from loss of blood. While considerable loss of blood would necessarily result from a wound of the kind received, the uncontradicted evidence shows the hemorrhage had nearly stopped when they reached Morrillton; and that only a very small quantity of blood was oozing from the wound. All the physicians testified that death would have ensued in ten or fifteen minutes from the loss of blood if the hemorrhage had not been checked by the blood coagulating. The coldness complained of by the injured man may have been caused by the severity of the shock; for the physicians testified that a sensation of coldness was produced by a severe shock as well as by loss of blood.

It was incumbent upon appellee, in order to recover in this case, to show that her intestate's death was caused by the delay in procuring surgical assistance. All the testimony that was introduced to meet this requirement was the testimony of the physicians that the injured man's chances of recovery would have been enhanced had surgical attention been given sooner, and the testimony of other witnesses that he was a strong able-bodied man. None of the evidence tended to show that he would have recovered, had he received medical attention sooner, or that the delay in procuring it was the proximate cause of his death.

Counsel for appellee in the oral argument of the case admitted that it could not be more fully developed in another trial. Therefore it is ordered that the judgment be reversed, and the cause dismissed.

SLOCUM v. SLOCUM.

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Opinion delivered June 8, 1908.

DIVORCE—ALIMONY AND SUIT MONEY—SHOWING OF MERIT.—While, in a suit for divorce brought by a wife, she must make a showing of merit before the court will make her an allowance of temporary

alimony and suit money, the court does not require such showing where the husband sues the wife, or brings a cross-bill, asking a divorce in a suit instituted by her.

Appeal from Benton Chancery Court; *T. Haden Humphreys,* Chancellor; affirmed.

Rice & Dickson, for appellant.

On the mere unverified allegations, and unsupported by proof making out a *prima facie* case, the court was unauthorized to pay such large sums of money. 30 Ark. 76; 63 *Id.* 128; 28 *Id.* 94; 37 S. W. 1022.

McGill & Lindsey and *Rice & Rice,* for appellee.

It is only necessary to make out a *prima facie* case by affirmative proof. Allowances are made without consideration of the merits if the suit is in good faith. 2 Am. & Eng. Enc. of L. 100; 1 Enc. Pl. & Pr. 421-2; 2 *Id.* 103; 1 Edw. Ch. 62; Clarke, Ch. 151; Keezer, Mar. & Div. 152; 3 Edw. Ch. 387; 8 *Id.* 194; 44 Ark. 46.

HILL, C. J. On the 20th of July, 1907, Mrs. Slocum filed suit for divorce against her husband, Dr. Slocum. The allegations of her complaint, if proved, would have entitled her to a divorce under the statutory cause of offering such indignities to the person as to render her condition in life intolerable.

To this complaint Dr. Slocum filed an answer, admitting marriage and denying all the material allegations constituting a cause of divorce. He also filed a cross-bill, in which he alleged facts which, if proved, would have entitled him to divorce under the same clause of the statute. To this cross-bill Mrs. Slocum filed an answer in which she denied all of its material allegations.

After the case was at issue upon the complaint and the cross-complaint and the answers thereto, Mrs. Slocum applied for temporary alimony, suit money and attorneys' fees, on the 31st of August, 1907, and was granted $400 attorneys' fee, $50 suit money and $25 per month temporary alimony; and from this order Dr. Slocum has appealed. The court refused to hear the merits of the case, and sustained objections to testimony offered by Dr. Slocum tending to prove that the wife did not have ground for divorce, and that he did have ground for

divorce, but heard testimony as to Dr. Slocum's property and income and Mrs. Slocum's dependence, and the cost of separate maintenance for her.

The first question presented by appellant is whether, upon the unverified allegations of the complaint, unsupported by proof, the court was authorized to award alimony, suit money and attorneys' fees.

Pleadings in divorce suits are expressly authorized to be made without verification. Section 2676 of Kirby's Digest. There is a decided difference between suits brought by husband and wife in respect to allowances to the wife. Where the wife separates from her husband, and seeks an order of court giving her separate maintenance and means to prosecute her suit against her husband, she should show merit in her cause. Mr. Nelson, in his work on Divorce and Separation, § 853, says:

"In order to obtain an order for alimony, costs and counsel fees, the wife must sustain her application by proof of—

(1) A marriage, either legal or *de facto*.

(2) A probable cause for divorce or valid defense.

(3) Her inability to support herself and prosecute or defend the action.

(4) The husband's ability to contribute to her support."

This statement is undoubtedly correct, with the exception of that part of the second clause, which states that the wife is required to show a valid defense. As to that the authorities are in conflict. In fact, there seems to be no general rule upon that subject. See 14 Cyc. 748, 749; 2 Am. & Eng. Enc. 100, 101.

But in this State the rule is otherwise than stated by Nelson. In *Glenn* v. *Glenn*, 44 Ark. 46, the court said: "In the absence of any proof of separate property in a wife, it is just and reasonable to compel the husband to furnish the wife with means to defend a suit by him for divorce. Otherwise she would be at his mercy. And for the same reason he would be secure against the best founded suit for a divorce on her part, if she were bound helpless to prosecute. He is compelled to furnish her with necessaries suitable to her station in society and to his means. Alimony *pendente lite* may be a greater necessity than anything else. It may be safe to say that no well balanced man, regardful of public opinion, would desire to put himself

in the position of prosecuting or defending a suit against a wife deprived, meanwhile, of counsel, and in danger of starving, whatever her guilt may be eventually proved to have been." This principle was recognized in *Fountain* v. *Fountain*, 80 Ark. 481.

Appellant relies upon the following rule, approved in *Countz* v. *Countz*, 30 Ark. 73: "It is not at all a matter of course to allow an advance to the wife on a bill for divorce *a mensa et thoro* to enable her to prosecute her suit. Injury and meritorious cause of action must be made to appear, and then a suitable allowance will be made." This principle was recognized in *Plant* v. *Plant*, 63 Ark. 128, and is a sound one; but in this State, and in many others, it is applicable only to suits brought by the wife. Where the suit is brought by the husband against the wife, and issue made in good faith as to the allegations upon which the divorce is sought, then the rule announced in *Glenn* v. *Glenn, supra,* prevails.

If this case had stood upon the complaint and answer, it would have been error for the court to have granted temporary alimony, suit money and attorneys' fees without the wife showing probable cause for divorce. In other words, she must show merit in her cause before she can require separate maintenance and means to prosecute her suit. How strong a showing should be made is a matter peculiar to each case, as it is a question appealing to the judicial discretion of the chancellor. 14 Cyc. 749.

Not content with defending the wife's suit, Dr. Slocum filed a cross-bill, in which he sought a divorce from her, alleging grounds which would have entitled him to it under the statute as heretofore stated; and issue was made by the wife as to these allegations. No attack is made upon the good faith of the defense, and it must be presumed that it is made for the purpose of seeking to contest the allegations made by the husband. It is recognized and permissible practice for the defendant to file a cross-bill and ask independent relief in divorce suits. When he does so, his suit is as separate and distinct from that of his wife as if the wife had brought no suit, and the finding of the court should be upon each separately. *Haley* v. *Haley,* 44 Ark. 429; Nelson on Divorce & Separation, § 744.

The allowance to the wife for alimony and suit money is not

unreasonable in view of the property of the husband and his income therefrom and her dependence upon him for support. The allowance of the attorneys' fees of $400 is attacked as excessive. Defendant was given until the first of November to pay the attorneys' fees. There is no showing whether this allowance is for the entire services to be rendered in the suit, or an advance fee for the attorneys on account. For their services in the trial court, this amount would not be excessive, in view of the means and station of the parties and issues involved. All the court can say now is whether the amount is disproportionate to the value of the services likely to be required of the attorneys; and the court cannot say that it is.

No error is found in the allowances made, and no other questions are properly presented for consideration.

The judgment is affirmed.

WILLIS v. BELL.

Opinion delivered June 8, 1908.

1. PARENT AND CHILD—WHEN MOTHER'S CUSTODY NOT DISTURBED.—A female child of tender years will not be taken from her mother's custody where, considering her age and sex and the character and environments of the mother, it appears to be best for her to remain with the mother, even though the evidence shows that the father is a man of good repute, that he is in good condition financially, and has a comfortable home shared by his mother, and that the child would be well cared for by him and properly reared. (Page 477.)
2. ADOPTION OF CHILD—NECESSITY OF PARENTS' CONSENT.—Under Kirby's Digest, providing that if a child sought to be adopted "have a father or mother living" such father or mother must appear in open court and give consent thereto, unless it be shown that the residence of such father or mother is unknown, *held,* that adoption proceedings are void which show that the child has two living parents, and that only one was present in court and consented to the adoption of the child by a third person, without showing that the residence of the other parent was unknown. (Page 478.)
3. PARENT AND CHILD—PROCEDURE AS TO CHILD'S CUSTODY.—Where a mother, in the father's absence, consented to the adoption of her

child by her brother, with whom she was living, and the adoption proceedings prove to be void, upon an application for habeas corpus by the father, addressed to the mother's brother, the case will be determined as if it were a contest between the father and mother. (Page 479.)

4. SAME—DIRECTIONS AS TO CHILD'S CUSTODY.—Where a child is left in her mother's care by the orders of the court, the mother will be directed not to change the child's name, nor to deny the father the privilege of seeing the child, nor to teach the child to forget the father. (Page 480.)

5. SAME—CONCLUSIVENESS OF ORDER ADJUDGING CHILD'S CUSTODY.—Judgments awarding the custody of infant children are in their nature temporary, and apply only to the conditions then existing. (Page 480.)

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

STATEMENT BY THE COURT.

Appellant, N. P. Willis, filed his complaint in the chancery court of Pulaski County against appellee, H. B. Bell, to obtain the custody of his child, Mary Francis Laura Willis, who is alleged to be wrongfully in the custody of appellee. The chancellor issued a writ of *habeas corpus* requiring the production of the child, which writ was duly served, and appellee produced the child in response thereto.

On the day set for hearing of the cause, the chancellor was absent from the county, and by consent of both parties, who were present with counsel, the cause was transferred to the circuit court of Pulaski County, and issuance of another writ of *habeas corpus* was expressly waived by appellee, he consenting to appear and answer as if a new writ had been issued by the circuit judge.

The case was heard upon the pleadings, documentary evidence, depositions of witnesses and oral testimony, and a final judgment was rendered awarding the custody of the child *pro tempore* to the defendant (appellee), and plaintiff appealed. The judgment of the court is as follows: "And it is therefore ordered and adjudged and decreed that the custody of the minor child, Mary Francis Laura Willis, be and remain in the said Harry Bell *pro tempore;* that the said Harry B. Bell be not allowed to remove the said child during her minority from the

jurisdiction of this court, unless otherwise granted permission to do so from time to time; and that he be required to enter into a bond in the sum of five thousand dollars that he will faithfully abide the orders of this court, which bond must be filed with the clerk of this court within ten days from this date, and upon the approval of the said bond by the clerk of this court, this order shall thereupon become binding *pro tempore.*

"It is further ordered that the petitioner, N. P. Willis, be and he is hereby authorized and permitted to see the said minor child at the home of the said H. B. Bell in the city of Pine Bluff, Arkansas, at any and all reasonable times, but he shall not remove the said child from the custody of the said Bell; and for the purpose of executing this provision he, his agents, servants and employees are hereby enjoined and restrained from taking or attempting to take or causing to be taken the said child from the custody of the said H. B. Bell, unless permitted to do so by the orders of this court.

"It is further ordered that the said petitioner, N. P. Willis shall be permitted to write to the said child at all reasonable times, and that the said Bell shall answer such communications with reasonable promptness, giving the said Willis correct information as to the whereabouts and condition of said child.

"It is further ordered that the petitioner, N. P. Willis, pay all cost of this proceeding."

Davis & Pace, for appellant; *Charles Jacobson,* of counsel.

1. The principle of *res judicata* applies to a decision as to the custody of a child on *habeas corpus* while the state of facts *remained* the same. 99 Mo. 484; 6 L. R. An. 672; 12 S. W. 798; 105 Mich. 61; 55 Am. St. 435; 62 N. W. 1009; 37 Minn. 260; 37 N. W. 334; 25 Wend. 64; 35 Am. Dec. 635; 96 Ind. 6; 37 La. Ann. 133. When *different conditions* prevail, another court may take up the question and make a different order where the welfare of the child requires, even though no material change of circumstances be shown. 37 La. Ann. 133; 67 L. R. An. 783. See our statute: Kirby's Digest, § § 1342 to 1345, etc.

2. The adoption proceeding is a nullity as to Willis. 11 Am. St. 808; 62 Am. St. 17.

3. The father by law has the paramount custody and control of minor children. Hoff. Ch. 499; 27 Barb. 14; 8 How.

Pr. 288; 5 L. R. A. 781; 112 Ind. 183; 103 *Id.* 569; 104 *Id.* 227; 43 Iowa, 653; 6 Me. 462; 16 N. J. L. 419. The welfare of the child is the paramount issue; and where father and mother have separated, it is the duty of the court to confine the custody of the child to that parent best suited to maintain, protect and educate it, and bring it up in moral courses. 12 R. I. 462; 34 Am. St. 694; 44 Ala. 670. The only inquiry and true test is, is the father a suitable person to take care of the child? Hurd on Habeas Corpus (2 Ed.), 550; 32 Oh. St. 305; 82 Va. 433; 21 N. J. Eq. 384; 35 Hun, 334; 61 Iowa, 199; 59 Ga. 555; 10 Allen, 270; 26 Kans. 650; 23 Ill. App. 196; 75 Ala. 409; 37 Ark. 27; 19 Wisc. 274.

4. The father is deprived of the custody only (1) where he is incompetent or improper person, and (2) where the enforcement of the rule would obviously destroy the happiness and well-being of the child. 76 Me. 565; 103 Ind. 569; 26 Kans. 650; 53 Am. St. 545; 68 Ala. 299; 56 Miss. 408; 3 Mason, 482; 48 *Id.* 349; 6 L. R. A. 672; 51 *Id.* 839; 20 Am. Dec. 324; 9 W. Va. 611; 88 N. C. 31; 1 Halst. Ch. 454; 40 N. H. 272, 280-1; 44 N. H. 321; 37 Ark. 29; 32 *Id.* 92; 50 Ark. 92; *Ib.* 351; 78 *Id.* 197; 82 Ark. 461.

Austin & Danaher, for appellee.

1. The matter is *res judicata*, and the judgment binds all parties and privies. 23 Cyc. 1253, 1319.

2. No abuse of discretion or error in judgment is shown, and this court will not interfere.

3. Humanity, respect for parental affection and regard for the infant's best interests are the three guides for the courts. 50 Ark. 351; 37 *Id.* 29; 78 *Id.* 198.

McCULLOCH, J., (after stating the above facts). This is a controversy concerning the custody of appellant's child, who is now a few months over five years of age. Appellee is a brother of the child's mother, appellant's divorced wife.

Appellant and his wife, Hattie Bell, the mother of this child, intermarried at Indianapolis, Indiana, April 25, 1900, and lived together, except during several short periods of separation, until the month of August, 1904, when the wife left her husband, and went to Hayti, Missouri, taking the child with her.

The child was born to these parents on March 5, 1903, and was therefore about a year and a half old when the final separation of the parents occurred. Appellant went to Hayti a short time afterwards, and took the child back to Indianapolis, the mother following or accompanying him. After they reached Indianapolis, Mrs. Willis instituted *habeas corpus* proceedings in the circuit court of that (Marion) county to obtain custody of the child. The circuit court awarded custody to her, and on appeal to the Supreme Court of Indiana the decree was affirmed. *Willis* v. *Willis,* 165 Ind. 325. Six or eight months later Mrs. Willis came to Arkansas, bringing the child with her, and took up her residence with appellee, her brother, and has resided with him up to the date of trial of this case below, except while she was out of the State for a time. On October 1, 1906, appellant obtained in the court at Indianapolis a decree for divorce from his wife on the grounds of desertion, no disposition being made in the decree concerning the custody of the child. On March 20, 1907, the probate court of Jefferson County, Arkansas, upon petition of appellee and upon the consent of Mrs. Willis, made and entered an order for the adoption of said child by appellee. The petition and order recites the fact that appellee had been divorced from his wife, that he was a resident of Indianapolis, Indiana, and that the custody of the child had been awarded to its mother by a court of competent jurisdiction in the State of Indiana. The present proceedings were commenced by appellant in April, 1907, to obtain custody of the child.

If this case was one directly between appellant and his former wife, it would, under the proof, present little difficulty here. We would, without hesitation, affirm a decree continuing the custody of the child, *pro tempore,* with its mother. Considering the present age of the child and her sex, the character and environments of the mother as shown by the evidence, we would deem it best not to take the child from her now. This view is prompted by a proper concern for the interest of the child, and does not leave out of consideration the rights and feelings of the father. We do not mean to intimate that we conclude from the testimony in the case that he is not a fit person to have the custody of his child, or that his home and surroundings would not afford suitable asylum for it. On the con-

trary, we think the evidence establishes the fact that he is a man of good repute, that he is in good condition financially, and has a comfortable home shared by his mother, and that the child would be well cared for there and properly reared. But for the present, at least, what she needs most is a mother's care and attention.

As we have said, therefore, the case would not be difficult of solution if the controversy was directly between the two parents. But such is not the state of the case. The mother has, by her own act in consenting to the order of adoption by her brother, done all she could to legally disestablish her parental relation toward her child. It has been given the name of another, and is being taught to forget her father. If the attempted act of adoption be legal and binding, it has completely changed the name and legal status of the child.

An important and controlling question is therefore presented as to the legal effect of the attempted adoption. Was it valid for any purpose?

The statutes of this State impower the probate court of the county where a child resides to make an order for its adoption by another person, but they are expressly prohibited from doing so if the child has "a father or mother living unless such father or mother appear in open court and give consent thereto, provided that, if such petitioner show by two competent witnesses that the residence of such father or mother be unknown, then such court may order the adoption of such child." Kirby's Digest, § 1345. The jurisdiction of the court depends upon the express consent of the parents of the child unless their residence be shown to be unknown. *Furgeson* v. *Jones,* 17 Oregon, 204. This evidently means that the consent of both living parents be given. Surely it was not intended that the legal status of a child can be changed upon the consent of only one of two living parents, and it goes without saying that the order is not binding upon the non-consenting parent. The record of the adoption proceedings shows affirmatively that the father was living at the time, and does not show that his place of residence was unknown.

There must be substantial compliance, in all their essential requirements, with statutes authorizing the adoption of children

in order to effect an adoption thereunder. *Morris* v. *Dooley,* 59 Ark. 483; 1 Cyc. p. 919. And an order of adoption not made in conformity with the statute is absolutely void. It cannot be valid in part or void in part. It is either valid or void in its entirety, and any one interested can take advantage of its invalidity. *Morris* v. *Dooley, supra.*

The statutes of some States provide that where a parent has been deprived of the custody of his child in divorce proceedings, his consent to the adoption is not necessary; but our statute contains no such provision.

We are therefore of the opinion that the order of adoption is void and of no effect.

The evidence in the case shows that the mother did not intend, by consenting to the adoption of the child by her brother, to actually release her custody of it. She intended, so the evidence shows, merely to provide another protector for the child and to give her brother, who is able to cope with her former husband in his effort to take the child away from her either by legal process, or, as she feared, by force, the legal right to prevent him from doing so. She lived with her brother, the appellee, and expected never to part with her child. He promised to give her and her child a permanent home and to provide for them both. Whether the order of adoption be treated as valid, as she deemed it to be, or void as it is in fact, it was not intended to alter the relationship between her and her child, or to release her right to remain with it and give it her maternal care. The child was thereafter to be in the joint custody of herself and her brother as its adopted parent. This was not the legal effect of the adoption if it had been valid, but such was the actual effect to be given it, as established by the evidence.

The case should then be determined as if it was a contest with the mother, for if the court by its process takes the child from appellee the effect is to take it from the mother. This we do not feel at liberty to do, under the facts established by the evidence. The fact that appellee and his wife have manifested a willingness and proved their fitness to undertake the care and maintenance of the child in conjunction with its mother adds but another reason why a change of custody should not be made at this time. Instead of having only its mother's care and

society, the child enjoys a place of refuge in the home of appellant and his wife, who appear to be both willing and able to give all that the mother may prove unable to supply—a home, food, raiment and facilities for its education.

As we have already shown, appellee and Mrs. Willis undertook to change the name of the child. That would have been one of the legal effects of the order of adoption if it had been valid. But there is also evidence of a settled purpose on the part of appellee, not only to change the child's name in fact, but to deny appellant the privilege of seeing it and to teach it to forget him, thus ignoring entirely his natural rights. This was wrong. That course was doubtless due to the belief that the order of adoption was valid, and that all of appellant's natural rights were thereby cut off, but now, since the proceeding is declared to be void, if the conduct is persisted in, it will afford grounds for changing the custody of the child. Appellant, though deprived of the custody of his child, has rights which must be respected. Notwithstanding the fact that he no longer has the child in his keeping, there rests upon him certain duties towards it in contributing to its support and education, but there also rest upon those having the child in their care reciprocal duties to the father, among which is that of not taking his name from the child nor of denying him the privilege of seeing her at all reasonable times, nor of teaching her to forget him.

The judgment and orders of the learned circuit judge are, we think, fair and just to appellant, and fully protect any right and privilege he is shown at present to be entitled to.

Judgments and decrees awarding the custody of infant children are in their nature temporary, and apply only to the facts and conditions then existent. They do not necessarily affect further proceedings under changed conditions. If, therefore, appellant should hereafter desire to institute further proceedings in a court of competent jurisdiction under changed conditions to regain the custody of the child, the chancery court of the county where the child and its mother reside being the most appropriate forum for that purpose, there is nothing in the judgment in this case to prevent him from so doing.

Finding no error in the judgment of the circuit court, the same is affirmed.

SHROPSHIRE *v.* STATE.

Opinion delivered June 8, 1908.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Where the evidence in a criminal case was conflicting, and after the verdict defendant discovered that one of the State's witnesses swore to defendant's guilt under a misapprehension that defendant's brother was on trial, this was a sufficient ground for a new trial, under Kirby's Digest, § 2422, subdiv. 6, being important evidence discovered since the trial.

Appeal from Conway Circuit Court; *J. Hugh Basham,* Judge; reversed.

W. P. Strait, for appellant.

1. A new trial will be granted where the verdict is so clearly against the weight of evidence as to shock the sense of justice of a reasonable person. 70 Ark. 385; 65 *Id.* 278; 34 *Id.* 632; 10 *Id.* 492.

2. Where the testimony inadvertently or erroneously given affects the verdict, a new trial should be granted. 6 Hill (N. Y.) 505; 8 Ga. 136; 54 *Id.* 635; 54 Me. 256; 7 Mo. 546; 82 Iowa, 397.

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

Appellant was guilty of negligence in not cross-examining the witness Faucette, and in not moving for continuance for surprise. It is too late to take advantage of his own negligence. 72 Ark. 140.

HILL, C. J. Robert Shropshire was convicted of gaming in the Conway Circuit Court, and appealed. Henderson Conner testified that he was a participant in a crap game near Morrilton on the 30th day of June, 1906. W. H. Faucette testified that the defendant Shropshire confessed to him that he had played in a certain crap game, on account of which the officers of the law were after him.

On the other hand, Tom Brown and Henry Johnson each testified to facts that showed that the defendant was not a participant in said game. The defendant himself denied being in the game, and denied making the statement to Faucette. Con-

ner testified that George Shropshire, as well as Robert Shropshire, was in said game.

After conviction, the defendant filed a motion for new trial, and attached thereto an affidavit of witness Faucette, who stated that, when called as a witness, he thought that they were trying the case of State *v.* George Shropshire, and that when the question was asked him if the defendant Shropshire had made a confession to him he thought the reference was to George Shropshire, and he gave the testimony which he did. That subsequently he had learned that Robert, and not George, was on trial, and consequently his testimony had been incorrect, as Robert Shropshire had never made a confession to him, and that George Shropshire had made the confession, as testified by him, which he thought was called for by the question of the prosecuting attorney.

If the statements of the affidavit are true, and there is nothing to contradict them, the defendant had no opportunity whatever before his conviction of meeting this testimony other than to deny it, which he did. The evidence of Faucette was of gravest moment, and doubtless largely contributed to the conviction of the defendant. As seen, there was but one witness, besides Faucette, that sustained the State, while there were three against it. The showing made falls within the requirement of "important evidence" discovered by the defendant since verdict, which would entitle him to a new trial under the sixth subdivision of section 2422 of Kirby's Digest.

The explanation offered by Faucette in his affidavit is entirely reasonable and consistent with the facts of the case, and there is nothing shown in the record whatsoever which would in any way indicate any doubt of an honest mistake made by this witness. If any issue of fact had been made on it, or his affidavit had been in conflict with any of the established facts of the case, or had been made under circumstances throwing suspicion upon it, then the circuit judge should be sustained in disregarding it. What was said in *Vaughan* v. *State,* 57 Ark. 1, is equally applicable to the judge who tried this case and to the affidavit now under review:

"The only doubt that arises on this branch of the cause is whether there is not some mistake, omission or defect in the rec-

ord; for we know that the judge who tried the cause is careful, conscientious and capable. Facts and circumstances which do not appear of record, and which made the matter clear to his mind, were perhaps known to him; but there is no intimation of them in the record, and we can try the cause only upon the record as it exists. By the well established practice, acted upon in this court in many cases, the unimpeached affidavit made a *prima facie* case."

For the error in not granting a new trial, the judgment is reversed and the cause remanded for new trial.

MIDLAND VALLEY RAILROAD COMPANY *v.* HALE.

Opinion delivered June 8, 1908.

1. CARRIERS—DAMAGE TO FREIGHT—FORM OF ACTION.—If the complaint in an action against a carrier to recover damages to freight might be treated as either on an implied contract or *ex delicto,* but the amount sued for, towit, $150, exceeded the justice's jurisdiction in matters *ex delicto,* the action will be treated as *ex contractu.* (Page 485.)
2. CONNECTING CARRIERS—PRESUMPTION AS TO DAMAGES TO FREIGHT.—Where, in a suit against the last of two or more connecting carriers, undisputed evidence showed that freight shipped over the connecting railroads was damaged when it arrived at the destination, and there was no evidence to show where the damage occurred, it was not error to direct a verdict in favor of the plaintiff for whatever amount the damage was found to be, as there was a presumption that the last carrier was the negligent one. (Page 485.)

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

Geo. W. Dodd, for appellant; *Jos. M. Spradling* and *Ira D. Oglesby,* of counsel.

1. The court had no jurisdiction. "Matters of damage to personal property" means all injuries one may sustain in respect to his ownership of personal estate. Const. art. 7, § 40; Kirby's Digest, § 4552; 41 Ark. 478; *Ib.* 210-14; 40 *Id.* 78; 47 *Id.* 58-61; 48 *Id.* 293; 55 *Id.* 281, 44 Ark. 377; 40 *Id.* 556; 43 *Id.* 107.

2. Statutes conferring jurisdiction are strictly construed. 66 Ark. 79; 7 *Id.* 305; 18 Am. & Eng. Enc. Law (2 Ed.), 17; 24 Cyc. 440. The amount in controversy is the sum demanded. 44 Ark. 100. Where the justice has no jurisdiction, the circuit court has none on appeal. 66 Ark. 346; 45 *Id.* 346; 24 Cyc. 730-731. The question can be raised here for the first time. 45 Ark. 346; *Ib.* 150; 48 *Id.* 151.

3. It was error to refuse a continuance. 9 Cyc. 128, note 99.

4. It was error to instruct the jury to find for the plaintiff under Acts 1905, § 1, p. 359. The presumption of negligence may be overcome by proof. 73 Ark. 112; 72 *Id.* 503. The statute was not intended to cut off all defenses. 65 Ark. 235; 63 *Id.* 636; 49 *Id.* 535; 57 *Id.* 136; 66 *Id.* 439; 67 *Id.* 514. The *prima facie* case may be overcome by proof that the damage did not occur while the goods were in possession of the carrier. 73 Ark. 112; 72 *Id.* 503. A statute in affirmance of the common law is to be construed as was the rule by that law. 23 Am. & Eng. Enc. of Law, 529; 1 Ark. 567; 44 *Id.* 265; 48 *Id.* 235. A State cannot make a carrier liable for the negligence of a connecting carrier. 7 Cyc. 427; 13 S. W. 709; 27 *Id.* 541.

5. So much of the act as attempts to regulate interstate shipments is void. 27 S. W. 541; 13 *Id.* 709; 54 Ark. 248; 57 *Id.* 24; 149 Ill. 600; 29 Am. St. 705, note; 202 U. S. 543; 17 Am. & Eng. Enc. (2 Ed.) 104.

Pryor & Tatum, for appellee.

1. The court had jurisdiction. 85 Ark. 257.

2. The *prima facie* presumption, in absence of evidence locating the damage, is that the last carrier is the negligent one. 76 Ark. 593. There was no evidence in this case to rebut this presumption.

McCULLOCH, J. Appellees, J. E. Hale & Company instituted suit before a justice of the peace against appellant railroad company to recover on an account in the sum of $95.58 for "damages on merchandise." Judgment was rendered in their favor, and the company appealed to the circuit court. The court there sustained a motion to make the complaint more definite and

certain; and appellees filed a formal complaint, alleging that on or about October 1, 1905, appellant received from a connecting carrier a consignment of merchandise shipped by the Ferguson-McKinney Dry Goods Company, at St. Louis, Mo., over the Chicago, Burlington & Quincy Railroad Company and connecting carriers, to appellee at Hackett City, Arkansas, as shown by bill of lading exhibited with the complaint, which was issued by the initial carrier, and "that through carelessness and negligence of defendant's agents and employees said shipment of merchandise was exposed to the weather and became wet and greatly damaged, to these plaintiffs' damage in the sum of $94.58, wherefore plaintiffs pray judgment," etc.

Appellant filed its answer, denying every allegation of the complaint and alleging that the damage, if any, occurred while the merchandise was in the hands of a connecting carrier, and not on appellant's line.

During the progress of the trial appellees were allowed to amend their complaint so as to conform to the evidence by stating the amount of damage at the sum of one hundred and fifty dollars. This was done over appellant's objection.

Appellees recovered judgment for the full amount claimed. It is urged, in the first place, that the circuit court lost jurisdiction of the case on account of the amendment raising the amount sued for to the sum of one hundred and fifty dollars. The recent decision of this court in the case of *St. Louis & N. A. Rd. Co.* v. *Wilson,* 85 Ark. 257, is conclusive of this question. The allegations of the complaint were sufficient to support an action *ex contractu.* Appellant did not issue the bill of lading sued on, as it was not the initial carrier, but an implied contract between it and the consignee arose by its acceptance of the goods for transportation from the initial or connecting carrier. A suit could, in case of loss or damage, be maintained either on the implied contract or for the tort. This is a suit on contract, and the court had jurisdiction of the amount mentioned in the amended complaint.

The undisputed evidence showed that the goods were in a damaged condition when they arrived at the point of destination in appellant's possession. No attempt was made to prove where the damage actually occurred, and the court gave a peremptory

instruction to the jury to return a verdict in favor of the plaintiff for whatever they found the amount of the damage to be. This was correct, as there was a presumption, in the absence of other proof, that the last carrier was the negligent one. *Kansas City So. Ry. Co.* v. *Embry*, 76 Ark. 589.

Error of the court is also assigned in its refusal to grant appellant a continuance until the succeeding term, but no abuse of the court's discretion is shown in this ruling.

Judgment affirmed.

MITCHELL v. STATE.

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Opinion delivered June 8, 1908.

1. HUSBAND AND WIFE—ESTOPPEL OF WIFE TO CLAIM PROPERTY.—Where a married woman permits her husband to hold her chattels out as his own, she will be estopped, as against his creditors, to claim them as hers. (Page 488.)
2. SAME—EVIDENCE OF OWNERSHIP.—In a suit between a married woman and her husband's creditors over property claimed by her in her own right and by them in the husband's right, testimony that the husband offered to sell witness some of the property was admissible in connection with evidence tending to show that the wife permitted her husband to use the property as his own. (Page 488.)
3. APPEAL—WAIVER OF OBJECTION.—An objection to testimony is waived by failure to set it up in the motion for new trial. (Page 489.)
4. SAME—INVITED ERROR.—Where appellant first introduced incompetent evidence, she cannot complain because the court permitted appellee to introduce evidence of the same character in rebuttal. (Page 489.)
5. TRIAL—TIME OF ARGUMENT.—It is within the trial court's discretion to limit the time allowed to counsel for argument. (Page 489.)

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

Action in replevin by Mattie P. Mitchell against Smith & Poe, and Cas Harper, constable, to recover possession of a lot of cattle seized under execution against R. L. Mitchell, plaintiff's husband.

Verdict and judgment in favor of defendants, and plaintiff appealed.

A. J. Newman, for appellant.

1. The jury were prejudiced by the testimony as to the acts of the husband, and rumors in the country as to the ownership of the cattle, etc., all of which were incompetent and objected to. Especially was the testimony as to statements by her husband long before the debt to appellees was created. 66 Ark. 299.

2. The law presumes the husband to be the agent only of the wife, and not the owner of her property. Kirby's Digest, § 5227.

3. The court erred in its instructions 1 and 2. The issue was as to who owned the property, and not as to the justness of appellee's judgment, or whether her property was scheduled or not. The 2d was misleading and prejudicial.

4. It was error to limit counsel to fifteen minutes. 33 Ark. 611; Kirby's Digest, § 5226; 21 Cyc. p. 1407 (B.)

Thomas T. Dickinson, for appellees.

1. Appellate jurisdiction is limited to correction of errors. 51 Ark. 146. Objection not raised below will not be considered. 62 Ark. 554; 70 *Id.* 197; 59 *Id.* 215. Errors complained of will not be considered unless exceptions are taken at the time in trial court. 44 Ark. 106; 50 *Id.* 348. A motion for new trial waives all exceptions not expressly embodied in it. 63 Ark. 447; 43 *Id.* 391; 70 *Id.* 427. A failure to set forth in the abstract the material facts relied on is a waiver of the objections. 74 Ark. 323; 55 *Id.* 547.

2. If hearsay testimony was admitted, it was invited error, as appellant first introduced evidence as to her husband's statements. Where a party acquiesces in (or invites) the admission of incompetent testimony, he cannot complain. 50 Ark. 350; 75 *Id.* 257; 80 *Id.* 587; 66 *Id.* 296; 67 *Id.* 47; 66 *Id.* 588; 81 *Id.* 579. When the sufficiency of evidence is questioned, full weight must be given to relevant testimony which would have been excluded had objection been made. 50 Ark. 350; 55 *Id.* 555; 70 *Id.* 120. Where incompetent testimony is selected and invited, but which is

relevant, it becomes competent and legal to sustain a verdict. 81 Ark. 587; 75 *Id.* 257; 51 *Id.* 475; 56 *Id.* 314, 320.

3. The jury are the sole judges of the facts and credibility of witnesses. If there is any legal evidence to sustain the verdict, it will not be disturbed. 79 Ark. 621; 67 *Id.* 401; 57 *Id.* 577; 56 *Id.* 314. The burden was on plaintiff to prove title, for she failed to schedule. Kirby's Digest, § § 5224-6; 77 Ark. 302; 29 *Id.* 277.

4. There must be possession, actual or constructive, to maintain replevin. 8e Ark. 362; 66 *Id.* 135; Cobbey on Replevin, § 423; 24 Am. & Eng. Enc. Law (2 Ed.) 495.

5. Where the answer of a witness is partly competent and partly not, an objection which fails to point out the incompetent part is insufficient. 84 Ark. 377.

6. Other errors complained of were not assigned in the motion for new trial nor copied in the abstract. 79 Ark. 470; 63 *Id.* 447; 50 *Id.* 348.

7. None of the instructions are made grounds in the motion for new trial. 24 Ark. 224; 57 *Id.* 153; 59 *Id.* 5. Nor are the instructions copied in the abstract. 74 Ark. 323; 84 *Id.* 552; 55 *Id.* 548; 83 *Id.* 359; 78 *Id.* 374-428.

8. No objection was made, nor exceptions saved at the time, and no assignment of error in motion for new trial as to the limitation to fifteen minutes of the attorney's argument.

McCULLOCH, J. No exceptions were saved to the giving or refusal of instructions, but it is contended on behalf of appellant that the evidence does not sustain the verdict, and that the court erred in admitting evidence introduced by appellee. The cattle were seized under execution on a judgment in favor of Smith & Poe against appellant's husband. She introduced evidence tending to show that the cattle belonged to her, but we think there was sufficient evidence to warrant a finding by the jury that she had permitted her husband to hold the property out as his own. A finding of that fact called for a verdict against her claim for the property against the rights of creditors. *Driggs* v. *Norwood,* 50 Ark. 42; *Roberts* v. *Bodman-Pettit Lumber Co,* 84 Ark. 227.

Numerous objections are urged against the admission of testimony, but we find that in many instances exceptions were not

properly saved. We need not discuss them all. One is that the court permitted a witness for appellees to testify that appellant's husband offered to sell witness some of the cattle. This testimony was not incompetent, in connection with other evidence tending to show that appellant permitted her husband to use the property as his own.

Frank Nichols, deputy assessor, was permitted to testify that appellant's son listed the property for taxation in the name of her husband, and he was also permitted to exhibit the list. Appellant objected to the introduction of the assessment list, but did not object to other testimony of the witness. In the motion for new trial she complained of the introduction of the other testimony, but not of the introduction of the assessment list. The objection was not, therefore, properly preserved.

Objection was made to the testimony of witness Dreher as to rumor and neighborhood reputation as to the ownership of the property. This testimony was incompetent, but appellant had previously introduced testimony of the same kind and can not complain. She first introduced the issue as to reputation in the neighborhood concerning the ownership of the cattle. The error was therefore an invited one. *German-American Ins. Co.* v. *Brown,* 75 Ark. 257.

The court limited the time for argument of counsel to fifteen minutes to the side, and this is assigned as error. This was a matter within the sound discretion of the court, and no abuse of the discretion is shown.

Judgment affirmed.

CHEROKEE CONSTRUCTION COMPANY *v.* BISHOP.

Opinion delivered May 25, 1908.

1. FORFEITURE—ENFORCEMENT IN EQUITY.—Though as a rule equity will not enforce a forfeiture, yet where the forfeiture works equity and protects the rights of parties, equity will enforce it. (Page 498.)
2. SAME—LEASE OF MINE.—Where a lease of land stipulates that the lessee shall operate the mine opened upon the land with due dili-

gence, and that at no time during the term of the lease shall such mine remain idle for more than thirty consecutive days, unless caused by strikes, floods, etc., failure to work the mine for more than thirty consecutive days, except for one of the causes mentioned, will be a ground of forfeiture in equity. (Page 502.)

3. FIXTURES—LEASE.—Where a lease of a mine stipulated that the lessee might at any time move any machinery from the premises, provided the royalty due the lessor has been paid, such machinery did not constitute a fixture, and was removable upon payment of such royalty. (Page 503.)

Appeal from Sebastian Chancery Court; *J. Virgil Bourland,* Chancellor; reversed in part.

Ira D. Oglesby, for appellant; *Geo. W. Dodd* and *J. M. Spradling,* of counsel.

1. The decree can only be sustained upon the theory that the mere removal of the large machinery from No. 2 slope authorized cancellation of the lease. This cannot be sustained. When the coal reached this slope and from a practical miner's standpoint became unworkable, then appellant had the right to sink an opening at such place as its judgment dictated for the purpose of removing the remaining coal, in the meantime paying minimum royalty.

2. The court erred in awarding judgment for the value of the machinery removed. For rules to determine whether the article is chattel or fixture, see 56 Ark. 55; 75 Ark. 232. By the terms and provisions of the lease itself the machinery is conclusively shown to be chattel property and not a fixture. 72 Ark. 500; 1 Tiffany, Real Prop. 544; 19 Cyc. 1048, 1049; 16 Ark. 511; 19 Cyc. 1048, note 76; 19 Cyc. 1056 and 1071, note 92; 84 Am. St. Rep. 881 and notes; 42 Miss. 732; 38 Me. 569; 27 Ark. 648. A controlling distinction between removable and irremovable fixtures is the character of the use of the fixture. If a fixture is placed on land for use that does not enhance the value of the realty, this is evidence that it is personal property. 42 Kan. 23; 16 Am. St. Rep. 471; 45 *Id.* 285; 54 Kan. 300; 13 Am. & Eng. Enc. of L. (2 Ed.), 612 and notes; 148 Ill. 163; 39 Am. St. Rep. 166 and notes; 62 Pa. St. 372; 11 Ala. L. J. 151; 24 Am. Rep. 719; 29 Wis. 655; 30 Md. 347; 22 Ohio St. 563; 10 Am. Rep. 770. "As between landlord and tenant, the rule is

well settled that trade fixtures, although securely fastened to the freehold, are the personal property of the tenant, and may be removed by him, if the removal can be effected without injury to the freehold." 4 Lea, 329; 4 Watts, 330; 7 Atl. 154; 43 Miss. 349; 2 Dev. 276; 7 Cow. 319; 23 Ind. 562; 25 Kan. 322; 30 N. E. 831; 48 Miss. 1; 80 N. W. 543.

Miles & Miles, Rob't A. Rowe, T. B. Pryor and *J. N. Rachels,* for appellees.

1. The lease was properly cancelled. In construing it, the whole instrument must be considered. 18 Am. & Eng. Enc. of L. 617, § 7; 17 *Id.* 4; 20 *Id.* 778, note 5; White on Mines & Mining Remedies, 337, § 253. It is no defense that the mine could not be profitably worked. White on Mines & Mining Remedies, § 263, note 4; 5 Moak, Eng. R. 114; Law Rep. 2 Scotch Ap. 273; B. & W. L. C. 430; 60 S. W. 304; 56 Mo. App. 221; 9 Sim. 519; 13 M. & W. 487; 81 Ala. 299; 36 Ohio St. 174.

2. All the machinery, tipple and all other appliances placed upon the premises were fixtures for the term of the lease, unless all coal was sooner worked out. Appellant had no right to remove the machinery and appliances, even after the term or the working out of all the coal, unless all royalties were fully paid. 56 Ark. 55; 73 Ark. 227; 10 Bosw. 537; 47 Cal. 56. As to intention: 56 Ark. 61; 63 Ark. 628; 65 Ark. 26; 13 Am. & Eng. Enc. of L. 602; 41 Barb. 234.

BATTLE, J. On the 26th day of February, 1901, Araminta D. Bishop and others leased certain lands to Jerry M. Cravens for a period of thirty years. The lease is as follows:

"This contract and agreement, made and entered into this 26th day of February, A. D., 1901, by and between Araminta D. Bishop, widow of R. A. Bishop, deceased, Titula W. Hocott and Thomas Hocott, her husband, Lee S. Bishop and wife, Hay Bishop, Almira T. Shelton and her husband, John H. Shelton, Ben Bishop and wife, Minnie Bishop, of Sebastian County, Arkansas, parties of the first part, and Jerry M. Cravens of Sebastian County, Arkansas, party of the second part.

"WITNESSETH: That the parties of the first part, for themselves, their heirs, executors, administrators and assigns, in con-

sideration of the sum of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration and covenants hereinafter mentioned, have leased and do hereby lease and let to the party of the second part, his heirs, executors and assigns, the following described lands for the purpose hereinafter named situated in the Greenwood District of Sebastian County, State of Arkansas, towit: the northeast quarter section thirteen and north half of northwest quarter and north half of the southeast quarter of northwest quarter, section thirteen, township five, range thirty-two, northeast quarter section thirteen and north half of northwest quarter and north half of southeast quarter of northwest quarter of section thirteen, township five, north, range thirty-two west, except one acre of said land in square form upon which the said parties of the first part's dwelling and adjoining buildings are now situated, which is strictly understood is reserved from the operation of this lease, and no coal is to be mined or taken therefrom.

"With the sole and exclusive privilege of mining for coal and operating coal mines thereon and taking and selling coal therefrom for the term and period of thirty years from this date, hereby giving to the party of the second part the exclusive right to mine coal on said premises and to remove and sell the same for the term aforesaid, hereby giving the party of the second part, for the consideration aforesaid, the privilege of taking sufficient coal out of said premises for stationary machinery necessary for conducting said mining operations free of charge, and said party of the second part shall have the right free of charge to take from the premises all such timber and stone as may be necessary to be used to conduct said mining business, that is to say, all of such material as may be necessary to be used in constructing and maintaining said mine or mines, but not to include such timber as is used in building houses, tipples, railroad bridges and railroad ties, and all timber so used for said purpose shall be paid for at the price of two dollars per thousand feet, standard measure.

"And the said party of the second part shall also, for the consideration aforesaid, have the right to erect on said premises all necessary buildings for the purpose of carrying on said coal

mining business, including dwellings for miners and other employees of said second party, and said party of the second part, his successors or assigns, shall have the right to build and maintain roads and railways to and from all shafts, slopes or strip pits now on said premises or that may hereafter be put thereon for the use of said mine or mines, and said party of the second part, his agents, successors or assigns, shall fence all the aforesaid railroad tracks and build and maintain suitable stock gaps thereon, and it is further understood and agreed that said party of the second part, or his legal representative, shall build and maintain gates on all dirt roads made by them as aforesaid when said roads enter upon any of the enclosure of said party of the first part.

"It is further agreed and understood that the party of the second part is to pay all taxes on improvements placed on said premises by the party of the second part, and the taxes on the realty are to be paid by the party of the first part.

"It is further understood and agreed that the party of the second part shall enter upon said land within ninety days from date hereof and begin sinking slope or shaft, and in event it is not commenced in the time specified then the party of the second part forfeits this lease and all privileges thereunder and all improvements made thereon to the parties of the first part.

"The party of the second part agrees and binds himself, his successors or assigns, that, should he elect to sink shaft or slope upon the line running east and west between the southeast quarter and the northeast quarter of said section thirteen, township five north, range thirty-two west, he will have, on or before the first day of July, 1902, in place upon said premises, for the operation of said slope or shaft, not less than two boilers of 60-horse power each and hoisting engine of not less than 100-horse power and all other necessary appliances for the successful operation of said mine or mines.

"It is further understood and agreed that said party of the second part, his successors or assigns, shall pay to the party of the first part the following royalty, to-wit: For mine run coal the sum of five cents per ton, 2,000 pounds to constitute a ton, (bulletin weights to govern settlement). The minimum royalty to be $500.00 per year during the period of this lease, or until

the coal shall be worked out, and, should all of the said coal be mined from said land before the expiration of the lease, then said minimum royalty shall cease, and, in case the royalty on coal mined shall exceed in any one year the said sum of $500.00, then the excess of royalty of previous years shall be applied to the deficiency. The royalty as aforesaid to be paid on the 20th day of each month for the coal mined the previous month, *i. e.*, coal mined in March, 1901, the royalty on same would be due and payable April 20 of same year, and, in the event that said royalty is not paid as aforesaid within ninety days from the date it becomes due, then said party of the second part, his successors or assigns, shall forfeit this lease and all privileges thereunder, and in no case shall any machinery or other improvements be removed from the premises or disposed of by the party of the second part, his successors or assigns, until said royalty is fully paid. And it is expressly understood and agreed that said parties of the first part, or their legal representatives, shall have a first lien upon all of said improvements and machinery that are now upon said leased premises or may hereafter be put thereon by the party of the second part, his successors or assigns, until royalties herein provided for are fully paid.

"Said party of the second part, his successors or assigns, shall furnish the parties of the first part, or their legal representatives, a statement on the 15th day of each month for all coal mined the previous month, said statement to be made from bulletin weights, and the parties of the first part or their legal representatives shall at all reasonable hours have access to the weigh books, bulletin sheets and other records of the coal mined and kept in his office.

"It is further understood and agreed by the parties hereto that said mines or mine shall be operated by the party of the second part, his successors or assigns, with due diligence, and at no time during the period of this lease shall said mine or mines be idle for more than thirty consecutive days in any one year, unless same is caused by strikes, labor troubles, shortage in cars, floods, explosions, fires, shortage in orders, or other unavoidable circumstances not within the power of the party of the second part to prevent.

"It is further understood and agreed by the parties hereto

that the party of the second part, his successors or assigns, may, at such times as he or they may deem best, move or cause to be moved any buildings, machinery, railroad tracks or materials which he or they have put upon said premises without force or process of law; provided, however, that the royalty has been paid as aforesaid and work commenced within ninety days as aforesaid.

"It is understood and agreed by the parties hereto that the party of the second part, his successors or assigns, shall have the right to sublet said premises for the purposes of mining coal as aforesaid, subject to all the conditions of this lease.

"It is hereby agreed by the parties of the first part, or their legal representatives, that said party of the second part, his successors or assigns, shall have the sole and exclusive right to locate, own or conduct a mercantile business on said premises for the period of this lease.

"It is further understood and agreed that said parties of the first part, or their legal representatives, shall at all times during reasonable hours have the right to enter said mine or mines for the purpose of investigation.

"In witness whereof, we have hereunto set our hands and seals, in duplicate, on this the day and date first above written.

"Araminta D. Bishop (Seal),
"Tahilah W. Hocott (Seal),
"May Bishop (Seal),
"John H. Shelton (Seal),
"Minnie Bishop (Seal),
"Thomas Hocott (Seal),
"Lee S. Bishop (Seal),
"Almira Shelton (Seal),
"Ben B. Bishop (Seal),
"Jerry M. Cravens (Seal)."

Cravens assigned the lease to the Montreal Coal Company, and it assigned the same to the Cherokee Construction Company. A mine was opened on the leased land, and machinery of the description stated in the lease was placed therein for the purpose of operating it. On the third day of July, 1905, the lessors brought a suit in the Sebastian Chancery Court, for the Greenwood District, in Sebastian County, against Cravens and

Cherokee Construction Company to cancel the lease and for other relief. After setting out the terms of the lease, the plaintiffs alleged in their complaint as follows: "That the lessees have failed and refused to pay to the lessors the minimum royalty provided by the terms of the lease for a period of time much longer than provided in the lease contract, and plaintiffs further charge that the lessees have moved away from the premises the machinery placed thereon for the purpose of mining coal, and have thus destroyed security out of which the lessors had the right, according to the terms of the lease, to secure the payment of the minimum royalty aforesaid. The plaintiffs further charge that the defendants have failed to furnish to the lessors on the 15th day of each month a statement of all the coal mined during the previous month according to the terms of the contract. The plaintiffs further charge that the lessees have violated their contract in that they have failed to operate the mine with due diligence, and have permitted the same to stand idle for more than thirty consecutive days in one year. Plaintiffs further charge that all the acts, conducts, failures and forfeitures hereinbefore complained of have destroyed the rights of the lessees with respect to the contract and to remain in possession of the premises. And plaintiffs, further complaining of the defendant, the Cherokee Construction Company, allege that they have been, by the wrongful acts and conduct of the defendant, its agents and employees, in violation of the terms and conditions of the lease, damaged in the sum of $15,000, as follows:

"For destroying and cutting timber upon the leased premises in the sum of $1,500, for removing tipple, machinery and all other equipment for the operation of the mine, and for pulling the pillars and destroying the underground work of the mine, in the sum of $13,500."

And asked as follows: "Wherefore, the premises considered, these plaintiffs pray that the lease herein set out shall be by the court cancelled; that the defendants and their agents or assigns shall be forever enjoined from setting up any claims to said premises or from going upon the same for the purpose of mining coal or for other purposes, and shall be perpetually enjoined from setting up any claim or right of title to said premises under the aforesaid lease, and that they have judgment

against the Cherokee Construction Company for damages as aforesaid in the sum of $25,000 and for all other and further relief to which in equity and good conscience they are entitled."

And the defendants, admitting the execution of the lease and the terms thereof so far as stated in the complaint, answered as follows:

"Defendants deny that the lessees have failed to pay lessors the minimum royalties provided by said lease contract for a period of time much longer than provided in said lease; and they also deny that the lessees have moved away from said premises the machinery placed thereon for the purpose of mining coal and have thus destroyed security out of which the lessor had a right, according to the terms of said lease, to secure payment of said royalties.

"Defendants also deny that they have failed to furnish the lessors a statement of all coal mined during the previous month, on the 15th day of each month, according to the terms of said lease contract, and also deny that the lessees have violated their contract by failing to operate said mine with due diligence, and that they have permitted the same to stand idle for more than thirty days of any one year, when within their power to prevent; and further deny that, by reason of anything alleged in the complaint, defendants have in any manner forfeited or destroyed their rights under said lease, or their right to remain in possession of said premises and further operate said mine.

"Further answering, defendants say that at expense of large sums of money, to-wit, $50,000, said lessees have opened up a coal mine upon the premises described in the complaint, and have developed said mine and operated the same with due diligence down to this day, and have not allowed same to remain idle for more than thirty consecutive days in one year, except when such idleness was enforced by labor troubles, shortage in cars, floods, shortage in orders, and other circumstances unavoidable and not within the power of defendants to prevent, and that most of the time during which said mine has remained idle, has been caused by shortage of orders, shortage in cars, and shortage in orders for coal produced from said mine, more especially the latter cause."

And denied the other allegations of the complaint so far as stated in this opinion.

The machinery in the mine was moved out by the Cherokee Construction Company on the second day of February, 1904. After its removal the pillars of the mine were pulled down, and the mine was virtually abandoned. All this was caused by the discovery of a fault of the depth of eighteen feet and four inches, which made the operation of the mine impracticable. It (mine) was idle fom January 16, 1904, until October of the same year, and was idle three or four months before the bringing of this suit. There was no evidence that any effort was made to open a mine on other parts of the land.

The court cancelled the lease, and rendered judgment against the Cherokee Construction Company for $3,167, for the value of the machinery; and it appealed.

As a rule, equity will not enforce a forfeiture. But there are exceptions to this rule. In cases where the forfeiture works equity and protects the rights of parties, equity will in effect enforce it. Courts of equity will not reject it when it becomes a means of enforcing equitable rights.

Pomeroy's Equity Jurisprudence says: "It is well settled that where the agreement secured is simply one for the payment of money, a forfeiture either of land, chattels, securitites, or money, incurred by its non-performance, will be set aside on behalf of the defaulting party, or relieved against in any other manner made necessary by the circumstances of the case, on payment of the debt, interest, and costs, if any have accrued, unless by his inequitable conduct he has debarred himself from the remedial right, or unless the remedy is prohibited, under the special circumstances of the case, by some other controlling doctrine of equity. Where the stipulation, however, is intended to secure the performance or non-performance of some act *in pais,* it is impossible to lay down any such general rule with which all the classes of decisions shall harmonize. It is certain that if the act is of such a nature that its value cannot be pecuniarily measured, if the compensation for a default cannot be ascertained and fixed with reasonable precision, relief against the forfeiture incurred by its non-performance will not, under ordinary circumstances, be given. The affirmative of this propo-

sition cannot be stated as a rule with the same generality. It has, indeed, been said that equity would relieve against forfeitures in all cases where compensation can be made; but this is clearly incorrect. It is well settled that a court of equity will not, under ordinary circumstances, set aside forfeitures incurred on the breach of many covenants contained in leases, or of stipulations in other agreements, although the compensation for the resulting injury could be ascertained without difficulty." 1 Pomeroy's Equity Jurisprudence (3 Ed.), § 450.

Again he says: "It is a well settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forefeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture. The few *apparent exceptions* to this doctrine are not real exceptions, since they all depend upon other rules and principles. The reasons of the doctrine are to be found in the universal principle that a court of equity refuses to aid any party who, by the remedy which he seeks to obtain against his adversary, is not himself doing equity, or who does not come before the court 'with clean hands'—the same principle upon which the court acts when it refuses to specifically enforce a contract which is unequal, unjust, or has any inequitable features and incidents." (*Ib.* § § 459, 460 and notes). From this we (this court) understand the author to mean that a court of equity will enforce a forfeiture where its enforcement involves equitable rights and principles, and in that case it would not be the enforcement of the forfeiture as such but of the equitable rights and principles.

The law of insurance affords examples of the necessity of forfeitures, the enforcement of which would be consonant with equity. In *New York Life Insurance Company* v. *Statham,* 93 U. S. 24, Mr. Justice Bradley, delivering the opinion of the court, said: "Promptness of payment is essential in the business of life insurance. * * * Delinquency cannot be tolerated nor redeemed, except at the option of the company. * * * Time is material and of the essence of the contract. Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract. * * * Courts cannot, with safety,

vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence."

In *Klein* v. *Insurance Co.,* 104 U. S. 88, it was said: "If the assured can neglect payment at maturity, and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture, they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on the failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract."

Brown v. *Vandergrift,* 80 Pa. St. 142, is a case wherein equity enforced a forfeiture based upon the same reason and principle as the forfeiture of a policy of insurance. The syllabus in that case is as follows:

"1. Brady leased to Lambing a lot of land, to have the sole right to bore for oil, etc., for twenty years, Lambing to commence operations in sixty days *and continue with due diligence; if he should cease operations twenty days at any one time, Brady might resume possession.* There were other covenants in the lease, and it was then stipulated that a failure of Lambing to comply with any one of the conditions should work a forfeiture, and Brady might enter and dispose of the premises as if the lease had not been made. It was further agreed that, if Lambing did not commence operations at the time specified, he should pay Brady $30 per month until he should commence. *Held,* that the covenant of forfeiture was modified, not abrogated, by the clause for payment of rent.

"2. Lambing did not commence operations; he paid four months' rent; he omitted payment for eleven months and then tendered the amount for that time. *Held,* that the lessor might refuse the tender and insist on the forfeiture.

"3. In such case time is of the essence of the contract, and equity follows the law, and will enforce the covenant of forfeiture as essential to do justice.

"4. Equity abhors a forfeiture when it works a loss that is contrary to equity, not when it works equity and protects the lessor against the laches of the lessee."

Chief Justice Agnew, speaking for the court, said: "The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. The surface required was often small compared with the results, when attended with success, while these results led to great speculations by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the landowner, as well as public interest, by numerous covenants, some of the most stringent kind, to prevent their lands from being burdened by unexecuted and profitless leases, incompatible with the right of alienation and the use of the land. * * * Hence covenants became necessary to regulate the boring of wells, their number and time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance and put an end to the lease in case of injurious delay or a want of success. These leases were not valuable, except by means of development, unlike the ordinary terms for the cultivation of the soil, or for the removal of fixed minerals. A forfeiture for non-development or delay therefore cut off no valuable rights of property while it was essential for the protection of private and public interest in relation to the use and alienation of property. * * * That time may be made of the essence of the contract by the express agreement of the parties has been so often decided that no citation of authority is necessary. In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture, but this is when it works a loss that is contrary to equity; not when it works equity and protects the landowner against the indifference and laches of the lessee

and prevents a great mischief, as in the case of such leases."

It is said that it is common for leases of land for the purpose of sinking wells for oil to contain covenants for diligent operation and for forfeiture in case of suspension, and such forfeitures are sometimes enforced in equity because the oil is a fluid likely to flow a considerable distance through the crevices and loose sand where it is found, and, if not removed, may be wholly lost to the owner of the land by reason of wells on land adjoining, and because its enforcement is essential to the protection of the rights of the owner, and because the lease yields nothing when idle, and is an incumbrance on the lands of the owner, tying his hands against selling or leasing to others. *Munroe* v. *Armstrong*, 96 Pa. St. 307.

In *Harper* v. *Tidholm*, 155 Ill. 370, Tidholm entered into a written contract with Harper, by which he bound himself, in consideration of a certain sum paid as earnest to bind the contract and of a certain other sum to be paid as purchase money, to convey certain lands to Harper when the stipulated price was paid; and provided that, if Harper failed to pay the purchase money at the time and in the manner specified in the contract, the money paid as earnest should, at the option of the vendor, be forfeited as liquidated damages, and the contract should be null and void. The contract was recorded. The purchase money not being paid at maturity upon demand, the vendor, upon tender of a deed for the land to the purchaser and his refusal to pay, declared the contract void and the earnest forfeited, and filed his bill in equity to cancel and remove the agreement and record as a cloud upon his title. The court, finding that the contract was null and void, and, being recorded, was a cloud upon the title of the vendor, decreed that it be cancelled and removed, and that the earnest be forfeited.

In this case it was stipulated in the lease that the lessee, his successors and assigns, shall operate the mine or mines opened upon the land with due diligence, and that, at no time during the term of the lease, shall it or they remain idle for more than thirty consecutive days in any one year, unless the same was caused by strikes, etc. The only mine upon the land remained idle about ten consecutive months in the year 1904, and three or four months in 1905. The lease thereby became

forfeitable at the option of the lessors (Barringer & Adams on the Laws of Mines and Mining, page 148; 20 Am. & Eng. Enc. of Law (2 Ed.), pages 778-780, paragraph 7 b, and cases cited); and they have so elected; and the enforcement of the forfeiture thereby created is necessary to protect them against unnecessary and injurious delays, and to protect them against an unprofitable lease being perpetuated by laches and kept hanging over their property like clouds upon titles, and to relieve their land of a burden.

"The findings of the court in favor of the plaintiffs for the value of the machinery is based on the theory that it was a fixture, became and was a part of the realty, and, defendant having removed the same, plaintiff could recover its value." This is error. Whether it was a fixture is determined by the intention of the parties expressed in clear and unambiguous language. *Choate* v. *Kimball,* 56 Ark. 55; *Ozark* v. *Adams,* 73 Ark. 227.

The lease clearly shows that the machinery was to remain the property of the lessees. After stipulating that the lessees should have the right to make certain improvements, it then provides:

"It is further agreed and understood that the party of the second part is to pay all taxes on improvements placed on the said premises by said party of the second part, and the taxes on the realty are to be paid by the party of the first part."

After stipulating that royalty shall be paid, and that the lease shall be forfeited if it is not paid in ninety days after it is due, it then provides:

"And in no case shall any machinery or other improvement be removed from the premises or disposed of by the party of the second part, his successors or assigns, until said royalty is fully paid. And it is expressly understood and agreed that said parties of the first part, or their legal representatives, shall have a first lien upon all of said improvements and machinery that are now upon said leased premises or may hereafter be put thereon by the party of the second part, his successors or assigns, until royalties herein provided for are fully paid.

And then this stipulation follows:

"It is further understood and agreed that the party of the second part, his successors or assigns, may at such times as he

or they may deem best move or cause to be moved any buildings, machinery, railroad tracks or materials which he or they have put upon said premises without force or process of law, provided, however, that the royalty has been paid as aforesaid and work commenced within ninety days as aforesaid. It is understood and agreed by the parties hereto that the party of the second part, his successors or assigns, shall have the right to sublet said premises for the purpose of mining coal as aforesaid, subject to all the conditions of the lease."

The only interest the lessors was to have in the machinery was a lien for unpaid royalty.

The decree as to the cancellation of the lease is affirmed; and the judgment for $3167 is reversed.

STEWART v WOOD.

86 504
190 377

Opinion delivered May 25, 1908.

1. JUDGMENT—VACATION AFTER TERM.—Kirby's Digest, § 4431, subdiv. 4, providing that "the court in which a judgment or final order has been rendered shall have power, after the expiration of the term, to vacate or modify such judgment or order. * * * *Fourth*, for fraud practiced by the successful party in the obtaining of the judgment or order," does not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court. (Page 505.)
2. APPEAL—CONCLUSIVENESS OF COURT'S FINDINGS OF FACT.—Findings of fact of a trial judge in an action at law are as binding upon the Supreme Court on appeal as the verdict of a jury would be. (Page 507.)

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

Winchester & Martin, for appellant.

The opinion delivered on the former appeal settles this controversy. 81 Ark. 41. The judgment appealed from is clearly erroneous. 63 Ark. 141; 79 Ark. 185; 60 Ark. 50; 56 Ark. 170; 55 Ark. 609. The only question sent down to the lower court was, did the agreement as to the judgment remain in force be-

tween the parties up to the time of its rendition, and, incidentally, what amount of judgment was agreed upon? If the lower court meant by its finding that no agreement ever existed, or that it had been rescinded, such finding is not supported by the record. Appellant does not contend that an agreement existed as to the amount of judgment, but that he signed the guaranty as a witness merely. If he is liable at all, it is only for the $100.00, keep of the jack, with interest.

Sam R. Chew, for appellee.

In order to set aside the former judgment, the burden was on appellant to prove fraud in obtaining it. Kirby's Dig., § 4431, sub-div. 4. And he must show a valid defense to the action. *Id.* § 4434. Failing in this, he has no standing here, even though the judgment had been obtained by fraud. 49 Ark. 497; 54 Ark. 539. The question presented on remand to the circuit court was one of fact, which that court has found contrary to appellant's claim. The judgment should be affirmed.

HART, J. This action is before the court a second time. The former opinion is reported in 81 Ark. 41, to which reference is made for a statement of the case.

When the cause was remanded, it was transferred to the circuit court pursuant to the directions of this court. Stewart then filed his motion to set aside the judgment, basing it on the fourth sub-division of section 4431 of Kirby's Digest, which reads as follows:

"For fraud practiced by the successful party in the obtaining of the judgment or order."

The motion was heard before the same judge who tried the case in the first instance. After hearing the evidence, he denied the motion, and made the following findings of fact: "I find that the case was originally tried upon proof where the plaintiff, S. W. Stewart, had the benefit in his presence and hearing and with his knowledge of his defense to the action; that all matters litigated here were considered by the court in that case, and the judgment was rendered upon proof, and not upon agreement between Stewart and Fitzhugh, and that at the time of the rendition of the judgment there was no existing agreement between Stewart and Fitzhugh by which the court

should render any amount of judgment; that Stewart and Fitzhugh appeared here as adversaries in the court, contending for their respective contentions, and the finding of the court in that case will not be disturbed. For these reasons the motion to vacate and modify the judgment will be overruled."

This court in its former opinion held that if Wood, while the alleged agreement was in force, procured judgment against Stewart for more than the latter had agreed to, or for more than it was agreed that Wood should ask for, then the judgment should be to that extent set aside. It, also, in effect, held that, if judgment in the first instance was rendered pursuant to the agreement, it should be presumed that Stewart only agreed that judgment should be entered for the amount for which he was liable by the terms of the written guaranty, which was the foundation of the action.

The findings of facts made by the circuit judge in his judgment denying the motion of Stewart to set aside the judgment rendered in the first instance show that the case, as originally tried, was upon the merits, and that judgment was not entered upon the agreement.

An inspection of the record of the former appeal shows that the complaint and answer filed in the circuit court in the original case raised an issue of fact, and that evidence was heard before the court sitting without a jury upon the issues presented by the pleadings. Therefore, instead of having the case of a judgment procured by fraud or entered through mistake for an amount different to that agreed upon by the parties to the suit, we have the case of an erroneous judgment, erroneous, for the reason that by the terms of the written guaranty Stewart was not liable for the return price of the jack. His remedy, then, to correct this error was by appeal.

In Black on Judgments, § 329, the rule is stated as follows:

"The statutes enacted in many of the States, granting power to vacate judgments rendered against a party through his mistake, inadvertence, surprise, or excusable neglect, do not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court."

In the case of *Luttrell* v. *Jones*, 63 Ark. 254, the court said:

"A judgment entry on sustaining a demurrer to a complaint which identifies the parties, [and] shows that the court found that the defendant had curtesy in the land sought to be recovered, that the plaintiffs stood on their complaint, refusing to plead over, and that their complaint was dismissed with costs, is sufficiently formal, and is conclusive on the question of curtesy in a subsequent action between the same parties."

The facts in that case are that the Luttrells brought suit against Reynolds to recover certain lands. Reynolds demurred to the complaint, and for cause stated that it affirmatively appeared from the complaint that he had curtesy in the lands. The court sustained the demurrer on that ground, and, finding from the complaint that Reynolds had curtesy, dismissed it at plaintiff's cost. The Luttrells afterwards brought suit against Reynolds to recover the same lands. On appeal, this court held that the complaint in the first case did not affirmatively show curtesy in Reynolds, and was not demurrable, but that the judgment in that case, although erroneous, was final and conclusive until reversed on appeal. So in the present case the trial judge found that the judgment in the first case in the circuit court was not entered upon the agreement, but was a trial had upon the merits. According to numerous decisions of this court, the findings of fact of a trial judge are as binding upon us as the verdict of a jury, and we can not say that there is not sufficient evidence to support his findings. The trial judge, then, having found that the action as originally brought was heard upon the merits, there is only left the case of an erroneous judgment, which, as we have seen, could only be corrected by appeal, and, this remedy not having been pursued, the judgment must be affirmed.

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

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Opinion delivered June 8, 1908.

1. MASTER AND SERVANT—ASSUMED RISK.—It was not error, in a suit to hold a master liable for negligently causing the death of a servant by maintaining a defective place for work, to charge the jury

that if the servant knew of the particular risk, but made complaint thereof to his foreman who promised to repair the defect, and the servant, relying upon such promise, continued to work, and the risk arising from the defective condition of the premises was not so obvious that an ordinarily prudent person would not have continued in the work, then it was a question for the jury to say whether deceased assumed the risk from the condition of the premises. (Page 512.)

2. SAME—DEFECTIVE PLACE OF WORK.—It was negligence for a railroad company to allow the existence of such a depression in its switch yard as would ordinarily be dangerous to switchmen employed therein. (Page 513.)

3. SAME—EFFECT OF MASTER'S PROMISE TO MAKE REPAIRS.—Although a servant who remains in his master's employment for a year after he discovers that his place of work is in a defective condition will be held to have assumed the risk therefrom, yet where the master promises to repair the defect, the servant is relieved of the assumption of risk during a reasonable time for the master to make his promise good, unless the danger is so imminent that no prudent person would continue in it. (Page 515.)

4. SAME—TO WHOM PROMISE TO REPAIR SHOULD BE MADE.—In order that a promise by a master or vice-principal to make repairs may be relied upon by a servant, it is not essential that the promise should have been made directly to the servant, but it is sufficient that the promise should have been communicated to the servant and relied upon by him. (Page 516.)

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

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

1. Deceased assumed the risk as one of the hazards of the employment in which he was engaged; he had used the switch for a year, and knew of the conditions. The court should have given the peremptory instruction to find for defendant. 82 Ark. 14; 37 Minn. 326; 33 N. W. 908; 5 Am. St. 851; 108 Wis. 530; 53 S. R. A. 657; 35 W. Va. 500; 55 Ark. 483; 18 S. W. 933; 138 Ind. 290; 37 N. E. 721; 43 Am. St. 384; 87 Me. 352; 32 Atl. 965; 167 Pa. 220; 15 Mont. 290; 39 Pac. 85; 81 Ark. 343; 77 *Id.* 367; 56 *Id.* 232; 41 *Id.* 542; 54 *Id.* 389; 56 *Id.* 206; 57 *Id.* 76; 68 *Id.* 316; 80 Wis. 350; 1 Labatt on Master and Servant, 260, 266, 267. Here the danger was obvious, and no prudent man would have taken the risk. The promise to

repair does not excuse him. 77 N. E. 1120; 220 Ill. 614; 91 S. W. 161; 115 Mo. App. 520; 63 Atl. 719; 141 Fed. 966; 55 Ark. 484.

2. He assumed the risk in stepping off at a place known to be dangerous when he could have stepped off at some other place just as well. 165 Mass. 16; 137 Ind. 208; 129 *Id.* 327; 112 *Id.* 592; 130 *Id.* 242; 136 *Id.* 242; 79 Me. 297; 12 Ill. App. 369. And this is true even when a promise to repair by the master is shown. 20 Am. & Eng. Enc. Law, p. 127; 55 Ark. 484.

3. As a matter of law, deceased assumed the risk, and the court should have so held. 82 Ark. 14; 36 Kan. 129; 79 N. E. 222; 80 *Id.* 65; 108 N. W. 1021; 145 Mich. 509; 87 Pac. 973; 34 Mont. 590; 57 Ark. 461; 73 *Id.* 383; 76 *Id.* 96; 77 *Id.* 757.

4. We especially call attention to the error in instruction No. 8. 77 Ark. 461, 367.

Smelser & Vaughan and *Scott & Head*, for appellee.

1. Deceased had a right to rely upon the repairs being made, as promised by the master. 216 Ill. 624; 75 N. E. 332; 54 Ark. 289; Wood on Master and Servant, § 352; 154 U. S. 200; 1 Labatt on Master and Servant, § 432; 81 S. W. 487; 41 Pac. 551; 51 N. E. 449; 78 *Id.* 417; 50 S. W. 601; 72 *Id.* 1028; 58 N. E. 416; 16 Pac. 46; 90 N. W. 976; 53 L. R. A. 653; 21 S. W. 326. The promise was made by one in authority. 6 S. E. 53; 29 N. E. 714; 80 Fed. 257. It was sufficient. 67 Minn. 358; 63 Ill. App. 165; 96 Ill. 616; 105 N. W. 568; 96 Ill. App. 616; 37 N. W. 908; 33 N. W. 908; 88 S. W. 167; 49 N. Y. 521; 49 Fed. 723; 139 *Id.* 519.

2. Deceased did not assume the risk as a matter of law; it was a question for the jury, even where there is no promise to repair. 109 Fed. 436; 183 U. S. 695; 97 Fed. 423; 53 *Id.* 65; 128 U. S. 91; 138 N. C. 401; 18 S. W. 976; 155 Mass. 155; *Ib.* 513; 4 S. E. 211; 49 S. W. 204; 62 Pac. 964; 108 Ill. 538; 45 Atl. 676; 27 Pac. 728; 18 S. E. 584; 30 S. W. 125; 26 S. E. 669; 50 Pac. 834; 74 N. W. 377; 52 *Id.* 983; 58 N. E. 416; 50 S. E. 703; 49 Fed. 723; 52 *Id.* 87.

3. If he knew there was some risk attached, this would not, as a matter of law, bar a recovery. 30 N. E. 366; 67 *Id.* 609; 47 N. W. 1037; 22 So. 742; 30 Atl. 16; 29 N. E. 464; 62

N. W. 692; 31 S. E. 276; 20 N. W. 147; 24 Id. 311; 77 Ark. 367; 79 Id. 53; 48 *Id.* 333.

4. There is no contributory negligence. Wood, Master and Servant (2 Ed.), § 378; 18 Am. Rep. 412; 8 Allen, 441; 103 Fed. 265; 21 S. W. 326; 53 Ark. 458; 82 *Id.* 137; 1 Labatt, Master and Servant, § 300; 79 Ark. 137, 241; 78 *Id.* 520; *Ib.* 355, 251; 83 *Id.* 61; 82 *Id.* 343; 80 *Id.* 169.

5. The plaintiff's instructions were correct, and there is no error in No. 8. 84 Ark. 74; 75 Ark. 76; 99 S. W. 73; 69 Ark. 632; 56 *Id.* 594; 65 *Id.* 54; 73 *Id.* 594; 83 *Id.* 61; 75 *Id.* 325; 76 *Id.* 224; 77 *Id.* 458.

6. Defendant's instructions were not applicable to the case. They all told the jury, as matter of law, that deceased assumed the risk if he knew the condition of the ground, or might have known by the exercise of ordinary care, etc. See cases *supra;* 79 Ark. 53; 77 *Id.* 367; 43 S. W. 508; 83 Ark. 318; 166 U. S. 17.

HILL, C. J. John Mangan was a switchman in the employ of the appellant railroad company in its yards at Texarkana, and had been so employed for three years. His usual duties at the time of his injury were on the night crew. Prior to the 4th of November, 1905, he had been laying off for several days, the exact number not being shown. On said day he was called upon as extra switchman to do day work, owing to the absence of some of the day crew. Passenger train No. 5 came in the yards, and some switching had to be done, and a coach for negro passengers set out on track 21, and the train had to be prepared to go out within ten minutes of its arrival.

In the performance of his duties, Mangan rode upon a coach until near switch 22, when he alighted from the slowly moving train in order to throw said switch; and as he alighted from the train he slipped and fell under it, and was run over and horribly mangled. Three days later, after enduring great mental and physical suffering, he died in the railroad hospital in St. Louis, to which place he had been carried to receive surgical treatment.

He left a widow, who was appointed administratrix of the estate, and two children. This is an action by the administratrix to recover for the loss to the estate and to the widow and

children. The jury returned a verdict for $5,000 on the first count, and for $12,500 on the second count. Judgment was entered thereupon, and from it the railroad company has appealed.

Negligence of the company was alleged to have been committed in failing to have a reasonably safe place for the performance of his duties as switchman. The facts in regard thereto, as established by the evidence which has been credited by the jury, were as follows:

The yards of the appellant company as originally constructed were level, the surface of the ground being even with the ties. But depressions had occurred in different parts of the ground, one of which existed around the head block of switch 22. It was a kind of sinking slope, a low place in the ground probably a foot and a half across on each side, and two or three or four inches deep, shaped like a dish-pan. This depression or worn place around the switch was caused by the switchmen stamping around it, and it would always be slippery when it rained. In wet weather it would be filled with water, and this rendered the place dangerous to the switchmen in the performance of their duties in that it made the ground slippery and muddy and the water concealed the exact condition of the surface underneath. This condition had existed for about a year. The proper care of the yard required that this depression be filled with cinders or gravel. The water also stood in wet weather along the track for some distance at this point, and the surface was so covered that a switchman alighting from a car could not make selection of a proper place to get off.

There had been a heavy rain the day that John Mangan was injured, and the season had been very wet. William Mangan, brother of the deceased, was also a switchman, and was extra foreman of a switch crew, and John at times worked under him, and was doing so on the day he was killed.

Several days before the injury, Mr. W. H. Saunders, the yardmaster, fell at this same switch, and William Mangan told him that it was dangerous and ought to be fixed, and Saunders promised he would have it fixed as quick as he could get the cinders for it. Shortly after this John Mangan complained to his brother about the danger at this switch, and Wm. Mangan

told him of the promise of Saunders to him to have it repaired. This conversation is not more definitely fixed than a few days before John's injury.

The only material conflict in the evidence is upon three points: First, whether this depression was filled with water at the time Mangan fell; second, whether this depression was filled up with cinders before or after the accident; and third, whether he had alighted from the train in a careful and orderly manner or whether he had recklessly leaped therefrom. All of these conflicts have been settled against the railroad company, and upon this hearing it must be taken that this depression was concealed by a thin sheet of water, that the cinders had not been placed in there at the time, and that Mangan descended from the coach in a careful manner and fell on account of the slippery and muddy condition of the place where he was required by his duties to alight.

Three questions arise upon these facts: First, as to the assumption of the risk; second, as to the reliance upon a promise of repair; and third, as to the contributory negligence of John Mangan. The latter proposition may be disposed of speedily, for it presented a question of fact which has gone to the jury upon appropriate instructions, and there was no contributory negligence *per se* which would call on the court to interfere with the finding of the jury upon that issue.

The turning point of the case is presented in the 8th instruction, which is as follows:

"8. The court instructs the jury that if you should find from the evidence that the deceased knew of the condition of the roadbed at the point where he was injured, still, if you should further find from the evidence that the deceased complained to the defendant or his immediate foreman under whom he was working of the condition thereof, and that the said foreman thereupon advised the deceased that the defendant had promised to repair the same as soon as it could get the cinders with which to do the work, and that thereafter, relying upon such promise, the deceased continued work in the employment of the defendant, and that the danger arising from the said condition of the said premises was not so obvious, imminent or glaring that an ordinarily prudent person would not have contin-

ued in the same work, then it is for you to say, under all the facts and circumstances of the case, whether the deceased did in fact assume the risk arising from the said condition of said premises."

This instruction and the other instructions in the case are in accord with the principles announced in *Patterson Coal Co.* v. *Poe,* 81 Ark. 343; *Mammoth Vein Coal Co.* v. *Bubliss,* 83 Ark. 567; *Louisiana & Ark. Ry. Co.* v. *Miles,* 82 Ark. 534; *Choctaw, O. & G. Rd. Co.* v. *Craig,* 79 Ark. 53; *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367. Is there sufficient evidence to sustain a verdict under these instructions? Primarily, the inquiry is whether the condition of the ground was one of the ordinary risks of the service assumed by the servant, or whether it was due to a default in duty of the company.

The duty of the master in regard to a safe place to work in switch yards is thus stated by the Texas court: "As an incident to operating trains, cars must be coupled and uncoupled in placing them in or taking them from the train and moved from one track to another. In making up trains this is generally done in switch yards where switches, switch-stands, frogs, side-tracks, etc., are maintained for such purpose. In doing this work, which, under the most favorable conditions, is perilous, the duty of exercising ordinary care (which is gauged by the danger to the servant) is imposed upon the company to maintain the grounds, tracks and all appliances and instrumentalities in the switch yard for doing it in a reasonably safe condition." (Citing authorities). *International & G. N. Ry. Co.* v. *Rieden,* 107 S. W. 661. And in the same case the court further said: "The work of coupling and uncoupling cars, especially from the manner it was done before they were equipped with automatic couplers, requires the roadbed to be free from such defects or obstructions as might reasonably be supposed to unnecessarily increase the danger. Hence, duty of the company to use ordinary care to keep that part of it designed for such work free from such defects and obstructions."

In *Haggerty* v. *Chicago, M. & St. P. Ry. Co.,* 73 C. C. A. 282, 141 Fed. 966, (in the Circuit Court of Appeals of this circuit), the negligence was predicated upon the existence of drains in the switching yards, into one of which a switchman

fell. The court said: "It was the duty of the railway company to use ordinary care to furnish Haggerty with a reasonably safe place in which to perform his duties, and it was also the duty of Haggerty to use ordinary care to not unnecessarily expose himself to dangers which he knew or in the exercise of ordinary care might have known. He assumed, when he entered the employ of the company as switch tender upon the yards in question, the ordinary risks and hazards of the service in which he was engaged, which he knew or which a reasonably prudent and careful man might have known. This case is clearly distinguishable from those cases where a master has allowed holes or culverts to remain uncovered at and about the place where the servant is obliged to perform his duties. The small ditch or drain in question was not what is known as a culvert, but a part of a system found necessary for the carrying off of surface water from the yards into larger drains or culverts, which were covered."

It follows from these statements of the duty of the railroad company that it was negligence to allow the existence of such a depression as a switching place where switchmen would have to perform their duties, for it was shown that such depression in wet weather was dangerous to them. This condition could have been known to the yardmaster—the vice principal—and he was notified of its danger and promised to speedily repair it. It must be taken then that it was not a hazard of the employment, but a default of the master, which produced the injury. That Mangan's death directly flows from this negligence is established by evidence stamped as true by the verdict. But that does not end the matter, for the negligence of the master may be assumed when known to exist, as well as the ordinary hazards of the service.

What was said by Mr. Justice RIDDICK *in Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367, applies here: "In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and where it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them; and if he

negligently fails to do so, he will still be held to have assumed them. * * * But the servant is not presumed to know of risks and dangers caused by the negligence of the master, after he enters the service, which change the condition of the service. If he is injured by such negligence, he can not be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on consent; but, if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk." Citing authorities.

It must be held that continuance in the employ for about a year with knowledge of the condition of this place would be an assumption of its risk, and the case narrows to whether it falls within the exception based on the promise to repair. The rule governing it may be thus stated: where the master promises to repair, then the servant is relieved of the assumption of the risk for a reasonable time for the master to make his promise good, unless the danger is so imminent that no prudent person would continue in it. *Gowen* v. *Harley,* 56 Fed. 963, 6 C. C. A. 190; *Patterson Coal Co.* v. *Poe,* 81 Ark. 343; *Mammoth Vein Coal Co.* v. *Bubliss,* 83 Ark. 567; *Kansas & T. Coal Co.* v. *Chandler,* 71 Ark. 518.

When the danger is so obvious and imminent that the servant is not justified in continuing in the employ, it is usually held to be contributory negligence if he does so, and not an assumption of the risk; although, as stated by Judge Taft in *Narramore* v. *Cleveland, C. C. & St. L. Ry. Co.,* 96 Fed. 298, "assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom." The distinction between the two becomes more theoretical than substantial, as pointed out by Mr. Justice RIDDICK in *Mammoth Vein Coal Co.* v. *Bubliss, supra.*

Judge Sanborn, for the Circuit Court of Appeals of this circuit, in *Chicago G. W. Ry. Co.* v. *Price,* 97 Fed. Rep. 423, stated the kind of danger referred to, as follows: "The rule

is that the danger from the defects of the railroad or machinery furnished the employee must have been so obvious and threatening that a reasonably prudent man in his situation would have avoided them, in order to charge the injured servant with contributory negligence because he continued in the discharge of his duty, and thereby assumed the risks." (Citing many cases.) It can not be said as a matter of law under the facts here that the danger was so obvious that Mangan was precluded from relying upon the promise. It was a question of fact.

This brings finally to consideration the only sustaining proposition of the plaintiff's cause—the promise of the master to repair. Without this promise, the long continuance of John Mangan in the performance of his duties in this yard where he knew this depression existed, and the danger incident thereto in performing his duty as a switchman, would require the court to hold as a matter of law that he had assumed the risk of the existing condition. But the testimony discloses that he complained to his brother, who, on the day of his injury, happened to be his foreman, though he was not acting as such at the time of the complaint; and his brother told him of the promise of the yardmaster to fill this depression as soon as he could get the cinders. This occurred several days before the injury; and for some days prior to his injury John Mangan was not at work, so that there was no showing that he knew the promise was not fulfilled when he alighted in this depression. Even if he had known it, yet for a reasonable time to allow the redemption of the promise the assumption of the risk was in abeyance.

It is said that this promise was not made to John Mangan, and that his complaint had been to William Mangan, who was only foreman at the time of a crew of switchmen, and that such foreman could not bind the company by a promise to repair. *Albrecht* v. *Chicago & N. W. Ry. Co.*, 108 Wis. 530, L. R. A. 657, is cited to sustain this contention. But the promise was not from William Mangan. He was a mere medium in conveying to John Mangan the promise of the yardmaster that this defect would be repaired, and it makes no difference that this promise from the yardmaster was not directly given to John Mangan, but came through another servant. This point

was thus decided by the Supreme Court of Illinois: "There was no error in admitting evidence of the promise made by Hawley to repair the appliances. The objection made to the evidence is that the promise was made to the machine runners who operated the machine, and was communicated to the plaintiff by them, instead of being made to the plaintiff directly. It was proper to prove that the promise was made through other servants of the defendant who notified the machine boss of the defect. The promise to repair was made to the machine runners, and when the plaintiff complained of the condition of the appliances, and said that he was not going to move the machine any more unless it was fixed, they told him of the promise, and he relied on it. It was not necessary for him to go to Hawley and receive the promise personally." *Odin Coal Co.* v. *Tadlock,* 216 Ill. 624.

The promise emanated from the yardmaster in control of the yard; it was conveyed to the deceased by his brother, who sometimes acted as foreman, and it was a promise consistent with the usual and proper method of repairing the yards. It was not an unreasonable time which elapsed from the promise till John Mangan resumed work on the morning of the injury, and there is no evidence that he knew that the promise had not been redeemed at the time he was called upon to alight from the train at this particular place in the performance of his duty.

The court is of opinion that the evidence sustains the verdict, and that the instructions are right. There has been some criticism of the instructions, but it would not be profitable to review them because they are drawn from the recent cases herein referred to, and contain no new principles or departures from established precedents. Every phase of the case that either party was entitled to have sent to the jury was sent to it under proper instructions.

The judgment is affirmed.

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

Opinion delivered June 15, 1908.

1. STATUTE—CONSTRUCTION—MEANING OF WORD "PERMANENTLY."—In the act of May 1, 1905, relating to the protection of persons employed in the construction and repair of railway equipment, which provides that "it shall be unlawful for any railroad company or person owning, controlling or operating any railroad to build, construct or repair railroad equipment, without first erecting and maintaining at every division point a building or shed over the repair tracks, same to be provided with a floor where such construction or repair [work] is *permanently* done, so as to provide that all men *permanently* employed in the construction and repair [of] cars, trucks, and other railroad equipment shall be under shelter during snows, sleet, rain and other inclement weather," the word "permanently" should not be construed literally, but should be taken to mean *constantly* or *regularly*. (Page 521.)
2. CONSTITUTIONAL LAW—EQUALITY OF OPERATION OF STATUTE.—The act of May 1, 1905, in providing that railroad companies shall furnish protection from the weather to their employees engaged in building, constructing or repairing railroad equipment, does not offend against the prohibition of inequality in the Fourteenth Amendment because it does not apply to persons and companies engaged in the building, construction or repair of railroad equipment who do not own or operate any lines of railroad, if it does not appear that there are any such corporations or persons so engaged in this State. (Page 522.)
3. SAME—EXCESSIVE PENALTIES.—The act of May 1, 1905, imposing upon railroad companies or persons owning, controlling or operating any railroad line a penalty of not less than $25 nor more than $100 for each day's failure to comply with its requirements, does not impose unreasonable penalties. (Page 522.)

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

STATEMENT BY THE COURT.

Information was filed in Crawford County against the appellant railroad company, charging it with a misdemeanor in having violated the act of May 1, 1905, entitled "An act to provide for the protection of mechanics, laborers and other persons employed in the construction and repair of railway equipment, and providing a punishment for the violation thereof." The act reads as follows:

"Section 1. It shall be unlawful for any railroad company or corporation, or other persons who own, control or operate any lines of railroad in the State of Arkansas, to build, construct, or repair railroad equipment, without first erecting and maintaining at every division point a building or shed over the repair tracks, same to be provided with a floor where such construction or repair [work] is permanently done, so as to provide that all men permanently employed in the construction and repair [of] cars, trucks and other railroad equipment shall be under shelter during snows, sleet, rain and other inclement weather.

"Section 2. Every corporation, person or persons, manager, superintendent or foreman of any company, corporation, person or persons, who shall fail or refuse to comply with the provisions of this act after the first day of November, 1905, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25) nor more than one hundred dollars ($100); and each and every day that said railroad company, corporation, person or persons, manager, foreman or agent of any such railroad company, corporation, person or persons, shall refuse or fail to comply with the provisions of this act shall constitute a separate and distinct violation thereof."

Section 3 contains the usual repealing clause, and declares the act to be in force from and after the 1st day of November, 1905.

The defendant was found guilty, and has appealed. The evidence adduced at the trial proved these facts: Van Buren is a division point on the line of the appellant railroad, and it maintained repair tracks there which were built in 1903. The number of men employed in repair work varied, but a force was regularly employed, and was about fifteen or twenty at the time the company was charged with the violation of the act and usually averaged about that many. There was no building or shed over the repair tracks, nor a floor where the construction or repair work was done. There was no protection from the weather for employees engaged in this repair work. The repairs usually done were substituting new for broken knuckles, putting in draft timbers, bolsters, end sills and putting roofs on

cars and supplying new trucks and wheels for defective or broken ones. Generally speaking, the work done on these repair tracks was that of putting missing or defective or broken parts on cars which were necessary to enable the car to keep in transit, and component parts of the cars were kept in stock for this purpose, and other light repairs that are necessary to conform to the M. C. B. rules and regulations covering interchange of cars. The repairs done at this point were "running repairs." The shops at Baring Cross, near Little Rock, are where the general and permanent repair and construction work of the company is done for the territory in which Van Buren is situated. Many of the repairs made at these repair tracks are just as permanent as those made at Baring Cross or any other shops. The men engaged in this work were employed by the hour, and were at liberty to check out and cease work whenever the weather was stormy or inclement. The company posted notice to that effect. There are frequently as many as fifty or sixty cars, and sometimes more, on these tracks for repairs at one time.

Lovick P. Miles, for appellant.

1. The act is void as an arbitrary classification of those engaged in the building, construction or repairing of railroad equipment, in violation of the Constitution of Arkansas and of the United States. 14 Amendment, § 1 U. S. Const.; art. 5, § 25, Const. Ark.; 165 U. S. 150; 184 U. S. 555; 108 Mich. 527; 49 Ark. 335; *Id.* 293; *Id.* 167; 75 Ark. 542; 146 U. S. 39; 185 U. S. 325.

2. It is void because of its penalty provision, being of such nature as necessarily to restrain the companies affected to submit rather than contest the act, whereby they are deprived of the legal protection of the laws. 183 U. S. 102.

3. In any event the act does not apply to conditions shown to have existed at Van Buren.

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

Not all class legislation is void, but only that legislation which arbitrarily, capriciously, oppressively or viciously operates upon a class selected and segregated by the law-mak-

ing power without substantial reason. 113 U. S. 27. The Fourteenth Amendment only proposed to prevent an unreasonable, arbitrary and inequitable exercise of the law-making power, —it does not take away from the State its inherent power to provide for the health, morals, safety and comfort of its people. "When a State legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts, under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." 194 U. S. 267. The presumption that a statute is constitutional continues until the attacking party has convinced the court of its invalidity, all doubts being resolved in favor of the statute; and it is not sufficient to show that the statute *may possibly* become unconstitutional, but it must appear that it *is now* void under prevailing conditions, and that it *does* operate unequally. 96 U. S. 521. For similar and analogous cases, see 25 L. R. A. 759; 26 *Id.* 317; 127 U. S. 205; 165 U. S. 1; 81 Ark. 304; 69 Ark. 521; 165 U. S. 268; 194 U. S. 267; 176 U. S. 114; 179 U. S. 89; 142 U. S. 339.

The statute applies to conditions existing at Van Buren. The company does not possess the right to contract away the police power of the State nor to evade it by such means. It can not enter into agreements that in effect nullify the law. 58 Ark. 437; 64 Ark. 83.

The act is not a special, but a general law. 58 Ark. 437.

HILL, C. J., (after stating the facts.) The questions are presented on appeal: Does the act apply to the conditions shown to exist at Van Buren? Does the act violate the Constitution of the United States or the Constitution of Arkansas?

I. The jury found, and correctly, under the facts, that the work done at Van Buren on the repair tracks was such as was contemplated by the act. The use of the word "permanent" in the act is inapt. The first use of it, "where such work is permanently done," means "constantly"; and "constant" is one of its synonyms. The second use of it, "all men permanently employed" in the repair of cars, is equivalent to "all men regularly employed." Taking the act as a whole, and reading it in connection with its title and the evident purpose thereof, its

meaning is reasonably clear. It is the duty of the court to disregard inapt words used and to enforce it according to its intent gathered from the whole act, and not from any particular word or words therein. Even if the literal use of the word "permanent" is accepted, the work done at Van Buren is within it, for repairs which were made there were usually as permanent as those made elsewhere. For instance, as one of the witnesses illustrated, if a sill was put in, it was as permanent as if done at Baring Cross. But this literal interpretation was not intended by the Legislature.

II. Was the act constitutional? The contention of counsel is thus stated: "A brief analysis of the act discloses its fatally arbitrary classification. It applies only to any railroad company or corporation or other persons who own, control or operate any lines of railroad in the State of Arkansas engaged in the building, construction or repair of railroad equipment at every division point. Any other corporation or other person engaged in the building, construction or repair of railroad equipment within this State may avoid the burden imposed by this act and engage in the building, construction or repair of railroad equipment without limit and compel those engaged in this work to pursue their labor without shelter during snow, sleet, rain and other inclement weather."

It is not shown here, as it was in *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, that as a matter of fact the law operated only upon one corporation, although others in like and similar conditions were not affected by it, owing to a classification based entirely upon volume of business. Nor was it shown here, as in *Yick Wo* v. *Hopkins*, 118 U. S. 356, that, although fair on its face, yet the practical operation of the law made it fall unequally upon persons similarly situated.

The contention here is that the act shows upon its face an arbitrary selection of railroad corporations who own, control and operate lines of railroad in the State, engaged in the building, construction or repair of railroad equipment at division points to bear the burden imposed, and excludes by this selection any other persons or corporations who may be engaged in the construction, building or repairing of railroad equipment. It is stated at the bar that there are no such corporations or

persons engaged in such business in this State, and, so far as the court knows from such sources as it is proper for it to take information from, this statement is true. It is asserted, and probably the court could take cognizance of it as a matter of common knowledge, that there are persons and corporations in other States engaged in the building, construction and repair of railroad equipment who do not own or operate any lines of railroad.

The argument is that, under this act, it is possible for a commercial corporation or private individual to engage in this business in Arkansas, and when that happens, which may occur at any time, then the act will fall unequally upon persons similarly situated and engaged in like occupations, and thereby be offensive to the equal protection of the law provision.

The court in *Williams* v. *State,* 85 Ark. 464, 471, said: "The Legislature, in framing this statute, met a condition which existed, and not an imaginary or improbable one." While it is not improbable that some commercial corporation may engage in this business in this State, yet that is a supposed and imaginary objection to the operation of the act, and it was "a condition, not a theory," which called forth this legislation.

The Supreme Court of the United States, in *Ozan Lumber Co.* v. *Union County Bank,* 207 U. S. 251, in referring to a statute of this State which exempted from its terms "merchants and dealers who sell patented things in the usual course of business," said:

"Exceptional and rare cases, not arising out of the sale of patented things in the ordinary way, may be imagined where the general classification separating the merchants and dealers from the rest of the people might be regarded as not sufficiently comprehensive, because in such unforeseen, unusual and exceptional cases the people affected by the statute ought, in strictness, to have been included in the exception. See opinion of circuit court herein, 127 Fed. Rep., *supra.* But we do not think the statute should be condemned on that account. It is because such imaginary and unforeseen cases are so rare and exceptional as to have been overlooked that the general classification ought not to be rendered invalid. In such case there is really no substantial denial of the equal protection of the laws within the meaning of the amendment.

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws."

The difference between the classification which does not cover every supposed case, and yet is valid, and one where the classification applies to a large number of people in like and similar conditions, and is consequently invalid, is well illustrated in the Ozan Lumber Company case and *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

"There is no objection to legislation being confined to a peculiar and well defined class of perils, and it is not necessary that they should be perils which are shared by the public, if they concern the body of citizens engaged in a particular work." *Minn. Iron Co.* v. *Kline,* 199 U. S. 593. Illustrating and applying this principle, see *Holden* v. *Hardy,* 169 U. S. 366; *Missouri Pac. Ry. Co.* v. *Mackey,* 127 U. S. 205; *Minneapolis & St. L. Ry. Co.* v. *Beckwith,* 129 U. S. 26.

The court is unable to find the classification here made offensive to the equality clause of the Constitution as construed by the Supreme Court of the United States, whose decisions are binding on this subject.

It is also contended that the act is void on account of the unreasonable penalties provided for its violation, and the recent case of Ex parte *Young,* decided by the Supreme Court of the United States on March 3d, is cited to sustain it. See 209 U. S. 123. An examination of the act there condemned and the act here will show the entire inapplicability of the doctrine there announced.

The judgment is affirmed.

REIDHAR v. STATE.

Opinion delivered June 15, 1908.

PERJURY—MATERIALITY OF TESTIMONY.—Where, in replevin by a mortgagee to recover mortgaged chattels from the mortgagor, the defense was that the debt had been paid, false testimony of the mortgagor that he never signed the mortgage, not tending to prove a material issue in the case, did not constitute perjury.

Appeal from Arkansas Circuit Court; *Frederick D. Fulkerson,* Judge on Exchange of Circuits; reversed.

J. M. Brice, for appellant.

The evidence is not sufficient to sustain the verdict. The question as to whether or not appellant had executed the mortgage was asked on cross-examination, and was at the time objected to because the legality of the mortgage was not questioned, and it was immaterial. The materiality of the testimony on which perjury is assigned is a question of law for the court, where there is no dispute about the facts sworn to, and not for the jury to pass upon. 32 Ark. 198; 75 S. W. 116.

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

The question as to whether or not appellant had executed the mortgage was at all times material, and the fact that his denial was brought out on cross examination does not lessen the materiality of the testimony.

HART, J. Appellant was indicted at the April term, 1907, of the Arkansas Circuit Court for perjury. He was tried at the November term, 1907, convicted and sentenced to one year's imprisonment. The case is here on appeal.

The indictment charges that on the 24th day of August, 1906, there was pending before J. M. Roscoe, a justice of the peace for Arkansas County, a replevin suit, wherein H. B. Dudley, as surviving partner of Baker & Dudley, sought to recover possession of certain personal property embraced in a mortgage alleged to have been executed by appellant in favor of said firm. That during the trial of said cause it became a material inquiry to ascertain whether or not the appellant had signed his name to said mortgage, or had authorized J. W.

Allen to affix his signature thereto, and that appellant willingly, corruptly and feloniously testified that he had not affixed his signature to said mortgage, and that he had not authorized J. W. Allen to sign his name thereto.

Upon the trial under indictment appellant denied that he had questioned the execution of the mortgage, and contended that his counsel had admitted its validity in the trial in the justice court, and that his defense to the replevin suit had been payment and death of the cattle embraced in the mortgage.

The only question raised by the appeal is the sufficiency of the evidence to support the verdict.

The signature to the mortgage in question appears to have been made by mark, and J. W. Allen was the witness thereto. Roscoe, the justice of the peace before whom the replevin suit was tried, testified that one of the defenses of appellant to that suit was that he never signed the mortgage, but the undisputed evidence is to the effect that he abandoned this defense before any testimony was taken.

The plaintiffs in the suit introduced in evidence the mortgage without objection on the part of appellant. The defendant made his defense without denying the validity of the mortgage. He based his defense on the alleged fact of payment, and that the cattle had died since the execution of the mortgage. He was the last witness to testify in the case, and it was upon cross examination that he testified that he had not signed the mortgage. He objected to testifying about that, and only did so upon being compelled by the court.

Whatever may have been the original intention of appellant, it is evident that, before the evidence had commenced to be taken, he had abandoned his defense of not having executed the mortgage. This is reasonable; for it was inconsistent with his other defenses. Therefore, the fact of the signing of the mortgage by appellant was not a material issue in the trial of the replevin suit, and for this reason the appellant is not guilty of perjury. *Bledsoe* v. *State,* 64 Ark. 474.

Reversed and remanded.

SIMON v. STATE.

Opinion delivered June 15, 1908.

1. STATUTES—AUTHENTICATION.—The Constitution does not prescribe the manner in which a bill shall be authenticated before being presented to the Governor for his approval, or that it shall be authenticated at all. (Page 528.)
2. SAME—EFFECT OF FAILURE TO AUTHENTICATE.—Although the Constitution impowers each house of the General Assembly to fix its rules of procedure, and a joint rule of the two houses provides that each bill should be signed by the Speaker of the House and President of the Senate, the validity of a statute does not depend upon compliance with such rule requiring authentication by the several presiding officers of the two houses. (Page 528.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

E. W. Rector, C. V. Teague and *Greaves & Martin,* for appellant.

At the time of the passage of the act under which appellants were prosecuted, the President of the Senate had become the Governor of the State because of the illness of the Governor, and thereafter continued to perform the duties of a senator and president of the senate. When he assumed the duties of Governor, his power and right to exercise the duties of President of Senate were suspended during such time as he was in the discharge of the duties of Governor. During this time his presiding over the Senate was a usurpation of authority. The act was therefore not passed in the manner required by the Constitution. Art. 4, § § 1 and 2, Const.; 72 Ark. 567; *Id.* 180; Senate Journal, 1907, pp. 118, 119; art. 5, § 17, and art. 6, § 12, Const.; 2 Ark. 282; 10 Ark. 142; 7 Me. 412; 55 N. Y. 74; 23 Nev. 216; 11 Ore. 389; 97 N. Y. 271; 77 N. Y. 503; 2 Hill (N. Y.), 93; Dillon, Mun. Corp. § 164; Brock. 102; 36 Miss. 292; 97 N. Y. 271; Joint Rules, 7, 8, 9, 10, 11 and 12, pp. 114, 115, Journal House Rep. 1907; see also 71 Ark. 531.

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

1. The Senate Journal shows that the bill received on final passage the votes of twenty-seven of the thirty-five senators com-

posing that body, which assured the passage of the bill. Art. 5, § 21, Const. The rule requiring each bill before presentation to the Governor to be verified by the signatures of the presiding officers of the two branches of the Legislature is a rule of procedure of the General Assembly, binding upon them only and not upon the Governor. When the bill was presented to, approved and signed by him, it became a law. Art. 6, § 15, Const.; 71 Ark. 536.

The validity of an act can not be tested upon an agreed statement of facts, 83 Ark. 448; 86 Ark. 69.

McCULLOCH, J. This appeal involves an attack on a statute of this State approved February 27, 1907, making it unlawful to bet on a horse-race. Its validity is questioned on the ground that the bill was not properly certified by the President of the Senate before presentation to the Governor for his approval. The bill originated in the Senate, and was passed by that branch of the Legislature on February 4, 1907, and was returned to the Senate on February 18, 1907, after having been duly passed by the House. On February 11, 1907, Hon. John S. Little certified his inability, by reason of illness, to perform the duties of Governor, and Hon. John I. Moore, the President of the Senate, pursuant to the constitutional mandate, assumed the powers and duties of the office of Governor. Art. 6, § 12, Const. 1874. He attested the bill as President of the Senate, and approved it as Governor.

It is contended that when the President of the Senate assumed to discharge the duties of Governor he ceased to be President of the Senate for the time, that he therefore had no authority to attest the bill; and that for want of proper authentication the bill did not become a law.

There is nothing in the Constitution of the State prescribing the manner in which a bill shall be authenticated before being presented to the Governor, or that it shall be authenticated at all. The Constitution merely provides that "every bill which shall have passed both houses of the General Assembly shall be presented to the Governor; if he approves it, he shall sign it; but if he shall not approve it, he shall return it, with his objections, to the house in which it originated." Art. 6, § 15.

The Constitution does, however, impower each house of

the General Assembly to fix its rules of proceeding, and the joint rules of the Senate and House provided that each bill should be signed by the Speaker of the House of Representatives and President of the Senate after examination by and report of the enrolling committee, and that when so signed it should be delivered to the Governor by the joint committee on enrolled bills. The validity of the statute, when the bill has been duly presented to and approved by the Governor, does not depend upon compliance with the rule requiring authentication by the several presiding officers of the two houses. *Railway Co.* v. *Gill,* 54 Ark. 101.

Authentication, in accordance with the rules, by the presiding officers of the two houses is not conclusive evidence of the passage of a bill or of the contents of the bill as passed, and it may be contradicted or controlled by the entries on the journals of the two houses. *Smithee* v. *Garth,* 33 Ark. 17; *Smithee* v. *Campbell,* 41 Ark. 471.

It would therefore be unreasonable to say that a lack of attestation or an improper attestation of a bill would invalidate the statute.

If the bill was in fact delivered to the Governor and was approved by him, it thereupon became a law without the signature of the President of the Senate. *Moore* v. *Green,* 71 Ark. 527.

It is unnecessary in this case to go into the question as to the effect of the assumption by the President of the Senate of the duties of Governor upon his continued incumbency of the former office. In this instance he, in fact, continued to act as President of the Senate while performing the duties of Governor, and as such President he attested the bills passed by the two houses of the General Assembly. No vacancy in the office of President of the Senate was declared, and no effort was made to supplant the President while he was acting as Governor. He was the *de facto* President of the Senate, and his acts as such in attesting bills were valid, even if it be conceded that his right to act in that capacity was suspended while he discharged the duties of Governor.

In no view of the case is the statute in question open to attack on the grounds named.

Judgment affirmed.

HOWELL v. JACKSON.

Opinion delivered June 15, 1908.

APPEAL—RES JUDICATA—RIGHT OF APPELLEES TO PROSECUTE SECOND APPEAL.—Where, in a suit for certain equitable relief based upon an alleged single wrong, plaintiffs recovered certain relief asked but were denied certain other relief prayed, and defendants prosecuted an appeal from so much of the decree as gave relief against them, the remedy of plaintiffs as to so much of the decree as was unfavorable to them was by taking a cross appeal, for when the decree was either affirmed or reversed by the Supreme Court it became the decree of that court, and the original decree could not be the subject of another appeal.

Appeal from La Fayette Chancery Court; *Emon O. Mahoney,* Chancellor; appeal dismissed.

D. L. King, for appellants.

Warren, Hamiter & Smith, for appellees.

On former appeal, the cause was reversed and remanded with directions to dismiss the complaint. Appellants were before the court then. The dismissal carried all parties out of court. The appeal should be dismissed for failure of appellants to obtain and prosecute a cross appeal when the case was before this court on former appeal. 104 S. W. 550.

BATTLE, J. S. R. Howell, and B. A. Moore instituted a suit against G. W. Jackson, J. E. F. Davis, as road commissioner, N. G. Lewis, as road overseer of Road District No. 5, and T. V. Cabiness, as overseer of Road District No. 1, in La Fayette County, Arkansas, in the La Fayette Chancery Court, to restrain defendants from stopping a certain ditch and constructing a ditch on either side of the public road running south from the old court house in Lewisville, La Fayette County, Arkansas, for the purpose of diverting surface water into Wilson Branch. The complaint is as follows: "The plaintiffs, Mrs. S. R. Howell and B. A. Moore, complaining of the defendants (naming them), state and allege:

"That she is a resident of La Fayette County, Arkansas, owning and residing on lands adjacent to the public road extending north and south through Old or North Lewisville, south of the court house in said county, and, that in case of heavy rainfall a large amount of surface water is collected on that por-

tion of said public road requiring one or more ditches for an outlet in order to properly drain the same from the road and keep the same in repair and protect the owners of adjacent lands from injury.

"That for a long period of time, at least twenty-five years, a ditch and natural drainage has been opened and used connecting with said road at a point in the same, and extending thence through an open street or alley belonging to the public, and lower lands, and thus affording sufficient outlet for said surface water and protection to owners of adjacent lands, and especially this plaintiff.

"That, notwithstanding the long use of said ditch and outlet so long enjoyed by the public, the defendants, G. W. Jackson, J. E. F. Davis as road commissioner and N. G. Lewis and T. C. Cabaniss as road overseer of La Fayette County, as plaintiff is informed and charges, contemplate and intend to close up said ditch and drainway which has so long been used as above stated, and also contemplate and intend to cut a ditch on either side of said public road extending south from the southeast corner of the place where the defendant, G. W. Jackson, lives to a point in front of the lot or parcel of land where Rosana Wilhite now resides immediately south of the home of Mrs. S. R. Howell, and, unless these defendants are enjoined, restrained, will do so, and which, if permitted, will or would cause said surface water to flow over plaintiff Mrs. S. R. Howell's land, and will result in irreparable injury to her.

"Wherefore plaintiff prays that a temporary restraining order be issued against said defendants enjoining and inhibiting them, their agents and employees, from obstructing or filling up said ditch or drainway or cutting said ditches on either side of said public road until the further order of this court in this cause, and upon the final hearing of this cause said injunction be made perpetual, and all and proper relief."

A temporary restraining order was granted in accordance with the prayer of the complaint.

Davis, as commissioner, and Cabaniss and Lewis, as road overseers, answered jointly and said:

"That they had no intention of closing the ditches between defendant, G. W. Jackson, and the Hattie Butler place, which

they understand is the private property of said G. W. Jackson, but that as to the ditches on either side of said road, at the point mentioned in the complaint they had intended to open the ditches; that the ditches are essential to the proper drainage of said road, and that the construction of the ditches will not cause any surface water to flow over and upon plaintiff Mrs. S. R. Howell's land, but will in fact protect her land from the flow of surface water; that there is a public road just north of plaintiff S. R. Howell's place, which intersects the road mentioned in the complaint, and that, unless the ditches be constructed, large volumes of water collected from the road described in the complaint would run down the road so intersecting the road mentioned in the complaint, and cause a great inconvenience to the public traveling over said road.

"Defendant G. W. Jackson answered separately, and stated that he had no intention of cutting either of the ditches on either side of the road as alleged in plaintiff's complaint, and that he had never threatened to so so. But that, as to the ditch mentioned in said complaint running between his place and the Hattie Butler place, he stated that it had never been opened or used by the public; that it is entirely on his land and had been opened and closed by him for his own purposes temporarily, and, that finding it necessary to protect his place from damage, he closed it; and that he can not protect his place from great damage in any other way; that he resides on said public road three hundred yards north of plaintiff, S. R. Howell, and that his land abuts said public road."

The closing of the ditch between the Jackson and Butler places and the cutting ditches on either side of the public road extending south from the old court house in Lewisville beyond the places owned by the plaintiffs, at the place designated in the complaint, would jointly affect plaintiffs by damaging their property. The question for the chancery court to determine was, how far, if at all, should the defendants be enjoined to protect the plaintiffs. For that purpose it was necessary for all of them to be brought before the court.

Upon final hearing, the chancery court dissolved the temporary restraining order to the extent it related to the closing of the ditch between the Jackson and Butler places, and made it

perpetual as to the opening of ditches on either side of the public road at the point designated in the complaint. The defendants, Davis, Lewis and Cabaniss, appealed to this court from so much of the decree as affected them, that is, as to the opening or cutting of ditches. The plaintiffs, or either of them, took no cross appeal. This court reversed so much of the decree as affected the appellants, and remanded the cause with directions to the chancery court to dismiss the complaint for want of equity. *Davis* v. *Howell,* 84 Ark. 29. Thereafter, and three days before the time allowed for appealing expired, plaintiffs appealed to this court from so much of the decree as dissolved the temporary restraining order as to closing the ditch between the Jackson and Butler places. That appeal is now before us.

The relief provided by the statute for appellee is a cross appeal. The statute provides: "The appellee at any time before trial, by an entry upon the records of the Supreme Court, may pray and obtain a cross appeal against the appellant, or any co-appellee in whose favor any question is decided prejudicial to such party." Kirby's Digest, § 1225. The objects of this statute are to avoid delay and the necessity of two appeals and to correct any errors in the judgment appealed from to appellee's prejudice, and to correct errors in interlocutory judgment or order which has influenced or controlled the final judgment to his prejudice. *Beidler* v. *Beidler,* 71 Ark. 318; *Brown* v. *Vancleave,* 86 Ky. 386.

Statutes upon the same subject provide that where a judgment is rendered against several, who are entitled to appeal, and an appeal is taken, all of such persons shall join in the appeal, and one refusing to do so, upon certain proceedings had, shall be forever precluded from bringing another appeal, or writ of error, on the same judgment. Kirby's Digest, § § 1203-1206. In case an appeal is taken the appellee may take a cross appeal. All of which evidences an intent to avoid unnecessary delay, and to confine the relief of the appellee to a cross appeal. *Caston* v. *Caston,* 54 Miss. 512.

In *McCabe* v. *Emerson,* 18 Pa. St. 111, it is said: "In *Henderson* v. *Irwin,* decided at the September term, 1848, at Pittsburgh, not yet reported, it is ruled that when a party omits to sue out a writ of error before the final adjudication of the

Supreme Court on a writ sued out by his adversary, he waives or loses the right to take a writ of error himself. A writ of error will not lie, for that in effect would be to reverse or call in question a final judgment already rendered by this court."

In *Corning* v. *Troy Iron & Nail Factory,* 15 How. (U. S.) 465, Mr. Justice GRIER, speaking for the court, said: "There must be an end to litigation some time. To allow a second appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. It is said by this court in *Martin* v. *Hunter,* (1 Wheat. 355), 'A final judgment of the court is conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its judgment.' * * It follows, therefore, that when a complainant has a decree in his favor, but not to the extent prayed for in his bill, and the respondent appeals, if the complainant desires a more favorable decree, he must enter a cross appeal that when the decree comes before the appellate court he may be heard. For, when the decree is either affirmed or reversed by the appellate court, it becomes the decree of that court, and can not be the subject of another appeal."

In this State the statute provides that the cross appeal shall be prayed for and obtained by an entry upon the record of the Supreme Court, at any time before the cause is submitted for decision. *Beidler* v. *Beidler,* 71 Ark. 318. In this way it provides that all questions arising on appeal shall be disposed of in one judgment or decree.

But appellants have treated the part of the decree from which they have taken an appeal as a separate and independent decree. This was not permissible. Plaintiffs complained of only one wrong. The question was, how should it be remedied or prevented? To decide it, it was necessary to have all the defendants before the court. The making of two orders did not divide the subject-matter of the suit. The making of one made the other, in the estimation of the court, necessary to afford the relief to plaintiffs. One was dependent on the other. If the court committed any error to their prejudice by deciding any question against them, they could have taken a cross appeal, and brought the whole case here as it was before the chancery

court. Having failed to do so before the appeal taken by the defendants was disposed of, they can not do so afterwards.

Appeal dismissed.

GRAHAM v. REMMEL.

Opinion delivered June 15, 1908.

1. INSURANCE—RIGHT TO RECOVER PREMIUM.—Where a policy of life insurance was issued upon the ten-year distribution plan, and a note executed for the premium, and thereafter the policy was cancelled under mistaken belief that the parties had agreed to substitute a five-year distribution policy, upon the negotiations with reference to the latter policy being broken off, the contract as to the first policy was left in force, and the insurer had a right to reissue the policy and recover upon the premium note. (Page 537.)
2. PARTIES—WHO MAY SUE UPON CONTRACT.—A suit upon a note given to an insurance agent for an insurance premium was properly maintained by the agent (a) if the note was made payable to him for the insurance company's benefit or (b) if he had settled with the company for whatever interest it had in the note. (Page 538.)

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

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

1. Appellee is not entitled to recover herein. 69 Ark. 67; Mechem on Agency, § § 760, 766. The fact that appellee took the note in his own name did not change the fact that the dealings were between appellants and the Insurance Company. The principal (Insurance Company), being the real party in interest, was the proper party to sue. 44 Ark. 564; 76 Ark. 558; Mechem on Agency, § 769. The agent's taking a note payable to himself personally will not defeat the principal's right. Cases *supra;* Mechem, Agency, § 772; 119 Mass. 383; 121 N. C. 112. See, also, 5 B. & A. 27; 4 Camp. 195; 15 Ill. App. 50; 18 Me. 361; 27 N. Y. 264. Appellee could not by his own act revive any obligation of the Grahams to take a policy on the ten-year distribution plan, after the policy was cancelled. Nor could he shift around, so

as to make effectual policies previously cancelled by the parties. 5 Ark. 651; 110 Mich. 183; 22 Cyc. 1448, note 60. Until the parties to the insurance entered into a binding contract for insurance, insisted upon by one or the other of the parties thereto, no recovery could be had for any part of the premium due thereon, whether evidenced by note or otherwise. 49 Ark. 320. Until premium is fully paid, company has right to retract proposition to insure. 13 Ark. 461. The note was not for the full amount of the premium. 86 S. W. 814. And under the circumstances there was no payment of premium, even if the note had been for the full amount, within the meaning of the policy. 158 Mass. 132; 44 How. Pr. 385; 107 Fed. 418; 111 Ga. 482; 108 Wis. 213; 59 N. H. 298; 140 N. Y. 79. The fact that appellee held the note for part of the premium on the first policy gave him no right to a premium which accrued on another policy, which was in no manner evidenced by the note. 3 Blatchf. 305; 1 Mart. (N. S.) 219; 16 Minn. 388; 45 Neb. 299; 5 Johns. Ch. 534.

2. The first policy was cancelled, and when cancelled it could not be revived without request of appellants. Cases *supra;* 2 Clement on Fire Ins. 424, and cases cited; 1 Biddle on Insurance, § 377. See also 11 Am. Dig. col. 1288, *et seq.* for cases of rescission for sundry causes, including change of mind. Return of refusal to take the policies, and cancellation thereof by the company, ended the liability of appellants upon their note. 57 S. E. 437. "Cancellation of the policy is effected by its voluntary surrender and delivery to the insurance company, or its agent, without reserve, the premium not having been paid." 2 Clement, Fire Insurance, 410. See also 178 U. S. 327; *Id.* 345; *Id.* 347; *Id.* 351.

3. The insured who deals with the agent of a company is not liable to the agent for his services in procuring the policy. 10 N. Y. Supp. 797. See also 1 Am. & Eng. Enc. of L. (2 Ed.), 1161, 1119, 1136; 82 Me. 547; 110 Mich. 183.

4. Appellee will not be permitted to maintain two inconsistent causes of action. 13 Ark. 448; 32 Ark. 244; Boone, Code Pl. (Pony Series), § 17; Newman, Pl. & Pr. (Code), 246.

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

1. Remmel had in mind the ordinary five-year distribution policy issued by his company, under which distributions of dividends are made only every five years. Graham was thinking of a policy which should accumulate the dividends for five years, and distribute them annually thereafter—a form of policy which the company does not issue. Their minds did not meet on a five-year policy. 94 U. S. 47; 146 U. S. 497; Lawson on Contracts, § 214; 55 N. Y. 265; 3 Hun, 608; 108 Mass. 56. There was, therefore, no new contract that was to be a substitute for the first, and the first was not abrogated. 140 Mass. 210; 125 Mass. 110; 111 N. Y. 390; 18 N. E. 632. See also 18 S. E. 911; 90 Va. 413; 54 Ark. 153.

2. There is no inconsistency. The facts were fully set out, and the jury were left to say upon which of the obligations the appellants were bound, if upon either. Kirby's Digest, § 6079; 5 Enc. Pl. & Pr. 323.

3. It it were true that the contract was with the insurance company, appellee would nevertheless have the right to sue. Kirby's Digest, § 6002.

JOHN FLETCHER, Special Judge. A statement of this case will be found in 76 Ark. 140, where a former judgment in favor of H. L. Remmel was reversed with directions to the trial court to admit evidence which had been rejected and to submit the issues of fact to a jury.

The second trial resulted in a verdict in favor of Remmel upon the first count of the complaint, and Graham Brothers have again appealed.

We discover no reversible error in the instructions given or in refusing requests for others.

The verdict sustains the contention of Remmel that the first contract executed by Graham Brothers to him was binding upon them. But it is contended that this contract was abrogated by a cancellation of the ten-year policy issued in accordance therewith. This was done upon the request of Graham Brothers that they be permitted to exchange the ten-year policy for a policy to be issued upon what is known as the five-year distribution plan, and upon the understanding that such policy would be accepted in lieu of the ten-year policy and paid for by Graham Brothers when delivered. The verdict of the jury establishes

the fact, and it is admitted in argument by counsel, that there was a misunderstanding between the parties as to the nature of this five-year policy, that the minds of the parties never met as to it, and hence that the negotiations relating to the same never culminated in an effectual and binding contract. This left the contract as to the first policy in full force, and the company at the request of Remmel had the right to reissue that policy, which it did by issuing and tendering through Remmel another just like the first. *Utley* v. *Donaldson,* 94 U. S. 47.

It is again contended that Remmel was acting merely as the agent of the company, and had no right of action upon the contract. The contract was made in his name, and the proof shows that he had settled with the company for any interest it had in the contract, and the company had no further interest in it. The suit was properly brought by him and in his name. Kirby's Digest, § § 5999 and 6002.

Affirmed.

HOME INSURANCE COMPANY *v.* NORTH LITTLE ROCK ICE & ELECTRIC COMPANY.

Opinion delivered June 15, 1908.

1. EVIDENCE—CONTENTS OF WRITING—BEST EVIDENCE.—Parol evidence of the contents of a writing was inadmissible as not being the best evidence. (Page 543.)
2. INSURANCE—WHEN AGENT'S KNOWLEDGE NOT IMPUTED TO PRINCIPAL.—Where an insurance agent has a personal interest, known to the assured and not known to the insurer, which might induce him to keep a matter concealed from his principal, and he does keep the matter concealed from the principal, to the latter's prejudice, the assured cannot rely upon the doctrine that the knowledge of the agent in such matter is the knowledge of the principal. (Page 543.)
3. SAME—FAILURE TO OPERATE FACTORY—FORFEITURE.—Where a policy of fire insurance stipulated that "if the subject of insurance be a manufacturing establishment, * * * and it cease to be operated for more than ten consecutive days," the entire policy shall be void, the fact that the building insured had formerly been an ice factory, but had ceased to be operated for more than ten days, did not cause

a forfeiture of the policy if the building was not being used as an ice factory at the time it was insured. (Page 544.)

4. SAME—CONSTRUCTION OF AMBIGUOUS POLICY.—A clause in a policy of fire insurance which refers to the building insured as "occupied as an ice factory" will not be construed to mean that the building would be occupied as an ice factory, as it is capable of meaning that the building had been previously used and operated as an ice factory. (Page 545.)

5. SAME—CONSTRUCTION OF POLICY.—Language in a policy of fire insurance which refers to machinery, engines, and boilers and says: "and all appurtenances necessary to and used in their business" does not imply that the business of the insured is that of manufacturing. (Page 547.)

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The knowledge of the Faucette Brothers will not be imputed to the appellant, their interests being at variance with those of the principal. Mechem on Agency, § 723; 68 N. W. (Mich.) 215; 47 Pac. (Kan.) 511; 14 N. Y. 91; 25 Pac. (Wash.) 331; 72 Miss. 46; 17 So. 83; *Id.* 282; 19 Fed. 14; 4 Berryman's Ins. Dig. 1283. See also 87 Fed. 29; 89 Fed. 619; 60 Am. Rep. 736; 80 Ill. App. 288; 85 Mo. App. 50; 162 Mo. 146; 9 S. W. 182; 22 C. C. A. 378; 52 *Id.* 126; 83 Fed. 48; 110 Fed. 830; 112 Ga. 823; 173 Ill. 414; 98 Ill. App. 399; 62 Pac. 705.

2. The stipulation that the policy should be void "if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days," is without question valid. 27 N. E. 6; 153 Mass. 475; 1 Marvel (Del.) 32; 29 Atl. 1039; 112 Cal. 548; 36 Wash. 520; 77 N. W. 648; 82 N. W. 45; 29 N. W. 443; 121 Fed. 937; 146 Fed. 695; 90 N. Y. 16; 115 N. Y. 287; 116 N. Y. 322; 109 Mich. 699; 67 N. Y. 283; 118 N. Y. 165.

J. W. Blackwood, for appellee.

1. There are no representations, warranties or statements either in the policy or in the evidence showing that the property insured was a manufacturing establishment. The statement that the building was *occupied* as an ice factory was no represen-

tation nor warranty that it would be *operated* as such. Moreover, this clause, being one of numerous printed conditions in the policy prepared by the company, is to be construed most strongly against the insurer. The term "occupied" is not synonymous with "operated." 33 L. R. A. 714; Ostrander on Ins. 412, 419. As to what is a manufacturing establishment and whether it has "ceased to be operated" within the meaning of the policy, see 3 MacArthur 412; 18 Fed. 584; 135 Mass. 262; 23 N. E. 989; 62 S. W. 146; 26 L. R. A. 316; 112 Pa. 149, 159; 28 Atl. 205; 73 Am. St. Rep. 533; 17 N. E. 771; 40 Am. St. Rep. 68; 8 Atl. 424; 11 Atl. 96; 52 Ill. 61; 147 N. Y. 478; 43 Am. Rep. 138; 97 Ga. 44; 52 Ill. 53; 36 Mich. 289.

2. While, as a rule, an agent cannot act in a dual capacity, yet if he is authorized by the insurance company to write the policy, or if he writes it and the company accepts the premiums and ratifies his acts, the company cannot avoid the policy. 76 Ark. 180; 2 Clement's Fire Insurance, (Ed. 1905) Rules 92-96; Ostrander on Ins. 154-159; 31 S. W. 1100; 37 Pac. 909; 4 N. W. 350; 31 S. W. 1103. Faucette Brothers were fully authorized to take this insurance by the general agent, Meyers, who authorized them to place it with appellant, and both the application and their daily reports notified him as general agent of all the facts. In the light of the facts, it is unreasonable to say that Meyers did not know of the ownership of the property. Appellant is chargeable with notice of the facts. Ostrander on Ins. 171; 43 Mich. 116.

3. The law presumes that the company issuing the policy knows the conditions, uses and title of the property insured. 8 How. (U. S.) 248; 2 Pet. 49; 8 *Id.* 582; *Id.* 557; 3 Kent 237; 9 Barn. & Cress. 693; 1 Marsh. on Ins. 450; 10 Pick. 402; 1 Pet. 160; 1 Marshall on Ins. 481, 482; 3 Burr. 1905; 1 Har. & Gill 295; 5 Hill, 192; 6 Cranch, 281; 6 Taunt. 338; 12 La. 134; 18 L. R. A. 139; 46 Mich. 56; 66 Mich. 98; 52 Mich. 131; 53 Mich. 306; 35 Mich. 481; 89 Fed. 936; 62 N. W. 857.

MORRIS M. COHN, Special Judge. The Home Fire Insurance Company, of Fordyce, Ark., was sued in the court below by the appellee for the amount of an award made by two appraisers, under an agreement of submission signed by the parties in interest; the Insurance Company after the award refusing to pay the same,

it having reserved all rights, except the right to contest the amount of sound value and the loss and damage which the appellee had sustained, in the agreement referred to. It placed its ground of refusal solely upon the ground that the appellee had disregarded the terms of the policies under which its claim originated, which provided that "if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days," the entire policy should be void, unless otherwise provided by agreement indorsed thereon or added thereto. It alleged merely that the appellee was a manufacturing establishment, and that it had ceased, during the life of the policies, to be operated for more than ten consecutive days, without indorsement on the policy or in any paper added thereto of permission so to do, and without notification.

A trial was held, resulting in a verdict and judgment for the appellee for the amount of the award, in addition to the amount of the statutory penalty of twelve per cent., and an attorney's fee was fixed by the court, for which judgment was rendered.

The policies all contained the same description of the risk covered thereby, which was given in five separate clauses, as follows:

"$5,000.00—On their one-story brick, composition roof building, including foundations and cold storage vaults, *occupied as an ice factory,* situated No. 'A' '1' Main Street, Block 31, sheet 63, Sanborn's Map of Argenta, Arkansas.

"$13,500.00—On their fixed and movable machinery of every description, including engines, boilers and their connections, settings and their foundations, metal stacks, tanks, pumps, refrigerating and ice machines, filters and condensers, ice cans, piping and pulleys, tools, hose, *and all appurtenances and appliances necessary to and used in their business.* All while contained in the above described building.

"$500.00—On their wagons and buggies.

"$100.00—On their wagon and buggy harness.

"$100.00—On their office furniture and fixtures, all while contained in the above described building."

At the trial J. P. Faucette testified in behalf of the appellee,

and stated that he was its president at the time of the fire and for four or five years before, and at the time the policies were issued; that he was a member of the firm of Faucette Bros., who were the local agents of the Home Insurance Company, at Argenta, Ark., where the risk was located; that his brother, W. C. Faucette, was the other member of that firm; that each of them owned eight thousand dollars of the capital stock of the Ice & Electric Company, the entire capital stock being $32,000; that the said Faucette Bros. were also directors of the said Ice & Electric Company, and he was its general manager at the time the policies were issued; that they, said Faucette Bros., issued the policies in suit, as local agents at Argenta, upon forms furnished in blank to them by G. L. Meyers & Company, general agents of the Insurance Company at Memphis, Tenn.; that these policies were renewals of previous ones issued by the said G. L. Meyers & Company in other companies; that the property of appellee had not been operated as an ice factory since October, 1904; that he knew of this fact at the time the policies were issued; that at that time the stables and places for the wagons and the horse and mules and the office were all in the building described in the policy; that a bookkeeper was in charge of the books; that orders were taken there for coal, and ice was delivered there by wagon and by car load, there being a switch connected with the premises; that, at the time of the closing of the manufacturing, the machinery was in good condition, and he had afterwards personally looked after it; that the factory ever since it had been opened in 1896 had operated only for the six months during the hot season, suspending in October; that there was no change in the use of the building after October 15, 1904, and that they were open for business, as usual, on the day the fire occurred.

G. L. Meyers for the appellant testified: that his firm were the general agents of the Insurance Company for Argenta and elsewhere; that they sometimes sent around inspectors to inspect risks, but he could not remember sending any inspector around to examine the risk in question; that his agent had adjusted a loss in the neighborhood; that he had no notice or knowledge at the time the policies in suit were issued up to the time of the fire that the building and machinery insured were not being

used and operated as an ice factory; that the Faucette Bros. never communicated the fact to his office that these were not being operated as a factory; that he was familiar with the views and customs of insurance companies as to material parts of policies, and that a manufacturing establishment not in operation was not generally considered a good risk.

The witness Meyers also testified that Faucette Bros. had sent reports of all policies issued to G. L. Meyers & Co., general agents, shortly after issuing the same, and had done so as to the policies in suit, setting forth the location and general description, but, upon objection of the appellee's counsel, he was not permitted to state whether there was anything in the report about the plant not being in operation, upon the ground that the written report was the best evidence. We may say, in passing, that we do not think there was any error in this ruling. *Jackson* v. *Son,* 2 Caines Rep. 178.

The appellant asked for a peremptory instruction, and also asked the court to instruct the jury that the insurance here was of a manufacturing establishment, and, if it ceased to be operated as a manufactory without consent for more than ten consecutive days, the policy became void; also that the knowledge of Faucette Bros. that the manufacturing establishment had ceased to be operated would not bind the appellant, if at the time they were officially connected with the appellee, or interested in it. These instructions were refused. And, at appellee's request, the court gave a peremptory instruction to the jury, directing them to find in favor of the appellee.

A question is raised in the brief of counsel for appellee as to whether appellant was not bound by the custom of the appellee, while it was operating an ice factory, to shut down during the cold season. But we do not deem it necessary to decide this.

There are two matters we are called upon to determine:

(1) Was the property insured a manufacturing establishment? (2) was the appellant bound by the knowledge of Faucette Bros?

Taking up the propositions in the reverse order to that stated, we first pass upon the question as to whether the Insurance Company was bound by the knowledge of Faucette Bros. As they were largely interested in the Ice & Electric Company,

as directors and stockholders, and one of them was its manager, at the time the policies were issued and until the date of the fire, and it has not been shown that these facts were known to the Insurance Company, or its general agents, at the time the policies were issued, it would be improper to make their knowledge, thus obtained, binding upon the Insurance Company. Where an agent has a personal interest, known to the assured and not known to the insurer, which might induce him to keep a matter concealed from his principal, and he does keep the matter concealed from the principal, to the prejudice of the latter, the assured cannot rely upon the doctrine that the knowledge of the agent of such matter is the knowledge of the principal. Elliott, Insurance, § 164; Mechem, Agency, § 723; *Zimmerman* v. *Dwelling House Ins. Co.,* 72 Miss. 46; *Wildberger* v. *Hartford F. Ins. Co.,* 72 Miss. 338; *Rockford Ins. Co.* v. *Winfield,* 57 Kans. 576; *Spare* v. *Home Mutual Ins. Co.,* 19 Fed. 14; *Cascade F. & M. Ins. Co.* v. *Journal Pub Co.,* 1 Wash. 452; note to *Potter's Appeal,* 7 Am. State, 279-283. And in stating this conclusion we are not oblivious to the fact that sometimes the same person acts as agent of both parties, either where both parties are put on notice of that fact, and acquiesce therein, or some peculiar provision of statute applies. See *Phoenix Ins. Co.* v. *State,* 76 Ark. 180; Clement, Fire Ins. pp. 504, 505; *Clay* v. *Phoenix Ins. Co.,* 97 Ga. 44. And, if this is material in the final determination of this cause, the failure of the court to notice this principle of law would require a reversal of the cause, even though it may be true that the local agents, that is, Faucette Bros., sent a report of the issuance of the policies to the general agents at Memphis, setting forth the location and general description of the property insured. For the appellant was entitled to the judgment of the jury, under proper instruction, on the point as to whether the report contained enough to inform the general agents of the fact that the Ice & Electric Company had ceased to operate an ice manufacturing establishment before the policies had issued.

The remaining question is whether it was incumbent upon the Ice & Electric Company to operate a manufacturing establishment, and not to cease doing so for any period of more than ten consecutive days? It is urged that the words, "if the subject

of insurance be a manufacturing establishment * * * (and) if it cease to be operated for more than ten consecutive days," were alone sufficient to work a forfeiture in this case. But we think that if, at the time the policies were issued, there was no factory in operation because the manufacturing of ice had been abandoned, the clause could not operate as a cause of forfeiture, and we must seek further for data on which to base the contention that the appellee was obliged to maintain a manufacturing establishment. The words quoted are contained in the printed part of the policies, and these printed parts are prepared by the insurer to meet the varying contigencies of different cases of insurance, as they arise; for different forms of policies are not prepared to meet the requirements of each case as it occurs. The clause might apply appropriately where the application for insurance, if such there was, or where the description of the risk, in apt terms showed the intention to be to insure a manufacturing establishment in operation, and nothing else.

We are therefore remitted to the written part of the policies. Now, the language of the first clause, referring to the building, uses the words: "occupied as an ice factory." Did this require the appellee to operate an ice factory? The language was capable of meaning that the building had been used and operated as an ice factory at one time, but was not necessarily then so operated. If it was intended to make the insurance only apply to the building while it was being operated as an ice factory, it would have been easy to say "occupied and operated as an ice factory and only while so operated." That would have made the language unambiguous. We are not disposed to construe away the terms of policies, neither are we disposed to give the insurer the benefit of the doubt, where the language is capable of different constructions, since insurance contracts are prepared entirely by the insurer or at its instance, and there is not that mutual consultation as to the use of the terms which obtain in ordinary contracts. Neither can we shut our eyes to the fact that policies of fire insurance are in most instances taken by the insured without reading, and that they are usually, as in the present instance, filled with provisions bearing upon all manner of subjects relating to insurance, some of which may not apply to the then existing case; and that the true application

of such provisions is not always clear. We think that the use of the language quoted, especially in view of the apparent indifference of the insurer as to the actual condition and use of the premises until the question of paying the loss arose, indicate that the intention was to insure the property as it was at the date of the policy.

Our conclusions are sustained by the decisions of the Supreme Court of Pennsylvania, in the cases of *Lebanon Mutual Fire Ins. Co.* v. *Erb,* 112 Pa. 149, and *Louch* v. *Orient Ins. Co.,* 176 Pa. 638.

We proceed to examine the cases cited by counsel for appellant. In the case of *Stone* v. *Howard Ins. Co.,* 153 Mass. 475, it was held that at the time the policy issued the property was used and operated as a manufacturing establishment, and was insured as such while it continued in operation, and that afterwards operations were stopped without permission of the insurer. In *Dover Glass Works Company* v. *American Fire Ins. Co.,* 1 Marvel (Del.) 32, the court held that the property insured was a manufactory in operation, and it appeared that during the life of the policy the manufactory ceased to be operated within the meaning of the policy. In *McKenzie* v. *Scottish Union & National Ins. Co.,* 112 Cal. 548, a saw-mill had been shut down, and the policy required certain conditions to be observed under those circumstances by the insured, which it had failed to comply with. In *Brehm Lumber Co.* v. *Svea Ins. Co.,* 36 Wash. 520, the policy insured a saw-mill in operation, and it provided that the mill should not remain idle or shut down for more than thirty days, without permission indorsed thereon, and the insurance company had on one occasion indorsed its permission on the policy, but for the period in question its permission had not been asked nor given. *Cronin* v. *Fire Association of Philadelphia,* 77 N. W. 648, reported again in 82 N. W. 45, was a case in which a creamery, while it continued in operation, had been insured, and operation had ceased for the prohibited period without the permission of the insurance company. In *Day* v. *Mill Owners' Mut. Fire Ins. Co.,* 70 Iowa, 710, the property insured was a flour mill while it was operated, and the mill was shut down for the prohibited period without the permission of the company. In *El Paso Reduction Co.* v. *Hartford Ins. Co.,*

121 Fed. 937, the facts were that at the date of the policy the insured property was being operated as a manufactory, and that it was insured while it should be so operated, and permits had been given to cease to operate the same at certain periods, but not for the period in question. In *Kentucky Vermillion M. & C. Co.* v. *Norwich Union Fire Ins. Co.,* 146 Fed. 695, the written part clearly provided for the continued operation and use of the premises as a manufacturing establishment, the written part setting out particularly what the insured should do in case the plant became idle or was shut down. And these provisions were disregarded. And in *Ranspach* v. *Teutonia Fire Ins. Co.,* 109 Mich. 699, the condition of the policy was that it should become void if the buildings insured "*be* or become vacant, and so remain for ten days," and the premises were left vacant for the prohibited period.

We have reviewed all of the cases which have been called to our attention by counsel for appellant. But we are unable to find anything therein which corresponds with the facts in the present case. All of the cases so cited, except the case last mentioned, went off upon the theory that the facts showed that a mill or manufactory, while continuing to be in operation, was insured, and that there had been a cessation of such operation, without permission or other compliance with the terms of the policy. The Michigan case related to vacancy of the premises, and expressly covered an existing as well as a future vacancy of the premises. But in the case before us we hold that the evidence shows that the property had ceased to be operated or used as a factory long before the policies were issued, and that the language quoted was all the evidence there was to sustain the position that the property insured was to be operated, and only to be insured while being operated, as a factory, and that this was inadequate to establish that contention.

The language of the second clause of the policies, which refers to machinery, engines, and boilers, and says: "and all appurtenances necessary to and used in their business," does not imply that the business of the insured company is that of manufacturing. The courts seem to favor the view, in cases like the present one, that each clause must be construed separately from the other, and that the language of a clause relating to

the building should not be looked to to construe a clause relating to personal property. *Halpin* v. *Ins. Co.,* 120 N. Y. 73; *Phenix Ins. Co.* v. *Holcombe,* 57 Neb. 622, 73 Am. St. 532; Elliott, Insurance, § 251. And see *Sunderlin* v. *Aetna Ins. Co.,* 18 Hun, 522.

It follows that no material error, which calls for a reversal, occurred at the trial in the circuit court, and that the judgment of that court should be affirmed.

And it is so ordered.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY *v.* MYANE.

Opinion delivered June 15, 1908.

1. ELECTRICITY—DUTY OF PERSONS SUSPENDING WIRES IN STREET.—A company or person keeping wires suspended above a street for the transmission of electricity owes to the public the duty of not only keeping such wires out of the street, but also of preventing the escape of electricity through any wires brought in contact with their own and its transmission thereby to any one using the street. (Page 553.)
2. SAME—VALIDITY OF ORDINANCE AS TO HEIGHT OF WIRES.—A city ordinance prescribing the height of the wires of telephone companies and of the street car companies and their relative distances from each other when it is necessary for such wires to cross each other is a valid municipal regulation, and a failure to comply with it is *prima facie* evidence of negligence on part of the delinquent company. (Page 553.)
3. SAME—EFFECT OF CONCURRING NEGLIGENCE.—If it be conceded that the negligence of a telephone company was separate and distinct from that of a street railway company, although they were jointly sued, nevertheless if the negligence of each was an efficient cause of the entire injury, error of the trial court in holding in effect that one of the companies was not liable did not prejudice the other company. (Page 554.)
4. SAME—WHEN NEGLIGENCE QUESTION FOR JURY.—Where the trolley pole of a street car company flew off its wire and broke an overhanging telephone wire which had been in its place for several months, and caused it to fall across the trolley wire, thereby killing plaintiff's horse, it was error to instruct the jury as matter of law that the street car company was not guilty of negligence if it complied with a municipal ordinance fixing the relative heights of street car and telephone

wires, instead of leaving to the jury to say whether, from all the facts and circumstances, the street car company was not guilty of negligence in not protecting its wire. (Page 554.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; reversed in part.

W. J. Terry, for appellant; *John N. Cook,* of counsel.

1. The remark of the court made during the examination of the witness Conway was prejudicial to the appellant Telephone Company. The ordinance does not require the telephone company to put its wires at any given distance above the trolley wire, but that the *electric light* wires shall not run nearer than five feet to the telephone wires. It was also prejudicial in that it was calculated to impress the jury with the belief that the trolley pole could not reach beyond 22.6 feet.

2. It was error to charge the jury in effect that if a wire of the telephone company was broken, had fallen across the trolley wire of the traction company, had become charged with electricity, and the horse came in contact with the wire and was thereby killed, this made out a *prima facie* case of negligence, and the burden devolved on each defendant to show that the same was not caused by any negligence on its part. 54 Ark. 209; 64 Ia. 762; 15 L. R. A. 33, note.

3. It was improper to introduce the ordinance in evidence, since it did not tend to establish any of the allegations of the complaint. But, had the complaint alleged that the telephone company was required by the ordinance to maintain the wires 25 feet above the ground and five feet above the trolley wire, and had the ordinance introduced shown these facts, the court's sixth instruction would still have been fatally defective in declaring as a matter of law that this of itself rendered the telephone company liable. There must be a causal connection between the two, and this fact must be submitted to the jury. Violation of an ordinance is not negligence *per se,* but is, at most, only *prima facie* evidence of negligence. Watson on Damages, § 253; *Id.* § § 254-6; *Id.* § 256, notes 2 and 3; 58 Mich. 437.

Joel D. Conway, for Traction Company.

1. Instructions given fairly submitted the question as to the traction company's knowledge and care. The jury could not have been misled.

2. All the proof shows that the traction company had complied with the ordinances of the city and was strictly in line of its duty when the accident occurred; and there is no proof that it knew of the position of the wire until the third car passed soon after it was broken, when it was immediately cut.

3. The complaint that the traction company might have tied down the trolley pole, etc., was not made an issue by the pleadings.

Scott & Head, for appellee.

1. One cannot be heard to complain of instructions unless all the instructions have not been set out in the abstract. 81 Ark. 327; 83 Ark. 133; *Id.* 356. That the horse came in contact with a broken wire belonging to the telephone company which had been charged with electricity by the traction company was undisputed. Here was a *prima facie* case of negligence on the part of the company maintaining the wire, and the burden was on the defendant to show that it was not negligent. 2 Joyce on Electric Law, § 606; 57 Ark. 429; 61 Ark. 381. And it was undoubtedly negligence on the part of both companies to fail to provide a guard wire to prevent the trolley pole from flying up and striking the wire above, since it was known that it was within reach of the trolley pole. 14 S. W. 863; 19 So. 695.

2. The ordinance was admissible in evidence, even if it had not been mentioned in the pleadings. Watson on Damages, § 277; 43 So. 723.

3. The exclusion of the testimony of witness Conway to the effect that the trolley pole might have been tied down, etc., was prejudicial to the appellee, and appellant cannot complain. 84 Ark. 594.

HART, J. Edward Myane brought suit against the Southwestern Telegraph & Telephone Company and E. J. Spencer, as receiver of the Texarkana Light & Traction Company, in the Miller Circuit Court for $150 damages for the killing of his horse, which is alleged to have been caused by the horse coming in contact with what is called a "live" wire through the negligence of said defendant companies.

The facts are substantially as follows: On the 18th day of October, 1906, in the afternoon, while a car of the defendant

electric company was running along Broad Street in the city of Texarkana, its trolley pole came off of the wire on which it was being carried, flew up and struck a telephone wire stretched above it and across the street. The force of the blow broke the telephone wire, and it fell down over the trolley wire, and extended down over the travelled portion of the street. When the telephone wire came in contact with the trolley wire, it became charged with the electricity carried by the trolley wire and thus became what is termed a "live" wire. After it had laid there about twenty-five minutes, the mother of the plaintiff came along driving his horse to a buggy. She testified that the sun was shining in her face, and that she did not see the wire until the horse became entangled in it. When the horse came in contact with the wire, it stood there, shivered a few times and fell dead.

The horse is admitted to be of the value of one hundred and fifty dollars.

A city ordinance regulating the placing of telephone and electric street car wires in the streets of Texarkana was read in evidence as follows:

"Sec. 3. The poles used by any of said companies shall be of sound timber, and all poles hereafter put up shall not be less than five inches in diameter at the small end, straight, shapely and of uniform size, neatly shaved or planed, and each of said companies shall have on all of its poles painted the initials of its name in large, black letters. The telephone and telegraph wires shall run at a height of not less than twenty-five feet above the grade of a street or alley, except in the suburbs or residence portion of said city, where they shall run at a height of not less than twenty feet above the grade of a street or alley; and the electric light or street car wire shall be placed at a height above the grade of a street or alley not less than twenty feet. Whenever it may be necessary in the construction or operation of such lines and plants for said lines to cross each other, the electric light wire shall not run nearer than five feet to said telegraph and telephone wires, and in all such cases and at all such crossings, the electric light and street car wires shall be placed under the said telegraph and telephone wires, and all such crossings shall be inspected and approved by the city engineer, to whom

notice of such intended crossing shall be given by the company making the same, before it is done; and the telegraph and telephone wires shall not be nearer each other than three feet."

George Conway, a witness for the defendant street car company, testified as follows: That he remembered the time Myane's horse was killed. That he received no notice of the bad condition of any of the wires prior to the killing of the horse. That he went down with Col. Spencer after the accident to make some measurements, and saw where the wire had been broken. That it was broken on the north side of the street. When asked how high the insulator to which the telephone wire was attached was from the ground, he answered: "To the best of my knowledge, it was twenty-seven feet or about that." He stated that the wire was attached to Crowder's hide house on the opposite side of the street, a distance of about 124.4 feet, 14 feet above the side walk. That the distance from the hide house to the center of the street car track was 70.4 feet; from the center of the track back to the pole on the north side was 54 feet. That a wire could not have been stretched across there without having some sag in it. That, to the best of his recollection, the telephone wire was a little over 22 feet from the ground at the point where it crossed the trolley wire. That he measured the height of the car and the trolley pole, and that, when standing perpendicularly, the trolley pole would reach 22.6 feet above the ground. That if the telephone wire had been stretched over 22.6 feet above the grade of the street, the trolley pole could not have touched it. That the trolley wire on Broad Street at the place where the accident occurred was 18 feet above the ground. The accident occurred in the business section of Texarkana. The telephone wire had been put up there three, four or five months prior to the accident, and crossed the street at the place where the accident occurred.

There was a jury trial; a verdict of $150 was returned against the telephone company. Whereupon the court entered judgment against the telephone company for that amount, and discharged the street car company from liability. The telephone company has appealed to this court, and Edward Myane has taken a cross appeal from the judgment in favor of the street car company.

In *City Electric Street Railway Co.* v. *Conery,* 61 Ark. 381, speaking of the duties of persons using a street for suspending wires charged with electricity, this court said:

"Subjecting the dangerous elements of electricity to their control and using it for their own purposes by means of wires suspended over the streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it, to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the preservation of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to anyone using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended."

It is manifest that in passing the ordinance prescribing the height of the wires of the telephone company and of the street railway company and their relative distance from each other when it was necessary for their wires to cross each other, the council recognized the danger to the public when these wires came in contact, and had in view the protection of persons who had a right to travel upon the streets. The passage of the ordinance was a municipal regulation, authorized by the laws of the State, and has the force of a statute within the limits of the city. It was the duty of the defendant companies to comply with the ordinance, and a failure to do so is *prima facie* evidence of negligence on their part. These principles are established by the following authorities: *Hayes* v. *Michigan Central Rd. Co.,* 111 U. S. 228; *Mitchell* v. *Raleigh Electric Co.,* 85 Am. St. Rep. (N. C.), 735; *Brush Electric Light & Power Co.,* v. *Lefevre,* 55 S. W. (Tex. Civ. App.), 396; *Knowlton* v. *Des Moines Edison Light Co.,* 90 N. W. (Iowa), 818; *Clements* v. *La. Electric Light Co.,* 44 La. Ann. 692.

We have read and considered the instructions given by the court, and, without setting them out, we may say that, when taken as a whole and tested by the principles of law announced above, there is no reversible error in them.

In examining the witness George Conway, the following appears in the record:

"Q. It (referring to the trolley pole) will go straight up the moment it escapes from the trolley wire anyway? A. Yes, sir. The court: What is the purpose of that testimony? I think it is immaterial. They had a right to operate that thing in the most practical way, and if the ordinance requires that the Telephone Company put its wires a certain distance above its trolley wire, and that the length of the car and the height of the pole would not reach that requirement, I can not see how it could be negligence on the part of the Street Car Company to allow it to fly up there."

The plaintiff and the defendant telephone company excepted to the ruling of the court.

Appellant was not prejudiced by the remarks of the court; for, as stated in the case of *San Marcos Electric Light & Power Co.* v. *Compton,* 107 S. W. (Tex Civ. App.), 1151: "If it be conceded that the negligence of each defendant was separate and distinct, and that they were not joint tort feasors, nevertherless, as the negligence of each was an efficient cause of the entire injury, each must be held liable to the full extent of the injury."

Counsel for appellant allege as error the remark of the court, in presence of the jury, that one of the witnesses for appellant, who was testifying about the height of the telephone wire at the place where the accident occurred, did not know anything about it. The record shows that the witness had not measured the distance, and was only testifying from his judgment after having viewed it. The witnesses for the defendant street railway company testified about the distance based upon actual measurement. This testimony was not attempted to be contradicted by the plaintiff in the case, and the record shows that the purpose of the testimony on this point by the telephone company was not to contradict it. We are of the opinion that no prejudice resulted to the telephone company from the remarks of the court.

We are, also, of the opinion that the averment in the complaint was sufficient to permit the introduction of the ordinance. *Brush Electric Light & Power Co.* v. *Lefevre, supra.*

The remarks of the court made in the presence of the jury

during the examination of the witness George Conway were prejudicial to the rights of Edward Myane, plaintiff below and now cross-appellant. The court practically told the jury that the defendant owed no duty to the public except that provided by the ordinance, and that it was not guilty of negligence if it complied with the ordinance. Obviously, it knew that its trolley pole would at times fly off of its trolley wire. It also knew, or ought to have known, that the telephone wire was not a sufficient distance above the ground to prevent the trolley pole from striking it in case of flying off its own wire, for the telephone wire had been only at the height it was at the time of the accident for several months prior thereto. The court in effect told the jury as a matter of law that the street car company was not guilty of negligence if it complied with the ordinance, when it should have left to the jury to say whether, from all the facts and circumstances in the case, the street car company was not guilty of negligence in not protecting its wire. We think this is established by the authorities cited *supra*.

For this error the judgment in favor of the Texarkana Light & Traction Company is reversed, and the cause as to it remanded for a new trial. The judgment against the Southwestern Telegraph and Telephone Company is affirmed.

BRUCE *v.* MATLOCK.

Opinion delivered June 15, 1908.

1. STATE OFFICER—TERM OF OFFICE—BOARD OF CHARITIES.—The act of April 5, 1893, provided that the Governor shall biennially appoint a board of trustees for the charitable institutions consisting of six members. seven, and provided that "the seventh member of said board shall be appointed upon the passage of this act. and his term of office shall expire simultaneously with that of the other six." The act of May 14, 1907, authorized the board of trustees to "make contracts for the purchase of fuel for twelve months, provided this period shall not extend beyond the tenure of the office of the board." *Held,* that the trustees of the charitable institutions hold office for a period of two years. (Page 558.)

2. SAME—POWER OF GOVERNOR TO REMOVE.—The power to remove a State officer appointed for a fixed term of office does not inhere in the Governor by reason of his having the power to appoint him. (Page 560.)

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

Campbell & Stevenson, for appellants; *Brooks, Hays & Martin, Marsh & Flenniken,* and *M. P. Huddleston,* of counsel.

1. In the absence of constitutional or legislative restrictions, the power of appointment of an officer carries with it the power of removal, where no definite term of office is fixed. 39 Ark. 211; 13 Pet. 230; 167 U. S. 324; 103 U. S. 232; 189 U. S. 311, 315; 81 Pac. 847; 73 Pac. 496; Throop, Pub. Off. § 304; 26 Mo. App. 673; 88 Mo. 144; 20 Wend. 595; 92 N. Y. 191; 3 S. & R, 145; 54 Pa. St. 233; 6 Coldw. 486; 7 Cal. 97; 25 La. Ann. 119; 71 Conn. 112.

2. There are no constitutional or statutory restrictions upon the power of removal, and no term of office is fixed for the trustees of the State charitable institutions. The act of 1905 (Acts 1905 p. 135-6) does not fix a term of office because (a) it omits the provisions of the previous statutes conferring a definite term, and repeals such provisions. Compare Gantt's Dig. § § 327-357, 358-359, 302-326; Mansfield's Dig. § § 6082-3, 2479, 4529; Sandels & Hill's Dig. § 3928; Kirby's Dig. § § 4129-4133 with present act; 1 Lewis' Suth. Stat. Const. § 270; 82 Ark. 302; 40 N. J. L. 257; 6 B. Mon. 146; (b) The word "biennial" is a word of limitation on the appointing power, and not of grant to the appointee. Cases *supra;* 47 W. Va. 343; 68 N. Y. 479; 68 N. Y. 628.

(c) The phrase "term of office" as used in the proviso is limited to the scope of the enacting clause, and does not imply a technical term of office or fixed tenure. 61 Ark. 502; 73 Ark. 600; 70 Ark. 458; 74 Ark. 534; 46 Ark. 306; 74 Ark. 303; 72 Md. 481.

The power of removal is absolute, and the Governor is the sole judge of the causes therefor. 39 Ark. 215; Throop, Pub. Off. § 354 and cases cited; *Id.* § 361: *Id.* § 394; 6 Current Law, 876; 32 Pa. St. 478; 13 Pet. 230; 182 U. S. 419.

Chas. Jacobson, for appellees; *E. L. Matlock,* of counsel.

1. The power of removal is incident to the power of appointment only when the tenure is not fixed by law, and where the office is held at the pleasure of the appointing power. 36 N. J. L. 101; 43 Pa. St. 375; 19 La. Ann. 210; 1 Cranch, 50; 36 Tex. 546. There is no right of removal, even where the tenure is during good behavior. 3 S. & R. (Pa.) 145.

Patton v. *Vaughan,* 39 Ark. 211, does not apply because (1) the oil inspector was not an officer but an employee, and his appointment as inspector was a mere police regulation; (2) no tenure of office was provided, and the statute limited his right to serve *until removed for misconduct, negligence or incompetency;* (3) the act clearly contemplated removal, at least for the causes named; (4) it was directory merely, and not mandatory upon the county judge to appoint an inspector, and (5) since it permitted a removal for cause, it was held as a corollary that the county judge, the appointing power, was the sole judge of the cause. The language used in that case does not apply to the Governor of the State. 19 La. Ann. 210. If the Governor has the power of removal, it must be derived from the Constitution. 36 N. J. L. 101. He has no power to appoint any one to office unless such power is expressly conferred upon him. 66 Cal. 655. He has no inherent power to fill vacancies. 110 Cal. 447; Wyman's Administrative Law, § 48, p. 117. That the power to remove from office is an executive funtion, and is inherent in and belongs *ex officio* to the executive, is contrary to the Constitution and to the principles of all constitutional government. 8 Am. & Eng. Enc. of L. 1402; Cooley, on Const. Lim. 114-115. See also 36 Mich. 416; Mechem on Pub. Off. 290, 454; Throop, Pub. Off. § 362 and case cited; 36 Tex. 546; 5 Rob. 367; 52 Kan. 750; 3 N. D. 433.

2. The term "biennial" in the proviso fixes a tenure of office. 15 Hun (N. Y.) 204; 42 Mo. 506. The best evidence of legislative intent is the use of the word by that body as also by the framers of the Constitution. Art. 3, § 8, Const.; art. 3, § 16, *Id.* Kirby's Dig. § § 4185, 4241, 4245. See further as to legislative intent, Acts 1905, p. 135, § 1; Acts 1907, p. 729, § 3.

3. By failing to provide for removals, it will be construed that the Legislature did not intend that the power of removal

should be exercised, unless for cause and a notice and an opportunity to be heard. 16 L. R. A. 413.

4. The policy of our laws makes the judiciary rather than the executive the medium through which removal from office should be effected. Art. 7, § 7, Const.; art. 10, § 2, art. 15, § § 1 and 3, Const.; Kirby's Dig., § 2450; *Id.* § 535; *Id.* § 7006; *Id.* § 7992; *Id.* § 7995.

5. There was no vacancy. A vacancy in office is never created by the appointment of a successor to the incumbent, except in the cases where there is no tenure of office, and the incumbent holds at the pleasure of the appointing power. 25 Ohio St. 588; 2 Hill, 103; 41 Md. 152; 19 Am. & Eng. Enc. of L. 432; 3 Ill. 79; 106 Ind. 203; 21 L. R. A. 545. An office is not vacant where there is a *de facto* incumbent. 44 Conn. 318. If a vacancy did exist, had the Governor a right to fill it? Art. 6, § 23, Const.; 72 Ark. 99. See also 36 Mich. 416; 32 N. Y. 355; Mechem on Pub. Off. § § 447-456; 21 L. R. A. 529; 22 La. Ann. 121; 30 Kan. 661.

McCULLOUGH, J. This case involves a determination of the question whether or not the Governor of the State has the power to remove at will members of the board of trustees of the State Charitable Institutions. We hold that the members of said board are by appointment put in office for a fixed term, and that the Governor can not remove them.

The Constitution contains no specific provision concerning the creation of a board of trustees for the control and management of the charitable institutions of the State. Prior to the year 1893 the State institutions for the blind, the deaf mutes and the insane were under the control of separate boards, the statute regulating the appointment of members of each of these boards providing that the Governor should make the appointment biennially on the second Wednesday after the organization of the General Assembly, and that the appointees should hold office for a term of two years.

The General Assembly, by an act which was approved on April 5, 1893, abolished these separate boards and provided that "the Governor shall biennially appoint one board of trustees for the school for the blind, the deaf mute institute, the insane asylum, to be composed of six members, one from each congress-

ional district, who shall have charge of said institutions, and discharge all duties now required by law."

The amendatory act of February 23, 1905, follows the language of the former statute just quoted except that the number of members of the board is increased from six to seven, and contains a proviso that "the seventh member of said board shall be appointed upon the passage of this act, and his term of office shall expire simultaneously with that of the other six."

It is therefore seen that the Legislature long ago adopted the policy of giving to the members of these boards a fixed tenure of incumbency. Doubtless, this policy was inspired by a desire to secure the independent action of the members of the boards, free from any sort of dictation or control.

It is true that the statute consolidating the boards, or rather placing the institutions under control of one board, did not in express terms provide for a definite tenure, but says that the Governor shall appoint the members biennially. This surely does not manifest a legislative disposition to depart from the previously adopted policy and create a board composed of members removable at the will and pleasure of the executive. And certainly the language of the act of April 8, 1905, must be taken as a legislative construction of the former statute to mean a fixed term of two years for the members of the board. If not, why say that "the term of office" of the seventh member "shall expire simultaneously with that of the other six?" The other six must have been thought to have a definite term of office and a definite date for the expiration of the term.

Another legislative construction to the same effect is found in the act of May 14, 1907, authorizing the board of trustees to "make contracts for the purchase of fuel for twelve months, provided, this period shall not extend beyond the tenure of the office of the board."

The word "biennial" means once in two years. We do not say that the use of the word under all circumstanes necessarily imposes a limitation upon the space of time which must intervene. It may, under some circumstances, be held to mean that the thing in question shall occur as often as once in two years. But we think that the use of the word in this instance clearly carries with it the meaning that a term of two years is fixed, and

that appointments to membership on the board shall be made every two years conformably to the expiration of the term. The fixing of a time for making appointments necessarily implies a fixed tenure for the appointee, for if the executive can remove him and appoint another at will the command to appoint biennially is superfluous. *Buffalo* v. *Mackay,* 15 Hun, 204; *Bryan* v. *Patrick,* 124 N. C. 651.

Counsel for appellants rely upon *People* v. *Kilbourn,* 68 N. Y. 479, as sustaining their contention, but such is not the effect of that decision. The court in that case held that the provision for a biennial appointment of an officer did not confer the right upon the appointee to hold the office for two years from the date of the appointment, regardless of the time the appointment should be made. The case involved the construction of a charter provision of a city authorizing the mayor to appoint certain officers biennially, and the court held that this provision related (quoting from the syllabi) "to the time when the appointments shall be made, and was not intended to fix the term of office of the appointee without regard to the time of appointment," and that "where a street commissioner was appointed just prior to the expiration of the term of office of the then mayor, and a new appointment was made by his successor, that the latter appointee was entitled to the office." This doctrine meets with our entire approval, and is not inconsistent with the conclusion reached in the present case.

The term begins, not necessarily from the date of appointment, but from the time fixed by the lawmakers for it to begin. It began with the approval of the act of April 5, 1893, creating the new board, and each succeeding term began biennially thereafter on the same day of the year.

The acts of February 23, 1905, and May 14, 1907, did not undertake to change the date of commencement of the term, and did not have that effect.

The members of the board having been appointed for a fixed term, and as the statute does not confer upon the governor the power of removal, the power does not exist. The right to remove public officers does not inhere in the chief executive of the State. Throop on Pub. Off. § 362; *State* v. *Pritchard,* 36 N. J. L. 101. Under our system of government the executive en-

joys no prerogative in the sense in which that word is usually employed, but he exercises only such powers as are conferred upon him by the Constitution and statutes of the State. These do not authorize him to remove members of the board of public charities. The Governor has nothing to do with the management and control of the charitable institutions of the State, further than to appoint the members of the board biennially.

The Constitution contains an express command to the Legislature to provide by law for the support of institutions for the education of the deaf mutes and for the blind, and for the treatment of the insane. Pursuant to this authority, the lawmakers have placed the control and management of these institutions in a board of trustees composed of seven members, to be presided over by the State Treasurer as *ex officio* member of the board. The Governor is authorized to appoint these members, and there his power in this respect ends. If the Legislature had intended to confer greater or additional powers, it would have been so expressed in the statutes.

Affirmed.

NORTH STATE FIRE INSURANCE COMPANY *v.* DILLARD.

Opinion delivered June 22, 1908.

1. APPEAL—EFFECT OF PROSECUTING SECOND APPEAL.—Where an appeal, with supersedeas, was obtained in the circuit court, but the appeal was not perfected by filing an authenticated copy of the record in the office of the clerk of the Supreme Court within ninety days as required by Kirby's Digest, § 1194, the appellant could dismiss the appeal and take another appeal within the year prescribed by the statute (*Id.* § 1199); and, while the better practice is to dismiss the first appeal before taking the second, the effect of procuring the second appeal is a voluntary dismissal of the first. (Page 562.)
2. SAME—EFFECT OF DISMISSAL UPON SUPERSEDEAS.—Where an appeal with supersedeas was taken, and dismissed, and a second appeal prosecuted, the supersedeas ceased to supersede the judgment. (Page 562.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; motion to affirm denied.

Appellant, pro se.

C. V. Teague, for appellee.

PER CURIAM. On the 23d of January, 1908, A. J. Dillard recovered judgment in the Garland Circuit Court against the North State Fire Insurance Company in the sum of $2,250, penalty and attorney's fees. The insurance company filed a motion for new trial, which was overruled on the 30th day of January, and appeal was thereon prayed to the Supreme Court, which was granted, and sixty days given in which to file bill of exceptions. On the 28th day of March, 1908, the bill of exceptions was filed.

On the 11th day of April, 1908, a supersedeas bond was filed in the circuit court. On the 22d day of May, 1908, Dillard gave notice that on the first of June he would move this court for an affirmance of the judgment pursuant to Rule 7 for failure to file authenticated copy of record within 90 days as prescribed by section 1194, Kirby's Digest; and on said day he filed herein a certified transcript of the judgment appealed from, the order granting the appeal, and the supersedeas bond, and his motion to affirm the judgment, showing service of said motion more than ten days before the first of June. The insurance company filed a response thereto, in which it sought to excuse its delay, and showed that it had, on the 27th of May, five days after the service of said notice upon it, presented to the clerk of this court an authenticated copy of the record and prayed an appeal from him, which was granted on said day. The question is, whether the appellee is entitled to have the judgment affirmed under Rule 7, under the facts above stated.

In *Robinson* v. *Ark. Loan & Trust Co.,* 72 Ark. 475, it was held that where an appeal was taken but not perfected, the appellant could dismiss the appeal and take another within the year prescribed by the statute, and this was true where the judgment was superseded as well as where it was not. It was further held that it was better practice to dismiss the appeal before the second was taken; but in effect the granting of the second appeal was a voluntary dismissal of the first. This case was followed in *Damon* v. *Hammonds,* 73 Ark. 608.

Under this construction of the statute, the action of the appellant in filing his authenticated copy of the record and ob-

taining the second appeal from the clerk was a dismissal of the first appeal. And when it was dismissed, necessarily the supersedeas bond ceased to be a supersedeas to the judgment, and the appellee was at once at liberty to proceed to have execution on the judgment. But, the appeal to which this motion was directed having ceased to exist, then there was nothing to dismiss under section 1194, which is the basis of this proceeding. Rule 7 establishes the practice for the dismissal of an appeal where the record is not filed as required by this section, and further provides that the judgment may be affirmed. Where the judgment is affirmed, there can be no second appeal. It is only where the appeal has been dismissed that the second appeal may be granted within the year.

Sec. 1229, Kirby's Digest, and Rule 2 establishing the practice thereunder, provide for the affirmance of a judgment where the appeal has been taken for delay, and it is doubtful whether an affirmance as a delay case could be sustained under Rule 7, but authority for the affirmance may be found in the right of the court to determine when causes shall be disposed of and when they shall be heard. But it is questionable whether it can be sustained where the appeal has been dismissed before the motion is reached, as under the statute the appellant has the right to a second appeal within the year; and if he exercises this right before the judgment is affirmed, then the court should not, if it can, cut off that statutory right.

Owing to this conflict with the statute, Rule 7 has not generally been enforced according to its terms; but the practice has grown up, ever since it was adopted, of permitting the appellant, if he comes in before the disposal of the motion and in good faith offers to pay the costs, to prosecute his appeal. This practice is apparently in conflict with the rule, and it may be misleading where the practice is not understood; and, in order that it may be made clear, the court has this day amended Rule 7 so as to permit the first appeal to be prosecuted if the costs incident to it and the motion are paid by the appellant, and if he in good faith then offers to prosecute his appeal, and files his transcript pursuant to the statute, and further amended the rule so that an affirmance can not be taken where a second appeal has been granted before the motion is submitted.

The motion to affirm is denied.

ARKANSAS & LOUISIANA RAILWAY COMPANY v. LUCK.

Opinion delivered June 22, 1908.

APPEAL—COSTS—LIABILITY OF NEXT FRIEND.—One who prosecutes an action at law as next friend of an infant plaintiff becomes liable for the costs of the appeal, under Kirby's Digest, § 6022, if a judgment in favor of such infant is reversed on appeal.

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

Mehaffy & Williams, for appellant.

Sain & Sain, and *T. D. Crawford,* for appellees.

PER CURIAM. B. D. Luck brought suit in his own behalf and as next friend of Rose Lee Custer, Robert Custer and Mamie Custer. The suit was to recover damages from the railroad company, which operates a line of telegraph, for failure to deliver a telegram, through which failure they suffered mental anguish. B. D. Luck recovered $50 for himself and $50 as next friend for each of the parties named in the complaint, and the railway company appealed.

It is stipulated here that the judgment shall be affirmed as to B. D. Luck and "reversed and dismissed as to the three minors, to-wit: Rose Lee Custer, Bob Custer and Mamie Custer, and the question of adjudicating the costs of this court shall be left to the court." The evidence does not show that these three parties are minors, but shows that one is, one is not, and probably the other was when the suit was brought, but she was not when the judgment was taken. But there was no change in the complaint, and the cause proceeded to judgment as if all of the plaintiffs except B. D. Luck were minors.

This stipulation amounts to a confession of error as to the judgment recovered in behalf of said three parties other than B. D. Luck, and the sole question is, how shall the judgment of this court be as to the costs?

B. D. Luck is entitled to recover his costs as plaintiff against the railroad company; but the railroad company is entitled to recover its costs against B. D. Luck as next friend under section 6022 of Kirby's Digest; for unquestionably one of these parties was a minor, and that would render him liable for the costs; and as there are no separable costs incurred on this appeal, the

question of apportioning costs between him and the other appellees does not arise. The railroad company is also entitled to a judgment against Mamie Custer, who the evidence shows was an adult when the suit was brought, and against Rose Lee Custer, who the evidence shows was an adult before the judgment was rendered.

The costs of the circuit court are not involved in this matter, and the costs of this court will be adjudged in favor of B. D. Luck on his appeal, and against B. D. Luck because of said statute and against Mamie Custer and Rose Lee Custer as adults prosecuting an appeal which is reversed.

ROAD IMPROVEMENT DISTRICT NO. 1 *v.* GLOVER.

Opinion delivered June 22, 1908.

APPEAL—ADVANCEMENT OF CAUSE ON ACCOUNT OF PUBLIC INTEREST.—A suit to test the constitutionality of the road improvement act of March 4, 1907, will not be advanced as involving the public interest if there is no showing that any person has an interest in the settlement of the questions involved therein, except those affected by the particular district involved, which is a small local district.

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; motion to advance denied.

J. C. Marshall, for appellant.

Ratcliffe, Fletcher & Ratcliffe, for appellee.

PER CURIAM. E. D. Glover filed a complaint in the Pulaski Chancery Court, attacking the validity of proceedings under the road improvement act passed by the General Assembly of 1907, and also attacking the constitutionality of said act. The court found that the proceedings were void, and disposed of the case upon that ground, but did not determine the constitutionality of the act, as the decision of that question was not called for by the facts of the case. See *Road Imp. Dist. No. 1* v. *Glover, ante* p. 231.

After the affirmance of the decree of the Pulaski Chancery Court, the board of improvement proceeded to act under their

organization in conformity to the principles announced by the court in said decision, and were again met by an injunction suit by Glover, in this instance attacking only the constitutionality of the act. That complaint was met by a demurrer, which was sustained, and the case is again brought here on appeal, and a motion is filed to advance the cause on the docket as a matter of public interest.

Mr. Elliott says: "It is quite clear that the court may rightfully advance the hearing of a case when 'good cause is shown,' but it is not so clear what constitutes good cause. Every case advanced displaces others. The advancement of an appeal is a preference of one case above others. Naturally and justly, litigants have a right to a disposal of their cases in the order of their filing. It can seldom be justly said that one case involving strictly private interests should be advanced over others involving like interests. * * * Generally, however, it is only cases involving important public interests that are entitled to advancement. The Supreme Court of the United States enforces this doctrine with strictness." Elliott on Appellate Procedure, § 463.

The above statement of the law is the correct rule for appellate courts to apply, and has generally been the rule governing this court. But, owing to the fact that the business of the court accumulated so that it was about three years before cases were disposed of in their regular turn, the court, from the necessities of the situation, advanced many cases which did not strictly fall within the above rule. There have been a great many applications to the court for the advancement of cases, most of which have been granted, and the result has been that the regular order of procedure has been much displaced by the consideration given by the court to these advanced cases. The condition of the business of the court does not now call for the relaxation of the proper rule on the subject. In the ordinary routine of business, a case is disposed of within six months of its filing here, the court for the past two years having issued and disposed of two dockets per year.

There is no showing here that any person, except those affected by this particular district, which is a small local district, has any interest in the settlement of the questions involved here-

in. In one sense, an attack upon any act of the General Assembly is an important public question, as the whole State may be interested in the act. But where there is a showing of interest only by a small community affected like the one here, the case does not fall within the principles governing the advancement of causes, and it would be unjust to litigants who now have their cases here for submission to displace their cases in order that this case may be heard out of its regular turn. The motion is therefore denied.

STATE v. BLACK.

Opinion delivered July 22, 1908.

1. APPEAL BY STATE IN CRIMINAL CASES—EFFECT.—Under Kirby's Digest, § 2618, providing that "a judgment on a verdict of acquittal of an offense, the punishment of which is imprisonment, shall not be reversed," there can be no reversal in any criminal case in which the prosecuting attorney has prayed an appeal from a judgment of acquittal if the crime may be punished by imprisonment. (Page 569.)
2. LIQUORS—"BLIND TIGER ACT"—CONSTRUCTION.—Kirby's Digest, § § 5140-5148, known as the "Blind Tiger Act," forbids not only the sale or giving away of intoxicating liquors, but also the maintaining of places where such liquors are either sold or given away. (Page 570.)

Appeal from Randolph Circuit Court; *John W. Meeks*, judge; court adjudged to have erred.

STATEMENT BY THE COURT.

Marvin Black and Frank E. Adair were convicted before a justice of the peace in Randolph County upon information filed by the deputy prosecuting attorney charging them with maintaining a place for selling and giving away liquor without license, contrary to section 5140, Kirby's Digest, and fined $200 each Upon appeal to the circuit court the following facts were established:

That the defendants conducted a cold storage business in a building which had formerly been occupied by a saloon in the town of Pocahontas, and intoxicating liquors as well as other

articles were kept in cold storage. This plan was pursued: Their customers or patrons would purchase and have delivered to them certain quantities of beer, to be kept in storage, for which they paid at the rate of five cents per bottle. This beer was ordinary malt beer, an intoxicant. The defendants gave their customers cards containing as many stars as they had bottles of beer in storage, and one of these stars would be punched for each bottle taken out by the customer, who would frequent the place with friends and have bottles of beer served to himself and friends, and it was usually drunk there on the premises. Liquor was also stored there, and the owner thereof would call with friends and give them drinks from his bottle or jug. Large quantities of beer and liquor were delivered at this cold storage warehouse. It came addressed to the owner, sometimes in care of defendants, and in some instances was hauled there at the direction of the defendants and in other instances at the direction of the parties to whom it was addressed.

The court refused instructions substantially in the language of sections 5140 and 5141 of Kirby's Digest, as amended by the act of 1907, and gave instructions 1, 2 and 4 over the objections of the State, which instructions are as follows:

"1. You are instructed that in this case the defendants are not charged with the sale of liquors in violation of the general statute prohibiting the sale of intoxicating liquors without license, and the State is not asking a conviction of the defendant of the offense of selling liquor without license. They are charged with violating a special statute by operating a Blind Tiger in the town of Pocahontas. If you find from the testimony beyond a reasonable doubt that the defendants did, within the incorporate limits of the town of Pocahontas, in Randolph County, Arkansas, and in the DeClerk building and within one year before the filing of the information herein, either openly or secretly and by any kind of device, sell either alcohol, ardent, vinous or malt liquors, then you should convict; otherwise you should find the defendants not guilty."

"2. You are instructed that if you find from the testimony beyond a reasonable doubt that the defendants kept or allowed to be kept in said building and at the time aforesaid any of the liquors aforesaid mentioned, to be sold by device, then you should convict; otherwise you should acquit."

"4. You are instructed that it is no violation in this case for the defendants to have given away any of the liquors charged in the complaint, unless you should find that it was a part of a plan on their part to evade the law and dispose of it for profit by some kind of device in violation of law."

The defendants were acquitted, and the State appeals.

William F. Kirby, Attorney General, and *Dan'l Taylor,* Assistant, for appellant.

The court ought to have given instructions 1 and 2, requested by the State. Kirby's Digest, § § 5140, 5141. The refusal of the court to charge the jury that the fact that defendants allowed persons to pass through and into the rooms of their saloon building was *prima facie* evidence of their guilt, or at least a circumstance which would raise a presumption of guilt, was tantamount to a nullification of the concluding clause of section 5141, Kirby's Digest. This was a "blind tiger," pure and simple, and the parties were resorting to a mere subterfuge, as shown by the evidence, to evade the operation of the liquor laws. 43 Ark. 389; 39 Ark. 204; 4 Ia. 443; 8 Metc. (Mass.) 525; 85 Miss. 338; 83 N. C. 668.

Witt & Schoonover, for appellees.

Under the instructions given, the jury were told to convict if they found that any liquors were kept or permitted to be kept for sale by device; and under the evidence this was all the State could ask and all it was entitled to have. 77 Ark. 453.

HILL, C. J., (after stating the facts). This is an appeal taken by the State pursuant to sections 2616, 2617, Kirby's Digest. As the crime of which the defendants were acquitted may be punished by imprisonment (section 5146, Kirby's Digest), the judgment of acquittal cannot be reversed. Section 2618, Kirby's Digest. Therefore, the only useful purpose of this appeal is to point out errors in the rulings of the trial court, if any occurred.

The instructions given by the court, which may be found in the statement of facts, are all erroneous as applied to the facts of this case. These instructions might be correct under such cases as *Glass* v. *State,* 45 Ark. 173, and *Henry* v. *State,* 77 Ark. 453, which were prosecutions for sales under the act. But

this is a prosecution for maintaining a place where liquors are allowed to be given away, and instructions as to sales, under the same section, are inapplicable.

The object of this statute against the clandestine sale of liquors is too well known to require any discussion. It was not aimed at mere sales or gifts of liquors (other statutes covered those subjects), but it was aimed at places maintained where intoxicating liquors were either sold or given away. It was against the maintenance of such places, considered by the Legislature to be harmful to the public morals, that this legislation was directed. Its salutary object would be largely defeated if confined to sales, and the Legislature did not confine it to sales, but made it equally forbid the maintenance of places where liquors are given away, or kept for sale or gift, or allowed to be given away, and it is the duty of the courts to enforce it as written. This important part of the statute was totally ignored by the trial court, and there was evidence sufficient to have justified the jury in convicting the defendants if they had been properly instructed. And there were no better instructions, indeed, than to give them the language of the law itself. It is plain, easy of comprehension, and needs no explanation.

The instructions asked by the State were substantially the statute, and should have been given; and, had they been given, the State would have been entitled to a conviction, had the State's evidence, the substance of which is set out in the statement of facts, been believed by the jury.

The judgment of the court is that the trial court erred in giving the instructions which were given, and in refusing to give the instructions asked by the State.

HARRIS v. GRAHAM.

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Opinion delivered May 18, 1908.

1. APPEAL—FAILURE TO ABSTRACT INSTRUCTIONS.—The court will not consider alleged errors in the giving of instructions if appellants fail to set out the instructions in their abstract. (Page 575.)

2. ESTOPPEL—WHEN WIFE ESTOPPED BY HUSBAND'S ACTS.—A married woman may, by silently acquiescing in the contract of one who to her knowledge assumes to act as her agent, be estopped to deny the agency. (Page 575.)

3. SAME.—Where a husband contracts for the improvement of his wife's land with one who believes him to be the owner, and the wife, knowing this fact, permits the work to be done without disclosing her right, she will be estopped to set up her title in defense of an action to enforce the contractor's lien. (Page 575.)

4. MECHANICS' LIEN—NECESSITY OF SUBSTANTIAL PERFORMANCE.—It is a good defense to a suit to enforce a mechanics' lien that there was a lack of substantial performance of the contract on the part of the contractor. (Page 576.)

5. SAME—LACK OF SUBSTANTIAL PERFORMANCE—RECOVERY ON QUANTUM MERUIT.—Where a building was not constructed substantially according to contract, and the owner of the land notified the contractor to remove the building, the contractor was not entitled to recover for the value of the work done and materials furnished. (Page 576.)

Appeal from Monroe Circuit Court; *Eugene Lankford,* Judge; reversed.

STATEMENT BY THE COURT.

This was a suit by Graham & Bordley as contractors to obtain judgment and enforce a lien for erecting a dwelling house for H. C. Harris and his wife, Lillie R. Harris. The contract price of the house was $2755, and was to have been built by Sample & Hoaglan, whose performance of the contract was guarantied by Graham & Bordley; and, Sample & Hoaglan failing to proceed with the work, it was assumed by Graham & Bordley.

The contractors claimed a balance of $2605 due them for the work of each of the said contractors, Sample & Hoaglan, and themselves. They filed a lien in substantial conformity with the statute, and brought suit for the said amount and to enforce said lien.

The defendants denied that the house had been built pursuant to the plans and specifications, setting forth with much detail various and divers defects, which they alleged occurred, justifying them in rejecting the house as one built pursuant to their contract. The defendants further alleged that Mrs. Harris owned the property upon which the building was to be erected

in her own right, and denied that she had entered into any contract with the plaintiffs or with Sample & Hoaglan or either of them, and denied that she was indebted to them, or that the property was subject to lien.

The contract was signed by H. C. Harris, and not by Mrs. Harris. The title to the lot stood in the name of Mrs. Harris. There was evidence adduced tending to prove that the contract was substantially complied with, and evidence tending to prove that it was not substantially complied with. There was also evidence that Harris notified the contractors before the completion of the work that it was not satisfactory, and he would not accept it and for them to remove their material from his ground. There was sufficient evidence to have sustained a verdict either way on the issue of substantial compliance.

The record discloses the following facts: After the case was submitted to the jury, and the argument of counsel closed, the jury returned into court and announced the following verdict: "We, the jury, find for the defendant," and, upon being asked if that was their verdict, one of the jurors stated that it was, but it was intended by the jury that the plaintiffs should be permitted to remove the building from the lot of the defendant, whereupon the court, of its own motion, and over the objections of the defendants, announced to the jury that it would not receive that verdict, and over the objections of the defendants ordered the jury dispersed for the night, but to return to the court room the following morning for further consideration of their verdict. Thereupon the defendants announced to the court that the defendants desired a judgment on the verdict of the jury, and to have the records show that the plaintiff should be permitted to remove the building from said lot of the defendants, but the court overruled the motion of the defendants, and refused to receive the verdict of the jury in behalf of the defendants, to which ruling of the court defendants saved their exceptions. Upon the following morning, the 12th day of December, 1906, the defendants renewed their motion for a judgment upon the verdict of the jury, and to have the judgment recite that the plaintiffs should have permission to remove buildings from the lot of the defendants, but the court overruled the motion of the defendants and refused to receive a verdict of the jury in behalf of the defendants, to which they saved their exceptions.

The record of the proceedings of the next day reads as follows: "Instruction number 3, given by the court of its own motion, over the objections of the defendants, and given after argument of counsel had been made to the jury, and after the jury had received instructions on part of the plaintiff and the defendant, and the cause had closed, and after the jury had returned into court and announced a conditional verdict in favor of the defendants, which verdict was not received by the court, and which instruction was given by the court of its own motion over the objections of the defendant, to which the defendants at the time excepted, and asked that their exceptions be noted of record, which was done; said instruction being as follows: 'If you believe from the evidence that the house had been completed substantially according to contract, but has slight defects in its construction, either in material or workmanship, and you further find that said house is on the land of defendants, and said building inures necessarily to the benefit of the said defendants, then you should find for the plaintiffs for the contract price, less whatever amount the evidence shows the defendants are damaged on account of said defects.'"

Thereafter the jury returned the following verdict: "We the jury, find for the plaintiffs $1537.50." Judgment was entered thereon, and Harris and his wife have appealed therefrom.

Manning & Emerson, for appellants.

1. Appellees guarantied that the contractors should fulfill their contract—in fact they were treated as original contractors. A contract is construed most strictly against the obligor. 73 Ark. 338; 4 *Id.* 199; 74 *Id.* 41. Signing a bond with contract attached is in legal effect signing the contract also. 62 Ark. 330.

2. Appellees were required to show affirmatively a substantial compliance with the contract, and it was error to admit the evidence of White, Morrill and Wert. Graham's testimony was incompetent. It was also error to allow the jury to view the building.

3. The affidavit and so-called account for lien was not in accordance with the statute. Kirby's Digest, § 4981; 32 Ark. 59.

4. It was error to refuse prayer No. 4 requiring the jury to find and appellees to prove that the work was done in such

manner as those capable of judging would state as skillful. 64 Ark. 34-37.

5. Error to refuse No. 7, and in modifying it. The court has no discretion to withhold instruction appropriate to any theory of the case sustained by competent evidence. 82 Ark. 499; 50 *Id.* 545; 77 *Id.* 128; 64 *Id.* 34. The modification was preposterous, as it obliterated the contract. Where parties make a contract, courts and juries cannot change it. 3 Ark. 324; 19 *Id.* 262; 33 *Id.* 751-755. The contract was an entirety—appellants either owed $2755.00 less $160 paid, and the house was his, or nothing and the house belonged to the contractors. 82 Ark. 592.

6. Where a party fails to comply with the contract, the other party is released. 65 Ark. 320; 64 *Id.* 34-47.

Thomas & Lee for appellees.

1. The contract was complied with. A verdict finding a substantial compliance will not be disturbed. 64 Ark. 38; 30 A. & E. Enc. Law, (2 Ed.) 1223; 6 Cyc. 104; 74 Coun. 418; 36 Ill. App. 357; 111 Mass. 57; 91 U. S. 596.

2. When the owner receives and retains the benefit of a builder's labor and materials, a strict, literal compliance with the contract is not a condition precedent to recovery. 6 Cyc. 87; 117 Cal. 669; 15 S. W. 208; 32 *Id.* 24. The law implies a promise to pay, and a recovery may be had on *quantum meruit.* 30 A. & E. Enc. L. 1225; 2 Ark. 370; 5 *Id.* 651; 27 Cal. 319; 72 *Id.* 588; 33 *Id.* 751.

3. Slight modifications and variations in a working contract with the consent of parties do not abrogate the entire contract, but it continues in force as altered. 30 A. & E. Enc. L. 1210; 13 S. W. 334.

4. An offer in good faith to correct defects entitles the builder to recover for what he has done. 107 Fed. 363; 46 C. C. A. 341.

5. The lien was properly filed. Kirby's Digest, § 4970; 93 S. W. 67; 71 Ark. 334.

6. The wife estopped by silence, acquiescence and accepting benefits. 56 Ark. 221-2; Bigelow on Estoppel, 602-3; 2 Jones, Liens, § 1264. Also by concealment that the lots were hers—a fraudulent suppression of the truth when it was her duty to speak. 79 Ill. 164; 105 Pa. St. 375; 21 Cyc. 1348.

7. There was no agreement, and hence no verdict for defendants. The court merely followed the statute. Kirby's Digest, § 6203; 31 Ark. 198.

HILL, C. J., (after stating the facts.) Appellants criticise the instructions, and allege various errors therein; but they have not set out the instructions in their abstract. They argue the instructions as if there were five transcripts here, and each judge had a transcript before him when he was reading their criticisms of the instructions. The rule that the abstract is to acquaint the judges with the material parts of the record seems to be overlooked. The court has so often said that it will not review instructions thus presented that it is unnecessary to cite the cases.

The property stood in the name of Mrs. Harris, and the contract was made by Mr. Harris, and it is insisted that there can be no recovery against her upon the terms thereof, and that a lien cannot be enforced upon her property without the contract having been signed by her or her agent.

In *Hoffman* v. *McFadden,* 56 Ark. 217, the court said: "A married woman may, by silently acquiescing in the contract of one who to her knowledge assumes to act as her agent, be estopped to deny the agency. And where the husband contracts for the improvement of his wife's property with one who believes him to be the owner, and the wife, knowing this fact, permits the work to be done without disclosing her right, it has been held that she will be estopped to set up her title in defense of an action to enforce the contractor's lien."

The evidence here is sufficient to justify the jury in finding against Mrs. Harris upon either of these propositions.

The principal question in the case is as to the verdict rendered by the jury in favor of the defendants and the refusal of the court to accept it when one of the jurors announced that the jury intended by that verdict for the plaintiffs to have the building, and that they be permitted to remove it. Under sections 6203-6204 of Kirby's Digest, if any juror dissents from the verdict as delivered by the foreman, the jury must be sent out for further deliberation. But this is not a case falling within the statute. The juror's announcement was not a dissent, but an explanation of the intended effect of the verdict for the defendants.

As shown in the statement of facts, there was a sharp conflict as to whether there were material variations from the contract, or whether there had been a substantial performance of it. The verdict of the jury for the defendants necessarily found that there were substantial and material deviations from the contract which justified the defendant in not accepting the building, and the statement of the juror showed that the jury intended in so finding that the house which had been erected by the contractors should belong to them, and that they should be entitled to remove it. If this was the effect of the verdict, then the statement of the intention of the jury neither added to it or took from it; if it was not the effect of the verdict, then they should have been remanded for further deliberation. Where there has been a lack of substantial performance of a contract by a contractor, he cannot establish a lien upon the property. Phillips on Mechanics' Liens, § 134; 20 A. & E. Enc. 367; *Dermott* v. *Jones,* 2 Wall. 1; *Smith* v. *Brady,* 17 N. Y. 173; *Fox* v. *Davidson,* 36 N. Y. App. 159; *Ark-Mo Zinc Co.* v. *Patterson,* 79 Ark. 406.

In New York the rule is rigidly adhered to that the contractor can recover nothing where he has failed to substantially comply, and although this may inflict upon him a heavy pecuniary punishment by giving the other party what the contractor has done without paying for it, still it is said that this consideration is unimportant, weighed against the healthy and beneficial effect of the rule denying recovery unless there is substantial compliance with the contract. Phillips on Mech. Liens, § 134.

In some jurisdictions it is held that while the contractor cannot recover upon his contract where he has failed to substantially comply, yet he may recover upon a *quantum meruit* for labor done and *quantum valebat* for material furnished. Phillips, *supra.*

Thus in Massachusetts it was said: "We think the weight of modern authority is in favor of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed, and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take

the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented—there having been no prohibition to proceed in the work after a deviation from the contract has taken place—no absolute rejection of the building, with notice to remove it from the ground; it would be a hard case indeed if the builder could recover nothing." *Hayward* v. *Leonard,* 7 Pick. (Mass.) 180.

Under neither rule can the action of the court in refusing to render judgment upon this verdict be sustained. The owner had given notice before the completion of the building several times that he would not accept the building, and that the material belonging to the contractor should be removed.

Immediately upon the juror saying that the jury intended that the contractor be permitted to remove the building, the owner offered to consent thereto. This consent, if not theretofore given, certainly then removed any objection to refusing recovery to the contractor, where there had not been substantial compliance, irrespective of whether the strict New York or the liberal Massachusetts rule is adopted.

When a contractor agrees to build and deliver a certain house on the land of another, the building does not become that of the landowner until it is finished in substantial conformity with the contract or accepted by him. Phillips on Mech. Liens, 135; *Dermott* v. *Jones,* 2 Wall. 1.

In some instances, as in the Massachusetts case, *supra,* and others may be found in 20 A. & E. Enc. 367, where a contractor in good faith has performed services and delivered material, he may have compensation for their value, notwithstanding he cannot recover on the contract. But those all seem to be cases where the building has become the landowner's, and grave injustice would be done the contractor unless he was allowed some compensation for what he had imperfectly done, and recovery is allowed to the extent that he had improved the landowner's property. None of these instances are in point here.

The second verdict, rendered after the court refused to accept the first one and gave instruction number 3, was, in round numbers, for $1100 less than the contract price. In other words, the jury said in this verdict that the contractors lacked by $1100

having fulfilled a $2755 contract. This was a second finding that there was a substantial and material deviation from the contract, and was but a confirmation in another form of the finding in the first verdict. This finding is supported by ample evidence, and, accepting it as true, then the jury's verdict for the defendants entitled the contractors to remove the house from the landowner's lots. This the landowner had requested, and again offered to consent to.

The court erred in not entering judgment upon this verdict. Reversed and remanded with directions to enter judgment upon the first verdict.

SIBLY v. THOMAS.

Opinion delivered June 29, 1908.

TAX SALE—EXCESSIVE COSTS.—Prior to the act of April 7, 1893, allowing twenty-five cents for certificate of purchase to be taxed as part of the costs of sale, a tax sale which included this sum was void.

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

STATEMENT BY THE COURT.

"The appellee, H. Thomas, claims title to the land in controversy under a donation deed executed by J. F. Ritchie, Commissioner of State Lands, on the 10th day of March, 1898—the statute of limitation of two years' actual possession and the statute of limitation of seven years. The undisputed facts are:

"The N. W. ¼ of sec. 11 S., 8 W., situated in Lonoke County, Arkansas, was by the collector of said county sold to the State at the delinquent tax sale of June 10, 1878, for the taxes of 1877, and, the same not having been redeemed within the time required by law, was certified by the clerk to the Commissioner of State Lands as State land under the law existing and in force at that time.

"That afterwards, to-wit, on the 9th day of January, 1882, under a certain proceeding (commonly known as a suit under

the overdue tax law) then pending in the Lonoke Chancery Court, viz: Lonoke County v N. E. S. E. sec. 27, 5 N., 8 W., and other lands embracing the N. W. ¼ of sec. 11, 1 S., 8 W., a decretal judgment was rendered in said cause, and, among other things, it was decreed that the sale to the State of the N. W. ¼ sec. 11, 1 S., 8 W., for the taxes of 1877 was null and void, and all certificates and evidences of title made to the State for said lands were annulled, and the taxes accrued thereon were declared a lien on said land.

"It was further decreed that if said taxes were not paid within twenty days Wm. Goodrum, commissioner appointed for that purpose, was ordered to sell the same. That said lands were not redeemed, and they were afterwards sold by the said Wm. Goodrum, commissioner, as directed under said decree, to the State of Arkansas. That Wm. Goodrum made his report of said sale to the court, and the same was by the court duly approved and affirmed.

"On January 10, 1895, the Commissioner of State Land for the State of Arkansas issued his donation certificate No. 3444 to the appellee for the N. W. ¼ sec. 11, 1 S., 8 W., the same having been sold to the State at the overdue tax sale of March 30, 1882. That after H. Thomas had procured said certificate he immediately went upon said land, built a dwelling house thereon and began to clear up and improve the same. That he afterwards filed the certificate of the county surveyor and the proof of the improvements in the manner and form required by law in the office of the Commissioner of State Lands, within the time provided by law, and the Commissioner of State Lands executed to him a deed on the 10th day of March, 1898. After he had procured his deed he leased the land—in 1898—to his son for a period of three years. During the year 1898 the house he had built was destroyed by fire. Later the fence around the place was destroyed by fire. Mr. Boyne, witness for appellant, states that for two years the land was not in cultivation. Appellee states that only one year it was not cultivated, after the house and fence were destroyed by fire, while it was in charge of his son. Be that as it may, there was no abandonment of the possession of this property, and not a particle of proof upon which to base such an argument. Appellee returned and took

actual possession of the premises at the expiration of the three years, to-wit, on March 5, 1901, and has continuously resided with his family on the same, during which time he has cleared up fifty acres of land, built another dwelling house, refenced the premises, built corn cribs, stable and other necessary outbuildings.

"The appellant Geo. Sibly, claims title under a tax deed executed by W. H. Lowman, county clerk of Lonoke County, Arkansas, on the 14th day of March, 1894. That the said tract of land was sold on the 13th day of June, 1892, for the taxes of 1891, at which tax sale one S. B. Webster became the purchaser, and a certificate of purchase was issued to him by the collector, which was afterwards assigned by him to the said George Sibly, and a deed to said land was executed to him as the assignee of the said Webster. That at the tax sale of 1892, exclusive of the taxes, the costs charged against the said land, and for which it was sold, amounted to 85 cents.

"Upon this testimony alone appellant asked that appellee be dispossessed—made to pay him damages. That he be put in possession and his title under his tax deed be quieted."

After hearing the evidence the court held and decreed that appellee was the owner of the land in controversy, and that the sale for taxes of 1891 was illegal and void, and cancelled the same. Defendant, Sibly, appealed.

George Sibly, pro se.

It was the intention of the law makers to remit the penalties upon such taxes only as were paid on or before the 20th of April, 1883. 76 Ark. 554. The two years possession under a donation deed, to be a bar, must begin with the date of the deed. 78 Ark. 15. The two years possession to which the law refers was not in appellee, but was in appellant. 73 Ark. 353. A void title is not sufficient upon which to build a possessory title. Donation deeds are only *prima facie* evidence of their recitals. 76 Ark. 554; 74 *Id.* 387. Appellant by his purchase and length of time acquired a title that the law recognizes, and the court should have given it that protection. 69 Ark. 424. A claim of title based upon an illegal sale for taxes is no evidence of title, and of constructive possession. 74 Ark. 387.

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

In this case appellant filed a cross bill to quiet his title. In such case the court will take jurisdiction over the entire controversy. 46 Ark. 96; 56 *Id.* 95. The tax title of appellant is void because, 1st, the land belonged to the State at the time of the sale for taxes, not subject to taxation, and the sale was therefore void. 2nd, the land was sold for too much costs. 56 Ark. 93.

BATTLE, J. (after stating the facts). The title of appellee to the land in controversy, was at least *prima facie* valid. The appellant, Sibly, claims title to it under a sale made on the 13th day of June, 1892, for the taxes of 1891, and penalty, and costs aggregating 85 cents. It was so sold before the enactment of the act of April 7, 1893, allowing twenty-five cents for certificate of purchase to be taxed as costs of sale, and was sold for twenty-five cents too much costs (*Sibly* v. *Cason, ante* p. 32), and is void. *Goodrum* v. *Ayers,* 56 Ark. 93; *Salinger* v. *Gunn,* 61 Ark 414; *Cooper* v. *Freeman Lumber Co.,* 61 Ark. 36; *Darter* v. *Houser,* 63 Ark. 475; *Kirker* v. *Daniels,* 73 Ark. 263.

Decree affirmed.

HART, J., being disqualified, did not participate.

LONDON & LANCASHIRE FIRE INSURANCE COMPANY *v.* LUDWIG.

Opinion delivered June 15, 1908.

1. CORPORATION—FEE ON CAPITAL STOCK.—Under the act of May 13, 1907, providing that corporations seeking to do business in this State shall pay into the treasury fees proportioned to their capital stock, the term "capital stock" includes stock which has been subscribed but not paid, but not stock which has been authorized but not subscribed. (Page 585.)
2. RECOVERY OF ILLEGAL FEES—PARTIES.—A complaint by a corporation against the Secretary of State which alleges that it was forced by defendant to pay excessive fees as a condition of doing business in the State, and seeks to recover such excess, is defective in failing to

allege that such fees were paid to the defendant, and that they were not paid by him into the State treasury, as required by law. (Page 587.)

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

The meaning of the term "capital stock" varies according to the context in which it is employed. Stock in the hands of a stockholder means his interest in the corporation, whether paid for or not; but the stock of a corporation itself is a term synonymous with capital. It means the assets which the company possesses, the amount that has been paid in by the stockholders, which constitutes the capital on which the company does business. 1 Sandf. Ch. 307; 15 Fla. 651; 68 Cal. 350; 83 Cal. 300; 83 Ill. 610; 52 Pa. St. 177; 18 Wis. 295; 16 Ind. 105; 102 Pa. St. 190; 72 Hun, 126; 76 Ill. 563; 129 Pa. St. 405; 106 N. Y. 100; 63 Vt. 183; 61 N. E. 346; 72 Fed. 22; 129 Pa. 405; 81 Cal. 378; 23 N. Y. 193; 1 Desty on Taxation, 353; 96 U. S. 455; 126 U. S. 427; 150 N. Y. 46; 154 N. Y. 101; 90 Cal. 131; 93 N. Y. 188; 75 N. Y. 216.

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

1. See secs. 1 and 3 of act. It is not a taxing act, as contended by appellant, but one prescribing the conditions upon which foreign corporations may do business in this State. The power of the State to prohibit foreign corporations from doing business within its limits, or to impose such conditions as it pleases for the privilege of so doing, is settled, and it lies not with appellant to question the wisdom, reasonableness, etc., of the terms prescribed, since it is not compelled to enter and accept them. 155 U. S. 648; 202 U. S. 246; 189 U. S. 1408; 205 U. S. 278.

2. The term "capital stock" has been given varied and divergent meanings, in accordance with the court's understanding of the particular statute under consideration. Capital stock means the entire number of shares authorized, while shares of stock indicate the ownership by individual stockholders. Purdy's Beach on Corp. § 183; *Id.* § § 184, 187. Capital stock is a sum

fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the transaction of the business of the corporation and for the benefit of the corporate creditors. Cook on Corp. § 8; 6 Cyc. 384; 56 N. J. L. 389; 95 Tenn. 639; 99 Ala. 1; 6 Conn. 89. See also Kirby's Dig. § 838; 95 U. S. 686; 201 U. S. 560; 90 Cal. 140. Capital and capital stock are used convertibly in 81 Cal. 378; 98 Ia. 737; 31 La. Ann. 475; 12 L. R. A. 762; 106 N. Y. 97; 63 Vt. 175; 16 S. Car. 525. But capital stock in its strict significance exists only nominally, and remains fixed, while the capital or capital property of a corporation varies in value. 30 Mo. 550; Purdy's Beach on Corp. § § 185, 187.

BATTLE, J. The London & Lancashire Fire Insurance Company sued O. C. Ludwig. The complaint in the case, omitting the caption, is as follows:

"The plaintiff states that it is a corporation which was duly organized under the laws of Great Britain in the year 1861, for the purpose, among others, of writing policies of insurance against loss by fire; and the defendant is at present the Secretary of State of Arkansas. That on the 25th day of March, 1905, and for a number of years prior thereto, it was conducting a part of its business within the State of Arkansas, and under its charter had the power to do so. That on the date last aforesaid it ceased to do business in the State, and since that time has done none. That during the time when it did business in the State it built up and established a profitable business, and on June 4, 1907, desiring to re-enter the State for the purpose of carrying on business, it applied to the defendant as Secretary of State for leave to file the documents required by an act entitled, 'An act to permit foreign corporations to do business in Arkansas, and fixing fees to be paid by all corporations'; that in connection with such application it tendered to the Secretary of State a copy of its charter, duly authenticated and certified as required by law, together with a statement of its assets and liabilities and the amount of its capital employed in this State, also designating its general office or place of business in this State, and naming an agent upon whom process may be served. It also offered to file with the Secretary of State a resolution adopted by its board of directors, consenting that service of

process upon any of its agents in the State, or upon the Secretary of this State, in any action brought or pending in the State, shall be valid service upon it, and it offered to pay to the Secretary of State at the same time the fees required by the said act to be paid. That the capital authorized by its charter is the sum of $15,000,000, of which $11,400,000 and no more has been subscribed, and of the amount so subscribed only ten per cent. has been paid up. That the Secretary of State declined to file the papers tendered unless the plaintiff would pay a fee based upon the authorized capital of $15,000,000 and declined to permit them to be filed upon the payment of a fee based upon the capital paid up or the capital subscribed, which was all that could be legally demanded. Plaintiff was entitled by the terms of its organization under the laws of the State to enter the State to do business upon compliance with the law. It had within the State many former customers and patrons who desired to renew their business relations with it, and with whom it desired to renew such relations. It could not do this without first filing the papers aforesaid, and in all respects complying with the act of the General Assembly. In order to enjoy this right, it was forced by the demand of the Secretary of State to pay $3706 in fees when but $306 was demandable, being $3400 fees in excess of what was due from it under the terms of the said act, and it made such payment under protest and with notice that it did so merely as a means of enjoying its right to do business within the State. By reason of the premises, the plaintiff says that an action has accrued to it to recover of and from the defendant the difference in the amount paid by it and the amount which it was required to pay under the terms of the said act, towit, the sum of $3400.

"Wherefore it prays judgment against the defendant in the sum of $3400 with its costs."

The defendant demurred to the complaint, which the court sustained, and, the plaintiff refusing to plead further, dismissed the action; and plaintiff appealed.

Section 3 of the act entitled, "An act to permit foreign corporations to do business in Arkansas and fixing fees to be paid by all corporations," approved May 13, 1907 (Acts 1907, p. 744), is involved in this action. It is as follows: "That all corpora-

tions hereafter incorporated in this State and all foreign corporations seeking to do business in this State shall pay into the treasury of this State for the filing of said articles [articles of incorporation or association] a fee of $25.00 where the capital stock is $50,000.00 or under; $75.00 where the capital stock is over $50,000.00 and not more than $100,000.00; and $25.00 additional for each $100,000.00 of capital stock."

The question is what is meant by capital stock?

In *Commercial Fire Insurance Co.* v. *Board of Revenue of Montgomery County,* 99 Ala. 9, Chief Justice Stone, delivering the opinion of the court, said: "We have shown by the highest legal authority that the capital stock of a corporation is a trust fund for the security and benefit of the creditors of the corporation, and that the managing board fills the relation of trustee for its preservation and administration. Corporations, acting within the scope of corporate powers, fix no liability on their officers or any one else. They charge only the corporation. Hence the purpose and policy of requiring a capital stock as security and indemnity of persons who become its creditors. The law-making power confers upon them privileges—a franchise, a right to make contracts in its artificial name without fastening a liability on any natural person—and it exacts from them, as a condition on which it grants this franchise, this privilege and power, that they place a capital stock in safe pledge for the security of their creditors. And this capital stock is a permanent investment, with no power in the shareholder to withdraw it, until the corporation is wound up and all its debts paid, and no power in the managing board to permit it to be withdrawn at the expense of creditors. It is a trust fund in the corporation's treasury, to be used only in its interests, and whatever of profit or emolument it may yield belongs of right to the corporation, its creditors and shareholders. It must be kept within the corporation and under its control, to meet the purpose for which it was required to be raised and paid in. It is not materially unlike any other pledge that is placed as a guaranty of faithful performance of debt or duty. It is a fixed pledge until the debt is paid, or the duty performed."

In *Sturges* v. *Stetson,* 1 Biss. (U. S.), 246, 248, Mr. Justice McLean said: "The corporate powers of the company

were conferred for the express purpose of creating stock as a means of constructing the railroad. As well might the route for the road designated be called a railroad, as to call the corporate means of creating the stock stock. * * * Stock can be created only by contract, whether it be in the simple form of a subscription, or in any other mode. There must be an agreement to take the stock, and nothing short of this can create it. This imparts to the stock the quality of property, which before it did not possess. It is called 'capital stock' in the charter, because the corporate capacity to create it is given. The term 'stock,' as used in the charter, before it is taken by subscription, means nothing more than a power in the directors to receive subscription for stock."

In *Sanger* v. *Upton,* 91 U. S. 60, it is said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

It is therefore evident that capital stock cannot include authorized stock which has not been subscribed. Such stock cannot be an asset, and cannot be used for any purpose, and no one is liable for it, the corporation or any one else.

The act of May 13, 1907, does not require all corporations to pay the same fee, but fixes it according to the capital stock;

the greater the capital stock, the greater the fee. This difference is evidently based upon the business the corporation will be able to transact, the benefits it may receive, and upon the presumption that the larger the capital stock the larger the business the corporation will do. If this be not true, why not require all corporations to pay the same fee? Upon the theory suggested as to the basis upon which the fees are fixed, it is plain to be seen that the authorized but unsubscribed stock is not, but unpaid subscribed stock is, a part of the capital stock within the meaning of the act, and we so hold.

Appellant states in his complaint that "it was forced by the demand of the Secretary of the State to pay $3706 in fees when but $306 was demandable, being $3400 fees in excess of what was due from it under the terms of said act, and it made such payment under protest and with notice that it did so merely as a means of enjoying its right to do business within the State." But it does not state to whom it paid the fees. The presumption is that it paid them according to law into the treasury of the State, or, if to the Secretary of State, that he did so, the presumption being that he did his duty, the law requiring all such fees to be paid directly to the Treasurer of the State. Kirby's Digest, § § 3447-3449.

The appellant fails to state a cause of action against appellee.

Judgment affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. LANNON.

Opinion delivered June 29, 1908.

1. RAILROADS—CONTRIBUTORY NEGLIGENCE—DISCOVERED PERIL.—Whether plaintiff who was injured while in a place of danger was negligent in being there was immaterial if the defendant's brakeman who caused his injuries knew of his peril but failed to make any effort to avoid injuring him. (Page 589.)

2. DAMAGES—EXCESSIVENESS.—An award of $1100 as damages for personal injuries was not excessive where the evidence shows that plain-

tiff suffered severe pain, was confined to his bed for a week, used crutches for a while, and that he was unable to return to his work, at which he had been earning $100 per month before his injuries. (Page 590.)

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

C. L. Marsilliot and *Paul W. Evans,* for appellant.

An experienced brakeman who enters the service of a railroad company using unblocked frogs, and a part of whose duties is to switch cars, and has an opportunity to observe the condition of the switches, assumes the risk from the use of the unblocked frogs. 82 Ark. 11; 48 *Id.* 333. An employee is bound to take notice of obvious defects. 77 Ark. 367; 58 *Id.* 217; 56 *Id.* 206; *Id.* 232; 57 *Id.* 76; 48 *Id.* 460; 46 *Id.* 388; 41 *Id.* 542; 54 *Id.* 389; *Id.* 289; 161 Mass. 153. Where contributory negligence is the proximate cause of the injury complained of, plaintiff cannot recover. 76 Ark. 10; 62 *Id.* 245; *Id.* 158; 61 *Id.* 549; 57 *Id.* 461; 56 *Id.* 457; *Id.* 271; 36 *Id.* 371; *Id.* 41; 39 *Id.* 17; 57 Fed. 921. The verdict is excessive. 25 Ark. 380; 39 *Id.* 491; 43 *Id.* 449.

N. W. Norton for appellee.

The fact that appellee was in a place of peril was no justification for an injury wilfully or even carelessly inflicted. The train crew were under Lannon's control, and he had a right to assume that nothing would be moved till he announced his readiness. It does not take much weakening of a man only 43 years old, and with an earning capacity of $100 per month, to amount to a sum equal to the verdict in this case. The judgment should be affirmed with damages. 80 Ark. 273.

BATTLE, J. James Lannon sued the Chicago, Rock Island & Pacific Railway Company, and states his cause of action as follows: "On the 17th day of June, 1907, he was injured by the negligence and carelessness of a brakeman in the employ of the defendant, Chicago, Rock Island & Pacific Railway Company; that said injury was caused by the carelessness of said brakeman in disconnecting the hose with which the airbrake is operated between the car next to the caboose and the caboose itself; that in disconnecting the hose the said brakeman carelessly failed to shut off the air, with the result that the discharged air caused the

end of the hose and heavy iron attachment thereon to be violently thrown against the leg of plaintiff, striking him between the knee and ankle, cutting through his clothing and the flesh on his leg to and injuring the bone; that from said injury plaintiff has suffered great pain, and has lost time from his employment, being as yet unable to work. That said train is what is known as a log train, and is operated by the defendant for the Forrest City Mfg. Co., the train being operated by the employees of the defendant, and the loading, handling and unloading of the logs being done by a crew in the employ of the Forrest City Mfg. Co., of which crew plaintiff was the foreman. Plaintiff in the discharge of his duties as such foreman of the Forrest City Mfg. Co.'s hands, was at all times rightfully in and about said train, superintending the loading and unloading of logs and the management of the loading machinery and tackle; and the injury to this plaintiff occurred while he was about said train in the discharge of his duties as foreman. By the injury above described plaintiff has been damaged in the sum of fifteen hundred dollars."

Defendant, Chicago, Rock Island & Pacific Railway Company, answered and denied the material allegations of the complaint, and pleaded the contributory negligence of the plaintiff as a defense.

The jury in the case, after hearing the evidence and the instructions of the court, returned a verdict in favor of the plaintiff for $1112.50. Defendants appealed.

The question in the case is, was the verdict sustained by evidence?

The evidence tended to prove the following facts: The appellant railway company, in the year 1907, operated what is known as a log train for the Forrest City Manufacturing Company in carrying logs. The loading, handling and unloading of the logs were done by a crew in the employment of the Manufacturing Company, of which appellee was foreman. His duties as such foreman were to superintend the loading and unloading of the train, and to manage the loading machinery and tackle, and to direct where the train should stop for the purpose of loading with logs and unloading the same, and when to move after such work had been finished. He had the right to be in

and about the train whenever and wherever his duties called him. On the 17th day of June, 1907, the train was standing, and the crew of the Manufacturing Company was engaged in loading it. About or near the time the loading was completed, appellee was standing between the caboose of the train and the car next to it, instructing a member of the loading crew as to how to do his work. While there, a brakeman of the railway company, engaged in operating the train, came within three feet of him and without any warning disconnected the hose with which the air brake is operated between the caboose and the car next to it, between which appellee was standing, and failed to shut off the air, with the result that the discharged air caused the end of the hose to be violently thrown against the leg of the appellee, to his great injury.

It is said that appellee was guilty of negligence in being between the cars. This may be true. If so, it did not excuse the brakeman in injuring him. He saw him there; knew the danger of disconnecting the hose in the manner indicated; knew of the danger to which the appellee was exposed by his action; and did nothing to protect him. There was no necessity for hasty action. The train was not yet ready to leave. Under the circumstances, the jury had reason to believe that appellee was in a "discovered peril," and that the brakeman failed to make any effort to avoid injuring him. There was evidence to sustain the verdict.

The appellant contends that the verdict was for excessive damages. The injury received caused the blood to run down appellee's leg. A physician treated him about three times. He testified: "I was laid up twelve, thirteen or fourteen days. For the first ten days I had to apply those hot turpentine bandages. The instructions were that my wife do this, and she kept it up until about ten o'clock at night for about ten or twelve days. It was very painful during that time, and then the turpentine got to blistering, and I would take them off, and then the pain would commence. Then the pain would strike me when I would go to move; it was great pain, and I was in misery. I was confined to my bed for about a week, before I even attempted to get up on a crutch. Mr. Abel loaned me some crutches, and after that I could hobble around the house in

two or three days, and finally walked down town with these crutches. This was twelve or fifteen days after the accident. I used the crutches something over four weeks, and then I used a walking cane up until about six weeks ago. I am not entirely free from pain yet. If I take a sudden step, I feel a soreness yet, and it is very sensitive. If I could find light employment where I could favor this limb, which I have been trying to do, I could go to work. I am not able to go to braking, or back into the railroad service. When injured, I was receiving one hundred dollars a month, and I had a promise of a raise of $25 on the first of January."

According to this testimony, which the jury had a right to believe, the damages recovered were not excessive, the intensity and duration of the pain suffered being an important element thereof.

The instructions asked for by appellant and refused by the court were sufficiently covered by those given.

Judgment affirmed.

JACKSON v. BECKTOLD PRINTING & BOOK MANUFACTURING COMPANY.

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Opinion delivered June 15, 1908.

1. EVIDENCE—PAROL EVIDENCE CONTRADICTING RECORD OF JUDGMENT.—Parol evidence is admissible to show that a decree which appears regular on its face was actually rendered in vacation and was consequently a nullity. (Page 596.)
2. LACHES—UNREASONABLE DELAY.—A suit to set aside a foreclosure decree in chancery alleged to have been rendered in vacation will be barred by laches where plaintiffs, knowing of such fact, have waited nearly five years before bringing suit, and until after the defendants have become purchasers of the lands affected, have sold large quantities of timber from them, changed the fences and used the lands as owners by purchase under a valid decree. (Page 597.)
3. CURTESY—EQUITABLE ESTATE.—A husband is entitled to curtesy in an equity of redemption of the lands of his wife. (Page 600.))

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

STATEMENT BY THE COURT.

The present suit, filed on the 11th day of August, 1902, by appellants, the husband and children of the late Fannie C. Jackson, against appellees, was brought to set aside a decree of the circuit court sitting in chancery purporting to have been rendered at the January term, 1897, of the court, but alleged to have been rendered and entered of record in vacation in July, 1897, and to redeem certain lands ordered sold by said decree, and for an accounting of the mortgage debt, rents, profits and waste.

Fannie C. Jackson in her lifetime was the owner of the premises referred to, and in March, 1892, she executed a mortgage thereon to W. G. Bryan, which he, in October, 1895, assigned to W. B. Becktold & Company, a partnership.

On the 29th day of April, 1896, Becktold & Company brought suit to foreclose said mortgage and made said Fannie C. Jackson and W. G. Bryan parties defendant thereto.

In May, 1896, Fannie C. Jackson departed this life, intestate, leaving her surviving George M. Jackson, Sr., her husband, and the remaining plaintiffs and appellants in the present suit as their children and her sole heirs at law. On the 16th day of July, 1896, Becktold & Company commenced a new suit to foreclose the mortgage above mentioned, in which all the appellants except George M. Jackson, Sr., were made defendants. In January, 1897, the appellee Becktold Printing & Book Manufacturing Company, hereafter called "Becktold Company," a corporation, was by order of the court, on its own application and on the application of Becktold & Company, substituted as plaintiff in that foreclosure proceeding by reason of the fact that Becktold & Company had, pending the action, assigned the mortgage to the corporation.

There was entered upon the records of said court a judgment and decree finding that there was due upon the mortgage the sum of $5525 and directing a sale of the premises for the payment thereof. The records of the court show that this decree was rendered and entered of record during the January

term, 1897. Pursuant to the directions of the decree, the lands were advertised for sale by the commissioner of the court, and on the day of sale were struck off to the appellee Becktold Company. The sale was reported to the court and duly confirmed at the next term thereof. A deed was executed by the commissioner to said Becktold Company, which was approved by the court. Thereupon the said Becktold Company entered into possession of said lands. The complaint alleges that it went into possession of all said lands about the 1st day of January, 1898.

On the 7th day of February, 1898, the Becktold Company, by its deed duly recorded, conveyed a part of these lands to B. B. Biffle. Thereafter, and before the institution of this suit, Biffle conveyed a part of the lands so purchased by him to other appellees herein. The Becktold Company also, by direct conveyances duly recorded, conveyed a part of the land to other appellees herein. The record does not disclose whether any of the lands are now owned by the Becktold Company, nor does it contain a complete description of the lands sold to Biffle. It only shows the date of the sale to Biffle and contains a description of the lands sold by Biffle to other purchasers.

The testimony in this case shows that the foreclosure suit was not heard and determined at the January term, 1897, of the court, but that the case was taken under advisement until after the adjournment of the court, and it was agreed by the parties to the suit that the finding of the judge should be made in vacation and the result embodied in a decree to be entered of record as if in term time. Pursuant to this understanding, the judge of the court decided the case, in July, 1897, in vacation, and caused a decree to be prepared in accordance with his findings, and had the same entered of record as if the proceedings were had during the January term, 1897, of the court.

George M. Jackson, Sr., was present at the January term, 1897, when the agreement for rendering and entering of record the decree in vacation was made. He represented the defendants to that suit. They were non-residents and not present. Maude S. Jackson was alleged in the complaint in the foreclosure proceedings to be a minor, and a guardian *ad litem* was appointed to make her defense. His answer denies that she was at that

time a minor. The present record does not disclose whether or not she was at that time a minor, nor at what time she reached her majority, but she sues as an adult in the present case.

George M. Jackson, Sr., testified that he objected to the decree rendered in vacation after it was made, and told the Becktold Company that the defendants, all of whom he represented, would not be bound by the decree. No objections were made to the confirmation of the sale, or to any of the subsequent proceedings in the case.

As above stated, the present suit was instituted to set aside the decree rendered in the foreclosure proceedings.

The defendants, appellees in this court, filed separate answers containing a general denial of the allegations of the complaint and pleading laches and estoppel on the part of the plaintiffs to maintain their action.

The chancellor found as a fact that the foreclosure decree was in vacation of the court, but held that such facts could only be shown by the record in the cause, and therefore dismissed the complaint, except as to George M. Jackson, Sr., for want of equity, because the record in the cause did not show that the foreclosure decree was pronounced in vacation.

The court also found that George M. Jackson, Sr., as the husband of said Fannie C. Jackson, had an interest in the lands, and was not bound by the decree rendered in the foreclosure proceedings because he was not a party thereto, and appointed a commissioner to state an account between him and the Becktold Company.

This decree was rendered at the March term, 1907, of the court, and the Becktold Company excepted to that part of the decree which held that G. M. Jackson, Sr., had an interest in the land, and prayed an appeal to the Supreme Court, which was granted.

In October, 1907, the plaintiffs in the court below were granted an appeal by the clerk of this court.

J. D. Block and *F. H. Sullivan,* for appellants.

1. This is not a collateral attack, but is as direct as the machinery of the law will permit. 50 Ark. 190. In fact, it is

not an attack either direct or collateral upon a judgment, because, if the decree was rendered in vacation, it was and is void. 71 Ark. 226. And the court unquestionably erred in holding that oral testimony was not admissible to show that the judgment in the foreclosure suit was not rendered in term time. *Id.;* 40 Ark. 224; 75 Ark. 16; 79 Ark. 287; 82 Ark. 192; 6 How. 260; 1 Freeman on Judg. 4th Ed., § 121, p. 200; 57 Miss. 730.

2. If the original decree was void, the sale and confirmation cannot stand. 71 Ark. 311. See also 49 Ark. 416; 34 Ark. 569; 65 Ark. 553.

3. On the death of Fannie C. Jackson, leaving her husband and their children surviving, the husband became tenant by the curtesy in the equity of redemption. 15 Ark. 484; 47 Ark. 175; 60 Ark. 70; 6 Ark. 269; 14 Ark. 637. And it is the rule that all persons possessing any legal or equitable interest in the premises are indispensable parties to bill to foreclose a mortgage. 3 Ark. 364; 32 Ark. 297; 39 Ark. 61. One who has a legal or equitable interest in the premises, and has not been made a party to the foreclosure proceedings, is entitled to redeem. 37 Ark. 632; 31 Ark. 91; 35 Ark. 67; 77 Ark. 479.

4. Appellant is not debarred from the right to relief by laches. 21 Ark. 379; 57 Ark. 198; 11 Am. & Eng. Enc. of L., 2 Ed. 247; 13 Ill. 654; 187 Mass. 207; 70 N. H. 602; 83 Ark. 160.

L. Hunter and *J. L. Hornsby,* for appellees.

1. A judgment record cannot be contradicted by parol evidence. 24 Am. & Eng. Enc. of L. 2 Ed. 193; 35 N. J. Eq. 534; 8 Humph. 363; 11 *Id.* 176; 52 Ala. 55; 78 Ky. 580; 119 Ill. 320; 57 Ill. 608; 125 Ill. 230; 123 Mich. 699; 24 Ga. 429; 50 Ga. 487; 90 Ind. 577; 2 Biss. (U. S. C. C.) 268; 33 Ark. 218.

2. A judgment will never be vacated unless there is a valid defense to the action. Here the appellants present the same defense only which was passed on in the trial of the foreclosure suit. 52 Ark. 80; 50 Ark. 458; 54 Ark. 539; 6 C. C. A. (U. S.) 83; 11 Enc. Pl. & Pr. 1192 et seq.

3. Confirmation of the sale under the foreclosure decree validates all prior action, and estops appellants from com-

plaining. 53 Ark. 110; 83 Ark. 154, 161; 76 Ark. 146, 149; 74 Ark. 81.

4. Appellants are barred by laches. The decree was rendered in January, 1897, and the bill to vacate was filed August 11, 1902, more than five years thereafter. Kirby's Dig., § 5074; 18 Am. & Eng. Enc. of L. 2 Ed. 97; 17 *Id.*, 2 Ed. 841; 19 Ark. 16; 35 Ark. 141; 42 Ark. 289; 55 Ark. 93; 71 Ark. 709; 12 Enc. Pl. & Pr. 99; 16 Ia. 310; 44 Wis. 568; 135 U. S. 304; 34 S. W. 106; 92 N. C. 236; 113 Ind. 131; Walk. Ch. (Mich.) 309; 36 Mich. 97; 48 Mich. 194.

5. George M. Jackson cannot recover because, (1) if he has any right it is the legal right to possession as tenant by the curtesy, and he has no standing in a court of equity; (2) he has, in fact, no estate by the curtesy; (3) he is estopped by his conduct, having taken part in and assumed control of the former trial. Elliott on Ev., § 1524; 11 Enc. Pl. & Pr. 1172; 63 Mo. 193; 31 Ia. 80.

HART, J. (after stating the facts). The evidence in this case shows that the decree was rendered in vacation. The chancellor so found, but was of the opinion that such fact could only be shown by the record in the cause, and therefore excluded from his consideration all the evidence contained in the deposition of witnesses showing or tending to show that the decree was actually rendered in vacation. In this there was error. The precise question was otherwise determined in the case of *Biffle* v. *Jackson,* 71 Ark. 226. The court said: "That the original decree was rendered in vacation is abundantly established by the testimony both of witnesses and the record, since it is shown that the depositions upon which the decree is based were taken after the adjournment of the court at which the decree purports to have been rendered."

It was held in the same case and in the later case of *Boynton* v. *Ashabranner,* 75 Ark. 415, that a decree in chancery rendered in vacation, though entered on the judgment record in a blank space left for the purpose, is a nullity. This is the general rule, in the absence of statutory provisions providing for the rendition of decrees in vacation.

If the fact of its rendition in vacation could not be shown by testimony, and could only be shown by the record, we would

have the anomolous condition, in cases like the present one, of a decree being a nullity and of the parties affected by it being denied the right to establish that fact.

In the case of *Bobo* v. *State,* 40 Ark. 224; Chief Justice ENGLISH said: "Courts have a continuing power over their records not affected by lapse of time. Should the record in any case be lost or destroyed, the court whose record it was possesses the undoubted power, at any time afterwards, to make a new record. In doing this it must seek information by the aid of such evidence as may be within reach tending to show the nature and existence of that which it is asked to establish. There is no reason why the same rule should not apply when, instead of being lost, the record was never made up, or was so made up as to express a different judgment than the one pronounced by the court. Hence the general rule that a record may be amended, not only by the judge's notes, but also by other satisfactory evidence."

This rule has been followed ever since by this court, and was reiterated in the case of *Ward* v. *Magness,* 75 Ark. 12.

While the consideration of public policy which requires that a record shall be taken as importing verity yield to equities which require it to speak the truth, it does so only when the party seeking the relief is not guilty of laches. *State* v. *Hill,* 50 Ark. 461. Mr. Freeman, in his work on Judgments, § 102, says that the rule will be strictly applied, and that any laches shown against the moving party will prove fatal to his relief. This court has held that the writ of certiorari will be refused when the party seeking it fails to show that he has proceeded with due expedition after discovering that it was necessary to resort to it. *Black* v. *Brinkley,* 54 Ark. 372; *Lyons* v. *Green,* 68 Ark. 205. The reason of the rule is based upon grounds of public policy, and the doctrine of laches is grounded upon the same principle. Its aim is the discouragement, for the peace and repose of society, of stale and antiquated demands. 18 Am. & Eng. Ency. of Law, p. 98.

The general rule of the doctrine of laches, as stated by Mr. Justice Harlan, has been quoted with approval by this court in the case of *Sturdivant* v. *Cook,* 81 Ark. 284. He said: "But it is now well settled that, independently of any limitation pre-

scribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the relief asked."

Appellants contend that the cases of *Earle Improvement Co.* v. *Chatfield,* 84 Ark. 296, and of *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 160, are decisive of the present case. In the former case, the following language is used: "In the absence of some intervening equity calling for application of the doctrine of laches, equity by analogy follows the law, and will not divest the owner of title by lapse of time shorter than the statutory period of limitation." In the Updegraff case the court said: "The supervening equities referred to in that case (meaning the Earle case) mean some element of estoppel aside from the mere lapse of time, payment of taxes and enhancement in value." It will be observed that both these cases were suits to quiet title; that the lands were unimproved and unenclosed, and therefore under the statute deemed to be in the possession of the parties who paid the taxes, and against whom the doctrine of laches was sought to be invoked. There was no element of estoppel, aside from the mere lapse of time, payment of taxes and enhancement in value of the land.

The rule as applied to facts similar to those in the present case is aptly stated in the case of *Galliher* v. *Cadwell,* 145 U. S. 368, and approved by this court in the case of *Rhodes* v. *Cissel,* 82 Ark. 371. It is as follows: "The cases are many in which this defense (laches) has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to assert them in the proper forum, that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned, and that because of the changes in conditions or relations during this period of delay it would be an injustice to the latter to permit him to now assert them."

"Now, the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. When it would be practically

unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or when, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice, in taking the one course or the other, so far as relates to the remedy." *Hall* v. *Otterson,* 52 N. J. Eq. 535.

In the present case, the parties invoking the doctrine of laches, under and by virtue of the decree of foreclosure now sought to be annulled, became the purchasers of the lands, and were placed in possession of them. They have sold large quantities of timber from them, changed the fences on the cleared lands, and in all respects used them as owners by purchase under a valid foreclosure decree. All these facts were known to appellants. George Jackson, Sr., employed for appellants counsel to represent them in the foreclosure proceeding. He knew that their counsl agreed to a vacation decree. He was advised that this decree could be annulled, but would be valid unless appellants moved in apt time to set it aside. No effort was made to oppose the confirmation under the sale or the entry into possession by the purchasers by virtue of the deeds executed to them pursuant to the decree. They knew the lands were being sold off from time to time; for the knowledge of George Jackson, Sr., must be imputed to them, he being their agent in all respects concerning the lands. They made no effort to settle off the mortgage debt or in any way to assert any rights to the lands. They did not move to set aside the decree until nearly five years after it was rendered. They do not claim to have been misled by any act of the parties to the suit, no excuse is given for the delay, which may be attributable to their own culpable negligence.

These facts render appellants guilty of laches in not sooner moving to annul the foreclosure decree, and make it inequitable to divest the numerous purchasers of rights which they acquired under what purported on its face to be a valid decree, and which they were led to believe appellants had acquiesced in by their delay and negligence in moving to have it annulled and set aside.

Appellees insist that a husband does not have curtesy in the equity of redemption of the lands of his wife. In this they are in error. It is now fully settled in equity that the husband shall have curtesy of trust as well as of legal estates and of an equity of redemption. *Davis* v. *Mason*, 1 Peters (U. S.) 503; *Hart* v. *Case*, 46 Conn. 212; *Robinson* v. *Lakeman*, 28 Mo. App. 135; *DeCamp* v. *Crane*, 19 N. J. Eq. 166; 2 Jones on Mortgages, § 1067. "Where a woman, having issue, dies possessed of an equitable estate in land, of which her husband holds the legal title, the husband is entitled to curtesy therein." *Ogden* v. *Ogden*, 60 Ark. 70.

The decree is affirmed for the reasons given in this opinion.

McDONOUGH v. WILLIAMS.

Opinion delivered May 18, 1908.

1. FRAUD—EVIDENCE.—In an action for deceit in the purchase of shares of corporate stock, evidence of the value of the physical property of the corporation was admissible to show the value of the stock. (Page (Page 605.).
2. SAME—SUFFICIENCY OF NOTICE.—Where a relation of trust and confidence existed between a vendor and vendee, and the vendor claims to have been overreached, he will not be held bound by notice of facts which would, under other circumstances, have put a reasonably prudent man upon inquiry; nothing short of actual knowledge would conclude him. (Page 604.)
3. TRIAL—REFUSAL OF ADDITIONAL INSTRUCTIONS—The refusal of instructions asked by the appellant was not erroneous where the court had already declared the law correctly and sufficiently in those given. (Page 605.)
4. FRAUD—EVIDENCE OF SUBSEQUENTLY DISCLOSED DEFECTS.—In an action for deceit in the purchase of corporate stock, evidence of defects in the property that were developed after the sale was inadmissible. 604.)

5. APPEAL—SUFFICIENCY OF ABSTRACT.—An abstract on appeal is sufficient if it sets forth the pleadings and all of the instructions and evidence and shows that the assignments of error were duly reserved in a motion for new trial. (Page 605.)
6. EVIDENCE—COMPETENCY OF EXPERT.—It was not an abuse of the court's discretion to refuse to permit a witness to testify as an expert upon the value of a particular coal mine, although he knew the value of coal lands generally in that locality, if he showed no familiarity with the particular mine and did not know the extent and cost of its development. (Page 606.)
7. TRIAL—IMPROPER ARGUMENT.—A new trial will not be ordered on account of misconduct in the argument of appellee's counsel if it does not appear that appellee secured thereby any undue advantage over appellant. (Page 607.)
8. APPEAL—CONCLUSIVENESS OF FORMER OPINION.—Where, on a former appeal, this court adjudged that plaintiff made out a case to go to the jury, and the case comes up on a second appeal with the same evidence, the former opinion will be deemed conclusive. (Page 607.)
9. SAME—CONCLUSIVENESS OF VERDICT.—The verdict of a jury upon conflicting evidence will not be disturbed, though against the preponderance of the evidence. (Page 608.)
10. JUDGMENT—INTEREST—A judgment in an action for deceit in procuring a sale bears interest from the date of its rendition, and not from the date of the sale. (Page 608.)

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

Jas. F. Read, F. A. Youmans and *B. R. Davidson,* for appellant.

The court erred in refusing to permit defendant to show by J. M. Spradling the value of the land options taken by defendant. The ground of objection is not shown, the writing was never accepted by either party as the whole contract, and parol evidence is admissible to show what the contract actually was. 55 Ark. 115; 27 *Id.* 512. It was admissible to show the real consideration of which the land options were part. 75 Ark. 94. This is not an action *between the parties to that contract.* In such cases the doctrine which excludes parol evidence to alter or vary the terms of a contract does not apply 48 Ark. 543.

Oscar L. & Lovick P. Miles, for appellee.

1. The appeal should be dismissed for noncompliance with rule 9 in this: he has wholly failed to abstract the pleadings, objections to testimony, instructions given by the court, instructions refused by the court, and the motion for new trial. 75 Ark. 571; 55 Ark. 547; 78 Ark. 377; 79 Ark. 179; 57 Ark. 304; 80 Ark. 23; 81 Ark. 327; *Id.* 66; 82 Ark. 547; 83 Ark. 359.

2. Not only were the jury justified in finding from the evidence that there was in fact a close confidential relationship between the appellant and appellee, upon which the latter relied, but it is submitted that, because of the fact that they were co-stockholders, co-directors and co-officers of the coal company, there existed *de jure* a fiduciary relationship between them which precluded either from disposing of the stock or property of the corporation to his own advantage and to the detriment of the other. 145 Fed. 107; 3 Thompson on Corp. § § 4009 *et seq.*; 89 Mo. 545 and cases cited; 103 U. S. 651; 29 L. E. 509; 144 Fed. 770; 21 Wall. 616, 22 L. Ed. 492; 132 Fed. 7; 65 C. C. A. 627; 88 U. S. 616.

WOOD, J. This is the second appeal in this case, and the issues and facts are sufficiently set forth in the statement and opinion on the former appeal, to be found in vol. 77, page 261, of our reports. As was stated in that opinion, the action is for damages, grounded on fraud and deceit alleged to have been practiced by appellant upon the appellee in the purchase by the former of shares of corporation stock from the latter. The relation of trust and confidence is set up by the appellee as having existed between him and appellant at the time of the sale of the stock, and it is alleged that certain false and fraudulent representations were made by appellant, and certain false and fraudulent concealments were indulged in by him, on which appellee relied, and by which he was induced to sell $12,500 worth of shares of stock at its par value, when it was worth more. Our former opinion narrowed the issues to the question of whether the alleged confidential relation existed between appellee and appellant at the time of the sale of the stock, and, if so, whether appellant concealed the terms of the Bache option, which he should have disclosed. Judge McCULLOCH, concluding the opinion for the court, said:

"It is therefore a question of fact for a jury to determine, under proper instructions, whether, notwithstanding the severance of the relation of principal and agent, the confidential relation continued up to the time of the sale, and, if so, whether the plaintiff, on account of that relation, relied upon the defendant to disclose information concerning the prospective resale to Bache at a higher price than the par value, and whether the defendant, knowing of such reliance, concealed the information from plaintiff or from Ball and Boone when he knew that they were the trusted advisers of plaintiff, and consummated a purchase of plaintiff's stock at par in view of a certain resale at a much higher price."

On the second trial appellant introduced J. M. Spradling, who testified that he had been engaged in the coal mining business for ten years; that he was familiar with the values of coal lands in Sebastian County; was familiar with the Montreal Coal Company property in a general way; knew the property very well; had not been under ground in the mines. He was mining coal about one and a half miles distant on the same vein. He knew of the thickness of the vein of the coal of the Montreal Coal Company from others, was familiar with the price of coal throughout that section of country, and had a fair knowledge of same. The appellant then offered to prove by this witness that the mines and property of the Montreal Coal Company on January 11, 1903, were not worth over $55,000.

By the terms of the option, Bache paid appellant $33,000 for the stock of the Montreal Coal Company. Bache was to pay the indebtedness of the corporation, which appellant guarantied would not exceed $50,000.

There was evidence tending to prove that the indebtedness of the corporation at the time of the option was about $53,500. In our former opinion we said: "The court erred in excluding evidence offered by appellant tending to show the value of the corporation stock at the time of the sale. The rule hereinbefore declared as to the measure of damages rendered it competent to show the value of the property sold. If the stock was worth no more than the price received by appellee for it, then he was not damaged." *McDonough* v. *Williams,* 77 Ark. 272.

Evidence of the value of the physical property, the *corpus,* of the Montreal Coal Company at the time of the sale of the stock of appellee to appellant certainly tended to show what the value of the stock was at that time.

On the former appeal we held that the measure of damages "would be the difference between the price paid to the plaintiff for his stock and the actual value thereof at the time, if the latter exceeded the former." Under this rule the testimony of J. M. Spradling, *supra,* was very important to appellant. For there was evidence tending to show that, if the debts were equal to the value of the property of the corporation, the stock would not be worth anything. One witness testified that if the debts were as much as $50,000, the stock was not worth anything, that the property of the corporation did not exceed in value $50,000. In view of this evidence, the refusal to allow the testimony of the witness above mentioned was exceedingly prejudicial. While there was other evidence to the same effect admitted, the jury did not accept it. We cannot say that this evidence was cumulative. The witnesses were not sufficiently numerous for that, and, if the jury had been given an opportunity to consider the testimony of Spradling, they might have given it more weight than the other testimony that was adduced to the same effect.

There are numerous assignments of error as to the giving and refusing of requests for instructions. But a majority of the court is of the opinion that the instructions of the court properly presented the law applicable to the facts. Appellant contends that the instructions took from the jury the question of appellee's right to rely on appellant to disclose information concerning the Bache option, also the materiality of the concealment of such option. But the issue as to whether the relation of trust and confidence existed was submitted. This necessarily included the question of the right to rely. The court also submitted the question as to whether or not appellant's purchase of the stock from appellee was in view of a resale to Bache for a substantially higher price. This necessarily included the question of the materiality of the concealments.

Appellant complains that the instructions did not submit the question as to whether appellee had notice of such facts in regard to a proposed sale by appellant as would put a reasona-

bly prudent man on inquiry. If the relation of confidence and trust existed, appellee was not put upon inquiry by notice of facts that would cause a reasonably prudent man to inquire. If the relation of trust and confidence existed, nothing short of actual knowledge would suffice. See *Thornton* v. *Mason,* 74 Ark. 46.

A majority is of the opinion that, while some of the requests for instructions by appellant were correct, the court did not err in refusing them because the law was sufficiently and correctly declared in those given.

The court properly excluded testimony as to defects in the property that were developed after the sale of the stock. Evidence of defects that were discovered after the sale of the stock, that were not known and could not have been known at the time of the sale, was not admissible. This did not tend to prove what was the actual market value at the time of the sale.

We do not deem it necessary to express any opinion on the alleged misconduct of appellee's counsel during the progress of the trial. We must assume that counsel in another trial will not indulge in any improper conduct.

The abstract of appellant is a sufficient compliance with rule nine of this court. The substance of the pleadings is stated. The instructions are all set forth. The evidence is printed, and the abstract shows that the assignments of error were duly reserved in motion for new trial.

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

HILL, C. J., disqualified and not participating.

NOTE—In our former opinion we said that "there was no evidence that the defendant misrepresented the financial condition of the company either to the plaintiff or to Messrs. Ball and Boone, or that he misrepresented the urgent attitude of the creditors of the concern, and that issue should have been withdrawn from the consideration of the jury." 77 Ark. 273. This language is just as applicable to the facts of the present record as it was in the former case, and in view of this I am of the opinion that the court erred in giving its sixth instruction, and then, having given the sixth, the error was accentuated in refusing appellant's requests numbered 14, 15 and 29. I am of the opinion that the cause should be reversed also for these reasons.

Instruction No. 6, given by the court, was as follows:

"6. I charge you, that in order to render a transaction void on account of fraud, it must appear that the defendant intentionally and false-

ON REHEARING.

Opinion delivered July 11, 1908.

McCULLOCH, J. Upon further consideration of this case we are unanimously of the opinion that we reached the wrong conclusion as to the admissibility of the offered testimony of J. M. Spradling. After a more critical examination of the testimony, aided by argument of appellee's counsel on this important point, which was entirely ignored by appellee in the former presentation of the case to us, we think that the witness did not show sufficient familiarity with the conditions and value of the Montreal Coal Company property to qualify him to testify on the subject. He only pretended to be acquainted with the property in a general way, and did not claim familiarity with it in detail. He did not know the number of slopes or mines owned by the company, he had never been underground in the mines, and did not know the extent and cost of their development. In fact, the only special knowledge which the witness displayed was that concerning the value of coal lands generally in that locality.

The question whether a witness has shown sufficient knowledge concerning the value of property to give him a definite opinion on the subject is a matter, to some extent, within the sound discretion of the trial judge, and this court will not reverse for alleged error in this respect unless an abuse of such discretion appears. *St. Louis, Ark. & Tex. Rd.* v. *Anderson,* 39 Ark. 167; 17 Cyc. 30. No abuse of the court's discretion is shown here.

It is announced in the former opinion that no other error was found by the majority of the court. Mr. Justice WOOD,

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ly misrepresented some material fact to the plaintiff, or intentionally concealed some material fact from plaintiff when he knew plaintiff was relying on him to disclose same, or intentionally made some false or fraudulent statement to him, or intentionally caused some false or fraudulent statement to be conveyed to him of a material existing fact, with a view to influencing him to enter into the transaction, and that such false and fraudulent statement was believed by the plaintiff and acted upon by him."

Defendant requested that the following instructions be given:

"14. It is alleged in the complaint that the defendant misrepresented the financial condition of the Montreal Coal Company to the plaintiff and to Messrs. Ball and Boone. There is no evidence sufficient to sustain these allegations, and you will therefore disregard all of these allegations in the complaint.

who wrote the opinion, expressed the view that the court below erred in refusing to give the fourteenth, fifteenth and twenty-ninth instructions requested by appellant. These were fully covered by instructions which the court gave. The court narrowed the issue to the question of fraudulent concealment of the prospective resale of the stock to Bache, thus excluding from the consideration of the jury all questions as to misrepresentation of the financial condition of the company. The court also instructed the jury that if appellee consummated the deal and transferred his stock to appellant after he had obtained knowledge of the alleged fraud and deceit, he could not recover. This fully covered the subject of the rejected twenty-ninth one.

The alleged misconduct of counsel consists of comments and remarks made during the progress of the cross-examination of appellant as a witness in his own behalf. It arose out of a controversy between opposing counsel, and the court seems to have done its best to restore order and remove any possible prejudice that might result from the incident. While the conduct of the attorney is not to be commended, we can not see that appellee secured thereby any undue advantage over his antagonist, and we do not feel at liberty to disturb the verdict on that account. *Kansas City S. Ry. Co.* v. *Murphy,* 74 Ark. 256.

Learned counsel for appellant argue with much zeal and plausibility that the plaintiff did not make out a case to go to the jury, and that the findings of the jury as to the various essential elements of the alleged cause of action are not supported by evidence. The same question was argued with equal force and confidence when the case was before us on former appeal, but we decided that there was enough evidence to go to the jury.

"15. It is also alleged in the complaint that the defendant misrepresented to the plaintiff and to Messrs. Ball and Boone the urgent attitude of the creditors of said corporation. There is no evidence of any such misrepresentation. You will, therefore, disregard all allegations with reference to this matter.

"29. Even if the jury should find that the defendant made the alleged false representations set out in the complaint, if, after said representations were made if they were made, the plaintiff was informed by the defendant that he had a deal on hand concerning the sale of the stock, and that if said deal went through he, the said defendant, would make $5,000 or $10,000, and if, after such statement by the defendant to the plaintiff, the plaintiff then sold his stock to the defendant, it will be the duty of the jury to find for the defendant."

There is little difference in the evidence in the present record and in that presented on the former appeal, and we must treat the former decision as conclusive of the question.

We are free to say that the various questions of confidential relations between the parties and of fraud and deceit practiced by the defendant were decided by the jury against what appears to us to be the preponderance of the evidence; but, as there was a conflict in the evidence on these points, it is not within our province to reverse the case on that account. The issues were submitted to the jury on correct instructions, and as there was evidence to sustain it the verdict must stand.

The verdict of the jury assessed the damages in the sum of $1575, and the court rendered judgment for that amount with interest from the date of the sale of the stock. This was erroneous. The judgment should have been only for the amount assessed by the jury.

The rehearing is therefore granted. The judgment is modified to the extent of striking out interest, and affirmed as thus modified.

HILL, C. J., disqualified and not participating.

WOOD, J., dissents on the ground that the court erred in refusing instructions requested by appellant, and that the evidence does not sustain the verdict.

MT. NEBO ANTHRACITE COAL COMPANY v. MARTIN.

Opinion delivered June 15, 1908.

1. PARTIES—HUSBAND AND WIFE.—It was not error to join a husband and wife as joint plaintiffs in a suit by them to recover salaries due to each of them separately. (Page 612.)
2. CORPORATION—DISSOLUTION—PARTIES.—In a suit to wind up the affairs of a corporation, every person interested as owner of stock or creditor of the concern is a proper party. (Page 612.)
3. SAME—RIGHTS OF DIRECTORS TO RECOVER FOR SERVICES.—When a director of a corporation acts as manager of the corporation or in any other capacity outside of his duties as director, he is entitled to receive a salary, either by contract or upon *quantum meruit*, according to the circumstances of the case. (Page 613.)

4. APPEAL—QUESTION NOT RAISED BELOW.—The defense of the statute of limitations cannot be raised on appeal if the record fails to show that any such defense was made in the court below. (Page 613.)
5. COSTS—PRACTICE IN EQUITY.—The giving of costs in equity is within the discretion of the chancellor, to be exercised upon a full consideration of all the circumstances of the case and the situation of the parties, and the appellate courts are slow to disturb his award of the costs when he has exercised that discretion. (Page 613.)

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

J. A. McCracken and *Dan B. Granger,* for appellants.

1. The motion to strike out the amendment to the complaint should have been sustained. Except by consent of parties, pleadings cannot be amended by introduction of new parties or causes of action. 98 N. C. 509; 30 W. Va. 774; 20 Pac. 45; 16 S. W. 124; 13 S. W. 922; 58 N. W. 693; 17 S. E. 1036. Amendment of complaint to conform to facts proved is properly denied when it will permit a recovery upon an entirely different cause of action from that originally set forth in the complaint. 132 N. Y. 22; 13 S. W. (Ark.) 769; 10 So. 328.

2. There is a misjoinder, both of plaintiffs and causes of action. The account introduced by the amendment was for services rendered by the plaintiffs separately. The wife had no right of recovery for the separate services of the husband, and he was not a necessary party, and had no right to the recovery for the wife's separate services. Kirby's Dig. § 5214. See also 43 Fed. 358; 38 W. Va. 409.

3. As to partnerships, it is settled that partners are not entitled to charge the partnership for services rendered in the prosecution of its business, unless by agreement. Lindl. on Partnership, Am. Ed. * 380, 643-44, and note 4; George on Partnership, 165 *et seq.*; 6 L. R. A. 72 and note. See also 128 Ill. 209; 129 Pa. 635; 67 Miss. 462. And as to corporations it is also settled that directors are not entitled to salary unless provided for by charter or by-law, and that a director cannot make a valid contract with himself so as to bind the corporation for services outside of his duty as a director. 3 L. R. A., 378 note. Clark on Corp. 508 *et seq.,* 531 *et seq.* See also 9 L. R. A. 117; 17 Am. & Eng. Enc. of L., 1st Ed., 119.

J. T. Bullock and *R. B. Wilson,* for appellees.

1. The amendment was both permissible and proper. It did not change the character of the action, affected no other parties but affected all parties to the suit alike. Kirby's Dig. § 6145; *Id.* § 6848; 80 Ark. 228; 42 Ark. 57; 64 Ark. 253; 67 Ark. 142; 74 Ark. 101; 62 Ark. 262.

The wife *may* claim and sue for her earnings as her sole and separate property. Kirby's Dig. § 5214. But when she does not elect so to do, but allows them to be used by the husband as his funds or to be used as a part of a common fund, then the common law rule applies, and the husband is entitled to sue for and recover them. 74 N. Y. 356. Where husband and wife bring an action jointly which should be brought by the husband alone, the proceedings may be amended by striking out the wife's name. 8 Ind. 341. An improper joinder of wife with husband is no ground of reversal. 84 Mo. 318; 128 Mo. 670; 51 Mo. App. 341; 120 Pa. St. 485; 21 Cyc. 1553.

HILL, C. J. Edward J. Martin discovered that a coal mine near Russellville could be purchased at a profit, and interested some of his relations, Frank Hoblit, Charles E., Samuel H. and Clinton D. Martin, the latter three being brothers, in the venture. The mine was purchased, and E. J. Martin placed in charge of it as manager; and part of the time Clinton Martin assisted him. Mrs. Minnie C. Martin served as clerk in the company's store.

This partnership was merged into a corporation, under the name of the Mt. Nebo Anthracite Coal Company. The property of the coal company was subsequently sold to William Hay and his associates, who were to form a corporation under the laws of Michigan to carry on the mining business purchased from the Mt. Nebo Anthracite Coal Company. The purchase price was partly in cash and partly in stock in the new corporation, which was styled the Russellville Anthracite Coal Mining Company, and was to be apportioned among the stockholders of the former corporation in proportion to their holdings. The sale was made, and the new corporation formed, and a disagreement arose between the parties as to the settlement of their respective interests, and E. J. Martin and Minnie C. Martin, his wife, brought suit in the Pope Chancery Court against the Mt. Nebo Anthracite Coal Company, Frank Hoblit, Samuel H. Martin, Charles

E. Martin, Clinton D. Martin, the Russellville Anthracite Coal Mining Company, and William Hay, wherein the history of the transactions was set forth and their respective claims against the Mt. Nebo Anthracite Coal Company were sought to be enforced. The prayer was for the dissolution of the Mt. Nebo Anthracite Coal Company and a settlement of its affairs and the payment of the sums owing to plaintiffs and distributing the remaining assets among the stockholders; and that the Russellville Anthracite Coal Mining Company and William Hay be restrained and enjoined from delivering the stock to Clinton B. Martin which was to be part payment for said property of the Mt. Nebo Anthracite Coal Company, and that it be held by the court so as to be subjected to the satisfaction of the judgment sought in this case. Issue was made upon all the allegations of the complaint, and there were amendments and a shifting of issues in the case in the progress of the litigation, which finally resulted in a decree finding that E. J. Martin was entitled to salary from the Mt. Nebo Anthracite Coal Company from the first of October, 1899, to the 15th of December, 1904, at the rate of $100 per month; and that said Minnie C. Martin was entitled to salary for forty months at the rate of $40 per month; and that said Company was indebted to the said plaintiffs in the sum of $4,778 on account of said salaries, which was shown in detail in the master's report, which was approved by the court. Judgment was rendered in favor of E. J. Martin for himself and his wife for said sum, and orders made for the enforcement of it against the assets of said Mt. Nebo Anthracite Coal Company, including the stock in the Russellville Anthracite Coal Mining Company which was to be part payment of the purchase price of the former corporation, and the defendants appealed.

There is abstracted only the testimony relating to the issue of the salaries of Martin and his wife; and a sharp conflict of evidence is found. It was contended by C. D. Martin and his side of the controversy that the agreement was that E. J. Martin was to have his expenses and one-fourth interest in the mining venture as his compensation, and that, while it was known that Minnie C. Martin was working at the store it was not known that she was working for a salary; and that E. J. Martin had told him that she was helping him, and he was paying her

something alone, but said nothing of a salary, and it was understood that she was working to help her husband make a good showing in the business.

On the other hand, E. J. Martin testifies to an agreement that he and Clint Martin were to have salaries at the rate of $100 per month, and that this was regularly charged on the books—first of the partnership and afterwards of the corporation—and that his wife was employed as clerk in the store with the knowledge and acquiescence of the others, and her salary charged on the books; and these books were open to the other side and frequently examined by them. While the number of witnesses is against this version of the transaction, yet there is some corroboration of it by witnesses, and the books strongly corroborate it; and the chancellor has accepted it as true, and it cannot be said that it is against the preponderance.

Objection is made to the amendments to the complaint and the shifting of the causes of action; but the court is unable to see that there was any abuse of discretion in this regard, or that any rights were prejudiced thereby.

It is insisted that there was a misjoinder of parties, in having husband and wife as joint plaintiffs for the recovery of separate salaries. The chancellor evidently regarded it so, as he caused the complaint to stand amended so as to claim on behalf of E. J. Martin to recover for his own salary and also in behalf of his wife, and the judgment was rendered accordingly.

It is sought to sustain this action upon the theory that when the wife does not elect to sue for her separate earnings under the statute giving that right to her, the common-law rule permitting the husband to sue and recover for them prevails. It is unnecessary to go into this question, because this was a suit to wind up the affairs of a corporation which had gone out of business, to dispose of its assets and distribute the proceeds among the holders of the stock. "Every person interested as owner of stock or creditor of the concern was a proper party, and should have been admitted to assert any rights." *Randolph* v. *Nichol,* 74 Ark. 93. Mr. Martin and Mrs. Martin were each creditors of the corporation, and were each a proper party to the suit to assert their respective and separate rights; and there was no misjoinder of them, and no reason why separate judg-

ments should not have been rendered in favor of each of them separately. The only party who could complain is Mrs. Martin, but she was a party to the suit, and permitted her rights to be asserted in the name of her husband, and is here asking an affirmance of the judgment in his favor for her salary. She has elected to treat the suit as his for the joint benefit of himself and herself, and this election is binding on her, and will make her husband's satisfaction of the judgment her satisfaction of it.

The court disallowed the claim for salary during the existence of the partnership, on the theory that E. J. Martin had not proved a contract that would be binding upon the partnership; but allowed salary for the time that the corporation existed. Authorities are cited to show that directors are not entitled to salaries as such; but these same authorities show that when a director is acting as a manager or in any other capacity outside of his duties as director he is entitled to receive a salary, either by contract or upon *quantum meruit,* according to the circumstances of the case.

The decree is affirmed.

ON REHEARING.

Opinion delivered July 13, 1908.

HILL, C. J. Counsel re-argue the facts, but the court fails to find the weight of the evidence against the chancellor's finding. Counsel now insist that the recovery of the salary of Mrs. Martin was barred by the statute of limitations. The record discloses that the statute of limitations was not pleaded as a defense. The only reference to it is in appellant's brief, where they say that the court erred in not sustaining the oral plea of the statute of limitations. The record discloses no plea, oral or written, of the statute of limitations.

Motion denied.

ON MOTION TO RETAX COSTS.

Opinion delivered September 28, 1908.

HILL, C. J. I. Appellants ask that the costs be retaxed and the decree modified, in so far as the claim of Mrs. Minnie

C. Martin is concerned. The giving of costs in equity is within the discretion of the chancellor, to be exercised upon a full consideration of all the circumstances of the case and the situation of the parties, and appellate courts are slow to disturb his award of the costs when he has exercised that discretion. *Williams* v. *Buchanan, ante* p. 259; *Temple* v. *Lawson,* 19 Ark. 248; *State* v. *Fort,* 18 Ark. 202; *Jones* v. *Graham,* 36 Ark. 383.

The chancellor adjudged that all of the costs of the suit, including the fees of the master, be paid from cash in the bank belonging to the defendant corporation. There is nothing in the circumstances of this case which would call for a reversal of this award of the costs.

The opinion heretofore delivered announced that this decree was affirmed, but the clerk made a mistake in writing up the judgment of affirmance, making it a recovery from the appellants of all the costs in the chancery court as well as in this court, and this mistake was not detected by the court when the record was approved. Attention has been called to it by this motion, and the order will be that the judgment be corrected so as to affirm the decision of the chancellor in this respect, and the judgment for costs against the appellants be for the costs of this court only, the costs of the chancery court to be paid as provided in the order of that court, which was not intended to be disturbed.

II. Appellants point out that the statute of limitations was pleaded against the claim of Mrs. Martin, and show that in the final decree of the chancellor, after some other motions had been disposed of, the coal company "interposed the plea of the statute of limitations against plaintiff's claim for salary, and the court doth find that said claim is not barred by limitation." When this question was raised on rehearing, the pleadings were searched in order to find wherein the statute of limitations was pleaded, and the court orders were searched in order to find if the court had accepted an oral plea, as contended by counsel; and, none being found at these places, where it should have been, the statement was made in the opinion overruling the motion for rehearing that the record did not contain such plea. But this was a mistake, as it is found in the final decree; and attention was called to it in the original brief.

It is doubtful whether it is proper for the court to consider the plea of limitations raised orally when the final decree was being rendered as properly raising that issue, even though the chancellor ruled upon it; but as the facts require an overruling of the plea upon the merits, it is not necessary to go into this question of practice.

The record shows that it was the joint account of Mr. and Mrs. Martin that was sued on. It contained items of debit and credit between them and the coal company running over a number of years, and contained items of debit and credit as late as December, 1904 (this suit was brought in 1905). Some of these credits were for salary of Mr. Martin and some for salary of Mrs. Martin. It is insisted that the last item of Mrs. Martin's salary is August 1, 1902. The plea of limitation is to the joint account of the two, and did not in any way separate the two claims. If the claims were separated, and the plea interposed to the separate claim of Mrs. Martin, the result is the same. The record shows that the court submitted to a master the duty of stating the account of Mr. and Mrs. Martin with the coal company. The fifth item of the master's statement is as follows: "I find in the account that Mrs. Minnie C. Martin has taken credit January 25, 1904, for $250. The defendants admit there is no contest over this item." Exceptions were filed to this account on other matters by both parties, and, in accordance with the instructions from the chancellor, the account was recast; but there was no change upon this item, as it appears in the restated account. "January 25, 1904, by cash Mrs. Minnie C. Martin, $250." This was evidently payment on the account.

From these facts the court concludes that Mrs. Martin's salary was not barred when this action was begun. The order is that the judgment be corrected so as to conform to the opinion; and in other respects the motion for retaxation of costs and modification of the decree is overruled.

APPENDIX

I.

IN MEMORIAM

WILLIAM SIMONTON McCAIN

On February 11, 1908, there passed away the Honorable William Simonton McCain, a member of the bar and sometime Special Judge of this court.

On October 12, 1908, the Honorable George B. Rose, a member of the bar, presented to the court the following:

RESOLUTIONS OF THE LITTLE ROCK BAR ON THE DEATH OF JUDGE McCAIN.

"Rarely have we been called upon to mourn so great a loss as that which afflicts us to-day; for our departed brother was not only a leader at the bar, but he was the friend of us all. He was a man of such gentleness, of such all-embracing charity, of such innate kindness and purity of heart that he drew all his colleagues to him and held their affections with hooks of steel. No matter how strenuous the contest or how trying the conduct of his opponent, he never lost his temper, never uttered an acrimonious word. When all around him were wrought up to fever heat, he remained serene and gentle, ignoring all personalities and seeking only to protect his client's rights. He was the pleasantest man with whom any of us ever practiced. He was vigilant on behalf of his client and indefatigable in urging his cases to an early hearing. There is perhaps none of us who equalled him in the promptitude with which he brought his suits to trial. But he did it all with such urbanity, with so much consideration for others, that we could never take offense. The rest of us in the heat of argument sometimes say unkind and ungenerous things to one another; but there is no living man who ever heard Judge McCain say a harsh thing about or to any worthy member of the bar; and, even when he spoke of those unhappy individuals who have brought dishonor upon our profession, it was in a tone of pity and regret.

"Whether as an associate or as an adversary, to practice law with him was a delight. In him you found an opponent who sought only law and justice, frank and open as daylight; who scorned tricks and technicalities, and strove only to reach the merits of the controversy; always courteous and conciliatory, never descending to personalities nor suffering himself to become the mouthpiece of his client's malevolence. As an

associate, he was charming. Possessed of a mind of striking originality, he illuminated every discussion without seeking unduly to force his views upon his colleagues. His sterling worth and his great legal attainments commanded the respect of all his brethren, and the unalterable sweetness of his disposition won their love. His death comes to us all as a deep personal loss.

"As he was in dealing with his professional brothers, so was he in all the relations of life. He was a man of unlimited moral courage, and was free in the expression of his views; but there was always about him such evident purity of motive, and there was in his manner such gentleness and good will—a perfect urbanity that could only spring from a heart of gold—that no one took offence. His great abilities, his varied learning and his lofty character commanded the reverence of all, and his evident love for his fellow men brought universal affection in return.

"He was a model in all the relations of life. As a lawyer, his candor, his courtesy to bench and bar, his diligence and his fidelity to every trust were beyond all praise. As a citizen, he was progressive and enlightened, interested in everything that tended toward the uplifting of the community, and he was especially concerned for the education of the young. As a man, he was always on the right side. He made no mistakes in questions of morals. "Blessed are the pure in heart," saith the Lord; and truly the cup of our brother's blessings should be running over; for a purer and a cleaner heart was never lodged in the bosom of man. With such qualities it was inevitable that he should be perfect as a husband and father, loving and patient, forgiving all offenses, encouraging every good impulse and ever pointing the upward way.

"When such a man passes from amongst us, it is proper that some memorial of his worth should be left by his associates who knew him so well and loved him so much. Therefore, be it resolved:

"1. That in the death of Judge McCain our bar has been deprived of one of its most distinguished members, whose many noble and amiable qualities endeared him to us all; that our State has lost one of its foremost citizens, a man who always stood for the highest ideals of right, justice and morality, and who was a leader in every movement for the upbuilding of our commonwealth and the elevation of its people; while his bereaved family must mourn for a husband and father who was kind, patient, loving and helpful to an almost unexampled degree.

"2. Resolved, further, that we endeavor to profit by the example of our departed brother, to live up to his high ideals of professional ethics, and when in the heat of forensic strife we are tempted to say something unkind or unjust, let us think of him and hold our peace.

[Signed] "G. B. ROSE,
"J. M. MOORE,
"W. L. TERRY,
"J. E. WILLIAMS,
"W. E. ATKINSON."

In presenting these Resolutions, Mr. Rose spoke as follows:

Judge William Simonton McCain was born in Tipton County, Tennessee, on May 31st, 1848. He was left an orphan without means at the age of twelve, and his education was obtained under great difficulties. In 1867 he came to Arkansas, settling at Monticello, where he began the study of the law. When only nineteen years of age, he was licensed to practice, and entered into partnership with Judge W. T. Wells. On July 4th, 1876, he removed to Pine Bluff, and formed a partnership with Major Herman Carlton, who was then one of the leaders of the bar. Two years later Major Carlton died, and he then became associated with Mr. John W. Crawford. In 1886 he went to Paris, Kentucky, and began to practice in partnership with his nephew, Mr. Emmett Dickson. At the end of two years, however, he returned to Pine Bluff, and shortly afterward removed to Little Rock, where he continued to reside until his death.

While living at Monticello, he married Miss Eliza Chestnutt, of that place, who survives him, as do also four sons.

Judge McCain was one of the most remarkable personalities that ever adorned our bar. He was tall and handsome in person, and there was upon his smooth-shaven face an expression of benevolence and candor that won the hearts even of casual strangers. His kindly smile, however, was only a faint indication of the treasures that lay beneath.

He was, without exaggeration, one of the best men that ever lived. No one was ever kinder, more charitable, or more generous in his estimate of others. He was absolutely without malice. He saw the faults of men, but they excited his pity, not his abhorrence, and he desired their amendment, not their castigation. And of the actions of all men he took the most charitable view possible, excusing their shortcomings and throwing over their pardonable transgressions the mantle of forgiveness. And, as he was without malice, so was he without envy. He rejoiced with all his soul in the prosperity of others. No spirit of rivalry embittered his forensic contests. He was glad to see his brother lawyers prosper, and rejoiced with them in their successes as much as he regretted their failures.

I have never known any man whose manner was so conciliatory. So far as I can learn, he never had a difference with a brother lawyer. He was vigorous and efficient in the conduct of his cases, pushing them on to an early hearing more effectively perhaps than any of us, and yet he never gave offense. When he was on the other side, you had to get ready for trial; but, however reluctant you were to do so, you could not resent his firm insistence, so kind and courteous was it; and, no matter how heated the argument, he never said anything that could wound the most sensitive opponent. Yet there was about him no weakness. He was a strong man, who insisted firmly upon his client's right; but the kindness of a heart of gold made discourtesy impossible.

There was never a lawyer who cared less for technicalities. He brushed them away as mere cobwebs that encumbered the path of justice, and went straight to the merits. He possessed no florid eloquence. He spoke fluently and well, but his appeal was to the reason, never to passion or prejudice. It was justice that he sought, not an unworthy victory, and he did his best only when convinced that his cause was just.

He maintained in its absolute perfection the ethics of his profession. It was no trouble for him to do right. He was simply incapable of doing a wilful wrong. He could not have taken an unworthy advantage of an opponent if he had tried. Nature had so made him that the straight path of conscience and duty was the only one that he could follow. He was born a perfect gentleman, with high, pure instincts, and during years of close friendship I could never perceive that there was any dross in his composition.

Soon after I came to the bar I was struck with the generosity of his nature. I was associated with him for the first time in a case that came to this court. He was much older than I, and he naturally prepared the brief here, and handed it to me. I was a very young man, with more than the average presumption and folly of youth; and I was foolish enough to think that I could improve on his manner of presenting his ideas. So I wrote the brief over again, changing its whole arrangement and scarcely leaving a paragraph as it had stood. I had sense enough to know that he would in all likelihood be very angry, and I took it back to him with great trepidation, escaping before he could see what I had done. But in a little while he came to me and told me that he thought the brief was greatly improved, and that he would print it exactly as I had written it. I was foolish enough then to feel much flattered; now I know that I should have hung my head in shame. And as he acted then, so was he on every occasion, always appreciative of the efforts of others, generous alike to adversary and associate.

He was a learned lawyer, who stuck to his office and read the books; but the most striking thing about his mind was its originality. No matter what subject was under discussion, he could suggest some view that had not occurred to others. They seemed to fly from his mind like sparks from an anvil. Of course, they were not all well taken. Some of them were in the teeth of the authorities. It is the nature of originality that it cannot follow the conventions. But they were always suggestive, often illuminating. There was no member of the bar with whom it was pleasanter to be associated. In consultation you were sure to get some ideas that would not have occurred to you, and he did not seek to force his views on colleagues to whom they were not acceptable.

With all these endearing qualities it was natural that he was well beloved. All of his brethren regarded him with a singular affection. And he was particularly kind to the younger members of the profession, never too busy to listen to their troubles and to enlighten their per-

plexities. Rarely in the annals of any bar has a death been felt as a personal loss by so many.

Not alone at the bar was he honored. He was a leader in the community, and his moral instincts were faultless. On any question of right or wrong he was always on the right side. He was an elder in the First Presbyterian Church, and he was sincerely religious; but his religion was the religion of sweetness and light, with none of that austerity that too often accompanies the profession of Calvinistic doctrines. He held firmly to his own faith; but his toleration of the religious opinions of others was perfect.

He was thoroughly public spirited and a leader in every thing that looked to the upbuilding of our State. He had a large practice and was a busy man; but he could always find time to attend meetings where serious public questions were to be considered, to serve on committees, and to discharge to the utmost his duties as a citizen. Though so mild in his manner, he was posessed of great moral courage, and never shirked responsibility nor avoided an issue. He did not look on those who differed from him as bad men, but he maintained what he believed to be the right with a firmness equal to his courtesy.

He was greatly interested in young people and their education. His heart was always young and responded to theirs; and they instinctively recognized that he was their friend. In his own family he was perfect. No better husband or father ever lived, none kinder, wiser, more generous and devoted.

He has left us now, and our hearts are sad because of our loss. But there is no danger of his being forgotten. His personality was so striking that the memory of him is planted deep in the bosoms of us all. And we shall be better men because we knew him. The good that he has done will not be interred with his bones. The example of his courtesy, his kindness, his patience under provocation, his devotion to duty, will not be lost upon us. Perhaps none of us will attain his moral excellence, but we shall come nearer that ideal because he showed us the way.

The Chief Justice responded as follows:

The professional life of Judge McCain was worthy of emulation and set a standard so high that it would infinitely benefit our profession to live to it. To his reverent mind, "law had its seat in the bosom of God," and its object was to enforce Right and redress Wrong. To him municipal law was formed and administered to secure as near as humanly possible its supreme end—equal and exact justice. He was ever interested in perfecting our code of laws, and drafted and influenced into enactment many important statutes.

His indefatigable energy, keen intellect and great learning were at the fullest service of his clients in the assertion or defense of their rights, but their rights were under the law and not in opposition to it nor evasion

of it. He made his client's cause "as strong as the law, no stronger; as weak as the law, no weaker." He was courteous, affable and just in his daily intercourse with his brethren of the bar, and considerate of and helpful to the courts.

He followed the elder traditions of the American Bar, which made the lawyer a leader in public affairs, and carried this unthankful but patriotic burden. His lifework is left upon the statute book, upon the records of this Court, occasionally as a judge, constantly as a lawyer; and in a wider way his impress is upon the Bar and the people as a lawyer of the highest character and a patriotic citizen, standing always for the Right as God gave him light to see it.

The pre-eminent characteristic of Judge McCain's life was that in every walk of it he was a Christian gentleman. He was a charming companion and drew friends to him with the strongest ties of affection, and among those friends were all the members of this Court. The Court is gratified at the just and beautiful tributes paid his memory at the Bar, and these Resolutions and the address will be preserved in the records of the Court, so that posterity may know what a splendid gentleman has passed before us.

II.

OPINIONS NOT REPORTED.

Rogers *v.* State; error to Sebastian Circuit Court; Daniel Hon, judge; affirmed April 20, 1908; per McCulloch, J.

Luxora Banking Co. *v.* Riley; appeal from Mississippi Circuit Court; Frank Smith, judge; affirmed May 4, 1908; per Hill, C. J.

Head *v.* Cook; appeal from St. Francis Chancery Court; Edward D. Robertson, chancellor; affirmed May 25, 1908; per Hill, C. J.

Franklin *v.* Hill; appeal from Ashley Circuit Court; Henry W. Wells, judge; affirmed June 1, 1908; per Hill, C. J.

Thompson *v.* Lonsdale; appeal from Garland Chancery Court; Alphonzo Curl, chancellor; affirmed June 1, 1908; per McCulloch, J.

Robinson *v.* State; appeal from Conway Circuit Court; Hugh Basham, judge; affirmed June 8, 1908; per Battle, J.

McAdoo *v.* Conner; appeal from Madison Chancery Court; T. H. Humphreys, chancellor; affirmed June 22, 1908; per Battle, J.

III.

CASES DISPOSED OF ON MOTION.

Interstate Medical Association of Arkansas *v.* Lizzie N. Elliott; Carroll Circuit Court; J. S. Maples, judge; appeal dismissed for non compliance with Rule nine, May 4, 1908; *per curiam.*

Choctaw, Oklahoma & Gulf Railroad Company *v.* Lula A. Duke, Admx.; Saline Circuit Court; W. H. Evans, judge; settled and cause dismissed by consent, May 11, 1908; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Lesser-Goldman Cotton Company; Nevada Circuit Court; Jacob M. Carter, judge; settled and judgment by consent, May 11, 1908; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* W. B. Waller *et al.;* Nevada Circuit Court; Jacob M. Carter, judge; settled and judgment by consent, May 11, 1908; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Prescott Hardware Company *et al.;* Nevada Circuit Court, Jacob M. Carter, judge; settled and judgment by consent, May 11, 1908; *per curiam.*

Byron Upton *v.* The State of Arkansas; Columbia Circuit Court; George W. Hays, judge; appellant pardoned and appeal dismissed on his motion, May 18, 1908; *per curiam.*

E. E. Hudspeth *v.* The State of Arkansas; Pike Circuit Court; James S. Steel, judge; appellant pardoned and appeal dismissed on his motion, May 25, 1908; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* The State of Arkansas; Crawford Circuit Court; Jeptha H. Evans, judge; appeal dismissed on motion of the attorney general, May 25, 1908; *per curiam.*

St. Louis & San Francisco Railroad Company *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, judge; appeal dismissed on motion of the attorney general, May 25, 1908; *per curiam.*

Will Gideon *v.* The State of Arkansas; Izard Circuit Court; J. W. Meeks, judge; appeal dismissed on motion of the attorney general, May 25, 1908; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* F. M. Jaco *et al.;* Perry Circuit Court; Edward W. Winfield, judge; settled and appeal dismissed, May 25, 1908; *per curiam.*

Frank H. Dodge, Receiver Peoples' Fire Insurance Company *v.* R. D. Plunkett *et al.;* appeal from Pulaski Chancery Court; Jesse C. Hart, chancellor; appeal dismissed for non compliance with rule nine, June 29, 1908; *per curiam.*

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