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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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BURRILL B. BATTLE,	ASSOCIATE JUSTICES
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

FRANK *v.* FRANK.

Opinion delivered October 26, 1908.

1. EQUITY—JURISDICTION TO CONSTRUE WILL.—Equity will not entertain jurisdiction of a bill brought solely to construe a will which disposes of legal estates only, and which makes no attempt to create any trust relations with respect to the property devised. (Page 4.)
2. SAME—WAIVER OF JURISDICTION.—The objection that equity has no jurisdiction of the subject-matter of a bill cannot be waived. (Page 6.)

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

STATEMENT BY THE COURT.

John F. Frank was a resident of Memphis, Tenn., and died there on October 6, 1904, leaving a will containing six paragraphs. The first paragraph provides for the payment of his debts; the second is a devise of his residence to two of his daughters and one of his sons; the third provides a legacy of one thousand dollars for a grandson. The fourth is as follows: "I hereby give, devise and bequeath to my seven children and legal heirs, to-wit: Chas. F., Robt. B., John L., Walter A., Clara M., Elizabeth G. and Leonora F. Frank, now Mrs. S. A. Bowen, all my property, real, personal and mixed, wheresoever situated, not already disposed of, which I now own or may hereafter acquire and of which I may die seized and possessed, absolutely and in fee simple and in equal shares. The division shall be made by three commissioners to be appointed by my said children, and the lots and parcels of land so divided shall be drawn for by them, and any difference in the valuation be settled among themselves. The property of my daughters, however, shall be held and owned by them for their sole and separate use and enjoy-

ment, free from the debts and contracts of any husbands, for and during their natural lives, with remainder in fee to their children, and, in default of children surviving either of them, then to my children who shall then be living, their heirs and assigns forever; and, should any of my sons die without issue, his or their shares shall also revert to my children then living, their heirs and assigns forever." The fifth paragraph is a provision that no lawyers' fees or court costs whatever be charged to his estate, and any heir desiring to employ an attorney should do so at his own individual expense. The sixth appointed three executors, and made provision for choosing their successors.

Mr. Frank owned large tracts of land in Lee, Crittenden and St. Francis counties, Arkansas. He left seven children surviving him; the children were all adults, and there were eight grandchildren, all of whom were minors. His children filed suit in the chancery court of St. Francis County against the grandchildren and the executors, seeking a construction of the will. They set forth the ownership of the land in said county and other counties in Arkansas by Mr. Frank at his death, the execution of his will and its due probation in Shelby County, Tenn., the names and residences of his children and grand children, and of the executors of the will, and that duly authenticated copies of the will had been filed with the clerk of each of said counties and had been duly admitted to probate by the probate courts of Lee, Crittenden and St. Francis counties; and set forth that the executors had duly qualified in the State of Tennessee, and are proceeding with the administration of said estate in the State of Tennessee, and have paid or will pay all of the debts and liabilities of every character, and have ample personal assets for that purpose, so that the said executors have not qualified and will not qualify in the State of Arkansas, as there is no occasion for their doing so. And they further alleged that the legacy given by the said will to the grandson had been paid or would be paid by the executors in Tennessee; and there is no necessity or occasion for taking such legacy into account for the purposes of this suit.

They further alleged that a suit had been brought and is now pending in the chancery court of Shelby County, Tenn., for a construction of the will of said John F. Frank, and that such court has jurisdiction of the subject-matter and the executors

named in said will, and that the children of said Frank are the plaintiffs, and his grandchildren are the defendants therein, and that said suit will be finally settled and determined with reference to the real estate located in the State of Tennessee, and all the personal property wheresoever situated; but that said court has no jurisdiction to establish the title to the lands in Arkansas; and for that reason this suit was brought for the purpose of obtaining a construction and interpretation of the titles derived by the parties to the suit to the lands devised by the fourth paragraph of the will.

The plaintiffs alleged that, by a proper construction and interpretation of the said fourth paragraph, the testator had attempted to limit a remainder in the lands upon a previous gift or devise thereof to the plaintiffs, respectively, in fee simple and equally; and charged that under the laws of Arkansas it was not lawful to dispose of the fee in said lands and then to create and limit a remainder upon such fee, and then to control and circumscribe the disposition of the fee, as was attempted in the will; and they allege that the plaintiffs take an absolute fee simple title, and that the remainders and cross-remainders to the children of the testator, or his grandchildren or descendants, as therein provided, are void and without effect. But they allege that, in consequence of the probate of the will, and because it disposes of all the said lands and contains provisions as above stated, it is necessary, in order that the titles of the plaintiffs may not be incumbered and embarrassed, and that they may be able to hold, use, enjoy and dispose of their lands according to their title and rights under the laws, that the court should put a construction and an interpretation upon the fourth paragraph of said will, and ascertain and declare and decree the legal effect thereof, so that the titles and rights of the parties may be fixed and established, and that it may be known just what they are and just what can be relied upon by all persons having occasion to deal with the same.

It was prayed that the defendants be brought in under proper process, and guardians *ad litem* appointed for the minors, they having no regular guardians; and that the court put a proper construction and interpretation upon every part of the will, particularly the fourth paragraph; ascertain and fix the rights

of the plaintiffs and defendants in the lands, which were described at length in the complaint, and their shares therein; and that the same be declared vested in the plaintiffs in fee, equally, share and share alike, and not subject to the remainders and provisions of the said fourth clause of the will limiting their titles and rights and restricting and circumscribing their powers of disposition; and that such provisions be declared and decreed to be of no force and effect.

The minor defendants were all brought properly into court, and filed answer through their guardian *ad litem,* taking issue with the construction which the plaintiffs placed upon the will and denying that the plaintiffs became seized in the fee simple of the real estate; and asserted that the proper construction of the fourth paragraph of the will was to devise the real estate to the plaintiffs for their natural lives, with a remainder in fee to the children of said plaintiffs; and they asked that the court place such construction upon the will.

The defendants also filed a demurrer to the complaint, on the ground that it did not state a cause of action. This demurrer does not appear to have been acted upon by the court.

Testimony was taken, which only went to prove the children and grandchildren left by Mr. Frank at the time of his death, and of the pendency of the suit in Tennessee, and other matters of fact alleged in the complaint. It was proved that all of the indebtedness of the estate had been discharged. The executors made no answer to the complaint, and accepted service of notice to take depositions. The case was heard on the complaint and its exhibits, and the answer of the infant defendants by their guardian *ad litem,* the evidence of service showing that the non-resident defendants were properly summoned, and the will and the depositions. The court construed the will as prayed in the complaint. The infant defendants by their guardian *ad litem* excepted to the same, and took an appeal.

John Gatling, for appellants.

Wm. M. Randolph, for appellees.

HILL, C. J. (after stating the facts). As will be seen by reference to the statement of facts, this is a bill brought by the children of John F. Frank to obtain a construction of the fourth

paragraph of his will; the children maintaining that thereunder they obtained a fee simple title to the lands devised in said paragraph, and the answer of the guardian *ad litem* of the grandchildren maintaining that the children obtained a life estate with a vested remainder in the grandchildren. There is no trust involved, no trust estate is created, and the excutors are not seeking aid or instruction in the discharge of their duties. The indebtedness of the estate has been paid. The sole question sought to be determined is the title conveyed to the respective parties to this suit under the fourth clause of the will. No controversy has arisen over it. The object of the suit appears to be to prevent rather than to settle a controversy. There are no equitable titles or trusts created by the will. The titles conferred by the fourth paragraph—whatever they may be—are purely legal and capable of assertion in a court of law. Has a chancery court jurisdiction to entertain this suit?

Mr. Pomeroy says: "Although there is not an entire uniformity in the decisions by courts of different States upon this particular subject, yet the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is that the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought *solely* for the purpose of interpreting the provisions of a will without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated." 3 Pomeroy's Equity Jur. (3 Ed.) § 1156.

This statement is quoted and followed in *Head* v. *Phillips,* 70 Ark. 432, and an examination of the authorities proves it to be sound.

The same principle is thus stated in the Encyclopædia of Pleading & Practice: "In fact, by the great preponderance of authority, the power of courts of equity to construe wills is simply an incident of their general jurisdiction over trusts; and while such power will be exercised liberally on behalf of executors, trustees or other persons interested in trusts created by wills, suits brought solely for the construction of wills, where no

trust is involved, will not be entertained." 22 Enc. Pl. & Pr. 1191.

The Court of Appeals of New York said: "It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers, as an incident of that jurisdiction, take cognizance of, and pass upon, the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy." *Chipman* v. *Montgomery,* 63 N. Y. 221.

In *Bailey* v. *Briggs,* 56 N. Y. 407, it is thus expressed: "It is when the court is moved in behalf of an executor, trustee or *cestui que trust,* and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts."

The Illinois court said: "Where no trust is created, the law, as we understand it, is that neither the executor, nor the heir or the devisee who claims only a legal title in the estate, will be permitted to come into a court of equity for the purpose of obtaining a judicial construction of the provisions of the will." *Strubher* v. *Belsey,* 79 Ill. 307. This case was followed and reiterated in *Harrison* v. *Owsley,* 172 Ill. 629. *Mansfield* v. *Mansfield,* 203 Ill. 92, is strikingly similar to the case at bar. The lower court had given judgment on titles derived from a will at the instance of an heir, where no trust was involved, and the Supreme Court declined to pass upon the will and dismissed the action for want of jurisdiction, although the jurisdiction had not been questioned.

The following cases have also been examined and found to contain the same principle, in many of which there are reviews of the authorities on the subject: *Woodlief* v. *Merritt,* 96 N. C. 226; *Dill* v. *Wisner,* 88 N. Y. 153; *Torrey* v. *Torrey,* 55 N. J. Eq. 410; *Fahy* v. *Fahy,* 58 N. J. Eq. 210; *Kelley* v. *Kelley,* 80 Wis. 486; *Mansfield* v. *Mansfield,* 203 Ill. 92; *Miller* v. *Drane,* 100 Wis. 1.

A demurrer was interposed in the chancery court which does not seem to have been passed upon, but it raised the question of jurisdiction. *Kelley* v. *Kelley,* 80 Wis. 486. Even with-

out the demurrer, however, the court should have declined to pass upon the issue tendered, as it is not the subject-matter of jurisdiction of the chancery court; and consent cannot give such jurisdiction. *Mansfield* v. *Mansfield,* 203 Ill. 92; *Richards* v. *Ry. Co.,* 124 Ill. 517.

In view of these authorities, and many more which may be found cited by the text writers and reviewed in the cases mentioned, it was unquestionably the duty of the chancery court to refuse to entertain the bill; and, for the error in entertaining it and rendering a decree construing the will, the decree is reversed, and the cause remanded with instructions to dismiss the bill without prejudice to any future litigation which may arise between the parties.

WESTERN COAL & MINING COMPANY *v.* BUCHANAN.

Opinion delivered November 9, 1908.

1. PLEADING—AMENDMENT TO CONFORM TO EVIDENCE.—Under Kirby's Digest, § 6140, providing that "no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits," where a complaint was without objection treated on a former trial as amended to conform to the proof adduced by plaintiff, the defendant on a second trial cannot object to the evidence as being without the issues if he makes no demand that the pleadings be conformed to the evidence in the first trial. (Page 9.)
2. APPEAL AND ERROR—HARMLESS ERROR.—The admission of harmless evidence is not reversible error. (Page 10.)
3. INSTRUCTION—SINGLING OUT EVIDENCE.—It was not error to refuse to charge the jury as to the force which should be given to a part of the evidence. (Page 10.)

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

Ira D. Oglesby, for appellant.

1. The question of inspection and what Korkille said and did with regard thereto was not an issue, and it was error to admit testimony and to instruct the jury on that point; also to

refuse the instructions asked by appellant touching that question. 90 S. W. 300. The court's instruction clearly made the negligent inspection an issue and authorized the jury to base its verdict upon that ground of negligence. Not only should such instructions requested by appellant eliminating the question of inspection not have been given, but the court should have given improper or negligent inspection made by Korkille as negligence on which recovery could be based.

2. The 9th instruction requested by appellant should have been given. There was testimony to the effect that the facts set out in this instruction were all that took place with regard to furnishing the safety lamp and the purpose for which furnished. If it was furnished under the conditions recited, then, as a matter of law, no authority was conferred upon Korkille to act as fire boss; he was not a vice principal, nor authorized to make inspection, and his negligence was not that of appellant.

Sam R. Chew, for appellee.

1. It was appellant's duty to furnish a reasonably safe place in which to work, and to exercise reasonable care to see that it was kept in that condition. 48 Ark. 333; 82 Ark. 499. If the allegation of negligent inspection by Korkille was necessary, then the complaint will be treated as amended, so as to include this allegation. The law provides that no variance between allegation and proof will be deemed material, unless the opposite party has been misled thereby. Kirby's Dig. § 6140. The burden would in such case be upon the opposite party to show that he was misled. On former appeal the court found that there were sufficient facts to go to the jury on the theory that the pit-boss delegated to Korkille the duty of inspecting for gas. Appellant was not misled. 82 Ark. 499.

2. The instructions as a whole cover every phase of the case, and correctly state the law applicable to the facts, and all questions raised here were raised on former appeal. *Id.*

BATTLE, J. This action was brought by J. L. Buchanan against the Western Coal & Mining Company. There have been two trials in the action. In the first the plaintiff recovered judgment, and the defendant appealed to this court, and the judgment was set aside, and the cause was remanded for a new trial. The statement of facts in the case and opinion of the court

are reported in 82 Ark. 499 *(Western Coal & Mining Co.* v. *Buchanan)*. In the second trial the plaintiff again recovered judgment, and the defendant appealed. The main and leading facts shown in the two trials are substantially the same. The statement and opinion in *Western Coal & Mining Company* v. *Buchanan,* 82 Ark. 499, in connection with the facts stated herein, we think, will be sufficient to make this opinion intelligible.

The first question presented by appellant in its brief is as follows: Plaintiff "sought to hold defendant liable on the theory that Korkille was on this occasion fire boss, and as such negligently examined the place where the accident occurred, and as the result of such negligence in examining it pronounced it free of gas, when it was not, by reason of which inspection and assurance of Korkille that the place was free of gas plaintiff entered it with an open light and exploded the gas. Defendant at every stage of the case challenged the right of plaintiff to recover upon this theory of negligence, objected to the testimony when offered in support of same, moved its exclusion at the end of plaintiff's case and at the close of the case, because no such issue was raised by the pleadings. There are no allegations in the complaint authorizing the trial of the issue as to whether Korkille was, for the time being, fire boss, or whether there was negligent inspection of the place where the accident occurred. When defendant challenged the right of plaintiff to inject this issue into the case and protested against the testimony offered in support of it, plaintiff did not ask to amend his complaint, so as to incorporate that issue. Defendant having objected to the testimony at all stages and excepted to the instructions of the court, plaintiff cannot claim that the pleadings can be considered as amended to conform to the testimony. * * * * Defendant had no notice from the complaint that this was an issue, or that it would be called upon to meet such alleged negligence."

The issue here stated by appellant was raised in the first trial by the evidence. Both parties treated it as an issue in the case, outside of the pleading, by the introduction of evidence by the plaintiff to prove the affirmative and by the defendant the negative. Both parties waived the incorporation of it, by writing, into the pleadings; and all parties and the trial and appellate courts treated the pleadings as amended to conform to the evi-

dence. With the waiver still in force, and no effort to withdraw it, and no demand that the issue should be in writing, and with the pleadings amended to conform to the evidence in the first trial, the parties entered the second. It was thereafter too late for appellant to seek to set aside the issues as settled by the first trial. The plaintiff then had the right to treat them as settled, as indicated. Under the circumstances the defendant could not have been misled, and under the statute had no right to complain, and no cause for reversal. Kirby's Digest, § 6140.

In the second trial plaintiff testified in his own behalf. He had made a statement in writing of the facts of the case before the trial. In this statement, after saying that the fire boss, in pursuance of the direction of the pit boss, gave to Korkille a safety lamp when he and plaintiff were on their way to the place where the accident afterwards occurred to do work, he said: "I told Korkille that if there was gas enough to need a safety we ought to have the fire boss go and look after it. He (Korkille) said he could adjust the gas as good as the fire boss." Defendant undertook to impeach him (plaintiff) by the introduction of this statement, with the two last sentences, commencing with and including the words "I told Korkille," stricken out, and the court refused to allow him to do so, but permitted him to introduce the whole statement as written, which he did. Appellant insists that the court erred in refusing to allow him to introduce the part of the statement that he offered, without the other. We understand that the part of the statement defendant sought to withhold was not contradictory of the testimony of plaintiff, and was not admissible as impeaching evidence. But we do not think that its admission was prejudicial. It did not tend to prove that there was any gas in the place where the accident occurred, or that Korkille was authorized to act as fire boss or was guilty of negligence, nor add to the probative force of the other evidence adduced in the trial.

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

"9. If the jury believes from the evidence that the place where the explosion occurred had been abandoned as a working place, leaving at the time in it a part of the pit track; that, after being so abandoned, if it was, gas accumulated therein, and in

consequence it was 'marked out' or 'deadlined'; that the plaintiff knew of this and the condition of the place; that Korkille, at the time of the accident, was employed as track man or track layer, and not as fire boss or gas man, and had never been so employed, and that defendant knew this, and also knew that he had never performed such duties; that the pit boss, upon being informed that there was gas in this place, said to the fire boss, in the presence and hearing of the plaintiff, in substance, if there was any gas there to give or better give them, or him, Korkille, a safety lamp, which was done, and at the same time endeavored to procure another safety lamp, which was found to be out of order, whereupon the pit boss said, in substance, go ahead or go on with that one, and that this was all that was said in this connection, this did not make Korkille a fire boss or gas inspector, so as to make his negligence, if the evidence shows such, in inspecting the place and pronouncing it safe, if he did so, the negligence of the defendant."

This request, if it had been granted, would have instructed the jury as to the force that should have been given to a part of the evidence, and was properly refused. So far as correct, it was covered by instructions given, one of which is as follows:

"4. If the jury believe from the evidence that plaintiff knew that the place at which he was directed to work by the pit boss was abandoned as a working place, and that it had been marked out for gas, and knew before he entered such place that the fire boss had reported that there was gas in said place, that thereupon the pit boss had furnished plaintiff or Korkille a safety lamp, not for the purpose of inspecting for gas, as gas man or fire boss, but to work by, and that Korkille, after examining said place, thought the place where they would work was free of gas, and that they could work with open lamp, and that plaintiff, relying upon the judgment and examination of Korkille, went to work in said place with open lamp and gas was set off with the lamp of either, plaintiff can not recover."

Other instructions were asked for by the defendant and refused by the court, but so far as material and correct were included in instructions given.

The evidence was sufficient to sustain the verdict in this court.

Judgment affirmed.

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

Opinion delivered November 9, 1908.

1. CARRIERS—INJURY BY MOVING TRAIN—PRESUMPTION.—Proof that a passenger was injured while attempting to alight from a moving train raises a *prima facie* presumption that the railroad company was negligent, under Kirby's Digest, § 6607. (Page 18.)
2. INSTRUCTIONS—RELEVANCY TO ISSUES.—It was not error to refuse to give an instruction upon a matter which was not in issue. (Page 18.)
3. SAME—REPETITION.—It was not error to refuse to give an instruction asked if the court had already given a correct instruction upon the same subject. (Page 19.)
4. CARRIERS—ALIGHTING FROM MOVING TRAIN—INSTRUCTION.—An instruction that if plaintiff, suing for injuries received in alighting from a moving train, was informed that the train which she got on did not go directly to her destination but connected at an intermediate point with a train which did go there, she was not justified in leaving the train while it was in motion, was properly refused both because it ignored the fact that she was given contrary information by the ticket agent and by a trainman, and because it was a question for the jury to determine whether she was negligent in attempting to alight from a slowly moving train when she did not know it was moving at all. (Page 19.)
5. SAME—DAMAGES—EXCESSIVENESS.—A verdict of $500 for damages sustained by a passenger from a fall while alighting from a train was not excessive where she testified that one arm and shoulder were badly skinned, her hip bruised, her knee bruised and sprained, that the leaders in her neck were strained, and she was very sore and suffered much pain as the result of the fall; that the soreness lasted a week or ten days, and it took the bruised places two or three weeks to heal. (Page 20.)
6. SAME.—A verdict of $500 for damages sustained by a passenger from a fall while alighting from a train was not excessive when she testified that her head was severely hurt by the fall; that she was knocked blind by the force of it; that she received a great nervous shock and was prevented from sleeping for several days; that her body was bruised and her muscles sprained, from which she suffered for a month or two; that she had a severe headache for a week, and had frequent headaches for four weeks or more. (Page 20.)

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

STATEMENT BY THE COURT.

Miss Gussie Fambro and Miss Florence Harkrider, two young ladies residing in Center, Texas, started to St. Louis. They reached Texarkana between eight and nine o'clock on the 14th of August, 1907, and went to the ticket agent of the St. Louis, Iron Mountain & Southern Railway Company, and asked what time a train would leave for St. Louis, and were told that a train then standing upon the track would leave in about five minutes (the train scheduled to leave at nine o'clock) for St. Louis. They asked if they had time to get tickets and have their trunks checked, and were told that they had. They then purchased tickets for St. Louis, and one of them waited for change and took charge of their grips while the other went to the baggage room and checked their trunks. They met in front of the door of the waiting room, and together went immediately to the Pullman car of the train indicated. There was no trainman at the entrance of the car to assist passengers on the train or to answer inquiries as to where the train went. They boarded it. One of them reached the vestibule, and the other was on the step immediately behind her, and there was a man standing in the vestibule whom they took to be a brakeman. Miss Fambro says he had on a uniform and train cap, and that she took him to be a brakeman, and asked him if that was the train going to St. Louis, and he said "No," and she asked him a second time if it was the train to St. Louis, and he again replied "No;" and she said she had better get off, and he said "Yes," she had better get off. Miss Harkrider says that the trainman in the vestibule of whom they made inquiries was not a Pullman porter. That he was a trainman, and wore a uniform cap.

Immediately upon being informed that that train was not the St. Louis train, they alighted from it, and in doing so fell, and both were injured. They said that they did not know that the train was moving when they attempted to alight therefrom, and that they got off as carefully as they could. The testimony of all the witnesses is that the train was then moving out of the station very slowly. The train had gone four or five car lengths when they fell.

Miss Fambro says that one arm and shoulder were badly skinned, her hip was bruised, and her knee bruised and sprained,

and the leaders in her neck were strained, and she was very sore and suffered much pain as the result of the fall from the train. The soreness lasted a week or ten days, and it took the bruised places two or three weeks to heal. She suffered a mental shock and was badly frightened. She expended $5 for medicines, and was treated by the company's physician at Texarkana and St. Louis.

Miss Harkrider says her head was severely hurt by the fall, that she was knocked blind by the force of it, and it was a great nervous shock to her and prevented her from sleeping for several days; her body was bruised and her muscles sprained, and she suffered from this for a month or more. She had a severe headache for a week, and then had frequent headaches for four weeks or more. She was also treated by the company's physicians at Texarkana and St. Louis.

The facts in regard to the train were these: The train which they boarded went only to Little Rock, leaving Texarkana at nine o'clock P. M., and was due to reach Little Rock at 2:10 A. M.; and another train left Little Rock at 3:40 A. M. for St. Louis. The next train which would have left Texarkana going direct to St. Louis was at 4:05 the next morning. Passengers were in the habit of taking this nine o'clock train for St. Louis and making the change at Little Rock. These ladies brought suit against the railroad company for the personal injuries received. The suits were consolidated and tried together, and they testified as above outlined.

Defendant's testimony tended to prove these facts: That the train was in motion when the young ladies boarded it, and that they hastily and carelessly jumped from it; that it was a Pullman porter, and not an employee of the railroad, who told them that the train was not for St. Louis. The defendant also introduced the testimony of a depot policeman, who said that they asked him if that was the train to St. Louis, and he told them that would be the train, and they could change at Little Rock. They denied ever seeing this man or receiving this information from him or any one else.

The court gave the following instructions:

"1. The court instructs the jury that if you find from a preponderance of the evidence that plaintiff applied to the ticket

agent of the defendant company, as alleged in her complaint, for a ticket from Texarkana to St. Louis; that such a ticket was sold to her by such agent and paid for by her, and that at the time of the purchase of the said ticket the said agent advised plaintiff that her train was then at the depot, and that she would have time to take passage on it, and if you further find from a preponderance of the evidence that the plaintiff, in the exercise of ordinary diligence, proceeded to the train so pointed out to her by said ticket agent, that the door of said train was open, and that plaintiff entered said train for the purpose of taking passage thereon for St. Louis, then you are instructed that plaintiff was a passenger.

"2. The court instructs the jury that if you find from a preponderance of the evidence that the plaintiff was a passenger, and that she was injured, and that such injuries were caused by a moving train of the defendant, then you are instructed that this is *prima facie* proof of negligence on the part of said company.

"3. If you find from a preponderance of the evidence that in obedience to the directions of defendant's ticket agent the plaintiff entered the said train for the purpose of taking passage thereon to St. Louis, and that while in the vestibule thereof she was advised by one of the defendant's trainmen in charge of said train that said train was not a St. Louis train and was ordered or directed by said trainmen to get off said train, she had a right to rely upon such advice or direction, provided she took no more risk in getting off the train than a prudent person would have taken under the same circumstances. And if you further find from a preponderance of the evidence that while in the exercise of ordinary care plaintiff was injured in attempting to alight from said train under such advice of the trainmen, and plaintiff received injuries, then she is entitled to recover.

"4. If you should find from a preponderance of the evidence that plaintiff was a passenger on said train, as defined in these instructions, then you are instructed that it became and was the duty of the defendant company to exercise for her safety the highest degree of skill, care and diligence which a reasonably prudent person under like circumstances would exercise and which is reasonably consistent with the mode of conveyance and the practical operation of its trains, and for any omission of these

duties whereby injury resulted to plaintiff the defendant would be liable, unless you should find that such injuries were caused or contributed to by the negligence of the plaintiff.

"5. If you believe from the evidence that the plaintiff was injured by reason of the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence, unless it appear from the evidence that the plaintiff herself failed in the exercise of ordinary prudence; and that such failure so contributed to the injury that it would not have occurred if she had been without fault. Contributory negligence will not be presumed, but must be proved by a preponderance of the evidence."

Instructions numbered 6 and 6½ were upon the measure of damages, and need not be set out here.

On behalf of the defendant the court gave six instructions. It is not necessary to set them out, as they presented the defendant's side of the controversy in the way in which the defendant desired it presented; and the court refused seven instructions which were requested on behalf of the defendant.

Miss Fambro recovered judgment for $505, and Miss Harkrider for $500, and the railroad company has appealed.

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

1. The court's second instruction errs in telling the jury that if they found from the evidence that the injuries were caused by a moving train this was *prima facie* proof of negligence of the company. 70 Ark. 481; 85 Ark. 117; 73 Ark. 554.

2. Instruction No. 8 requested by appellant should have been given. If the negligence of appellees contributed to their injuries, they cannot recover, even though appellant's employees were negligent at the same time. Moreover, it is negligence *per se* to attempt to get off a moving car. 59 Atl. 1007; 37 Ark. 526; 46 Ark. 423.

3. The company was not bound to keep watch to prevent persons from attempting to get off its cars while in motion, and a failure to do so was not negligence. The 10th instruction requested should have been given.

4. The gravamen of the case was not the getting on the wrong train, even if appellees were directed thereto, because, at last, the testimony shows that they were not misdirected. The 11th

instruction requested should have been given, as also the 15th, which told the jury that if appellees, after getting on the train, were informed that they could go to St. Louis on that train by a connection at Little Rock, then they were not justified in leaving the train while in motion.

John N. Cook and *Scott & Head,* for appellees.

1. There is no error in the second instruction. 83 Ark. 217; 73 Ark. 548; 81 Ark. 276. The Green case, 85 Ark. 117, cited by appellant, is not in point.

2. There is no merit in the contention that the person who told the appellees to get off was not a servant of the appellant, but must have been the Pullman porter. From his dress and the fact that he stood in the vestibule and assumed to give appellees directions, the inference is that he was an employee of appellant; but even if he was in the employ of the Pullman company, appellant would be responsible for his acts. 86 Ark. 208; 48 Ark. 177; 70 Ark. 136; 3 Thompson on Neg. § 3613; 2 Hutchinson on Car., 3d Ed., § 1135.

3. In both the third and fourth instructions given by the court, the burden was placed on appellees to show that a trainman advised or directed them to get off. This court has approved the doctrine that carriers of passengers are held to the highest degree of care and are responsible for the smallest negligence to such passengers. 82 Ark. 504. The fourth was a proper instruction under the facts developed in this case, but even if abstract it was not prejudicial. 83 Ark. 217.

4. There is no error in refusing to give an instruction already covered by another instruction given by the court. In this case the 8th instruction requested by appellant is fully covered by instruction No. 6 given; the question of contributory negligence was properly submitted under instruction No. 5 given at appellees' request, and instructions Nos. 3, 4, 5. 6 and 7 given at request of appellant; No. 9, requested, was covered by Nos. 5, 6 and 7 given at appellant's instance; No. 10, requested, was wholly inapplicable, abstract, and wholly ignores undisputed proof that one of appellant's trainmen directed appellees to get off; the 11th instruction, requested, is, so far as applicable, fully covered by instruction No. 3 requested by appellant and given; and instruction No. 15, requested, is evidently based on the testimony

of the depot watchman. Appellees had the right, and it was their duty, to rely on information given by servants of appellant, rather than that given by some outside party, whose appearance gave no indication of any connection with the company. It is not negligence as a matter of law to leave a train while in motion. 37 Ark. 519; 45 Ark. 256.

HILL, C. J., (after stating the facts). I. The first error assigned is in giving the second instruction, to the effect that if the jury found that the plaintiffs were passengers and were injured, and that such injuries were caused by a moving train of the defendant, this is *prima facie* proof of negligence on the part of the defendant. This presumption is based upon section 6607 of Kirby's Digest. It is insisted that this is not a case for its application, and *St. Louis & S. F. Rd. Co.* v. *Cooksey,* 70 Ark. 481, is relied upon to sustain this position. In that case the plaintiff had alighted from a train and was passing the engine while it was not in motion when an employee of the railroad company, engaged in wetting coal on the tender, carelessly turned the hose so as to throw a stream of hot water on the plaintiff whereby he was severely burned. The court said that the statutory presumption only applies where the injury is caused by the actual running of the train, which was not the case there.

The case of *St. Louis, I. M. & S. Ry. Co.* v. *Green,* 85 Ark. 117, is also cited to sustain this contention; but this presumption was not considered in that case. The court has held this presumption applicable in the following cases, which are indistinguishable from the case at bar: *Barringer* v. *St. Louis, I. M. & S. Ry. Co.,* 73 Ark. 548; *Kansas City So. Ry. Co.* v. *Davis,* 83 Ark. 217; *St. Louis, I. M. & S. Ry. Co.* v. *Stell,* 87 Ark. 308; *St. Louis, I. M. & S. Ry. Co.* v. *Briggs,* 87 Ark. 581.

II. It is next argued that there was error in refusing instructions asked on behalf of the defendant. The 8th instruction stated that contributory negligence was a bar to suits of this character, and that if the plaintiffs, by reason of lack of care on their part, either caused or contributed to produce the injury, the verdict should be for the defendant, even if the proof should show that the defendant was negligent. This subject was fully covered in other instructions given on behalf of the defendant.

The 10th refused instruction stated that the company was

not bound to keep a watch to prevent persons attempting to get off its trains while in motion, and that its failure to do so is not negligence; and that if the plaintiffs voluntarily attempted to get off the moving train because they discovered they were on the wrong train, and were injured thereby, the verdict should be for the defendant. There was no charge of negligence for failing to keep watch to prevent persons attempting to get off trains while in motion, and it was not proper to give an instruction on a matter not in issue. As to whether the conduct of the young ladies in attempting to get off the train was negligence was fully and correctly explained in other instructions.

The 11th refused instruction charged the jury that it made no difference whether the plaintiffs got on the wrong train or not; that such was not charged as a cause of action in the case; and if the employees of the defendant, in the exercise of care, did not anticipate that the plaintiffs were going to get off the train, they were not guilty of negligence, and the verdict should be for the defendant. The third instruction given at the instance of the appellant correctly stated the law on this subject, and in much better form than it was stated in the 11th which was refused.*

The 15th refused instruction told the jury that if they found from the evidence that the plaintiffs were informed that the train that they got on did not go direct to St. Louis but connected with a train at Little Rock that did go to St. Louis, they were not justified in leaving the train while it was in motion.

The depot policeman testified that he told the ladies that this train did not go direct to St. Louis, but connected at Little Rock. There is no other evidence that they were informed by any person of this fact. Their evidence shows that they were informed by the ticket agent that the train did go to St. Louis, and by the brakeman at the entrance to the car that it did not

*The third instruction was as follows: "3. The law does not require of the carrier that it do more than try to protect its passengers from dangers which it may reasonably anticipate; therefore if you find from the evidence in this case that the plaintiffs of their own accord negligently jumped off the train while it was in motion, and thereby received the injuries of which they complain, they cannot recover, and your verdict should be for the defendant." (Rep.)

go to St. Louis. The court should not have given an instruction, which in effect was a peremptory one, that if this depot policeman gave them this information they could not recover, in the face of contrary information received from the ticket agent.

In addition to this, the instruction was incorrect in making it negligence, as a matter of law, to leave a moving train. The undisputed evidence is that this train was moving very slowly when these ladies attempted to get off, and they said they did not know it was moving at all; and whether their conduct in leaving it was negligence presented a question of fact for the jury.

III. Finally, it is urged that the verdicts are excessive. The facts testified to by the young ladies as to the extent of their injuries are undisputed, and the jury had a right to accept what they said on the subject; and, accepting their testimony as true, it cannot be said that the verdicts are excessive.

IV. If either the ticket agent or the brakeman had explained to the ladies that they could go to St. Louis on this train by making the change at Little Rock, this accident would have been avoided. Each in a way told the truth, but did not tell the whole truth; and their half-truths amounted to a misdirection to these ladies; and whether their conduct in leaving the train when they did was negligent was a question for the jury to determine. This has been done under proper instructions, and no error is found. The judgments are affirmed.

EL DORADO & BASTROP RAILROAD COMPANY v. WHATLEY.

Opinion delivered November 9, 1908.

1. TRIAL—INSTRUCTION—RELEVANCY.—It was misleading error to submit to the jury the question whether defendant railroad company was negligent in failing to warn plaintiff's intestate, a brakeman, as to the danger of riding upon the pilot of the engine if all the evidence on the subject was to the effect that such warning was given. (Page 25.)

2. MASTER AND SERVANT—WHETHER NEGLIGENCE EXCUSED BY CUSTOM.—It was error to instruct the jury that if it was the custom of the employees of defendant railroad to ride upon the pilot beam of the engine in violation of the company's rules, and the superior officers of

defendant knew of such custom and permitted it, then plaintiff's intestate was not guilty of negligence in riding thereon; it was proper to consider such custom in determining whether such intestate was negligent, but not to make it a test of such negligence. (Page 26.)

3. SAME—QUESTIONS FOR JURY.—Notwithstanding plaintiff's intestate was told that it was dangerous and against the rules to ride upon the pilot beam of the engine, yet where the beam was put there for that purpose, and other brakemen engaged in the same work habitually used it with the knowledge of their superior officers, and intestate was young and inexperienced, the questions of negligence of the defendant and contributory negligence of intestate were properly submitted to the jury. (Page 28.)

4. SAME—INSTRUCTION.—It was error, in a personal injury suit against a railroad company, to instruct the jury to find for plaintiff if his intestate used ordinary care, without instructing them that they must further find that defendant was negligent. (Page 28.)

Appeal from Union Circuit Court; *George W. Hays,* Judge; reversed.

STATEMENT BY THE COURT.

David Rufus, a youth about sixteen years old, was in the employ of appellant as brakeman about its yards in the town of El Dorado, Arkansas. On the morning of his fatal injury, he was riding on the pilot of the engine. The engine and tender were going north on the side track, and young Rufus was going to make a coupling on the pilot. He was standing on a board or step on the right hand side of the pilot. There was "a piece on the side of the pilot, put there for people to stand on who go there to fix the knuckle" of the coupler. The piece was put there to keep the feet of those who go there to open the knuckle from slipping off. There was a place on the engine for the brakeman to ride who opened the knuckle, so they did not have to get on the pilot. He was opening a knuckle, when the engine ran over one rail that was higher than the other at the joint between them, making a spring that caused the pilot to tilt and throw him off between the rails, his right leg being across the rail. The engine and tender passed over him, crushing his leg, which was soon after amputated. He was conscious after his injury, and suffered extremely from Saturday morning until Monday morning, when he died. Appellee as the administrator sued for the benefit of the estate, for the benefit of his father as next of kin

and for the loss of services to the father. The negligence alleged was the failure of appellant to give proper warning of the dangers to which Rufus was exposed, and the negligent construction and maintenance of its track, in that the rails were not properly joined together, and consequently one was lower than the other, causing the rebound of the front part of the engine and tilt of the pilot which threw young Rufus to the track, etc.

All the material allegations of the complaint were denied, and the defense of contributory negligence was set up. There was evidence sufficient to sustain the verdict on the issue of the negligence of appellant in maintaining its track in a defective condition. On the issue of contributory negligence, the evidence showed that it was against the rules of the company to ride on the pilot of the engine, that it was dangerous to do so, and the engineer so informed Rufus. The conductor whose duty it was to warn Rufus of the danger of riding on the pilot said that he "told every new man to keep off the pilot, and the head negro brakeman looked after that order, too." The brakeman testified that he told Rufus "a good many times" before, and told him "that same morning", that "it was against the rules of the company" to ride on the pilot, and "if he was caught it would be at his own risk." This was all the testimony on the subject of the warning that was given Rufus. There was evidence to warrant the conclusion that "it was customary for brakemen to board the pilot and be transferred from one part of the yard to the other", and that the conductor had knowledge of this custom. Among many instructions the court gave the following prayers for instructions at the instance of appellee:

"5. The jury are instructed that if they believe from the evidence that David Rufus, the deceased, was a minor, and was employed by the defendant upon one of its trains to perform dangerous and hazardous services, and that he was injured while in the discharge of the duties of his employment, a recovery cannot be defeated on the ground of contributory negligence, unless they further find from the evidence that the deceased was warned and instructed by the defendant against the dangers incident to the duties of his employment, and, after being so warned, the deceased failed in the exercise of ordinary care and prudence."

"7. The jury are instructed that if they believe from the

evidence that the deceased was in the employment of the defendant upon one of its trains to perform dangerous and hazardous services, and that he was at the time a minor, and on account of his youth and inexperience he did not know or appreciate the dangers incident to the services he was so employed to do, and that the defendant failed to warn him of such dangers, or to instruct him how to avoid it so far as it could be avoided, before exposing him to such danger, and that deceased was injured while in the discharge of the duties of his employment, and suffered great pain of body and mental anguish, and came to his death on account of the defendant's failure to so warn and instruct him, the defendant is liable for any damages the jury may find, from the evidence, directly resulting from said injuries; and they may find for the plaintiff under one or all three counts laid in the complaint, as they may believe from the evidence he is entitled to recover."

"9. The jury are instructed that if they find from the evidence that the deceased was an employee of the defendant, he was not bound by the rule of said defendant which they believe from the evidence was not brought to his attention, or was habitually violated with the knowledge of his superior officers without any effort on their part to enforce it. And if the jury believe from the evidence that the defendant had a rule that employees should not board the pilot of engine in performing the services of their employment, and that said rule was not brought to the attention of the deceased, or that it was habitually violated with the knowledge of his superior officers without any effort on their part to enforce it, and which, they believe from the evidence, tended to mislead deceased in the violation of such rules, then they will find that there was no such breach of duty on the part of the deceased in boarding the said pilot, and that such act on his part does not amount to such contributory negligence as would excuse the defendant from such liabilities for injuries caused by defects in railroad tracks which it was its duty to discover and repair, and which might have been discovered and repaired by the exercise of ordinary care and diligence on the part of the defendant."

"10. The jury are instructed that if they believe from the evidence in this case that the deceased was, on the 6th day of

May, 1905, in the employment of the defendant on one of its trains, and was a minor, and that the coupling and uncoupling of its cars was a part of the duties of his employment, and that the deceased took the pilot of the engine of the defendant to be transferred from one part of the railroad yards, at its depot in El Dorado, Union County, Arkansas, to another part thereof, in the performance of said duty, and that it was permissible by its superior officers and not unusual for employees of defendant in performing such services to be thus transferred from one part of its railroad yards to another, with the knowledge of their superior officers; and if they further find from the evidence that, while being so transferred, the deceased was thrown from the pilot in front of the engine, and was run over by said engine, bruised, mashed and mangled, and that from said injuries he suffered great pain of body and anguish of mind for the space of about two days, and died, and that said injuries, suffering, pain and death of the deceased were the direct results of the carelessness and negligence of the servants and agents of the defendant in not keeping said railroad track in a reasonably safe condition, then they will find for the plaintiff such damages as they may believe from the evidence he is entitled to recover under any one or all three counts sued on."

Appellant asked but the court refused the following:

"1. The court instructs the jury to find for the defendant."

"7. The court instructs the jury that one who is injured by the negligence of another cannot recover any compensation for his injury if he by his own negligence and wilful wrong contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; and in this case if the jury believe from the evidence that the deceased, David Rufus, had been warned and was informed that it was against the rules and regulations of the company to ride on the front of the engine, and that in disregard of this warning he got up on the engine in front, on what is known as the pilot, slipped, and was run over and injured, and that he would not have been injured had it not been for the position he was in, then your verdict should be for the defendant."

The court modified prayer number 7 by adding at its con-

clusion the words: "provided you find that the defendant by using ordinary care could have prevented the injury."

The court on its own motion gave the following instruction over appellant's objection: "If you find from the evidence in this case than the plaintiff used ordinary care, you will find for the plaintiff."

The verdict and judgment were for $500. This appeal has been duly prosecuted.

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

1. It is error to instruct a jury on undisputed evidence unless peremptorily. 72 Ark. 440; 69 Ark. 489; 67 Ark. 147. It is also error to submit to a jury issues upon which there was no evidence to support a finding. 63 Ark. 177; *Id.* 563; 70 Ark. 441; 70 Ark. 136; 74 Ark. 19; 76 Ark. 348; *Id.* 599; 77 Ark. 20. When warned and instructed, a minor is then in the same position as an adult. That it is negligence which will bar recovery for an adult to ride upon the pilot of an engine: 14 L. R. A. 552; 95 U. S. 439; 18 Fed. 232; 82 Mich. 374; 77 Miss. 727; 99 Ala. 440; 118 Fed. 232; 118 Ia. 396; 128 Mich. 489; 132 N. C. 711; 57 Kan. 719.

2. It was error for the court to instruct the jury that "if you find from the evidence in this case that the plaintiff used ordinary care you will find for the plaintiff." This instruction states no rule of law which could be based upon the facts in this case, and is in direct conflict, and cannot be harmonized, with instructions given at request of appellant. 65 Ark. 98; *Id.* 64; 54 Ark. 588; 59 Ark. 98; 55 Ark. 393; 69 Ark. 134; 57 Ark. 203; 72 Ark. 31; 74 Ark. 437; *Id.* 585; 76 Ark. 224; 76 Ark. 69; 77 Ark. 20; *Id.* 200.

3. The court erred in modifying the 7th instruction requested by appellant by adding the words: "Provided you find that the defendant by using ordinary care could have prevented the injury." The instruction was thereby rendered meaningless, and could not do otherwise than confuse the jury.

WOOD, J., (after stating the facts). The court erred in submitting to the jury the question as to whether David Rufus had been warned by appellant of the danger of riding on the pilot. The uncontroverted evidence is that he was warned of

the danger of so riding. The evidence is consistent in itself, and, there being no evidence to the contrary, the court should not have submitted the matter to the jury as if it were a disputed proposition. It is error to submit as issues to the jury matters about which there is no dispute, or to submit questions upon which there is no evidence. *Maddox* v. *Reynolds,* 72 Ark. 440; *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 69 Ark. 489; *Pacific Mut. Life Ins. Co.* v. *Walker,* 67 Ark. 147; *St. Louis, I. M. & S. Ry. Co.* v. *Denty,* 63 Ark. 177; *St. Louis, I. M. & S. Ry. Co.* v. *Sweet,* 63 Ark. 563; *St. Louis, I. M. & S. Ry. Co.* v. *Woodward,* 70 Ark. 441; *St. Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136; *Fordyce* v. *Key,* 74 Ark. 19; *Davis* v. *Richardson,* 76 Ark. 348; *Frank* v. *Dungan,* 76 Ark. 599; *St. Louis S. W. Ry. Co.* v. *Knight,* 77 Ark. 20; *St. Louis, I. M. & S. Ry. Co.* v. *Fambro, ante* p. 12.

A failure to warn was one of the grounds of negligence charged, and submitting it as a question for the jury when there was no evidence to support it, and when the evidence was all to the contrary, was misleading and prejudicial. See cases *supra.*

In prayers numbered nine and ten given at the instance of appellee, the court in effect told the jury that if it was the custom for employees of appellant to ride the pilot in violation of the rules of the company, and the superior officers of the appellant knew of such custom and permitted it, then David Rufus was not guilty of contributory negligence in also riding the pilot. That is not the law. Although it may have been the custom of other employees of appellant to ride the pilot, of which custom appellant was cognizant, still that would not relieve David Rufus of the charge of contributory negligence in riding the pilot, if the danger of doing so was so imminent and obvious that no prudent man under the circumstances would undertake it. If the danger were of that character, it could not excuse Rufus from the consequences of his negligent act because forsooth other employees were as imprudent as he. It is proper to consider the custom in connection with the other evidence in determining the question of the contributory negligence of Rufus, but not to make that custom a criterion of his conduct, and declare as a matter of law that, because it was the custom for other employees to ride the pilot with the knowledge of appellant's

superior agents in charge, he might do so too without being subject to the charge of contributory negligence.

The Supreme Court of Alabama says: "Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent in itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, a resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarliy and unnecessarily done, and which the law itself declares to be negligent." (Citing authorities.) *Warden* v. *L. & N. R. Co.*, 14 L. R. A. 552.

Appellant's counsel have cited several cases where, under the circumstances peculiar to those cases, it was declared, as matter of law, to be contributory negligence for the employee to ride the pilot or in other place of obvious danger. We have examined the cases, and it could serve no useful purpose to review them here. Suffice it to say that the facts in those cases distinguish them from this. Here a boy about sixteen years of age is employed about the yards of appellant company as a brakeman, and was engaged at the time of the accident in switching cars, making up the train. The engine upon which he was riding at the time was going slowly, but faster than a man walks. He was riding on a piece of board on the side of the pilot that was placed there to keep the feet from slipping while employees stood there to open the knuckle to the coupler. It was there for the employees to stand upon while doing that work. It seems that the "piece" or board was a continuation of the steps on the side of the engine. Other brakemen, while engaged in the same work and while being transferred about the yards, rode in this place on the pilot, and did so constantly, and the superior agents of appellant in charge knew that they did so. Under these circumstances, we do not think that it should be held, as matter of law, that the act of young Rufus in so riding was contributory negligence, notwithstanding he was told that it

was against the rules of the company and was warned that it was dangerous. The habitual violation of the rules by other employees with the apparent acquiescence of appellant was well calculated to lead young Rufus to conclude that the rules upon the subject were not considered of sufficient importance to be enforced, and that neither the brakeman, nor the superior servants of appellant regarded riding the pilot as dangerous.

Upon the facts of this case reasonable minds might reach different conclusions as to whether the danger of riding the pilot was such an imminent and obvious one that no prudent man would undertake it.

We are of the opinion that both the questions of the negligence of appellant and the contributory negligence of David Rufus were those of fact to be submitted to the jury under proper instructions.

The court did not err therefore in refusing appellant's first prayer for instructions.

The court erred in instructing the jury on its own motion tc find for the plaintiff if it found that he used ordinary care. This instruction, standing alone, was well calculated to cause the jury to believe that only plaintiff's conduct was under consideration, whereas it was necessary to find negligence on the part of appellant before the contributory negligence could be inquired into or operate as a defense. The instruction was incomplete, misleading and prejudicial. The court also erred in giving appellant's seventh prayer as modified. The modification destroyed the effect that should be given to contributory negligence, if found, and rendered the whole instruction contradictory and meaningless. For the errors indicated the judgment is reversed, and the cause is remanded for new trial.

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MARCUM v. THREE STATES LUMBER COMPANY.

Opinion delivered October 26, 1908.

1. MASTER AND SERVANT—DEFECTIVE MACHINERY—ASSUMPTION OF RISK.—The assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery or work is defective

or dangerous is suspended by the master's promise to repair, made in response to the servant's complaint; so that if the servant is induced by such promise to continue at work he may recover for an injury which he sustains by reason of such defect within a reasonable time after making the promise, provided he uses due care, unless the defect renders the appliance so obviously dangerous that a reasonably prudent person would decline to use it at all unless it was repaired. (Page 34.)

2. SAME—CONTRIBUTORY NEGLIGENCE.—Where a servant complains of injuries caused by the master furnishing defective machinery, the question whether the servant was negligent in using it was properly left to the jury if the machinery was complicated, or if the danger from its use depended upon the want of due care of fellow servants engaged in operating it, so that, although the facts were undisputed, reasonable minds might draw different conclusions as to the servant's negligence. (Page 36.)

3. SAME—CONCURRING NEGLIGENCE OF VICE PRINCIPAL AND FELLOW SERVANT. —A master is liable for the negligence of a vice-principal concurring with that of a fellow servant. (Page 37.)

Appeal from Mississippi Circuit Court, Osceola District; *Frank Smith*, Judge; reversed.

STATEMENT BY THE COURT.

This is an action by James Marcum against the Three States Lumber Company to recover damages for breaking his leg on January 17, 1907, while in the employ of the company. The defendant company was at the time operating a steam log skidder, used for dragging or skidding logs from the woods to the railroad. The machine was made by the Clyde Iron Works, and consisted of a steam engine mounted on a flat car with a boom about 32 feet long at each end and extending in both directions, front and rear, at an angle of about 45 degrees, each of which stood directly over the railroad. It was about 32 feet from the engine to the end of each boom, and on the end of the boom was a pulley over which a steel cable worked. One end of the cable was attached to a drum near the engine, and it extended out over the pulley on the end of the boom. Attached to the other end of the cable was a pair of tongs, which weighed about 75 pounds. They were constructed on the principle of ice tongs. They were made of octagon steel, six-sided like a rifle barrel, and were, except at the points, one and seven-eighths inches in

diameter. They were sharp pointed for the purpose of being fastened to a log four or five inches from its end.

The machine was operated in this way: The tongs attached to the cable would be dragged into the woods, where the logs were, by a horse. The tongs would be fastened on the end of the log by a man called a "hooker." The hooker would then signal the flagman, and he in turn would then flag the engineer, who would start the engine. The engine would wind up the cable on the drum like a spool of thread, and this winding of the cable would skid the log to the railroad. The tongs were so constructed that when in perfect condition the harder the engine would pull, the tighter the tongs would clutch the log. If, while skidding a log from the woods to the railroad, it should strike the root of a tree or other obstruction, the usual and customary way of releasing it was to unhook the cable from the ring in the end of the tongs, place it around a stump or a tree standing a little to one side or the other of a straight line from the log to the engine, and then again hook the cable to the ring in the end of the tongs. Then, by the same process of signalling as before, the engine would be started, the log wrenched to one side and released from the obstruction.

When the Clyde Iron Works shipped this machinery to the defendant, it sent along one Mr. Hall as an instructor, whose duty it was to teach the employees of the defendant company how to operate the machine. Plaintiff was an engineer by profession, and was placed in charge of the engine by defendant. Mr. Gibson, the general foreman of the defendant company, told him to do whatever Mr. Hall told him to do, to do it just like he told him to do it, and learn all about the business. About the fourth or fifth day after they commenced operating the machinery, Hall came to the plaintiff and told him that he would take his place on the engine for a while, and directed plaintiff to go into the woods, help the hookers hook logs awhile, and learn how it was done. He gave as a reason for this order that he thought from all he had heard that plaintiff would be made foreman of the crew.

On that morning they were running two lines of cables. Mr. Cannon was the hooker for one line, and Mr. Reed for the other. The tongs that Cannon was using were fastened to the cable

with a clevis or hook, similar to a hook on a log chain. The hook on the cable that Reed was using had been almost straightened out the day before, and the cable was welded on the tongs. The tongs that Reed was using on that morning were sprung—that is, they were nearer straight than they should be—and on account of this defect they would sometimes slip from the end of the log, when the cable was being pulled, and jump a considerable distance, 35 or 40 feet. The fact that the tongs were sprung was known to the plaintiff at the time the injury was received. Either the day before or that morning the tongs had pulled out of a log; then it came across the end of the boom and struck the side of the cab of the engine, and knocked a hole in it as big as a five gallon keg. The cab was made out of seven-eighths inch pine lumber. At that time plaintiff was running the engine. He called the attention of Mr. Gibson to the accident, and told him some one would get killed or crippled with the tongs unless they were fixed. Mr. Gibson told the plaintiff to go ahead; that he would furnish new tongs or repair those in a day or two.

When Mr. Hall directed plaintiff to go out in the woods and assist in the hooking and skidding for awhile, he first went over on Cannon's line and saw him hook two or three logs. He then went over to Reed's line, and the first log they hooked after he arrived struck an oak tree that had been cut down, and the tongs slipped out. The oak tree was then cut out of the way, and, fastening the hooks in a new place, they started with the log again. They did not go far until the log struck a maple root. About 10 or 12 feet to the right of the cable, and about 35 feet from the end of the log, stood a stump. There was a man who rode a mule that drags the tongs back in the woods. Reed said, "We will have the rider to pull the line around the stump." Plaintiff said that he thought that Reed and himself could pull the line over it; so Reed and the plaintiff took hold of the cable with their hands, lifted it over to the right, and placed it behind the stump. As soon as the cable was placed behind the stump, without waiting for the signal to start, the engine began to pull the cable, and the plaintiff at the same time started to get out of the way. He had gone only a few feet

when the tongs slipped from the end of the log and struck him, breaking his leg.

The plaintiff had worked around a sawmill a great many years. He had assisted in operating other makes of log loading machines. The plaintiff was the only witness examined at the trial, and the above is substantially his statement of how the injury occurred and the incidents connected with it. At the conclusion of his testimony, the court directed a verdict for the defendant, and plaintiff has appealed.

J. T. Coston, for appellant.

1. The servant assumes the risks ordinarily incident to his employment. 92 S. W. 246. If a new risk arise on account of a defect in the machine, implement or appliance, the servant will not be deemed to have assumed the new risk, even after he discovers the defect, unless he is also aware of the danger; and not then unless the danger is so patent that a reasonably prudent person would not continue in the service. 92 S. W. 247. He will not be deemed to have assumed the new risk, if, after discovering the defect, he promptly complains to the master, and the latter promises to remedy the defect. 1 Labatt, Master & Servant, § 424; *Id.* p. 1198; 70 S. W. (Ark.) 606; 100 S. W. (Ark.) 744; 4 Thompson on Neg. § 4467; 47 Atl. 1018; 49 Atl. 1037; 8 So. 218; 58 N. E. 417; 36 N. E. 574; 29 S. W. 675; 59 N. W. 188; 53 N. E. 467; 100 U. S. 225.

2. When a log would meet an obstruction, and the cable be placed behind a stump for the purpose of releasing it, it had always been the custom not to start the machinery until the hookers had reached a place of safety. This custom was tantamount to a fixed rule of business. 1 Labatt on Master & Servant, 474. Appellant, being aware of the custom and believing that it would be followed in this instance, had a right to rely on its observance. There was therefore no imminent danger, obvious to him, and no contributory negligence on his part. 92 S. W. 248; 100 S. W. 85; 10 S. W. 606; 77 S. W. 913; 107 S. W. 376; 1 Labatt on Master & Servant § 355; 68 N. W. 776.

3. Where the negligence of the principal and that of a fellow servant together produce an injury, the principal is liable. 99 Fed. 51; 203 U. S. 473; 106 U. S. 702; 67 Ark. 8; 4 Thomp-

son on Neg. § 4858; 2 Labatt, M. & S. § 814; 3 N. E. 577-8; 21 N. E. 347; 42 Pac. 344; 67 Fed. 885; 25 N. E. 915. The defect in the tongs contributed to the injury, and appellee is liable, even though the negligence of a fellow servant also contributed to the happening of the accident. 61 N. W. 912; 24 S. E. 233; 138 Mass. 436.

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

1. There was a total failure of proof that the condition of the tongs complained of caused the accident. "Where the evidence leaves material facts admitted and undisputed, and they are of such a conclusive character that the court could give effect to but one verdict, it is the duty of the court to direct a verdict." 131 Fed. 712; 150 U. S. 245; 152 U. S. 262; 113 U. S. 227; 139 U. S. 469; 39 Am. St. Rep. 264; 99 N. W. 827; 103 N. W. 1017; 137 Fed. 557; 128 Fed. 679; *Id.* 32. The record being entirely silent as to what caused the tongs to break loose from the log to which it was attached, and the burden being upon the appellant to show negligence on the part of appellee, the inference most favorable to the appellee from the undisputed evidence must be taken. 88 S. W. 988; 91 Mo. App. 539 and cases cited; 63 Atl. 204; 93 S. W. 869; 48 S. E. 509; 155 Mo. 382; 2 Am. St. 193; 15 Wall. 524; 47 Am. Rep. 566; 9 Am. & Eng. R. Cas. 445; 164 Mass. 257.

2. The proof without conflict shows that appellant fully appreciated the only danger incident to the use of the appliances furnished, knew more about them than the master, and hence assumed the risks incident to their use. 92 S. W. 244; 81 Ark. 343; 56 Ark. 232; 114 N. W. 853. It is not the law that a complaint by the servant and a promise by the master to repair relieves the servant of the assumption of risks of dangers known to and appreciated by him. The promise relieves from assumption of risk only where it amounts to an assurance that the appliance or place is safe. 70 S. W. 606; 100 S. W. 743; 72 N. E. 393; 68 N. E. 938; 138 Ind. 290; 97 Tenn. 615; 6 C. C. A. 190; 55 Ark. 483; 126 Fed. 495. See also 127 Fed. 609; 27 Pac. 701; 4 Pa. 544; 53 S. E. 97; 43 N. E. 961; 75 N. E. 288.

3. Appellant was guilty of contributory negligence in knowingly occupying the only place of danger about the premises,

when a better and safer place was furnished him by the master. Hence he cannot recover. 95 U. S. 439; 41 Ark. 542; 70 Ark. 603; 128 Fed. 529; 76 Fed. 125; 118 Mo. App. 152; 54 S. E. 110; 53 S. E. 658; 40 So. 280; 88 S. W. (Ark.) 988; 89 S. W. 512.

HART, J. (after stating the facts). In support of the judgment of the court directing a verdict for the defendant, now appellee, it is contended that upon the undisputed facts of the case the plaintiff, now appellant, must be deemed to have accepted the risk of such injury as befell him.

In a note to the case of *Foster* v. *Chicago, &c., Ry. Co.*, 127 Iowa 84, 4 Am. & Eng. Ann. Cas., 153, the servant's assumption of risk, as affected by the master's promise to repair, is aptly stated as follows: "It is a well settled general rule that the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery or piece of work is defective or dangerous is suspended by the master's promise to repair, made in response to the servant's complaint, so that if the servant is induced by such promise to continue at work he may recover for an injury which he sustains by reason of such defect within a reasonable time after the making the promise, provided he exercises due care, unless the defect renders the appliance so imminently and obviously dangerous that a reasonably prudent person would decline to use it at all until it was repaired."

Many decisions from a great number of the States are cited to support the rule. Mr. Thompson, in his work on Negligence, vol. 4, § 4667, expresses the same views; and adds that under such circumstances "he will not, as a matter of law, be put in the position of having accepted the risk, but whether he has done so will be a question for the jury." See also 1 Labatt on Master and Servant, § 453.

The latest decision of our court in which the rule has been recognized and applied is the case of *St. Louis, I. M. & S. Ry. Co.* v. *Mangan*, 86 Ark. 507, in which the prior decisions of our court on the subject to the same effect as the rule above quoted are cited and approved. In the case of *Greene* v. *Minneapolis & St. Louis Ry. Co.*, 31 Minn. 248, the court said:

"If a servant who has knowledge of defects in the instrumentalities furnished for his use gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. Under such circumstances his subsequent use of the defective instrumentality would not necessarily, or as a matter of law, make the servant guilty of contributory negligence, but it would be a question for the jury whether, in continuing its use after he knew of the defect, he was in the exercise of ordinary care." The opinion was delivered by Mr. Justice Mitchell, and in support of it he cited, among other cases, that of *Hough* v. *Railway Company,* 100 U. S. 213. The latter is a leading case on the question, and has been followed in numerous decisions of the State as well as United States courts.

We also call attention to the following cases as sustaining the decision: *Indianapolis & St. Louis Ry. Co.* v. *Watson,* 114 Ind. 20; *Erdman* v. *Illinois Steel Co.,* 95 Wis. 6; *Rothenberger* v. *Northwestern Consolidated Milling Co.,* 57 Minn. 461; *Patterson* v. *Pittsburg & Connellsville Rd. Co.,* 76 Pa. St. 389; *McKelvey* v. *Chesapeake & Ohio Ry. Co.,* 35 West Va. 514.

Counsel for appellee rely upon the case of *Railway Co.* v. *Kelton,* 55 Ark. 483, to sustain the action of the court in directing a verdict for it. In that case the court said:

"In an action by a house painter to recover damages for an injury occasioned by a fall from a defective ladder furnished by his employer, he is not entitled to recover if, knowing that the ladder could not be used with any assurance of safety, he continued to use it until the injury occurred, relying upon his employer's promise to furnish a safe ladder." In that case the facts were undisputed, and the court said as a matter of law that the promise on the part of the employer to furnish a better ladder would not justify the employee in looking to his employer for compensation for damages which he sustained by wantonly and recklessly encountering danger which he knew necessarily at-

tended the use of the old ladder. Later adjudications of our court have said it was a question for the jury, where the servant relies upon the promise of the master to repair, if the appliance is so obviously and imminently dangerous that a reasonably prudent person would decline to use it until it was repaired. There is an apparent, but no real, conflict in the two classes of decisions. In the Kelton case no special knowledge was required to discern the danger of the continued use of the ladder. It was not an appliance which required the exercise of skill and care. The danger of its continued use could be as well comprehended by one man as another. It was used only by the one man. The case is different where the appliance is either so complicated that the servant may rely upon the superior knowledge of the master, or where it is a machine or appliance which requires several persons to operate it, and the danger in its continued use in its defective condition depends upon the mutual care toward each other of the servants operating it. This distinction is recognized in the following cases: *Gunning System* v. *Lapointe,* 72 N. E. (Ill.) 393 and cases cited; *Swift* v. *O'Neal,* 58 N. E. (Ill.) 416; *Morden Frog & Crossing Works* v. *Fries,* 81 N. E. (Ill.) 862; *Webster Mfg. Co.* v. *Nesbitt,* 68 N. E. (Ill.) 936; *Marsh* v. *Chickering,* 101 N. Y. 396.

The application of the following rule differentiates the two classes of cases: "It is only when the facts are undisputed, and are such that reasonable minds may draw but one conclusion from them, that the question of negligence is ever considered one of law for the court." *St. Louis & San Francisco R. Co.* v. *Summers,* 111 S. W. (Tex. Civ. App.) 211.

Where the servant is engaged in ordinary labor, with tools of simple construction, which are used by himself alone, and where the facts are undisputed, reasonable minds must inevitably come to the same conclusion. Hence there is nothing to submit to the jury.

On the other hand, in the case of complicated machinery, or in cases where the danger in the continued use of the machine or instrumentality depends upon the want of due care of the fellow servants engaged in operating it, although the facts are undisputed, reasonable minds might draw different conclusions.

In such cases the question of negligence is one for the jury. The case under consideration is a good illustration.

The jury might have found that the proximate cause of the injury was the negligence of the master in furnishing defective tongs, together with the concurring negligence of the fellow servants, either the flagman in prematurely signalling the engineer to start the machinery in motion, or the engineer in starting it without a signal. That a master is liable for the negligence of a vice principal concurring with that of a fellow servant, we refer to the following cases: *Archer-Foster Construction Co.* v. *Vaughn,* 79 Ark. 20; *Kansas City, Fort Scott & Memphis Rd. Co.* v. *Becker,* 67 Ark. 1.

The court should also have submitted to the jury under proper instructions the sufficiency of the complaint by the servant and the promise to repair by the master and the servant's reliance on this promise, and the reasonableness of the time to repair.

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

LITTLE v. WILLIAMS.

Opinion delivered June 22, 1908.

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1. WATERS—RIGHT TO BED OF LAKE.—The title of the owner of land adjoining a nonnavigable lake extends to the center of such lake by virtue of his riparian ownership. *Rhodes* v. *Cissel,* 82 Ark. 367, followed. (Page 46.)
2. CLOUD ON TITLE—BURDEN OF PROOF.—The plaintiff in a suit to quiet title must succeed, if at all, upon the strength of her own title, and not upon the weakness of the title of her adversaries. (Page 46.)
3. WATERS—OWNERSHIP OF BED OF LAKE.—Where the plats of the government survey and the field notes which accompany them show that certain lands at the time of the survey constituted the bed of a nonnavigable lake, the burden is upon one who seeks to maintain that the lands were not at that time within such lake bed. (Page 46.)
4. PUBLIC LANDS—CONCLUSIVENESS OF PUBLIC SURVEYS.—The official surveys made by the government are not open to collateral attack in an action at law between private parties. (Page 48.)

5. WATERS—OWNERSHIP OF LAKE—PRESUMPTION.—Where a patent conveying swamp land from the United States to the State described the land as bordering on the meandered line of a nonnavigable lake, the effect was to vest *prima facie* title to the bed of the lake, as shown in the plats, from meandered shore lines to center; and a conveyance from the State in turn to its grantees had the same effect. (Page 50.)

6. SWAMP LAND GRANT—WHEN TITLE PASSED.—Though the Swamp Land Grant was a grant *in praesenti,* the legal title did not pass until the lands were duly selected as swamp and overflowed, and the patents were delivered. (Page 50.)

7. SAME—CONCLUSIVENESS OF COMPROMISE.—Under the terms of a compromise entered into between the United States and the State of Arkansas, and witnessed by statute of Arkansas of March 10, 1897, and by act of Congress of April 29, 1898, the State expressly relinquished her claim to any unpatented swamp land. (Page 50.)

8. SAME—CONCLUSIVENESS OF PATENT.—Where, in accordance with the government survey, a patent conveying swamp land to the State described the land as bordering upon the meandered line of a nonnavigable lake, until the government elects to correct mistakes in the survey, no one else can complain that the land so described did not border upon the lake, but that swamp land intervened at the time the survey was made. (Page 50.)

9. EVIDENCE—JUDICIAL NOTICE OF SURVEYS.—The courts take judicial cognizance of the general system of government surveys, and that lands are surveyed and platted into sections and parts of sections and into fractional sections where they abut on streams or other bodies of water. (Page 52.)

10. PUBLIC LANDS—DESCRIPTION.—A patent from the United States conveying as swamp land certain land in a designated section, township and range will be construed by reference to the plat of the public surveys, and will not be held to convey land which does not appear on the public surveys. (Page 52.)

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

STATEMENT BY THE COURT.

This case involves a controversy concerning the title to a large body of unsurveyed and unoccupied land containing 1,000 or 1,200 acres of land within the meandered lines of what is known as Walker's Lake according to the survey made in 1847 by the United States government.

The plaintiff, Johanna Little, claiming to be in actual possession of the lands in controversy, instituted this suit in chan-

cery against the defendants, J. J. Williams and others, to quiet her alleged title.

The plaintiff claims title to the land through the following chain:

First—United States to State of Arkansas, act of Congress, dated September 28, 1850, donating swamp and overflowed land.

Second—State of Arkansas to Board of Directors of St. Francis Levee District, act of General Assembly, dated March 29, 1893, donating all lands in the district owned by the State.

Third—Board of Directors of St. Francis Levee District to plaintiff, deed dated March 11, 1903.

The defendants are the owners by mesne conveyances, running back to the State of Arkansas and the United States, of the fractional sections, according to government survey, of land bordering on the meandered line of Walker's Lake, and claim title to the lands in controversy by virtue of their alleged riparian rights as such owners.

Walker's Lake is, and at the time of the government survey was, a shallow, non-navigable lake. The testimony is conflicting as to the true boundaries of the lake and the character of the territory now in controversy—whether it was water or swamp land—at the time of the government survey. Testimony introduced by the plaintiff tends to establish the fact that the territory was swamp land at that time; and the testimony of defendants' witnesses tends to show that at that time the waters of the lake extended up to the meandered lines of the survey, but have since then receded so as to leave the land dry.

The parties, in addition to introducing the plats and field notes of the government survey and depositions of witnesses, entered into the following written agreement as to facts, which writing was a part of the record:

"In order to avoid labor and expense in taking testimony, it is agreed by counsel representing defendants that all of the surveyed lands in the vicinity and locality of what would be south ½ of section 25, the whole of section 36, township 16, range 12 east, and northwest ¼ and south ½ of section 31, township 16, range 13 east, Mississippi County, Arkansas, if same were surveyed, were in September, 1850, swamp and overflowed lands, and passed to the State of Arkansas under the grant of the United

States of date September 28, 1850, and that the townships including Walker's Lake, as meandered on the map, were included by the Secretary of the Interior of the United States government in the list of lands prepared by him and forwarded by him to the Governor of Arkansas, showing the lands which passed to the State under the grant of 1850, and that said lands embraced in said list were subsequently covered by patents from the government of the United States.

"And it is further agreed that the State of Arkansas never undertook to convey the said lands embraced within the meandered lines of Walker's Lake, except as same might have passed by operation of law to the defendants as riparian owners, prior to the land grant made by the State to the St. Francis Levee Board in 1893."

The chancellor, after hearing the evidence, dismissed the complaint for want of equity, and plaintiff appealed.

Henry Craft, for appellant.

1. The title of a riparian owner of land bordering upon a pond or shallow lake extends only to the water's edge. 25 Ark. 120; 9 N. H. 461; 13 Wis. 692; 42 Wis. 248; 28 Vt. 257; 13 Me. 201; 48 N. J. Eq. 42; Angell on Watercourses, 41; 44 S. E. 286. The United States Supreme Court holds that it is for the States themselves to say what waters and to what extent this prerogative of the State over lands under the water shall be exercised. 140 U. S. 371, 35 Law Ed. 428. And this State in the case first above cited has allied itself with those States which hold a riparian owner limited by the edge of the water which bounds his land.

2. Appellees' contention that the Government survey and plat showing their fractional sections abutting upon the meandered line of Walker's Lake is conclusive evidence that the lake was there when the survey was made, and fixes their rights as riparian owners, is not supported by the authorities. 185 U. S. 47, 46 Law. Ed., 800.

3. In fact, the lake was not within a mile of the eastern meandered line as shown by the survey. The land was never the bed of a lake, but was swamp and overflowed land. The record shows that it was swamp and overflowed land from 1850 to the

building of the levee along the Mississippi river, and stipulations of counsel agree that it was swamp and overflowed land in 1850 when the act of Congress was passed, and as such passed to the State. The proof shows that it was never the bed of a lake, and that Walker's Lake as meandered upon the Government map never existed. If in 1850 the land was covered by water and was the bed of a shallow lake, nevertheless it was swamp and overflowed land, came within the operation of the Government grant, title was vested in the State, and the land was never subject to the law of accretion and reliction applying to real lakes and navigable waters. 109 La. Ann. 625. The evidence clearly establishes the fact that the Government surveyors made a mistake in meandering the lake, but the Government was not bound by the mistake. 140 U. S. 406. The effect of the mistake was to leave the land between the water line and the meandered line owned by the Government. 175 U. S. 300, 44 Law. Ed. 171; 4 Neb. 245; 75 Ia. 20; 78 Wis. 240. When the water is controlled by artificial means, the land which is reclaimed is not subject to the law of riparian ownership, the elements of gradual, "imperceptible and insensible" recession being lacking. 25 Ark. 120. See, also, 138 U. S. 584, 34 Law. Ed. 1063. The questions involved in this case have already been passed upon by this court. See 77 Ark. 338.

4. It is shown by agreement that the lands in question were selected by the Secretary of the Interior "as swamp and overflowed lands," and by him conveyed as such to the State in 1850. This determines the nature of the lands at that time, and the burden of proving that the nature of the lands changed was upon the alleged riparian owners. The presumption is that they continued to be swamp and overflowed land until reclaimed by the building of the levee. Such land "is to be treated as land." 175 U. S. 308.

N. W. Norton, amicus curiae, for appellant.

1. The pertinent fact in the agreement is that *the townships* including Walker's Lake were selected and patented to the State as swamp and overflowed lands. Since the lands were selected and patented by townships, it follows that all land in the townships passed, whether included in sections or not, and whether submerged or not. 190 U. S. 452; 23 Sup. Ct. Rep.

651. Lands are not the less lands for being covered by water. 7 Ad. & El. 671. The Swamp Land Act was a grant *in praesenti* to the State of all swamp and overflowed lands within its boundaries. 24 Ark. 431. The State's title does not depend alone upon the deed from the United States, but upon the grant contained in the act. 76 Ark. 464. The fact that the land was meandered and platted as a lake does not make it other than swamp and overflowed land. 11 Fed. 389; 77 Ark. 338; 27 Supt. Ct. 679. If the entire area platted by the surveyors as Walker's Lake had been an open lake, it would nevertheless have passed to the State as swamp land, under the patent for the township. 138 U. S. 584.

2. The title of the State passed to the Board of Directors of the St. Francis Levee District. Acts 1893, p. 172; 76 Ark. 442.

3. A swamp land deed will pass title to no more land than is described in it. 7 N. E. 379. It does not follow that if the State obtained title to the lake bed from the Government, the purchasers of abutting fractional sections from the State got the bed of the lake also. It was said with reference to navigable waters: "If they (the States) choose to resign to the riparian proprietors rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." 94 U. S. 324. And this rule was extended to non-navigable lakes. 190 U. S. 508, 23 Sup. Ct. 685. What passes from the State to its vendee is, therefore, purely a question of local law.

4. As to title under the doctrine of accretion or reliction, the burden of proof is on appellees to establish the fact of accretion or reliction. Therein they have failed, but on the contrary have proved conditions practically the same as in *Chapman & Dewey* v. *Bigelow*, 77 Ark. 338.

S. S. Semmes and *Will J. Driver*, for appellees.

1. The burden of proof is upon appellant to show title in herself. If she recover at all, it must be upon the strength of her own title, not upon the weakness of her adversary's. 77 Ark. 338; 82 Ark. 301.

2. Appellees are owners of the lands in controversy by virtue of being the grantees of the original surveyed lands riparian to Walker's Lake, which is a shallow, nonnavigable lake.

These lands at the time of the Government survey, and of the act of Congress of 1850, were the bottom or bed of that lake, and have since become uncovered and dry. The legal effect of the grant of 1850 was to convey to the State the right, title, and interest of the United States to the bed of the lake, the latter having made no reservation thereof in the grant. The State having made no reservation thereof, nor imposed any restriction, her grantees took respectively, ratably with their frontage on the lake, to its center. 82 Ark. 367; 140 U. S. 380; 52 Minn. 181.

3. Reservation of any portion of the lake or of the bed thereof, either by the Government or by the State, must have been express,—no reservation can be implied, in case of conveyance of lands along streams. 17 Am. & Eng. Enc. of L. (2 Ed.), 533; 49 N. E. 692. And there is no proof whatever of any such reservation.

4. The survey of 1847 became the official authority of the Government in establishing the corners, bearings, lines and area subject to entry of the lands surveyed, and is strong *prima facie* evidence of its correctness. It can only be overcome by clear and positive proof of a gross mistake, or fraud, on the part of the surveyor in running the lines. 11 Sup. Ct. 818; 22 *Id.* 566.

5. If any portion of the lands in controversy was highland, and not a part of the bottom of the lake in 1847, by appellant's own testimony it was an unsurveyed island out in the lake. If so, the title passed to appellees as riparian owners. If not an island, it was nothing more than a ridge or tongue of land projecting out into the lake, which the surveyor chained across as being too unimportant to meander. He was the best judge of that; and this situation would, under the proof, in no way affect the riparian rights of appellees. 11 Sup. Ct. 818; *Id.* 822.

6. The record does not establish that Walker's Lake was a mere "overflow lake" from the Mississippi river, the lands becoming uncovered as the overflow subsided, and remaining dry during the greater part of the year. On the contrary, the proof shows that after the overflows subsided the original lake remained permanently there. The Louisiana case, 109 La. 625, cited by appellant is not controlling in this case, because in that State the civil law, not the common law, prevails, and that decision was founded on an act of the Legislature peculiar to that State.

Allen Hughes, for appellees.

1. The placing of a comma before "including" in the clause of the stipulation reading, "* * * the townships including Walker's Lake as meandered on the map," has given a totally different meaning to that clause from the construction placed thereon by the court and counsel at the trial. There it was construed as though it were written: "The townships which include," etc. That construction should prevail here. 20 Enc. Pl. & Pr. 659.

2. The patents did not convey legal title to the unsurveyed lands. "When lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written upon the face of the deed or the grant itself." 128 U. S. 691; Jones on Conveyancing, § 424; 138 U. S. 573; 162 U. S. 37; 130 Ind. 593; 119 Mich. 612; 116 Mo. 201; 14 Wash. 3.

3. This court is without jurisdiction to determine the merits of appellant's claim of title. The effect of the statute, Swamp Land Grant, was to devolve upon the Secretary of the Interior the duty and confer upon him the power of determining what lands were swamp and overflowed lands, and to make his office the tribunal whose decisions were to control. Except in cases where he fails or refuses to act, his jurisdiction is exclusive. 6 Fed. Stat. Ann. 404, § 2; 46 Ark. 17; 202 U. S. 60; 195 U. S. 480; 173 U. S. 473; 164 U. S. 559; 168 U. S. 589; 71 Ark. 491; 190 U. S. 301; 104 Fed. 18; 9 Wall. 89; *Id.* 95; 93 U. S. 169; 97 U. S. 345; 121 U. S. 488; 138 U. S. 134; 6 Fed. Stat. Ann. 411, § 2488. No dereliction of duty can be charged to the Secretary of the Interior with reference to the selection of swamp lands in this State, the State having from the first taken upon itself the selection thereof without waiting for the department at Washington to do so. Acts 1850, p. 77, § 15; Acts 1854, p. 236; Acts 1856, p. 32; Acts 1885, p. 69. While the act of Congress of 1850 was a grant *in praesenti* in the sense that the United States could not without notice, hearing, etc., thereafter confer title upon any other to the lands coming within the terms of the act, yet it was not a grant *in praesenti* in the sense that it had the same legal

effect as a patent or a deed. The legal title did not pass from the United States. 142 Fed. 985; 139 Fed. 941; 29 Fed. 830; 116 Ia. 352; 93 N. W. 52; 196 U. S. 573; 129 Fed. 1; 40 Miss. 504; 67 Mo. 102; 71 Mo. 127; 63 Mo. 129; See, also, 154 Fed. 425; 22 Ia. 579; 29 Fed. 837; 90 N. W. 842; 23 Cal. 431; 65 Mo. 233; 105 N. W. 233; 91 N. W. 294; 124 Fed. 819; 104 Fed. 118; 13 App. D. C. 279; 137 Fed. 516.

4. The act of 1893 donating lands to the Levee Board did not include unsurveyed lands. Statutes granting public property to private individuals or corporations are to be strictly construed. 107 U. S. 342; 164 U. S. 190; 152 U. S. 110; Endlich, Interp. Stat., § 356; 26 Am. & Eng. Enc. of L. (2 Ed.), 672; 1 Jones on Conveyancing, § 548. The word "all" used in the act is not to be construed in its general or broad sense. 1 Cowper, 9; 60 L. R. A. 415; 15 Ga. 518; 48 Ark. 305; 18 Pa. St. 388; 54 N. Y. 25; 2 Am. & Eng. Enc. of L., (2 Ed.), 141; 1 Words & Phrases, 312.

5. Beds of unnavigable lakes are the property of the riparian proprietors. 197 U. S. 510; 159 U. S. 87; 152 U. S. 1; 140 U. S. 406; *Id.* 371; 94 U. S. 324; 82 Ark. 367; 24 Ark. 102; 25 Ark. 120; 50 Ark. 466; 140 Fed. 781.

If at the time of the survey the lake was a body of water, the title of the United States to its bed was that of a riparian proprietor, which passed with its patent and every subsequent conveyance. 69 Ark. 34; 71 Ark. 390; 190 U. S. 508; Gould on Waters, § § 195, 196. Meander lines are not lines of boundary. 2 Farnham on Waters, 1464; Gould on Waters, § 76; 190 U. S. 452; 134 U. S. 178; 7 Wall. 272.

6. On the question of mistake in the survey, see 39 Fed. 74; 16 Pet. 166; 140 U. S. 406, 412; 52 Minn. 181.

Murphy, Coleman & Lewis, for appellees.

1. No one but the United States, and perhaps the State, can question the correctness of the Government survey. If there was a mistake in the survey, the State alone had the right to complain, the official survey and plats being conclusive between individuals, and none but the State could claim that the title terminated at the meander line. 2 Farnham on Water and Water Rights, § 418; *Id.*, § 422; 20 How. 264; 128 U. S. 696; 158 U

S. 256; 90 N. W. 966; 197 U. S. 510; 23 Tex. 241; 12 Johns. 77; 96 Ia. 414; 40 Minn. 455; 54 Minn. 290; 40 Am. St. Rep. 328. No one can set aside a patent on the ground of fraud except the Government or the State itself. 46 Fed. 224; 61 Fed. 777; 76 Fed. 157; 82 Fed. 160; 18 How. 173; 3 Wall. 478; 19 How. 323; 101 U. S. 514; 104 U. S. 636; 21 Tex. 728; 28 Tex. 146; 81 Tex. 603; 9 Ala. 594; 16 Cal. 295; 54 Ark. 258.

2. Where land is reserved from a grant, either by express terms or by intendment of law, it would not pass under the grant, though the reservation be afterwards removed. 113 U. S. 629; 145 U. S. 535; 158 U. S. 85; 132 U. S. 357; 189 U. S. 447; 13 Pet. 497; 92 U. S. 733; 54 Ark. 266. It follows, therefore, that, as the bed of Walker's Lake was excepted from the grant of the Levee Board by intendment of law, because it had already been disposed of to the riparian owners, a cancellation of such previous disposition for fraud or mistake would not inure to the benefit of the Levee Board or its grantee, but would revest the title in the State.

McCULLOCH, J., (after stating the facts.) The first question presented is one of fact, whether at the time of the Government survey in 1847 the land in controversy was a portion of the bed of Walker's Lake, or whether it was swamp land; for, if the former state of fact is found to have existed, then the title of the owners of adjoining lands extended to the center of the lake by virtue of their riparian rights as such owners; and, since the recession or drying up of the waters has left the land exposed, it belongs to them. See *Rhodes* v. *Cissel,* 82 Ark. 367, and cases therein cited.

Appellant was the plaintiff below, seeking to quiet her alleged title, and must succeed, if at all, upon the strength of her own title, and not upon the weakness of that of her adversaries. *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338. In other words, the burden of proof is upon her to show that the land in controversy was land, and not lake bed, at the time of the government survey.

In addition to that, the plats of the government survey and the field notes which accompany them show that these lands then constituted the bed of the lake, and were within the meandered lines of the lake. This establishes, *prima facie,* that the lands

were a part of the lake bed, and the burden is upon the appellant to overcome it by proof to the contrary.

But, thus conceding the burden to be upon the appellant, the testimony which she has adduced convinces us that she is correct in her contention as to this question of fact, and that the land in controversy was swamp land at the time of the government survey, and was not in the bed of the lake. The surveyors made mistakes in relimiting the boundary lines of the lake, and included a large amount of low swampy land, which the waters of the lake did not cover. These mistakes were not unreasonable ones, and do not demonstrate either fraud or gross carelessness on the part of the surveyors, for the evidence shows that there may have been grounds at that time to believe that the meander line followed the bank of the lake. The intervening territory between the meander line and the bank of the lake was undoubtedly of that indeterminate character, low lands partly covered by water, about which the surveyors could reasonably have been mistaken, and which they may have concluded was the bed of a shallow part of the lake. There was a slash or low place along the meander line; and, as this may have been temporarily covered by water at the time, the surveyors followed its outer line, believing it to be the shore line of the lake.

We are satisfied, however, that a mistake was made in establishing this line as the shore line of the lake. Out of the testimony of all the witnesses who testify from recollection as to the condition of the land and the boundaries of the lake many years ago, the preponderance lies, we think, with those who say that the land in controversy was swamp land, and not lake bed. In addition to this, the condition in which the undisputed evidence shows the land to be at this day, and the character of the timber growing thereon, is convincing that it was not a portion of the lake in 1847. The present banks of the lake are well marked, and have not materially changed during the memory of those persons whose testimony on the subject preponderates. We will, therefore, treat it as established that mistakes were made in survey, and that this land was in fact swamp land, and not lake bed. The real location of Walker's Lake was and is far inside the meander lines run by the surveyors. At some points the bank of the lake is over a mile from the surveyed meander line.

But, conceding this to be true, the fact remains that a meander line was surveyed, which the field notes show was intended to indicate the shore line of the lake. A body of water constituting a non-navigable lake existed then and still exists within the meander line, though a considerable distance inward from it. The plats of this survey were filed in the General Land Office of the United States, and were accepted and approved by that department of the Government as correct. In running the meander lines, the surrounding sections and parts of sections were necessarily made fractional, and, under the Swamp Land Act of 1850, surveyed land in the townships surrounding the lake were selected by the State. The selections were approved by the Secretary of the Interior, and patents were issued to the State conveying the land by description "according to the official plats of the survey returned to the General Land Office of the Surveyor General." The State of Arkansas has, from time to time, sold to individuals the surveyed lands and conveyed them by descriptions according to the plats.

Neither the Land Department of the United States nor of the State of Arkansas has ever questioned the correctness of the survey, but, on the contrary, they have up to the present time treated and do now treat them as correct; if we may view in that light a failure to take any steps looking to a correction. Can an individual question the correctness of the surveys when neither the general government nor the State government has ever done so? Can an individual acquire and assert rights in these unsurveyed lands which the Government has never asserted against the riparian rights of the adjoining owners?

The Supreme Court of the United States, as early as the case of *Spencer* v. *Lapsley,* 20 How. 264, decided that "the issue of the grant or patent conveys the title, and questions of fraud or irregularity, or excess in the survey cannot be raised by other parties than the Government."

Mr. Justice Lamar, in delivering the opinion of the court in *Cragin* v. *Powell,* 128 U. S. 691, said: "That the power to make and correct surveys of the public land belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tri-

bunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not elementary principles of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. The reason of the rule, as stated by Justice Catron in the case of *Haydel* v. *Dufresne,* 17 How. 23, is that 'great confusion and litigation would ensue if the judicial tribunals, State and Federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field done and divisions more equitably made than the department of public lands could do.' "

In *Russell* v. *Maxwell Land Grant Co.,* 158 U. S. 253, Mr. Justice Brewer, speaking for the court, said: "In the nature of things, a survey made by the government must be held conclusive against collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the land department. None other is named in the statutes. If in every controversy between neighbors the accuracy of a survey made by the government were open to question, interminable confusion would ensue."

The same learned Judge, in delivering the opinion of the court in *Whittaker* v. *McBride,* 197 U. S. 510, said: "The official surveys made by the government are not open to collateral attack in an action at law between private parties."

Mr. Farnham, in his work on Water and Water Rights (vol. 2, § 422), states the same doctrine, as follows:

"Where a patent issues for a fractional lot appearing by the plat of the United States survey to be bounded on one side by a meandered lake, the patent is not void so far as it purports to convey the land under the water, though it was an error in the surveyor to treat the tract covered by water as a lake to be meandered, instead of land to be surveyed. Conceding the patent to that extent to be void, it can be avoided only by the United States in a suit to which the patentee is a party. The land passed, and a private individual cannot complain."

The following decisions of the Supreme Court of the United States announce in effect the same principle: *Michigan Land &*

Lumber Co. v. *Rust,* 168 U. S. 599; *Humbird* v. *Avery,* 195 U. S. 480; *Oregon* v. *Hitchcock,* 202 U. S. 60.

The decisions of this court in *Smith* v. *Hollis,* 46 Ark. 17, and *Williamson* v. *Baugh,* 71 Ark. 491, are based upon the same principle. The court in these cases held that the decision of the Secretary of the Interior in determining whether or not certain lands came within the terms of the Swamp Land Grant was, in the absence of fraud, conclusive, and could not be overturned in a collateral proceeding.

The legal effect of the patents to the State of the fractional sections and parts of sections surrounding the meandered lines of the lake, according to the official plats of the public survey, was to convey all riparian rights, and by virtue thereof to vest *prima facie* title to the bed of the lake, as shown on the plats, from meander shore lines to center. The conveyances executed by the State in turn to its grantees had the same effect. *Hardin* v. *Jordan,* 140 U. S. 371; *Mitchell* v. *Smale,* 140 U. S. 406.

If title to the lands in controversy has not passed out of the United States to the State and its grantees in that way, it has never passed at all. Though the Swamp Land Act has been held to be a grant *in praesenti,* the legal title did not pass until the lands were duly selected as such, and the patents were delivered. *Rogers Locomotive Machine Works* v. *American Emigrant Co.,* 164 U. S. 559; *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589; *Brown* v. *Hitchcock,* 173 U. S. 473; *Ogden* v. *Buckley,* 116 Iowa, 352; *Funston* v. *Metcalf,* 40 Miss. 504.

These lands have never been selected or patented at all, unless the patents to the adjoining fractional sections embraced them.

The State of Arkansas, by the compromise settlement contract entered into with the United States, which was approved by act of the General Assembly of Arkansas, March 10, 1897, and by act of Congress, April 29, 1898, expressly relinquished her claim to any unpatented swamp land.

So the title to these lands is either in the owners of the adjoining lands by virtue of their riparian rights, according to the legal purport of the patents and subsequent conveyances, or it remains in the United States government. Until the government elects to correct the mistakes in the original survey and assert

claim to the lands, no one can complain or dispute the title of the holders of the *prima facie* title. *Schlosser* v. *Cruikshank,* 96 Iowa, 414; *Ogden* v. *Buckley,* 116 Iowa, 352; *Minnesota Land & Investment Co.* v. *Davis,* 40 Minn. 455; *Lamphrey* v. *Mead,* 54 Minn. 290; *Whittaker* v. *McBride,* 197 U. S. 510.

Appellant in no event has any shadow of title, for, if the State took title as riparian owner under the patent to the adjoining land, she in like manner conveyed it to her grantees, and had no title to donate to the Levee Board. *Towell* v. *Etter,* 69 Ark. 34; *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178, 10 Sup. Ct. 518.

Whether or not the State can now correct any mistake as to the quantity of land conveyed by her patent to individuals is not presented in this case, and we therefore refrain from any discussion on that point.

The case of *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338, has no application to the facts of the present case, and is not controlling. In that case the meander line was run by the government surveyors along the bank of a stream, and title was claimed under a patent of lands bordering on this meandered line by virtue of riparian rights to lands lying beyond the body of water meandered. This court refused to sustain the claim, holding that no title passed under the patent to lands lying beyond the meandered stream. Neither do *Horn* v. *Smith,* 159 U. S. 40, *Niles* v. *Cedar Point Club,* 175 U. S. 300, nor *French-Glenn Live Stock Co.* v. *Springer,* 185 U. S. 47, have any bearing on the present case. They are cited in the Bigelow case, and the facts of each bring them all within the same class of cases, but they have no controlling force here, because of the difference in the facts.

We conclude that the decree of the chancellor is correct, and the same is in all things affirmed.

ON REHEARING.

Opinion delivered November 9, 1908.

MCCULLOCH, J. The decision is vigorously assailed on the ground that we were mistaken in holding that the unsurveyed land between the meandered line and true shore line of this lake

was not patented by the United States to the State of Arkansas. Courts take cognizance judicially of the general system of government surveys, and accordingly we know that lands are surveyed and platted into sections and parts of sections and into fractionals where they abut on streams or other bodies of water. The record in this case contains a plat and the field notes of the governmental surveys of the land surrounding Walker's Lake, and they confirm the facts of which we are already judicially cognizant. *Bittle* v. *Stuart,* 34 Ark. 224; 7 Enc. Ev. pp. 987, 988; *Webb* v. *Mullins,* 78 Ala. 111; *Ledbetter* v. *Borland,* 128 Ala. 418; *Peck* v. *Sims,* 120 Ind. 345; *Muse* v. *Richards,* 70 Miss. 581; *Standford* v. *Bailey* (Ga.) 50 S. E. 161.

Description of lands, according to terminology employed in the system of governmental surveys and plats of lands, is necessarily a reference to the plats of those surveys; for those terms are meaningless unless so considered with reference to the surveys and plats. There is nothing known of townships, sections and part of sections of lands except such as are described in the plats of the government surveys. Therefore, giving the word "township," used in the stipulation of facts, the meaning which we must attribute to the parties who employed the term, it has reference to the townships surveyed and platted by the government surveyors, and means the townships according to the surveys and plats. A conveyance of the township "according to plat of the surveys" does not include lands which do not appear on the plat of the surveys. We do not mean to hold that the unsurveyed land could not have been selected as swamp lands and patented to the State by the use of proper descriptive terms in the patent; but this was not accomplished by reference to townships, sections or parts thereof according to the plat of the surveys, when the unsurveyed land did not appear on the plats at all. The plats showed it to be water and not land.

We are convinced, also, that, even if we discard the technical meaning of the word "township," the language of the stipulation is susceptible of no other reasonable construction than that only the surveyed land appearing on the plat of the public survey was meant to be covered by the agreement. It is evident that the parties meant only the surveyed lands appearing on the plat, leaving all questions as to the character of the unsurveyed terri-

tory and title thereto open to further proof and adjudication. We find nothing to indicate that appellees' counsel meant to concede that, if the *locus in quo* should be found to have been land and and not lake-bed at the time of the survey in 1847, it was included in the patents from the United States to the State of Arkansas and belonged to appellant. In this respect the stipulation deals only with the surveyed land. It reads that "all of the surveyed lands in the vicinity and locality * * * were, in September, 1850, swamp and overflowed lands and passed to the State of Arkansas under the grant of the United States of date September 28, 1850, and that the townships including Walker's Lake, as meandered on the map, were included by the Secretary of the Interior of the United States government in the list of lands prepared by him and forwarded by him to the Governor of Arkansas, showing the lands which passed to the State under the grant of 1850, and that said lands embraced in said list were subsequently covered by patents fom the government of the United States."

Now, as it was only stipulated that the surveyed lands passed to the State as swamp and overflowed lands under the act of Congress, it would be unreasonable, in the absence of a clear expression, to construe the meaning of the stipulation to be that the unsurveyed lands were patented by the United States to the State.

We therefore think that we were correct in saying that "the legal effect of the patents to the State of the fractional sections and parts of sections surrounding the meandered lines of the lake, according to the official plats of the public survey, was to convey all riparian rights and by virtue thereof to vest *prima facie* title to the bed of the lake, as shown on the plats, from meandered shore line to center," and that "if title to the lands in controversy has not passed out of the United States to the State and its grantees in that way, it has never passed at all."

We have not been unmindful of the earnest reliance of counsel upon the case of *Kean* v. *Calumet Canal & Improvement Co.*, 190 U. S. 452, but we do not think that the case supports their contention. On the contrary, we think that the views already expressed are in conformity with the conclusions reached in that case. The facts there were that the land in controversy at the time of the survey made by the Government, as well as at the time of the issuance of the patent to the State, was the bed of a

non-navigable lake duly meandered by the survey and situated within the bounds of the section of land patented. The court held that the title to the bed of the lake passed to the State under the patent, and in turn to the State's grantee under its patent, basing that conclusion upon the decisions in *Hardin* v. *Jordan,* 140 U. S. 371, and *Mitchell* v. *Smale,* 140 U. S. 406. It is apparent, therefore, that the court based its conclusion as to the passage of title under the patent upon the fact that the title passed as a riparian right or as an appurtenant to the surveyed land which was conveyed. This is apparent when we consider the language used by the court in the two former cases.

In *Hardin* v. *Jordan, supra,* Mr. Justice Bradley, speaking for the court, said: "It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters."

In *Mitchell* v. *Smale, supra,* the same learned justice, speaking for the court, said: "Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin* v. *Jordan,* and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable part of his grant."

It therefore appears from the above quotations that the court held that the title to the bed of the lake passed because of the riparian or appurtenant rights, for it was not surveyed out as land, and was not described on the plat as land. In other words, it was conveyed as lake-bed and not as land. And so it is in the present case. If the title to the unsurveyed land in controversy passed at all from the general government to the State under the patents, it passed by virtue of riparian rights, for it was

designated on the plats as water, not land; and if the title did pass in that way, the State's title in like manner passed to its vendees.

Counsel for the Board of Directors of St. Francis Levee District has filed a brief, as *amicus curiae,* calling attention to the fact that the rights of the district in unsurveyed lands claimed to have been donated by the act of 1893 (Acts 1893, p. 172) should not be prejudiced by a decision that the compromise between the State and United States affected its right to lands donated prior to the compromise. The district not being a party in the case, its rights cannot be adjudicated herein. The compromise is referred to in the opinion merely to call attention to the fact that the State has thereby released her claim to all unpatented swamp lands, and can not now make selections of swamp land and call for patents for the purpose of correcting mistakes in surveys. If the State did not obtain title under the patents, it is now too late for her to procure title.

Appellant claims title as vendee of the levee district, but, conceding (though not deciding) that the donation act of 1893 could be operative as a grant of the State's equitable claim or title to unpatented swamp lands, and that the State could not thereafter release the claim to the general government, yet the right is not conferred upon appellee to question the accuracy of the original survey, and disturb the *prima facie* title of a prior patentee of the adjoining land.

It may be that the donation act of 1893 conveyed to the levee district the State's equitable title under the Swamp Land Grant of 1850 to unsurveyed lands situated, for instance, like those in the case of *Chapman & Dewey Land Co.* v. *Bigelow, supra,* the *prima facie* title to which had not been created by patent, and that the State could not, subsequent to the donation to the levee district, release the claim to the general government. But we are not required, by the facts of this case, to decide that question.

After a very careful re-examination of the case, bearing in mind the importance and magnitude of the questions and interests involved, we are of the opinion that we reached the correct conclusion on the former hearing. The petition for reconsideration is therefore denied.

MATHY v. MATHY.

Opinion delivered November 2, 1908.

1. DIVORCE—CONDONATION.—Resumption of the marriage relation amounts to a condonation of past causes of divorce. (Page 59.)

2. HUSBAND AND WIFE—EFFECT OF CONVEYANCES BETWEEN.—A deed from a wife to her husband directly will convey the equitable, but not the legal, title. (Page 60.)

3. SAME—BURDEN OF PROOF.—The presumption in equity is against the validity of a conveyance of land from a wife to her husband, and the burden is on him to show that it was obtained fairly and without the exercise of undue influence, and that it ought in good conscience to bind her. (Page 61.)

4. DIVORCE—RESTORATION OF PROPERTY—CHARGES AND CREDITS.—Where, on granting a divorce, the husband is required to restore property which the wife had deeded to him, he will be charged with the net amounts of rents received by him therefrom, and will be credited with all amounts expended by him in clearing the title and removing incumbrances from the property, insurance, taxes, and fixed charges against it paid by him and all permanent improvements made by him, with legal interest from date of payment, and to have a lien on the property for any excess found to be due him. (Page 62.)

Appeal from Garland Chancery Court; *Alphonso Curl,* Chancellor; reversed.

C. V. Teague, for appellant.

1. If the evidence as to appellant's alleged trespasses against the marriage vow was all true, it was condoned by the appellee's voluntarily cohabitating with him, after she knew of the offenses, when she could find no other to please her better; and there is no proof of subsequent guilt on his part. 87 Ark. 175.

2. Five years having elapsed after she discovered the offenses before she brought suit, she is barred.

3. It was error to decree a trust in favor of the appellee in the Magnolia Hotel property. The effect of her deed to appellant was to leave the legal title in her, and vest the equitable title in appellant. 60 Ark. 70; 62 Ark. 26. There is no proof to warrant a finding that appellant used undue influence or coercion to obtain the deed, nor even that he solicited her to make it. No claim that he used persuasion, duress, or undue influence to induce her to make the deed. It was simply a case of business

precaution, justified by her conduct, to decline to invest in the property, and pay out his money, without receiving the title. There is no equity in holding that he shall lose all that he has paid, and that he holds the property only in trust for her. A deed from a wife to her husband is not void, both at law and in equity. 75 Ark. 127; 73 Ark. 310; 40 Ark. 62. In order to establish an implied, resulting or constructive trust, the evidence must be full, clear and satisfactory. If it is doubtful or capable of reasonable explanation upon other theories than the existence of such a trust, the party setting it up will have failed. 64 Ark. 165; 48 Ark. 169; 44 Ark. 365; 61 S. E. 200; 35 N. E. 214; 36 N. E. 617; 41 N. E. 156; 2 Pomeroy's Eq. Jur. (2 Ed.), § 1040. In the absence of fraud, trusts are never presumed as intended by the parties. 26 Ark. 240, 250. See, also, 27 Ark. 77; 94 Pac. 1047; 9 Ark. 518, 526; 68 N. E. 545; 40 Ark. 62; 50 Ark. 42; 71 Ark. 373; 113 Mass. 157; 18 B. Mon. (Ky.) 866. While at common law neither husband nor wife could convey to the other, the rule is different in equity, and the wife may contract with the husband on fair terms. 41 Ark. 177; 42 Ark. 503; 15 Ark. 519; 23 Ark. 507; 101 U. S. 225; 111 U. S. 117; 21 Neb. 671; 86 Ala. 357; 132 Ill. 445; 88 Am. Dec. 49.

S. W. Leslie, M. S. Cobb and *Wood & Henderson,* for appellee.

1. Argue from the evidence that the chancellor was right in refusing a divorce to either party.

2. The chancellor was right in finding that the appellant advanced the money to pay off the indebtedness on the hotel property, and that this advancement was intended as a gift to the wife; that he took the deed to the property in his own name, to the end that, in the event of appellee's death prior to his own, the property would be his; also in order to prevent appellee from disposing of the property without his consent, and that he would protect appellee by his will. These things being true, appellant held the property in trust for his wife, and his payments thereon were gifts. 36 Ark. 586; 64 Ark. 155; 118 N. Y. 684; 52 N. J. L. 7; 69 Wis. 564; 111 Ind. 433; 1 Parsons, Notes & Bills, 149; 121 Ill. 388. Consideration is essential to a contract. Neither the motive nor the expectation of result that induces one to enter into a contract constitutes its consideration. 14 Wall. 570.

There is no equitable consideration here. 15 Cent. Law Jour. 386. And there could be no consideration of love and affection in this case. The presumptions are against the validity of this entire transaction. The burden is upon appellant to show that it was fair, free and voluntary on appellee's part. 21 Cyc. 1293; 29 Am. Rep. 197; 20 Am. Dec. 410. Unless he shows some consideration therefor, the burden is on appellant to show that appellee's deed to him was intended as a gift of the property, and not as a trust. 77 Pac. 264; 21 Cyc. 1300-1. A trust *ex maleficio* arises whenever a person acquires the legal title to property by means of an intentional, false or fraudulent verbal promise to hold the same for a certain specific purpose. 33 Am. St. Rep. 229; Pomeroy's Eq. Jur. 1053; 3 Ballard, Real Prop. 661; 102 N. W. 268. Resulting trusts are especially excepted from the operation of the statute of frauds. Martin's Chancery (Ark.) 125. And whether or not there was a trust depends on the intention of the parties at the time of the transaction. *Id.* 126. To enforce a wife's contract with her husband, it must be equitable and fairly made, and for a proper consideration. 9 Am. Rep. 670; 104 Ill. 122; 80 Pa. St. 298.

HART, J. Della J. Mathy instituted an action for divorce against Joseph Mathy in the chancery court of Garland County on the 19th day of April, 1906, and the case is here on appeal.

The complaint alleges a marriage on May 3, 1885, in Chicago, Illinois, a residence in Arkansas for the statutory period required for divorce, and for cause of divorce assigns cruel treatment and personal indignities. She prays for alimony, attorney's fees, and for general relief.

On May 23, 1906, Joseph Mathy answered, admitting the marriage and residence in the State of Arkansas, but denies all the other material allegations of the complaint. On May 30, 1906, he filed his cross-complaint, alleging that appellee had been guilty of adultery with divers persons named in his cross-complaint.

On June 9, 1906, appellee answered the cross-complaint. She denied adultery on her part, and charged appellant with adultery with various women named by her in her amended bill. Subsequently, several amendments were made to the pleadings, which consisted in additional charges of adultery by each and a denial of the charges by the other.

The chancellor found both parties equally at fault, and therefore rendered a decree dismissing both the complaint and the cross-complaint for want of equity.

A large amount of testimony was taken on each side. On account of the vulgar details, we will refrain from making an abstract of the testimony. Besides, it would serve no useful purpose.

A careful examination of the evidence leads us to conclude that, whatever may have been the sins of each against the marriage vows, about the beginning of the year 1905, they confessed their past offenses to each other, and each forgave the other. A reconciliation was had, and the marriage relation was resumed. This amounted to a condonation of past causes of divorce. *Womack* v. *Womack,* 73 Ark. 281.

The evidence clearly establishes the subsequent adultery of appellee. On the other hand, we do not think that the testimony shows that appellant has been guilty of adultery since the date at which all past offenses of each party was condoned by the other, nor do we think it sustains the charge of cruel treatment against him during that time. Therefore the chancellor erred in dismissing the cross-complaint of appellant.

On the day that the decree was rendered, the chancellor permitted appellee to amend her complaint so as to conform to the proof, and to ask that appellant be decreed to hold certain property situated in Hot Springs, Arkansas, called the Magnolia Hotel, in trust for her, and that the title to the same be invested in her.

The facts concerning this property as disclosed by the record are as follows: After appellee became enamoured of one Judge Irwin and went to live with him, she claims that she and her mother, in partnership, bought the property in Hot Springs, Arkansas, called the Magnolia Hotel; that the purchase price was $3,300, and that her mother and herself contributed $1,200 or $1,400 towards the payment of it. In any event, the undisputed facts show that the property was purchased for $3,300, and the title was taken in Judge Irwin's name. After the death of the mother of appellee, and after Judge Irwin had abandoned appellee, he conveyed the property to her by deed. The consideration was $1,100, for which she gave him her note, and also an

agreement on her part to pay the balance of the purchase money, which was the difference between the $1,100 and $3,300, the original purchase price. After she returned to her husband in 1902, she conveyed the property to him for a nominal consideration. He paid the note which she had given to Judge Irwin and also the note for the balance of the purchase money, amounting in the aggregate to something over $3,300.

Appellee told appellant the exact condition of affairs; said that she was not able to pay off the incumbrance, and asked him to do so. Appellant agreed to do this if appellee would deed him the property, but not otherwise. Appellee wanted the deed in the name of both of them. Appellant said that he would not invest in the property unless it was deeded absolutely to him, and that he wanted it this way to keep her people from getting it if she should die. She told him that she would make a will in his favor to prevent that. He replied that the will was not sufficient. She finally deeded it to him because he did not want her people to get it. This is the version of the transaction as testified to by appellee.

Appellant claims that appellee confessed to him that Irwin had kept the money of herself and mother, and took the title in his own name in violation of his agreement with them. He says that he paid off the incumbrances on the property to the extent of over $3,300, and denies that he told her that he must have the title in his own name because he did not want it to go to her people in case of her death. He found that the property would sell for the amount it would cost to clear off the indebtedness, and then took a deed direct from his wife to himself. Subsequently he paid off the indebtedness.

"A deed of land by husband directly to his wife, in the absence of fraud, will convey to her the equitable estate, while he holds the legal title as her trustee." *Ogden* v. *Ogden,* 60 Ark. 70. In like manner a deed from the wife to the husband does not convey legal, but only the equitable, title. The present case stands with the legal title in the wife and the equitable title in the husband. The property is in the possession of the husband. Appellee seeks the aid of a court of equity to have the equitable title revested in her, and appellant asks that the legal title be vested in him. At the time of the conveyance, the parties, al-

though formerly estranged, had become reconciled to each other, and the presumption was that their marriage relation would only be dissolved by death. The changed conditions now are that the property has increased in value, and the marriage relation has been dissolved by an absolute divorce.

Equity will scrutinize more closely a conveyance from the wife to the husband than an ordinary conveyance. On account of the confidential relation and the supposedly greater influence of the husband, the wife's conveyance may be attended with a presumption against its validity. 21 Cyc. 1293.

"In any transaction by which the husband acquires title to his wife's separate property, the burden is on him to show it to be fair, and without any exercise of undue influence, and such as in good conscience ought to bind her." *Pennington* v. *Acker*, 30 Miss. 161; *Farmer* v. *Farmer*, 39 N. J. Eq. 211.

The chancellor found in favor of the appellee, and, when tested by the equitable principles above announced, we cannot say his finding was against the weight of the evidence. But we think the case calls for the application of that maxim, which has been regarded as the foundation of all equity, "he who seeks equity must do equity." It would be inequitable to restore the property to the appellee, and not require her to return to appellant the amounts he has expended on the property. She should be required to repay him the amount expended by him in removing incumbrances from the property, taxes paid by him, and permanent improvements, if any, made by him, with the legal rate of interest from date of payment, and these amounts should be credited by the amount of rents received by him. A lien on the property should be declared to secure the payment of the balance.

For the reasons given, the decree must be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

The chancellor may, if he deem it necessary, give leave to either party to introduce further evidence in regard to the amounts expended by appellant and the rents received by him on the Magnolia Hotel property.

ON REHEARING.

Opinion delivered November 30, 1908.

HART, J. The original opinion in this case will be so amended as to allow appellant all amounts expended by him in clearing the title and removing incumbrances from the property, insurance, taxes, and fixed charges against it paid by him, and all permanent improvements, if any, made by him, with the legal rate of interest from date of payment if the same be shown in an equitable accounting to be just charges. These amounts should be credited by the net amount of rents received by him.

In all other respects the motion for rehearing is denied.

SKAGGS v. STATE.

Opinion delivered October 19, 1908.

1. CRIMINAL LAW—ABSENCE OF JUDGE DURING TRIAL.—The bill of exceptions in a felony case shows that while defendant's counsel was making his argument to the jury the judge stepped across the hall from the court room to a closet, and was absent from the court room for the space of about two minutes, and while out of the court room an attorney sat in the judge's chair at the request of the judge. *Held* that the record fails to show that the judge was out of hearing and lost control of the case. (Page 68.)
2. TRIAL—INSTRUCTION—WEIGHT OF EVIDENCE.—An instruction that if the jury find that defendant confessed his guilt, and that the crime was committed, they should convict, was not objectionable as being on the weight of evidence. (Page 70.)
3. JUDICIAL CONFESSIONS—CORROBORATION.—Confessions made by the accused in preliminary examinations before magistrates are judicial confessions, within the rule which holds such confessions to be sufficient without corroboration to sustain a conviction. (Page 71.)
4. TRIAL—IMPROPER ARGUMENT.—A conviction of assault with intent to commit rape will not be reversed on account of improper argument of the prosecuting attorney which might have influenced the jury to convict if the defendant confessed in the examining court that he was guilty of rape. (Page 72.)
5. SAME—IMPROPER ARGUMENT.—A conviction of a felony will not be reversed because the prosecuting attorney in his opening statement

said that defendant was a "man of lowest character, and unworthy of belief; a gambler of the meanest type, preaching in the daytime and gambling at night," where the trial court was not asked to do anything more than sustain an objection to the statement, which was done. (Page 72.)

6. SAME—EXCLUSION OF TESTIMONY.—Where the defendant in a felony case testified in his own behalf, he cannot complain on appeal because the State offered to prove that he was a man of bad character, a gambler of the worst type and unworthy of belief, if the court on his objection excluded the proffered testimony. (Page 73.)

7. RAPE—EVIDENCE—COMPLAINT MADE BY PROSECUTRIX.—In a prosecution for rape the fact that the prosecutrix made complaint is admissible under certain circumstances, but the details of the complaint are not admissible unless they constitute a part of *res gestae,* or corroborate her testimony when attached. (Page 73.)

8. SAME—EVIDENCE—CORROBORATION OF PROSECUTRIX.—In a prosecution for rape, the physical appearance of the prosecutrix, the condition of her garments, and sometimes the condition of the place where the crime is alleged to have been committed, are admissible in corroboration of her testimony. (Page 74.)

9. CRIMINAL LAW—PRESENCE OF TRIAL JUDGE.—The presiding judge in a criminal trial is not required to sit in one place in the court room; and, so long as he is in the presence of the parties and the jury and in control of the proceedings, the integrity of the trial is not affected by a change in his seat. (Page 74.)

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

STATEMENT BY THE COURT.

Elijah Skaggs, Mrs. Margaret Irene Taylor, her brother, Mr. Todd and a Mr. Allen came to Fort Smith in May, 1908, from Dallas, Texas, in and about which place these parties had resided for a number of years. When they reached Fort Smith, they went to a hotel and had dinner together. After they came out of the hotel, the suggestion was made that they see the town, and she proposed going to the park. Her brother proposed that he and Mr. Allen go together, and that she and Skaggs go together. This was agreed to. Her brother and Mr. Allen went somewhere else, and she and Skaggs got on a car and went to the park, some distance from the city. They walked around the park for some time, and then crawled out of

the rear fence and went some little distance into the woods. What occurred there will be referred to later.

She and Skaggs returned from the park on the same car, but not sitting together; and immediately upon arrival in the city she went to the mayor's office and seemed rather excited. The city clerk told her the mayor was out, and asked her if there was anything she wanted, and she remarked that a rape had been committed. He told her that the mayor had nothing to do with it, and sent her to Sam Edmondson, a justice of the peace, to whom she then went and made complaint. He went out with her and Mr. Todd, her brother, and two officers. They went to the back end of the park and saw the tracks where a man and woman had walked, and the imprint of the heels of the woman's shoes were similar to those worn by Mrs. Taylor. They found the place where these tracks led to, and it was trampled down and the appearance of the ground indicated that persons had been scuffling there. Mrs. Taylor exhibited a torn undergarment.

Skaggs was arrested, and had a preliminary trial before said magistrate. His conduct in said court was thus afterwards described by the justice of the peace (and Skaggs did not deny it):

"Q. I will ask you if you arraigned the defendant and advised him of the crime with which he was charged?

"A. I did.

"Q. What was his answer?

"A. His answer was that he was guilty of rape, and he was guilty of murder, and I remarked to him if he wanted an attorney, and he said he did not; that he wanted to suffer the penalty of the law for what he had done; and I said to him that that was a very grave matter; that if he entered a plea of guilty in the case the penalty was hanging, and I said, 'My friend, don't you want a lawyer?' and he said 'No, I am not only guilty of rape, but I am guilty of murder,' and I said I did not know of anybody being killed, how could you be guilty of murder, and he said, 'I am guilty of the crime for which I am accused; I am guilty of murder, because I have taken that woman's honor', and pointed to Mrs. Taylor."

Mrs. Taylor testified in said examining court that when they reached the place where the scuffle was indicated he had

grabbed her, and she fought him, but he was strong, and overcame her, and ravished her, tearing her undergarment in order to accomplish his purpose; and that she immediately came back made complaint as stated. She repeated this same testimony before the grand jury, and Skaggs was indicted for rape. While he was in jail, she visited him four times. There was testimony that the first time she visited him he offered her $500 to withdraw her charge, and she became very angry thereat, but later held long private conversations with him.

Skaggs was put on trial, and the State introduced Mrs. Taylor as the first witness. She testified that she had known Skaggs for four years, during which time he was preaching the gospel; that she believed him to be the King of Kings and Lord of Lords, and Elijah the Prophet; and that she was a disciple of his; that before they came to Fort Smith they made a covenant; the King was to restore all things, and she was willing to be a sacrifice to him; that they went to the park, to have the appearance of having committed an offense which he did not commit, so that he would be hung, in order that all men might have glory and peace and honor.

In his testimony he was more explicit as to his covenant. He says that he and Mrs. Taylor agreed that he should die and rise on the third day; that he should die by hanging; that he knows he is King of Kings and Lord of Lords; that he is Elijah, King of the Gentiles, the same as Christ was King of the Jews; that he wanted to be hung, and on the third day rise and redeem the world; that he did not want to murder any one, and in order to accomplish the purpose it was agreed that a rape should be simulated.

Mrs. Taylor testified that Skaggs did not ravish her physically, that the rape was a spiritual one. She admitted that her former testimony before the justice of the peace and before the grand jury made out a charge of rape against him; but said that the wrong interpretation had been placed upon it; that she meant a spiritual, and not a carnal, rape. She says she tore the garment herself, and that he had not touched her.

The State proved her former testimony, which she admitted; proved the appearance of a scuffle and the torn garment, and her excited and almost hysterical manner immediately after the oc-

currence; and also proved that in the trial before the justice of the peace Skaggs in open court confessed that he had raped her, and said that he wanted to be hung therefor.

Other testimony was adduced, showing admissions which he had made and which tended to prove that his conduct was actuated by a carnal, and not a spiritual, mind, and that he had accomplished a physical rape. In his testimony he admitted practically all of the testimony adduced by the State, but claimed that he had committed this spiritual rape for the purpose of being hung and rising on the third day and redeeming the world. He said that he had consulted a lawyer before he went to the park (and this was also proved by the lawyer), to ascertain the punishment for the crime of rape in this State. He averred his readiness to be hung then, but said that he had been told by his best friends that the jury would not hang him, and that if he pleaded guilty they would send him to the penitentiary, and he did not want to go to the penitentiary; that he would rather be hung than go to the penitentiary.

The defendant introduced the testimony of a deputy constable, who said he saw Mrs. Taylor and Skaggs at the park. He said he saw them turn towards the south side of the park, and they stayed about thirty minutes or a little longer; that he does not think they were out of his sight more than two minutes. The defendant did not touch her while in his sight. He was within about thirty or forty feet of them when they were south of the park. He did not go out where they claimed they were. He says that he did not stop at the place where the scuffle was alleged by her to have occurred. He says that she was using profane language and cursing Skaggs. Mrs. Taylor was recalled and denied that she saw this officer, and denied using the language which he attributed to her. This was substantially all the testimony in the case. The jury convicted him of assault with intent to rape, and assessed his punishment at twenty-one years in the penitentiary. Skaggs has appealed, and the Attorney General confesses error, and the prosecuting attorney of the 12th circuit files a brief, insisting that there was no error.

Rowe & Rowe, for appellant.

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

Error is confessed because:

1. The trial judge, during the progress of the trial and while defendant's counsel was making his argument to the jury, left the court room, absenting himself therefrom about two minutes. This is reversible error. 77 Ark. 112.

2. A trial judge is prohibited from instructing with regard to matters of fact, or from telling the jury what would be sufficient to convict, or what facts would warrant a verdict of guilty. The fourth instruction is erroneous. 83 Ark. 192; 85 Ark. 138.

3. The bitter denunciations of appellant by the prosecuting attorney in his opening statement to the jury were of such character that the prejudicial effect thereof could not be eradicated by merely sustaining the objections of defendant's counsel to such remarks. Confession of error would not be based on this alone, had the State's attorney not, at the conclusion of the evidence, although appellant had not put his character in issue, demanded in the hearing of the jury that he be allowed to introduce evidence to show that appellant was a man of bad character, a gambler of the worst type and unworthy of belief. 66 Ark. 16; 33 Barb. 229; 35 Mich. 371; 71 Ark. 415; *Id.* 427; 58 Ark. 368; 63 Ark. 176; 72 Ark. 461.

4. The evidence is weak and unreliable—not a *scintilla* of testimony to show an assault with intent to rape. All of the incriminating evidence shows conclusively that the crime, if any was in fact committed, was that of rape. Appellant was either guilty of the crime of rape, or of no crime at all.

A. A. McDonald, prosecuting attorney 12th circuit, for appellee, resisting confession of error.

1. The fourth instruction is a correct statement of the law, and is applicable. It does not fall in the class with the instructions criticised in the cases cited by the Attorney General. This instruction leaves it to the jury *to find from the evidence* whether or not a confession was made, whether or not proof was made that the offense was committed, then if, from the evidence they found, beyond a reasonable doubt, that the confession was made, and that the crime was committed, they were authorized to convict. The entire instruction is hypothetical, assumes no facts,

leaves everything to the jury to find from the evidence and beyond a reasonable doubt.

2. The fact that, during the progress of the argument of defendant's attorney, the judge stepped across the hall from the court room to the water closet, is no ground for reversal. *Stokes* v. *State,* 71 Ark. 112, does not apply. Reversible error occurred during the absence of the judge in that case, where in this not only was there no exception taken to the absence of the judge, but the attorney for appellant was arguing to the jury in his behalf and was practically in charge. The action of the judge in absenting himself from the immediate presence of the jury was rather in appellant's favor than otherwise, and he has no ground of complaint.

3. If, as seems to be conceded by the Attorney General, the opening statement of the prosecuting attorney and his offer to prove the bad character of the defendant must be taken together to constitute error, then I contend there was no error. The trial court sustained objections both to the alleged improper remarks and to the offer to introduce this testimony. Indeed, the court ought to have admitted this testimony because appellant had put his character in issue in the most positive manner possible in parading himself before the jury as a man of God, a preacher for 13 years as belonging to the Church of the First Born, as King of Kings and Lord of Lords, etc.

4. As to the evidence being unreliable and weak, etc., and the argument that the defendant was guilty of rape or nothing, it is sufficient to say that that was for the jury to determine under the evidence and the instructions of the court. The crime of assault with intent to commit rape is included in the crime of rape, and the jury had the right to say from all the evidence and circumstances whether appellant was guilty of the higher or lesser degree of crime.

HILL, C. J., (after stating the facts). 1. The first point upon which the Attorney General confesses error is the absence from the court room of the presiding judge. The record on this point reads as follows: "While defendant's counsel was making his argument to the jury, the judge stepped across the hall from the court room to the water closet, and was absent from the court room for the space of about two minutes, and

while out of the court room T. S. Osborne, a regular practicing attorney of the bar, sat in the judge's chair at the request of the judge. No objection was made to this, and no exception taken to it during the trial."

The authorities are not entirely harmonious as to the effect of the absence of a judge from the bench during the progress of a trial. The subject may be found reviewed in *Horne* v. *Rodgers,* 110 Ga. 362, s. c. 49 L. R. A. 176; *Ellerbee* v. *State,* 75 Miss. 522, s. c. 41 L. R. A. 569. This court had the subject before it in *Stokes* v. *State,* 71 Ark. 112, and the court followed the language of Judge Chalmers in *Turbeville* v. *State,* 56 Miss. 793, a leading case on the subject. The Turbeville decision is applicable here, as shown by the following excerpts: "During the arguments of counsel to the jury, the judge left the bench and stepped into a room immediately adjoining and in the rear of the bench, and separated from it only by the thickness of the wall, through which a door opened. He placed a member of the bar on the bench, with instructions to call or notify him if needed. He remained in this room, thus absent from the bench, and distant from it, as the bill of exceptions shows, five or six feet, during the greater portion of the time consumed in the several addresses of counsel to the jury. It does not appear whether the door which opened from the bench, or rostrum, into this room (styled the judge's retiring room) was closed or open while the judge was thus absent. * * * If we could consider this statement of the facts as showing such absence from the room on the part of the judge as constituted even a temporary relinquishment of the control of the court and of the conduct of the trial, we should unhesitatingly reverse the judgment. There can be no court without a judge, and his presence, as the presiding genius of the trial, is as essential during the argument as at any other time. We do not mean to say that he must actually listen to every word that falls from the lips of counsel while they are addressing the jury, for this might impose a burden too heavy to be borne, but we do mean that the conduct and control of the argument within legitimate limits is confined to him as a judicial duty, and cannot be by him devolved upon another. While he will not be precluded from changing his seat to any portion of the room he may prefer, or from tem-

porarily engaging in conversation, or reading or writing, he must remain within the hearing of counsel, so as to be able instantly to assert his authority, if demanded by anything that may occur. While it will rarely be necessary or proper for him to interfere with counsel, instances may arise that will require it; and, moreover, the conduct of the jurors, spectators, or officers of court may be such as to demand the instant interposition of his authority. * * * The bill of exceptions in this case fails to show clearly that there was any relinquishment by the judge of the functions of his office, or any such bodily absence as prevented their instant assertion when demanded; and we decline, on this account, to reverse the judgment."

It is thus seen that the determining test is whether the judge has lost control of the proceedings. If he has done so, even if it be but for a short time, the integrity of the trial is destroyed. Applying that principle here, the record fails to show that the judge was out of hearing of the proceedings of the court when he stepped across the hall to a closet for a brief space of time. It does not disclose the distance from the court room to the closet, or whether the doors were opened or closed, or whether the proceedings could or could not be heard by him. The matter then before the court was the address of the defendant's counsel to the jury. The trial having taken place in June, and the doors between court rooms and halls at that time of the year being usually left open, it may well be inferred that the judge was within the hearing of the proceedings of the trial and within the reach of it so that he could instantly have asserted his authority. On the other hand, it may have been that the doors were closed, or that the closet was in such a position that he was withdrawn entirely from hearing the proceedings, and was unable to instantly control them—in which event it would vitiate the trial. The burden is on the appellant to show affirmatively that the judge had lost control of the trial; and this record fails to show that, leaving it, at best, a matter of conjecture as to whether or not he had removed himself for a brief period of time from the immediate presence of the proceedings where he could not exercise his legitimate functions as presiding judge of the court.

II. The next confession of error is for the giving of the

fourth instruction, which is as follows: "If you find from the evidence that the defendant made a confession that he had committed the crime of rape on the person of Margaret Irene Taylor, that alone would not be sufficient to authorize you to convict; but the confession of defendant, if made, accompanied by proof that the offense was actually committed, will warrant a conviction; and if you find from the evidence beyond a reasonable doubt that defendant made the confession of the crime, and that the crime was committed, you should convict."

The Attorney General says that under *Duckworth* v. *State*, 83 Ark. 192, and *Thomas* v. *State*, 85 Ark. 138, this instruction is erroneous.

This is not an instruction on the weight of the evidence, and is not obnoxious to the objection for which the instructions were condemned in those cases. The court left it to the jury to say whether or not the appellant made a confession, and told them that, if they found that he did make a confession, such fact alone would not authorize them to convict, but that they must also find that the offense was committed, which was tantamount to saying that they could not convict the defendant because he made the confession, but that they must go further and find that his confession was true before they were authorized to convict. There was really no dispute in the evidence about the fact that the defendant had made a confession, and that it was a confession in open court. The instruction as a whole fairly submitted to the jury to find beyond a reasonable doubt whether the defendant made a confession, and whether the crime was committed; in other words, whether the confession was true.

While the form of the instruction cannot be commended, prejudicial error is not found in it. If specific objection had been made to it, its awkward form could and should have been corrected. The real question in the case was, not whether the confession was made, but whether the crime was committed; and the instructions on the only real issue were clear and sound. In one respect the instruction is more favorable to the defendant than he was entitled to. It is based on the theory that his confession in the examining court was an extrajudicial confession, and needed corroboration, pursuant to section 2385 of Kirby's Digest: "A confession of a defendant, unless made in open

court, will not warrant a conviction, unless accompanied with other proof that such offense was committed."

Confessions made in preliminary examinations before magistrates are confessions in open court, or, as they are usually expressed, "judicial confessions." 1 Greenleaf on Evidence, § 216; 12 Cyc. 459 and 473; 6 Am. & Eng. Enc. 523; 3 Enc. of Ev. 352; *Matthews* v. *State,* 55 Ala. 65; *State* v. *Needham,* 78 N. C. 474; *State* v. *Lamb,* 28 Mo. 218; *Speer* v. *State,* 4 Tex. Cr. App. 474; *Com.* v. *Brown,* 150 Mass. 330.

From these authorities it will be seen that a confession made in a preliminary hearing, when made in the due course of proceedings of the examining court, is a judicial confession within the meaning of the law, which holds such confessions alone to be sufficient to sustain a conviction.

III. The Attorney General confesses error on account of remarks of the prosecuting attorney. He does it upon the ground that the testimony, if it established anything, established rape, and not attempt to commit rape, and that the testimony to sunstain the conviction is weak, and that the improper argument of the prosecuting attorney may furnish the key to the verdict returned by the jury. In view of the confession in court being of itself sufficient to sustain the conviction, the force of the argument is broken. This confession was of the graver, and not of the lesser, crime; and it is within the power of the jury to find a defendant guilty of an assault to commit a rape, although the evidence justified a conviction of rape. This was settled in *Pratt* v. *State,* 51 Ark. 167.

IV. The next confession of error is on account of the argument of the prosecuting attorney in his opening statement. He said that the defendant was a "man of lowest character, and unworthy of belief; a gambler of the meanest type, preaching in the daytime and gambling at night"—and using other denunciatory language. The defendant objected to said statement, and the court sustained the objection. The judge was not asked to do anything except to sustain the objection to the argument, which he did. Had the court been asked to reprimand counsel for stating a matter not proper to be stated in presenting the State's case, and called the attention of the jury to the fact that the character of the defendant was not at that time in

issue, and could not be unless he was called as a witness, and then only for the purpose of impeaching him as a witness, doubtless it would have been done; and, had the court failed to properly eradicate the improper remarks, there would then have been something before this court to consider. *Kansas City S. Ry. Co.* v. *Murphy,* 74 Ark. 256.

After the evidence was closed, the prosecuting attorney, in the presence of the jury, requested the court to permit the State to introduce evidence to show that the defendant was a man of bad character, a gambler of the worst type and unworthy of belief. The defendant objected to said statements and to the introduction of the evidence, and the court had the jury to retire from the court room, and afterwards heard argument on this point and sustained the objection of the defendant. As the defendant had then testified, testimony as to his reputation for morality and veracity would have been competent; and the court should have permitted the prosecuting attorney to introduce testimony on these subjects, but not as to the fact that he was a gambler. The ruling of the court was more favorable to the defendant than he was entitled to. There is nothing for this court to review upon it, other than the question whether the effort of the prosecuting attorney to make this proof was such flagrant conduct as would of itself prejudice the defendant's cause. It was a mere offer, doubtless in good faith, to prove what he was entitled to prove—and a little more. The defendant did not ask that the effect of it be removed, and only objected to the testimony being admitted, and the court sustained his objection. He got all he asked of the court, and cannot complain that the court did not do more for him than he asked of it.

These are the only grounds upon which error is confessed. Appellant has not favored the court with a brief, but was content to submit the case upon the confession of error. The court has examined the other assignments of error in the motion for new trial, which were, briefly stated, as follows:

Exception was taken to the evidence of witnesses to the effect that they accompanied the prosecuting witness to the park, and there found a man's and a woman's tracks leading to a place where the ground was trampled down in such condition that it gave the appearance of a scuffle having taken place. The fact

that the prosecutrix made complaint is admissible under certain circumstances; but the details of the complaint are not admissible unless they constitute a part of the *res gestae,* or in corroboration of her testimony when it is attacked. Her physical appearance, and the condition of her garments, and sometimes the condition of the place where the crime is alleged to have been committed, are admissible in corroboration. See *Pleasant* v. *State,* 15 Ark. 624, Enc. Ev. 587, 590 and notes. It is wholly unimportant to go into that subject, because the defendant himself testified to the fact that he and Mrs. Taylor walked around the park for a while, and that they decided they would go and fix a place, mash down some weeds and give the place the appearance of a scuffle having taken place, and then she would go back to town and have him arrested. In other words, they were manufacturing evidence tending to prove that the rape had been committed; and the question was not whether their tracks were at the given place, whether the weeds were mashed down and a garment torn, but it was whether there was a crime committed, or whether a mere stage-play had taken place.

The court, at the instance of the prosecuting attorney, ordered the prosecutrix to be arrested for perjury at the conclusion of her testimony, after she had admitted that she had testified in the justice's court to facts showing rape. No objection was made to this proceeding, no exception taken to the action of the court thereupon, and therefore there is nothing to review on this assignment of error.

Other language of the prosecuting attorney denunciatory of the defendant was assigned as error in the motion for new trial; but exception was not taken to it at the time it was made, nor were any rulings of the court asked upon it.

At another time during the trial the judge vacated the bench and asked an attorney to occupy his seat; but he did not retire from the court room, merely going to a window in the court room for fresh air for a time. As stated in the Tuberville case and the Stokes case, heretofore referred to, the judge is not required to sit in one place in the court room, but so long as he is there, in the presence of the parties and the jury and in control of the proceedings, the integrity of the trial is not affected by a change in his seat.

Exceptions were taken to the instructions. The instructions merely followed the statutes on the subject of the crime and a few general principles governing it. There is no error in them. The court gave all requested by the defendant but one, and it was manifestly incorrect.

Judgment affirmed.

McCULLOCH, J., (dissenting.) It will be readily seen from a perusal of the statement of facts in the opinion of the Chief Justice that the only direct evidence of crime is the repudiated statements of the accused man and the accusing woman. The circumstances adduced in evidence are at most only corroborative of these statements. The woman having in her testimony at the present trial denied the truth of her former statements and declared that no assault had been made upon her person, her testimony is without any probative force whatever. Her former statements can not be received as substantive evidence of the commission of a crime. The only purpose of admitting it is to discredit her present testimony by showing her former contradictory statement; and, since her present testimony tends to prove nothing, the former statement is valueless. 2 Wigmore on Ev., § 1136. Nor can her former statement be received in evidence as part of the *res gestae*. Her statement to the officers soon after she returned from the scene of the alleged crime is too remote, and is but a narrative of a past event and not a part of the transaction itself. *Baker* v. *State,* 85 Ark. 300.

The alleged incriminating circumstances prove nothing of themselves, for their relation to the commission of the offense depends entirely on the truth of the woman's former statements to the officers. The torn garment, the tracks and evidences of a struggle on the ground in the public park, without other evidence connecting them with the crime, have no tendency towards proving the crime of rape or assault with intent to rape.

This leaves nothing in the case except the repudiated confession of appellant himself. Appellant's offer, while in jail, to pay the woman money to withdraw the accusation adds nothing to the strength of the evidence, as it is but a tacit confession of guilt, and certainly amounts to no more than his direct confession.

The authorities cited in the opinion of the Chief Justice

seem to sustain the conclusions expressed therein that the confession of an accused person made to a justice of the peace in an examining trial is a judicial confession, and may be sufficient to sustain a conviction without other evidence of the commission of the alleged crime. I do not dissent from that conclusion. But, aside from the legal insufficiency of the evidence, it is far from convincing that any crime has been committed. The undisputed evidence of a previous plan between this man and woman to simulate the commission of the crime, their intimate and friendly association with each other, both immediately before and after the alleged crime, her frequent visits to and conferences with him in jail and her narrative on the witness stand of their weird scheme to simulate the commission of the crime so that he might expiate it on the gallows as a voluntary sacrifice of his life, convince me that no crime was in fact committed, but that the plan was born either of fanaticism or a vitiated taste for notoriety. I am so thoroughly convinced by the testimony that no crime was committed that I cannot consent for the conviction of the accused to stand.

The court gave, over appellant's objection, the following instruction, which is assigned as error:

"4. If you find from the evidence that the defendant made a confession that he had committed the crime of rape on the person of Margaret Irene Taylor, that alone would not be sufficient to authorize you to convict; but the confession of the defendant, if made, accompanied by proof that the offense was actually committed, will warrant a conviction; and if you find from the evidence, beyond a reasonable doubt, that the defendant made the confession of the crime, and that the crime was committed, you should convict."

The instruction is criticised on the ground that it invades the province of the jury in passing on the weight of the evidence. *Duckworth* v. *State,* 83 Ark. 192. The language of the instruction is ambiguous, and Mr. Justice HART and I are of the opinion that it was calculated to mislead the jury, when it is considered in the light of the very weak evidence in the case, even if the evidence should be held to be legally sufficient to sustain the verdict.

The other judges think that the concluding words of the in-

struction save it from condemnation because the jury are in effect told that they must, in order to convict, find beyond a reasonable doubt, in addition to the confession, that the crime was committed by the defendant. While it is possible to place this construction upon the form of expression employed, it is ambiguous to the average mind, and calculated to induce in the minds of the jury the idea that, if they believe that the defendant made a confession, it was their duty to convict him. It was therefore misleading and prejudicial.

It is proper for trial courts to instruct juries, in the language of the statute, that a confession not made in open court will not warrant a conviction unless accompanied with other proof that the offense was committed; but it is improper to give the converse of the proposition unless it be coupled with the further statement or qualification that the evidence as a whole must satisfy the jury beyond a reasonable doubt of the guilt of the accused. In that form it is not improper, but without the above qualification it is an instruction on the weight of the evidence.

I am unable to escape the conclusion that the jury must have been misled by this instruction, for I cannot find any evidence which would satisfy a jury beyond a reasonable doubt that appellant made an assault upon the woman with intent to rape her. It is, to my mind, preposterous to say that under this evidence the commission of the crime has been proved beyond a reasonable doubt. Therefore I dissent.

Mr. Justice HART concurs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. PLANTERS' GIN & OIL COMPANY.

Opinion delivered October 19, 1908.

1. CARRIERS—DELAY—SPECIAL DAMAGES.—Although a carrier is compelled to accept freight tendered for shipment, and cannot make any special contract to compensate it for assuming the additional risk that the notice of special damages to flow from the failure to promptly deliver such freight would place upon it, it will still be liable for special damages fairly attributable to its failure to make such delivery with-

in a reasonable time, if notice of the special damages was given to it at the time the shipment was made. (Page 83.)

2. SAME—TO WHOM NOTICE OF SPECIAL DAMAGES SHOULD BE GIVEN.—Where one, desiring to ship freight, applied at a carrier's freight office, and was referred to a certain person, with whom he entered into a contract for shipment, notice of special damages to accrue from delay in the shipment was properly given to such person, in order to bind the carrier. (Page 86.)

3. SAME—TIME OF DELIVERY OF FREIGHT.—Where a bill of lading does not fix the time within which freight is to be transported, the law implies that the delivery shall be made within a reasonable time, in view of the circumstances, taking into account the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities for transportation under the control of the carrier. (Page 87.)

4. SAME—SPECIAL DAMAGES—BREACH OF CONTRACTS.—A carrier which has failed to deliver freight within a reasonable time is not thereby rendered liable to the shipper for special damages by reason of contracts broken by him on account of such delay if the contracts were entered into after the contract of shipment was made. (Page 87.)

5. SAME—LIABILITY FOR LOSS OF PROFITS.—A shipper cannot recover special damages for delay in shipping machinery on account of a saving of expense, such damages being too remote and speculative. (Page 89.)

6. SAME—DELAY IN CARRYING MACHINERY—DAMAGES.—The question whether a shipper may, on account of the carrier's delay in delivering machinery, recover damages for its "fixed expenses" while shutting down its mill depends on whether at the time the machinery was due the fixed charges against the mill were less than at the time when the machinery was received, so that the cessation of business during the installation of the machinery would be more expensive than at the earlier time, and also upon whether this damage was called to the carrier's notice at the time of shipment. (Page 89.)

7. SAME—COST OF DUPLICATING MACHINERY.—When, on account of delay of a carrier in shipping machinery, the shipper was compelled to purchase a second set of machinery, he is entitled to recover the cost of the duplicated machinery, less the value of the delayed machinery utilized to its best advantage. (Page 89.)

8. SAME—DELAY IN SHIPMENT—CONVERSION.—A carrier is not liable for conversion of freight on account of its delay for an unreasonable time in making a delivery thereof. (Page 90.)

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

STATEMENT BY THE COURT.

The Planters' Gin & Oil Company was engaged in the manufacture and sale of cotton seed products at Baldwin, Mississippi. Its plant was a one-press mill. It was desired to increase its capacity to a two-press mill, and Mr. Justin Matthews was authorized by it to purchase in Little Rock, Arkansas, a cylinder, a head block, a pressing ram and heavy castings for a cotton seed oil plant. Matthews did so, and drew a draft in favor of the vendor for $500, the price of the machinery, which was paid by the oil company. He had the bill of lading made out and went to the freight depot of the Chicago, Rock Island & Pacific Railway Company to ship the machinery over said road to Baldwin, Mississippi, where the plant was located. The shipment was an interstate shipment, and would have to go over connecting lines. R. E. Palmer was the local freight agent at Little Rock, and he had 35 or 40 clerks under him in his office. The bill clerk, E. A. Bliss, and the chief clerk, G. A. Swope, and himself were authorized to sign bills of lading, and were the only employees of the company in said office so authorized. Mr. Matthews was not acquainted with the clerks or their duties. He went to the freight office, and handed the bill of lading to one of the clerks, who pointed out another man as the one with whom he should transact his business. He went to this man and explained his business, and he took the bill of lading, went off with it, and presently returned with it duly signed. It was signed "R. E. Palmer by B." It subsequently developed that it was signed by Mr. Bliss, and Mr. Bliss was not the man with whom Mr. Matthews was transacting the business. Mr. Matthews stated to this gentleman who handled the bill of lading for him that he wanted the railroad company to accept the shipment with the understanding that the oil company was to have a reasonable delivery of the machinery. He stated to him that delay in the shipment would be cause for damages, and said that the oil company had requested him to state that they had time contracts made for oil and meal, and that in case of a decline in the market they would be damaged for that cause, and that they would also be damaged by reason of the additional expense of handling the seed by hand. He also stated that they would be damaged by reason of the seed heating and making an inferior grade of oil

and meal and a less quantity of oil produced from it, and that they would not have room to store the seed, and would buy in anticipation of increasing the capacity of the mill, and in the meantime would have to operate a one-press mill. The agent made no reply to this, but after hearing this statement he took the bill of lading and went away, and presently came back with it signed.

This was upon the 8th of September, 1906, and the machinery was shipped out of Little Rock on the following day. It was received at Baldwin, Mississippi, on October 29. The oil company refused to receive it and left it on the platform of the railroad. It was testified to, and not disputed, that seven to ten days was a reasonable time to allow for the transportation of machinery from Little Rock to Baldwin, Mississippi.

The oil company brought suit against the railroad company for $4,987.50, and set forth nine elements of damages, towit:

"1. The plaintiff was forced to buy another set of articles described, in Atlanta, Georgia, and pay $500 therefor, because it could not complete its mill, after waiting upon defendant for a long time.

"2. The plaintiff, expecting to receive said machinery and complete its mill and manufacture products in a reasonable time, made contracts for the sale of oil, which it was forced to cancel by defendant's wrongful act and pay $375 to the parties who had bought said oil.

"3. The plaintiff could not manufacture the seed in its seed house, and, having, in anticipation of reasonable conduct on defendant's part, contracted for seed more than enough to fill said seed house, was compelled to pay hauling and storage on the same in the sum of $100.

"4. The seed in the house of plaintiff was kept there an unreasonable length of time, and heated and deteriorated, thus making an inferior quality of oil, and damaging plaintiff in the sum of $100.

"5. The seed in the house of plaintiff was kept there an unreasonable length of time, and heated and deteriorated, and resulted in the manufacture of an inferior grade of meal, thus damaging plaintiff in the sum of $375.

"6. The plaintiff was put to increased cost of fuel by reason

of having to run its boilers and engines when the mill was not up to full capacity, and was thus damaged in the sum of $137.50.

"7. The plaintiff could only operate one press of its mill for a part of the time, and was thus damaged in the sum of $200.

"8. The plaintiff was damaged by the shutting down of its mill in the sum of $300, this being the fixed expenses for such period in salaries.

"9. The seed, being heated from being stored an unreasonable length of time, produced less oil than they otherwise would, and the plaintiff was thereby damaged in the sum of $750."

The 6th ground was withdrawn by plaintiff during the trial. The jury returned a verdict of $2,375, and the railroad and the oil company each appealed. On the trial, in addition to the testimony above outlined, the following evidence was given: The president of the oil company testified that they commenced purchasing cotton seed about the latter part of September. By the 19th of October they had purchased from 800 to 1,000 tons at from $15 to $18 per ton. They had capacity to store from 1,000 to 1,500 tons in their seed house. He testified as to the depreciation in the oil and meal producing qualities of seed and in the quantity of oil produced therefrom by reason of the delay in handling it, the seed becoming heated when they were unable to work it promptly through the mill. Some time in the latter part of September or the first of October he made a contract with Armour & Company for oil, to be delivered the last of October, and could have fulfilled the contract, had this machinery arrived in time. Armour & Company called on them for the oil, and they could not deliver it, and they effected a compromise of the breach of their contract by paying Armour & Company $375. He also testified that they expended $100 in having to store their seed in a shed some four or five blocks from the oil mill. He stated that a two-press mill can run for almost as little expense as a one-press mill, as it only requires about one more employee to operate a two-press mill, and that there was an accumulation of extra labor which could have been utilized with the two-press mill, and that they lost on that account $200. He further testified that they lost $300 by reason of having to shut down the mill for three weeks while installing new machinery in October which they had purchased elsewhere before the arrival of this ma-

chinery. He said that the machinery had not arrived at the time that he made his contracts for the seed, and had already been delayed longer than it should have been. He further testified that he could not rent parts to take the place of the delayed machinery. On the 18th or 19th of October the oil company purchased elsewhere a duplicate set of machinery at the same price, and it arrived at about the same time that the first machinery did, and they installed the second set of machinery, and did not receive the first and did not pay the freight thereon when it finally arrived, as it could not be used by them nor sold for anything except scrap iron.

Mr. Palmer, Mr. Bliss and Mr. Swope each denied that they received the notice of the necessity of prompt shipment as testified to by Mr. Matthews. It was evident that none of these gentlemen were the ones with whom Mr. Matthews had the conversation of which he testified.

Buzbee & Hicks, for appellant.

1. No notice was given to appellant nor to any agent of appellant authorized to receive such notice, of any special damages. A person dealing with an agent of a corporation is bound to ascertain the nature and extent of his authority. 72 Ark. 283; Mechem on Agency, § 289; 62 Ark. 33; 70 Ark. 233; 53 Ark. 209; 65 Ark. 385. Even if the person to whom Matthews claimed to have given notice had authority to sign bills of lading, it would not follow that he had authority to enter into a contract on behalf of appellant to assume such an extraordinary obligation. Cases *supra.* The notice by Matthews, if given, was not sufficient to put defendant on notice as to the special circumstances under which special damages were expected to occur; and the evidence fails to show that appellant entered into the contract understanding such circumstances. 72 Ark. 275; 190 U. S. 540. The damages in this case are too remote and speculative to form a basis of recovery. 56 Ark. 610; 57 Ark. 207; 129 U. S. 204; 190 U. S. 540. If appellee's notice was sufficient to entitle it to special damages at all, such damages would be the rental value either of the machinery or of the oil mill. 72 Ark. 287; 77 Ark. 150.

2. This was an interstate shipment, and the rate was fixed

by the tariffs on file with the Interstate Commission for the shipment of this machinery, and appellant could not lawfully vary therefrom; neither had it any right to make any different contract, nor assume any different liability with appellee, than that assumed with all other parties making interstate shipments. U. S. Comp. Stat. 1901, supplement 1907, p. 897.

H. M. Armistead, for appellee.

1. The interstate commerce legislation of Congress is not intended to, and does not, relieve carriers from liability for special damages sustained by shippers. 162 U. S. 197; 145 U. S. 26; 37 Fed. 567; 63 Fed. 775; 81 Fed. 547; 74 Fed. 715; 105 Fed. 703; 167 Fed. 511; 164 U. S. 578; 136 U. S. 507.

2. Matthews offered his shipping receipts, and gave notice to an agent of the company to whom another agent of the company referred him as having authority to attend to contracts of shipment. That was sufficient notice to the company. The law permits of no "sleight of hand" performances in matters of this kind by common carriers to evade responsibility. A shipper contracting with a railroad station agent for the transportation of freight is under no legal obligation to make inquiries concerning the agent's instructions or powers. 57 S. W. 883; 87 Ark. 219; 37 N. E. 280; 107 S. W. 434; Hutchinson on Carriers, § § 457, 460, 462, 152, 158, 630; 2 Am. Rep. 276; 2 Redfield on Railways, 113.

3. Appellant will be presumed to have known that this machinery was required at its destination for some purpose, and is answerable for the naturally to be expected results of delay; and full notice was given it of all the circumstances attending before the contract of shipment was signed. To hold that the shipper is entitled to the rental value alone of the castings and machinery would be to establish an entirely inadequate measure of damages. 77 S. W. 920; 91 S. W. 1121; 76 N. E. 1050; 1 Q. B. D. 274; 22 Ont. App. 278; 85 Pac. 408; 48 S. E. 961; 104 Tenn. 568; 86 Ark. 179.

HILL, C. J. (after stating the facts). I. Appellant argues that the defendant as a common carrier was compelled to accept this shipment when tendered to it; that, under the "Hepburn Act" of Congress, it had no right to make any special contract to

compensate it for assuming the additional risk that the notice of the special damages to flow from the failure to promptly deliver would place upon it. The cases of *Hooks Smelting Co.* v. *Planters' Comp. Co.*, 72 Ark. 275, and *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, are relied upon as authorities fixing the principle that, to hold a party to a contract liable for special damages, there must be notice of the special circumstances at or before the making of the contract, so that the party sought to be charged for the breach of the contract may be free to insist on such additional compensation as he may choose to demand, or at liberty to refuse the contract. The argument is not without force, and there is language in these and other opinions applying the doctrine of *Hadley* v. *Baxendale*, 9 Exch. 341, to this effect.

However applicable that doctrine may be where the contract is between parties at liberty to contract, it is inapplicable when applied to the implied contract of carriers, although the same language is frequently used in cases when discussing liability of carriers as when discussing the liability of manufacturers or machinists who enter into contracts to promptly furnish or repair machinery. In fact, *Hadley* v. *Baxendale* was a carrier case itself, but the distinction was not then made. This difference is referred to in *Crutcher* v. *Choctaw, O. & G. Rd. Co.*, 74 Ark. 358. One is a matter of contract, the other is a legal obligation.

The court recently had before it the question of special damages flowing from the breach of the implied contract of a carrier to furnish cars, and, following the authorities, particularly *Vicksburg & M. Ry. Co.* v. *Ragsdale*, 46 Miss. 458, the court sustained such action. *Choctaw, O. & G. Rd. Co.* v. *Rolfe*, 76 Ark. 220. See also *Choctaw, O. & G. Rd. Co.* v. *Crutcher*, 74 Ark. 358, and *St. Louis, I. M. & So. Ry. Co.* v. *Ozier*, 86 Ark. 179. A much earlier case, likewise applying to it, is *St. Louis, I. M. & So. Ry. Co.* v. *Mudford*, 48 Ark. 502. The Ragsdale case, heretofore referred to, which has been approved by this court in the Mudford, Crutcher and Rolfe cases, is a leading authority upon the subject, and has been much quoted and approved by text writers. See 4 Elliott on Railroads, 1731; 3 Hutchinson on Carriers, 1369 (old ed.), 772; 3 Joyce on

Damages, 1960. On this exact question the Mississippi court said: "6th. If the delay is in the transportation of machinery to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means, the expenses of idle hands, the loss or gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time. 7th. The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him."

Mr. Hutchinson says, in referring to the justice of the rule which gives special damages where the circumstances would make the general rule inequitable: "And if, with a knowledge of these circumstances, the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time or for a given purpose, he should negligently delay them beyond that time, or so as to defeat their purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner." And again he says: "The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one, and that the carrier was so informed must be both alleged and proved." 3 Hutchinson on Carriers, 1367. See also 4 Elliott on Railroads, § 1724.

While it is true that the carrier cannot refuse to receive goods, and while it may be true that under the recent act of Congress he cannot make any special charge commensurate with his undertaking, yet such consideration can not change his duty to promptly carry. Notice of the special circumstances puts upon him the duty to use diligence commensurate to the requirements of the case; and he has discharged his whole duty when he uses reasonable diligence to fulfill the implied contract which the law places on him to promptly forward the goods. It would not be consistent with the duties resting on a carrier to

say that where he has broken his implied contract to promptly deliver he can escape responsibility for failing to exercise due care in promptly forwarding goods because he could not refuse the goods when offered, nor charge a different rate than for similar goods shipped without notice. The test of his liability is his care in the execution of his duty, and the amount of damage is dependent upon the nature of the shipment and the circumstances under which it is made. Special damages present no question of liability, but a question of amount of damages where liability is otherwise fixed. The liability is dependent solely upon the negligence of the carrier in the performance of his duty to promptly carry. 4 Elliott on Railroads, § 1712. The exercise of reasonable diligence in forwarding acquits the carrier of negligence and defeats the action based on a failure to deliver within a reasonable time. And in this way the carrier can always protect itself.

II. It is insisted that the notice was not brought home to a person properly representative of the company. The notice was given to the party who actually made the contract of shipment. The company had thirty-five or forty employees in the freight office, only three of whom were authorized to make contracts of shipment. A shipper goes to the office, and is referred to a certain person as the proper one with whom to enter into his contract. He gives his notice to that person, and that person causes to be executed the contract—the bill of lading. It may be that that person did not personally sign it. That fact was not known to the shipper. Nor was it necessary to be known to him. For the man whom the company put forward to transact business did transact it for the company, did enter into the contract, and under the contract so executed the carrier received the goods, and shipped them; and notice to such person was notice to the company.

III. Having determined that the plaintiff has made out a case for special damages, it is necessary then to consider the damages recovered and sought to be recovered. Notice was given to the railroad company that contracts had been made for the purchase of seed by the oil company; but the evidence fails to establish this fact. On the contrary, the evidence of the president of the oil company shows that he only began contract-

ing for the seed in the latter part of September or the first of October; and most, if not all, of the contracts for seed were made in October.

The machinery was delivered to the carrier on the 8th of September, and left Little Rock on the 9th. Under the undisputed evidence, seven to ten days was the usual and reasonable time to allow for its delivery to Baldwin, Miss. Where the time of delivery is not fixed by contract, the law implies the time necessary to complete the transaction. But "the law does not attempt to fix by rule what is a 'reasonable time.' Each case is referred to its own peculiar circumstances, an account being taken of the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities for transportation under the control of the carrier." 4 Elliott on Railroads, 1730. The testimony has fixed beyond dispute that a reasonable time for the delivery of these goods expired not later than the 19th of September. The president of the company says that the machinery had already been delayed an unreasonable length of time before he commenced contracting for seed. No assurance from this railroad company of its speedy arrival was shown. It may be taken under the facts of this case that the machinery was to have been delivered on or before the 19th of September, as if that date had been definitely settled and fixed by contract in the beginning.

The ground upon which special damages are allowed, where contracts have been made and they are breached, is that the carrier has notice of those contracts and the probable effect of the breach of them by reason of the carrier's default in delivery of the shipment in time for the shipper to fulfill his contract. 3 Hutchinson, Carriers, 1367; *St. Louis, I. M. & S. Ry. Co.* v. *Mudford,* 48 Ark. 502. The Massachusetts court, speaking through Mr. Justice Endicott on this subject, said: "If, therefore, the defendant had received the ties for transportation according to its contract, and failed to deliver them at all, it would have been liable for their market value in Boston at the time when they should have been delivered; or, if it had negligently delayed the delivery, it would have been liable for the diminution in their market value during the delay. It would not in either event have been liable in damages for loss of profits sus-

tained by the plaintiff under his subsequent contracts with other parties, unless it can be said that, by reason of the plaintiff's announcement that he intended to make such contracts, it was necessarily within the contemplation of the parties when they made the contract of transportation, and as the probable consequence of its breach, that the defendant might be liable for damages resulting to the plaintiff from his inability to fulfill such contracts, the terms of which were not and could not then be disclosed.

"The damages for which a carrier is liable upon failure to perform his contract are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation; and a larger liability can be imposed upon him only when it is in the contemplation of the parties that the carrier is to respond, in case of breach, for special and exceptional damages. In such a case the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not then made. The mere knowledge on the part of the defendant that the plaintiff intended to make contracts for the sale of the ties to be transported cannot impose liability upon the defendant for loss of profits on such contracts. * * * *

"We are therefore of opinion there was error in instructing the jury that the plaintiff could recover damages for loss of profits on his subsequent contracts. As the ties were not sent to Boston, the true measure of damages is the difference between the market price in Boston and the market price in Canada at the time when the defendant should have transported the ties according to its contract, deducting therefrom the price stipulated in the contract for transportation." *Harvey* v. *Connecticut & Passumpsic River Ry. Co.*, 124 Mass. 421.

In this case the contracts were not only subsequent to the notice of the company, but were subsequent to the default of the railroad company.

The second, third, fourth, fifth and ninth elements of damage set forth in the complaint grew out of the contracts made long subsequent to the notice to the carrier, and from ten to thirty days after the carrier had breached the contract by failing to promptly deliver the machinery. A shipper cannot recover damages growing out of contracts made subsequent to the ship-

ment, for it is only such matters as are then in contemplation for which the carrier can be held, and *a fortiori* a shipper cannot recover on account of contracts made after the carrier was already in default in making delivery. It cannot be said that when he made these contracts he was relying upon the carrier to fulfill its obligation, because it was already in default, and the oil company had no assurances from it that its default would be speedily remedied.

The seventh ground seems to be based upon the loss to the company of the saving in expense between a one-press mill and a two-press mill. This is but another form of recovering expected profits from a two-press mill, in that the fixed charges against the two-press mill would have got better results, as some of the hands were idle, while in operating the two-press mill they would not have been idle. This is too remote and speculative to be recoverable.

The eighth item may be recoverable, but it is not sufficiently developed here to definitely determine. If at the time the machinery was due the fixed charges against the mill were less than at the time when the machinery was received, and the cessation of business during the installation of the plant would be more expensive at that time than the earlier time, and if this was necessarily included in the notice, then the difference may well be recoverable.

The first item is recoverable, and the court erred in not giving instruction No. 3 asked by the oil company: "If you find that the plaintiff sustained actual damages by reason of being compelled to purchase a duplicate set of machinery and pay for same, after having paid for the set shipped over defendant's roads, and such damage was caused by the unreasonable delay of defendant in carrying said machinery, if you find there was an unreasonable delay, then the plaintiff is entitled to recover such actual damages as it sustained by reason of being compelled to buy the second set of machinery. You will consider this item of damage apart from the other claims for damage about which you have been instructed."

The oil company has also appealed, and assigns error for the failure of the court to give this instruction and permit it to recover on this item. The oil company waited long beyond the

breach of the contract before purchasing other machinery. The railroad company had sufficient notice of the use for which this machinery was intended and of the consequences which would attend the failure to deliver it to the oil company to make it liable for it for the purchase price of the duplicate machinery obtained elsewhere when it had failed to deliver it within a reasonable time. "It is the duty of the shipper to exercise reasonable diligence and care to minimize the injury to his shipment caused by delay." 4 Eliott on Railroads, 1730. And he "must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses and diminish the responsibility of the party in default to him." *Vicksburg & M. Ry. Co.* v. *Ragsdale,* 46 Miss. 458.

If the goods were absolutely worthless, the shipper could recover the full amount of the cost that he was put to in getting their duplication. *Wabash Rd. Co.* v. *Harris,* 55 Ill. App. 159. But, if they were of value, it was his duty to utilize them to advantage. The machinery was his, and the railroad did not convert it to its own use by its unreasonable delay. 3 Hutchinson on Carriers, § 1372; 4 Elliott on Railroads, § 1710. His measure of damage would be the cost of the duplicated machinery, *minus* the value of the delayed machinery utilized to its best advantage.

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

ON REHEARING.

Opinion delivered November 9, 1908.

HILL, C. J. Appellee files a motion for rehearing, and takes issue with the correctness of this statement in the opinion: "The president of the company says that the machinery had already been delayed an unreasonable length of time before he commenced contracting for seed. No assurance from this railroad company of its speedy arrival was shown." Counsel calls attention to the testimony of the witness referred to, wherein he said that they had assurances from the railroad company that the machinery would be there, but when he was asked what company he replied, "Well, it was the company here and the Thomas-

Fordyce Manufacturing Company, and we had asked them to hurry it up." This was all the evidence upon the subject. Counsel say that, as the witness was testifying in Little Rock, it necessarily referred to the defendant railway company.

This testimony was not overlooked in the consideration of the case, as supposed by counsel; but it was considered insufficient to prove any assurance on the part of the defendant railroad company, and insufficient to prove such a definite promise of the speedy delivery of the machinery that a reasonable man could rely upon it. In fact, it was considered so indefinite and uncertain as to amount to nothing, and it was decided to so treat it in the opinion.

The motion is overruled.

WILLIAMS v. STATE.

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Opinion delivered November 16, 1908.

ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF ATTEMPT.—Evidence that the accused accosted the prosecutrix and approached her, without more, is insufficient to sustain a conviction of assault with intent to commit rape.

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

Jas. B. Gray, for appellant.

1. No assault of any kind was proved; no intent was shown, nor any "present ability" nor "unlawful attempt" to commit a crime of any kind proved. Kirby's Digest, § 1583; 49 Ark. 179, 182; 77 *Id.* 39; 43 Tex. 576.

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

Under our statute defining an assault as construed in 77 Ark. 37, the crime of assault with intent to rape is not established. Error is confessed.

HART, J. At the August term, 1908, of the Lonoke Circuit Court, the grand jury returned an indictment in due form against Sam Williams, charging him with assault with intent

to commit rape upon Beryl Shadle. He was tried and convicted at the same term of the court. His punishment was fixed at a term of three years in the State penitentiary, which he is now serving, pending his appeal to this court.

Miss Beryl Shadle, the prosecuting witness, testified as follows: "I live at England, Lonoke County, Arkansas. On July 27th, 1908, I was living on Plum Bayou some seven or eight miles southeast of England, and on that morning I started from my home at England to my school on Plum Bayou, riding in a buggy alone. I started from England about seven o'clock in the morning and when I had got about five miles from home I was tackled by a negro. The negro's name is Sam Williams, and that is him there (pointing to the defendant.)

"Q. Go on, and tell all that occurred; whose house you were passing?

"A. I was passing the house where Mahomes live, and my attention was called by some one saying, 'Wait,' and I looked around to the left to see, and a negro was just starting across the fence, had his right foot over the rail, and was fixing to put the other one over, and I thought he was talking to some one on the other side, and I looked across the road, and saw he wasn't, and I looked again, and he was sliding off the fence inside the road. He said: 'You look mighty sweet in that buggy, honey,' and I realized then that he was talking to me, and I whipped the horse with the lines, and I looked back at the negro, and he had crossed back over the fence, and he was running up the fence the way I was going. And I ran a good piece, and the buggy ran up against a stump and threw me out and dragged me a piece, and I went to Mr. Hughes's house and called him."

"When the negro first called, he was 10 or 15 steps from me. When I last saw him, he was on the inside of the fence in the field about 15 or 20 steps from where I first saw him, running in the direction I was going." The remaining testimony was directed towards the identity of appellant, the attempted establishment of an alibi by him, and his denial of having been the negro who accosted the prosecuting witness.

The view we have taken of the case renders it unnecessary to abstract this evidence. The Attorney General confesses error. In this he is correct. The case under consideration is ruled by

that of *Anderson* v. *State,* 77 Ark. 37. In that case the court in discussing the sufficiency of the evidence to sustain a charge of assault with intent to rape said: "The statutes of this State, requiring the unlawful act to be coupled with the present ability to do the injury, clearly indicate that the unlawful act must be the beginning or part of the act to injure, of the perpetration of the crime, and not of preparation to commit some contemplated crime."

In the present case the testimony does not show even a simple assault on the prosecuting witness. The negro was never closer than ten or fifteen feet to her; he made no attempt to touch her person, and when she whipped up her horse immediately crossed back over the fence. Of course, the language used by him to her was calculated to scare her, but the evidence wholly fails to sustain the judgment for assault with intent to rape, or even the charge of an assault merely.

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

GREER v. COOK.

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Opinion delivered November 16, 1908.

1. INJUNCTION—ENJOINING PROCEEDINGS IN ANOTHER STATE.—The rule that when a debtor and creditor are residents of the same State an attempt of the latter to evade the exemption laws of the State by suing in another State may be enjoined in equity is not applicable where one of two creditors suing is a resident of another State. (Page 95.)
2. SAME—FORMER SUIT PENDING.—A resident of this State will not be enjoined from prosecuting an action in another State because a suit by him upon the same claim is already pending in this State. (Page 96.)
3. SAME—ABUSE OF PROCESS.—The fact that a creditor sued his debtor in a foreign jurisdiction for the sole purpose of vexation and oppression does not authorize the interposition of a court of equity by injunction; the remedy being at law for the malicious abuse of process. (Page 96.)

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Special Chancellor; reversed.

W. T. Tucker and *Vaughan & Vaughan,* for appellant.

1. There was a complete and adequate remedy at law, and in such case it was error for the chancery court to assume jurisdiction. 7 Ark. 520; 13 Ark. 630; 26 Ark. 649; 27 Ark. 97; 48 Ark. 331; 14 Ark. 50; *id.* 360; 18 Ark. 546; 16 Cyc. 45 and note 90; *id.* 46, 47 and notes.

2. It is shown by the complaint that another action was pending between the same parties for the same cause, wherefore the demurrer should have been sustained. Kirby's Dig., § 6093, sub-div. 3; 70 Ark. 71; 34 Ark. 410; 5 Ark. 9; 13 Ark. 600; 28 Ark. 341; 50 Ark. 34; 14 Ark. 50.

3. A debt which is not barred by the statute of limitations of the State in which the action is being prosecuted, the defendant being found in that State, may be prosecuted in that State, and equity will not interfere to enjoin the prosecution of such action. Beach on Injunctions, § 569; 142 Ill. 450; 2 Story, Eq. Jur. 12th Ed., § 1521; *id.* § 61; 13 Am. & Eng. Enc. of L. 674 and note; 19 Fed. 609; 126 Ill. 58. See also 72 Ill. 492; 83 Ill. 365; 142 Ill. 248.

Robertson & DeMers, for appellee.

The chancery court had jurisdiction to hear and determine this cause and to restrain the further prosecution of the garnishment proceedings in Missouri. 45 Ark. 189; 97 Ala. 399; 142 Mass. 47; 4 Allen, 545; 43 Hun, 348; 3 Abb. Pr. 377; 62 How. Pr. 284; 86 Fed. 984.

McCULLOCH, J. Cook is a railroad locomotive engineer, and resides in Pulaski County, Arkansas, and one Shilling, acting through his agent and attorney, Greer, sued him before a justice of the peace of Pulaski County for a debt of $51.32 alleged to be due on open account for goods sold. Judgment was rendered in favor of Shilling for the alleged debt and cost, and afterwards a writ of garnishment was issued on the judgment and served on Cook's employer, the St. Louis, Iron Mountain & Southern Railway Company, to seize his wages. He appealed from the judgment of the justice of the peace to the circuit court, and superseded the judgment.

While the case was pending in the circuit court, Shilling and Greer (an interest in the alleged debt having been assigned to the latter in payment for his services as collecting agent) as-

signed the claim to one Dart at Kansas City, Missouri, for the sole purpose of having a new suit brought on the claim in Dart's name in the State of Missouri. The new suit was instituted at Kansas City, including garnishment proceedings against the railway company to seize the same wages of Cook covered by the garnishment in the Arkansas suit.

Cook then instituted the present action in equity to enjoin the further prosecution of the Missouri action, alleging that it was being prosecuted in another State for the purpose of defeating his right of exemptions as a resident of the State of Arkansas. He also alleged in his complaint that he did not owe the alleged debt. The chancellor granted a perpetual injunction as prayed for, and also rendered a decree in Cook's favor for the sum of $75 damages found to have been sustained on account of the wrongful prosecution of the Missouri action.

Shilling and Dart, being non-residents of the State, were not made parties to the suit, Greer and the railroad company being the only defendants. It seems to be well established by authority that when a debtor and creditor are residents of the same State an attempt of the latter to evade the exemption laws of the State of their domicil by bringing suit in another State may be enjoined by a chancery court. *Griffith* v. *Langsdale,* 53 Ark. 71; note to *Rader* v. *Stubblefield,* 10 A. & E. Annotated Cases, p. 26.

And the same doctrine is often extended so as to prevent other evasions of the laws of the State of the domicil of the parties. But this court in the case above cited expressly limited the application of the rule to suits between parties residing in the same State, and refused to enjoin a resident of another State from suing in that State a citizen of this State, even though the effect of it was to prevent the latter from getting the benefit of his exemptions.

The complaint in the present case does not set forth the residence of either party to the suit sought to be enjoined, nor does the proof show definitely where they reside, but it does show that Shilling, the original creditor, is not a resident of the State of Arkansas. He may have been a resident of the State of Missouri, for aught the record discloses. It was the duty of appellee to allege and prove facts sufficient to entitle him to the

relief sought, and, having failed to do so, the relief must be denied.

It is true that Greer, to whom an interest in the debt alleged to be due from appellee had been assigned as compensation for his services in collecting it, resided in this State, but as his co-creditor resided in another State they had the right to bring another action there to collect the debt.

The fact that an action was first instituted and was pending here when the new action was commenced in Missouri does not alter the case. Whether or not the bringing of a new action in a foreign jurisdiction operates as an abatement of the action here, we need not decide. The result turns upon the right of the creditor to bring his action in another State without being open to the charge of having fraudulently evaded the laws of this State; and if he had the right, in the first instance, to sue in another State, the fact that he had already instituted suit here does not cut off that right. The fact that the creditor instituted the suit in a foreign jurisdiction for the sole purpose of vexation and oppression does not authorize the interposition of a court of equity by injunction. The remedy, if any, is at law for the malicious abuse of process. *Baxley* v. *Laster,* 82 Ark. 236.

The case of *Pickett* v. *Ferguson,* 45 Ark. 177, which is relied on by appellee to sustain the decree, has no application, for there the court of equity in this State had assumed jurisdiction of all the parties and subject-matter of the litigation on other well-established grounds of equity jurisdiction, and, as an incident to the proper adjudication of the matters involved, enjoined one of the parties from prosecuting a suit in Tennessee involving the same issues. The injunction was granted at the instance of cross-complainants, and this court approved it on the ground that, inasmuch as all of the necessary parties were not before the Tennessee court, complete relief could not be given them. No such state of facts exist in the present case. Here the jurisdiction of the chancery court was invoked for the sole purpose of granting an injunction to stop the prosecution of an action at law in a foreign jurisdiction.

We are clearly of the opinion that no grounds are shown for equitable interference, and the decree is therefore reversed with directions to dismiss the complaint.

HAMITER v. BROWN.

Opinion delivered November 16, 1908.

1. BILLS AND NOTES—BONA FIDE HOLDER—ACCOMMODATION PAPER.—One who takes negotiable paper in payment of an antecedent debt, before maturity and without notice of any defect therein, receives it in due course of business, and is a holder for value, even against a joint maker who executed the paper for accommodation merely. (Page 98.)
2. SAME—DEFENSE.—It is no defense to a suit by the *bona fide* holder of negotiable paper that he acquired the paper with notice that one of the makers signed as accommodation surety. (Page 98.)

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

Dan W. Jones, for appellant.

It is undisputed that appellant signed the notes as surety merely. Of this fact parol evidence is admissible. 54 Ark. 97. Appellee admits knowledge of the fact that appellant signed as surety merely at the time he received the notes. No consideration is shown either to Tucker or to appellant, but, at most, appellant held the notes as collateral security for a debt which appellee alleges Tucker owed him. He relinquished no valuable right, gave no time to Tucker, neither did he receive the notes absolutely and unconditionally in payment of Tucker's pre-existing debt, nor "in due course of trade" for value. Appellee therefore took the notes subject to appellant's equities. 13 Ark. 150, 159. The justice of the peace court, where this cause originated, had the power, and it was its duty, to apply equitable doctrines to the questions arising in this case. 44 Ark. 377; 55 Ark. 101.

E. M. Merriman, for appellee.

It is immaterial whether appellant was surety or maker; in either instance he is bound, but the facts developed show that he was a maker. 62 Ark. 387; 40 Ark. 545; 34 Ark. 524; 35 Ark. 279. Parol evidence is not admissible to vary or contradict the written contract. 1 Daniel on Neg. Inst. § § 80, 87, and authorities cited. A pre-existing debt is a valid consideration for a note. *Id.* § 184; 30 Ark. 684. See also 27 Ark. 407; 21 Ark. 18.

McCULLOCH, J. This is an action instituted by appellee on three negotiable promissory notes executed to him by appellant, as one of the joint makers with W. T. Tucker and T. H. Davis.

Appellant and Davis signed the notes as joint makers, but were in fact only accommodation sureties for Tucker, which fact was known to appellee when he accepted the notes. Tucker was indebted to appellee for a sum of money collected as attorney for the latter, and appellee testified that the notes were delivered to him in satisfaction of the debt. Tucker admitted that he was indebted to appellee for money collected as the latter's attorney, but denied that the notes were delivered in satisfaction of this debt. He testified that he delivered the notes to appellee for the latter to use as collateral in borrowing money, and that he represented to appellant, when he requested him to sign as surety, that the notes were to be used only for that purpose. Appellant also testified that he signed the notes upon said representations made to him by Tucker that the same were for appellee's use as collateral in borrowing money. Appellee did not negotiate the notes, but kept them until maturity, and afterwards instituted this action on them.

There is no dispute in the evidence as to these representations being made by Tucker to appellant to induce him to sign the notes; and, as the verdict of the jury has settled in appellee's favor the conflict between his testimony and Tucker's as to the purpose for which the notes were delivered, we must treat it as settled that the notes were put into circulation by Tucker for a purpose not in accordance with his representations to appellant when he obtained the latter's signature.

Appellant, then, has made out a defense except as against a *bona fide* holder of the notes for value. Can appellee, who accepted the notes in payment of an antecedent indebtedness from Tucker, the principal, claim as an innocent holder for value? This court has answered that question in the affirmative. *Tabor* v. *Merchants' National Bank*, 48 Ark. 454. In that case the court held that "one who takes negotiable paper in payment of an antecedent debt before maturity and without notice, actual or otherwise, of any defect thereto, receives it in due course of business, and becomes, within the meaning of commercial law, a holder for value."

The fact that appellee knew when he received the notes that appellant was an accommodation surety does not affect his right

to recover. *Evans* v. *Speer Hardware Co.*, 65 Ark. 204.

The instructions given by the court at the instance of appellant were more favorable to him than he was entitled to, but of this he cannot complain.

The evidence justified the verdict of the jury, and the judgment is affirmed.

BELL v. OLD.

Opinion delivered November 16, 1908.

1. ELECTION OF REMEDIES—CASE STATED.—Where the terms of a written guaranty required the guarantee to bring a suit to enforce a reservation of title upon certain personal property before suing to hold the guarantor liable, it was error to hold that by suing to enforce the reservation of title, which suit proved futile, the guarantee elected not to sue upon the guaranty. (Page 105.)
2. SALE OF CHATTELS—RESERVATION OF TITLE—WAIVER.—A vendor of chattels waives a reservation of the title where he consents to the execution of a mortgage by the vendee—at least as to the mortgagee and those claiming under him. (Page 106.)
3. VERDICT—SUFFICIENCY.—A general verdict upon a money obligation will be enforced, though the amount found due is not stated, if the amount is not in dispute. (Page 107.)
4. SAME—WHEN ENFORCED.—Where the jury returned a proper verdict for plaintiff, and the court erroneously refused to receive it and directed a verdict for defendant, the cause will be remanded with directions to enter the verdict for plaintiff. (Page 107.)

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

STATEMENT BY THE COURT.

In 1902 Old was the owner of a certain printing plant, and sold a half-interest in it to Turner for $400. Turner executed the following note:

"Nashville, Arkansas, July 21, 1902.

"On or before November 1st, 1903, I promise to pay to the order of W. J. Old the sum of four hundred dollars with interest from date until paid at the rate of ten per cent. per annum.

This note is given for a part of the purchase money for the following property: one Chandler & Price jobber, one Chandler & Price paper cutter, three double type stands and one cabinet, all filled with job and display type, 250 lbs. of body type and all other fixtures in and now belonging to the *Howard County Times* office at Nashville, Arkansas. It being hereby expressly agreed and understood by and between the parties hereto that the title to said property shall be and remain in the said W. J. Old until this note is fully paid, and that in case default is made in the payment of same he is hereby empowered without legal process to sell a sufficiency of said property to pay this note and interest.

"Witness our hands this 21st day of July, 1902.

[Signed] "H. A. TURNER."

Note indorsed:

"Transferred to E. M. Bell, 1 yr. 5 mo. 17 ds. $58.53. Credit by work 2-23-04 $105.59."

Subsequently, Turner mortgaged the property to J. B. Hill to secure a loan of $375. This mortgage was made with the consent of Old, and Old delivered to Hill as additional security the Turner note. The money obtained from Hill was paid to Old. It was agreed at the time that the Turner note was delivered to Hill that when Turner paid Hill the mortgage debt Hill should return the note to Old. When the mortgage became due, instead of paying it, Turner induced the Bank of Ozan to purchase it from Hill. The bank did not know that the Turner note contained a reservation of title, and consented that it be returned to Old, relying entirely upon the mortgage as its security for the note to Hill which it then purchased. Turner defaulting in the payment of the mortgage note, the Bank of Ozan foreclosed the mortgage, and Hyatt purchased most of the property at the mortgage sale. After the Turner note had been returned to Old, Old entered into negotiations with Bell for the purchase of an undivided one-half interest in a livery stable, and after pending for some time a trade was made. Old delivered the Turner note to Bell in part payment of the purchase price of the stable, and, either during the negotiations or when the sale was consummated—there is a conflict in the evidence upon that point—delivered the following guaranty to Bell:

"KNOW ALL MEN BY THESE PRESENTS: That W. J. Old, of Nashville, Arkansas, to whom E. M. Bell has executed a bill of sale to me, bearing even date herewith, for an undivided one half interest in the livery property known as the Arkansas Stable, situated in Nashville, Arkansas, have assigned, transferred, delivered and set over to E. M. Bell a certain promissory note for $400 with 10 per cent. interest from November 1st, 1903, executed July 21st, 1902, by H. A. Turner to me, and under term of said note a vendor's lien being reserved on certain printing press, type, and so forth, as described in said note, the transfer of said note being in part consideration of the purchase money for the livery property referred to herein and the assignment of said note by me, and its acceptance thereof by the said E. M. Bell being upon the condition hereby expressly well understood by and between us, that is to say: 'In the event the said H. A. Turner note be not paid within such time as may be agreed upon by the said H. A. Turner and E. M. Bell, and the said E. M. Bell has to foreclose and enforce the vendor's lien therein reserved, and in doing so becomes the purchaser or owner of the printing press, type and material mentioned, then in that event I hereby covenant and bind myself to take the said property at a sum equivalent to the amount due on the note, including the interest from November 1st, 1903, and the cost of foreclosure of said note, and to pay cash therefor immediately after the said E. M. Bell becomes the purchaser or the owner of the said printing press, type and machinery by virtue of such foreclosure, in the event such steps have to be taken for its collection, and intending hereby to guaranty the payment of said note.'

"In testimony whereof I have hereunto set my hand on this the 1st day of February, 1904.

[Signed] "W. J. OLD."

Bell says that the guaranty was a part of the sale, and an inducing cause thereof; while Old says that after the guaranty was executed and delivered there was a subsequent agreement before the trade was closed by which it was cancelled and annulled, and that Bell took the Turner note without the guaranty, and was to return the written instrument but neglected to do so.

Turner defaulted in paying his note to Old, which, as stated, was last transferred to Bell; and Bell brought a replevin suit against Hyatt to recover the printing plant, which had passed into his hands under the mortgage foreclosure, and obtained judgment therefor. Hyatt appealed, and the judgment was reversed. *Hyatt* v. *Bell,* 83 Ark. 360.

After losing this case, Bell brought this suit against Old and Turner, seeking to recover against Turner on the note and against Old on the guaranty. He admitted a credit growing out of a transaction, not material here, which was indorsed upon the note, amounting to $105.59, and sued for the balance and also for $60, the amount of costs expended in his suit against Hyatt. Defendant Old answered, alleging two defenses: First, that the guaranty had been cancelled by agreement and had never become effective; and, second, that the suit of Hyatt against Bell was an election to pursue the property, and precluded suit on the note. Turner answered, setting forth an election in said suit to proceed against the property, and alleging that the plaintiff could not shift his position and demand the purchase price of the property described in the note.

On the trial, the facts above outlined were adduced, and Bell asked the court to give instructions numbered 1 and 4, which the court gave but with this modification, "unless you further find that plaintiff, before bringing this suit, elected to pursue the property, as defined in these instructions," making said instructions read as follows:

"No. 1. The court instructs the jury that the burden of proof is upon the defendant to prove by a preponderance of the evidence that the guaranty given by him to the plaintiff was cancelled before the trade between them for the purchase of the livery stable was consummated; and if he fails to do so your verdict will be for the plaintiff, unless you further find that plaintiff, before this suit, elected to pursue the property, as defined in these instructions.

"No. 4. You are instructed that if you believe from the evidence that W. J. Old sold the note to E. M. Bell, and in writing guarantied the payment of said note, your verdict will be for the plaintiff for the balance due on said note as shown by the evidence, unless you further find that plaintiff elected to pursue the property as defined in these instructions."

The court also gave the following instruction at the instance of the plaintiff:

"No. 5. The court instructs the jury that, before the defendant can recover in this action, he must prove by a preponderance of the evidence that the guaranty was cancelled before the trade was consummated; and if it was cancelled after the trade was made, then it would take a consideration moving between the parties to cancel the guaranty."

At the instance of the defendant the court gave the following instruction:

"No. 1. A vendor of chattels who has reserved the title until the purchase price is paid has, in default in payment thereof, a right to make an election among two remedies, to-wit. 1st. He may retake the property, and thus in effect cancel the debt; or 2d. He may sue to recover the debt, and thus affirm the sale and waive the reservation of title. So in this case, if you believe from the evidence that after the maturity of the note sued on plaintiff E. M. Bell instituted suit in replevin against one J. J. Hyatt and H. A. Turner, who were then in possession of said property, and alleged in said suit that he was the owner thereof, he will now be precluded and estopped to maintain this action against either of the defendants to recover the purchase price of the said property."

"No. 2. If you believe from the evidence that W. J. Old guarantied the payment of the note sued on, and subsequent to said guaranty the said plaintiff brought suit in replevin against one J. J. Hyatt to recover possession of the property described in said note, he thereby elected to disaffirm the sale of said property, and cannot now maintain his suit against the defendant, Turner, to recover the purchase price of said property, or the defendant, Old, upon the guaranty of the payment of the said note, which represents the purchase price of said property."

The jury returned this verdict: "We, the jury, find for the plaintiff, E. M. Bell." The court refused to accept the verdict, and thereupon gave the jury a peremptory instruction to return a verdict in favor of the defendants, which the jury did, upon which verdict judgment was rendered for the defendants, and the plaintiff has appealed.

Sain & Sain, for appellant.

1. Appellant in this suit could not be estopped on the question of election, because different parties are sued from those in the former suit, and because an election is not binding where it is made without fault and in ignorance of material facts, if other parties' rights have not thereby been prejudiced. 65 Ark. 278; 128 Mass. 152; 67 Ark. 206; 111 Ind. 351; 86 Ia. 283; 66 Miss. 258; 68 Miss. 603; 7 Enc. Pl. & Pr. 366. Old has lost no rights; neither has his interest been affected in any way, except by his own waiver of whatever rights he had under the note when he consented for Turner to mortgage the property to Hill; and Turner's rights have not been affected by the former suit. 83 Ark. 360. See also 13 Cal. 133; 50 Cal. 328; 91 Ia. 406.

2. The court should have given the instruction requested by appellant without modification. The question of election should not be submitted to a jury.

3. It was manifest error to refuse to accept the verdict first returned, and to direct them to return a verdict for appellee. Such action was tantamount to refusing instruction No. 5 requested by appellant.

W. P. Feazel, for appellee.

1. A vendor of chattels who has reserved title in himself until the purchase price is fully paid may, upon maturity of the debt, pursue either of two remedies: he may elect to retake the property, and thus in effect cancel the debt, or he may bring an action to recover the debt, thereby waiving reservation of title and affirming the sale; but he cannot pursue both remedies. 78 Ark. 573. The fact that Old consented to the mortgage was developed at the trial of the former suit, and that was the proper time for him to change his position, and he cannot be allowed now to set up mistake or ignorance of material facts as an excuse for his election. 67 Ark. 206. The claim that the parties are not the same in this suit as in the former is not tenable as an excuse for this action. The maker of the note was sued in that case, and appellant by reason of his election placed it beyond the power of Old to maintain a suit against Turner to recover the purchase price of the property mentioned in the note. 66 Ark. 240. If Old, by reason of appellant's election, has been deprived of a valuable right—recovery of the debt

from Turner—the appellant, being responsible for that loss, should be the sufferer. 87 Ia. 56; 43 Am. St. Rep. 354.

2. If, as a matter of law, no recovery can be had upon any reasonable view of the facts developed in evidence, or if there be no question about the facts, it is the duty of the court to direct the verdict. 69 Ark. 562; 71 Ark. 445; 75 Ark. 406.

3. This is a suit for the recovery of money. If appellant was entitled to a verdict at all, it was for some specific amount. The first verdict of the jury was not responsive to the issue, not being for a specific amount, and was therefore void. No judgment could have been rendered on it. Kirby's Dig., § 6209; 25 Ark. 183.

HILL, C. J. (after stating the facts). This case is a sequel to *Hyatt* v. *Bell,* 83 Ark. 360. The material facts in regard to the origin of this litigation may be found therein stated; the other material facts are in the preceding statement. An important matter in this case is the sharp conflict in the evidence as to whether the guaranty was cancelled by agreement after its execution. This was submitted to the jury in several instructions. It must be taken from the verdict returned by the jury under those instructions that they found in favor of Bell upon that issue. The instructions were erroneous wherein they submitted to the jury the question of an election of remedies growing out of the suit of Bell against Hyatt. There was no election of remedies by virtue of that suit which would preclude Bell from maintaining this suit, and the court should have so instructed the jury as a matter of law, and only left for their determination the question of fact above indicated, as to whether the guaranty was effective or whether it had been cancelled before the trade for the half interest in the livery stable was consummated.

The principle is well established that a vendor of chattels who has reserved title until the purchase price is paid may, upon default of payment, retake the property and thereby cancel the debt, or he may sue to recover the debt and thereby affirm the sale—in which case he looks to the debtor and not to the property; in the other case he looks to the property and not to the debtor. But that principle does not apply here. The Turner note contained reservation of title. The guaranty erroneously

describes it as retaining a vendor's lien upon the printing plant. The two rights are different. A vendor's lien on personal property can only be created by suit, and only when the property is in the hands of the vendee. When it passes out of the hands of the vendee, the right to create a vendor's lien against it is gone. When the title to personal property is reserved, the title does not pass, and the property may be retaken upon default in the payment.

When default was made on the Turner note, which was owned by Bell, the property had passed out of the hands of Turner, having been mortgaged to Hill, which mortgage was purchased from Hill by the Bank of Ozan. This mortgage was made with the consent of Old, and he thereby waived any right to pursue the property and create a vendor's lien upon it, as his action in consenting to the mortgage of it placed it beyond the possibility of that remedy being available to him or his transferree (after maturity) of the note. But, as seen, that right did not in fact exist, as the note reserved the title, and not a lien; but his action in consenting to the mortgage of it was equally a waiver of the reservation of the title, in so far as the mortgagee and those holding under him were concerned. This action of his in consenting to the mortgage defeated Bell from recovering the property in the suit of *Hyatt* v. *Bell.* The guaranty by its terms only became effective in the event that the Turner note was not paid, and Bell had "to foreclose and enforce the vendor's lien therein reserved." Therefore, in order to make the guaranty effective, Bell was required to attempt to foreclose and to enforce a vendor's lien. The only action that was open to him was to seek to recover the property in a replevin suit, in order that he might then bring suit to enforce a vendor's lien or maintain his replevin suit upon the reservation of title. Old's action, as heretofore shown, in consenting to the mortgage defeated that suit. There was no record notice of this conduct, and no showing that Bell had actual knowledge of it when he brought that suit. It was a fact developed in that litigation. To permit him now to defeat Bell's suit on the guaranty on account of Bell having brought this necessary suit in order to hold the guaranty would be to enable him to profit by his own act in derogation of Bell's rights, and to which Bell was not a party. The terms of

the guaranty having required him to pursue this remedy, although the remedy may be erroneously described in it, before it became effective, Bell was required to pursue the only course open to him—that is, to seek to recover the property. And, now that he has exhausted that remedy, then the terms of the guaranty bring into being his remedy upon it, and he should be entitled to recover upon it. The jury has settled the only open question in the case, that is, whether the guaranty was cancelled or effective, and, having decided the latter, then it was the duty of the court to have entered judgment upon the verdict first rendered by the jury.

It is objected that said verdict is insufficient to render judgment upon it, because the amount of recovery is not therein stated. This amount is undisputed. The face of the note and the guaranty show that the principal was $400 with interest. There was a credit upon the note of $105.59. There was an allegation in the complaint, which was not denied in either answer, that the plaintiff had expended for costs $60 in his suit with Hyatt. The amount being undisputed, the court should have directed it inserted in the verdict, or rendered judgment upon the verdict as it stood for the undisputed amount.

The court committed two errors: First, in giving the instructions which he did at the instance of the defendant (appellee) in regard to the election of remedies, and in modifying those that he gave at the instance of the plaintiff (appellant) so as to embrace the same question. These instructions placed an additional burden upon Bell which he should not have been compelled to carry, and which the jury evidently disregarded. This is not prejudicial error as to the appellees. The only real issue in the case—whether the guaranty was effective or whether it was cancelled—was properly submitted in instructions numbered 1 and 4 and 5 given at the instance of the appellant and No. 3 given at the instance of the appellee.

The other error of the court was in giving a peremptory instruction for a verdict in favor of the defendant. This error occurred after the proper verdict had been returned, and it is unnecessary to order a new trial on account of it. *Harris* v. *Graham,* 86 Ark. 570.

The judgment is reversed and cause remanded with direc-

tions to enter judgment upon the verdict first rendered, for the amount of the note and interest, less the credit thereon, against Turner and Old, and the additional sum against Old of $60 for the costs expended in the Hyatt suit.

Mr. Justice BATTLE concurs in the reversal, but not in directing judgment entered on the first verdict.

LOEB v. GERMAN NATIONAL BANK.

Opinion delivered November 16, 1908.

1. ACTION ON NOTES—MOTION TO TRANSFER TO EQUITY.—In an action on notes a motion to transfer the cause to equity which alleges that "it is impossible for defendants to state, owing to the large number of transactions between the parties, the calculations of interest on the various notes, the various offsets and appropriations of collateral to the various notes, just what amount is now due, if any, by said defendants upon the notes sued upon herein," sets up no equitable defense and was properly refused. (Page 112.)
2. CORPORATIONS—TRANSFER OF STOCK—RECORD.—Kirby's Digest, § 849, providing for the recording of transfers of corporate stock with the county clerk, does not apply to transfers for collateral security, but only to actual sales. (Page 113.)
3. BILLS AND NOTES—DELAY IN ENFORCEMENT OF COLLATERAL.—The maker of a note is not exonerated from liability thereon by mere delay of the payee in enforcing the collection of collateral security (Page 114.)

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

STATEMENT BY THE COURT.

On the 30th of April, 1906, the German National Bank brought suit against Joseph Loeb and Helen Loeb for a balance upon two promissory notes. On November 5, 1906, the defendants filed an answer and counterclaim. On March 15, 1907, the plaintiff filed a reply to the counterclaim; and on March 26, 1907, the defendant filed a motion to transfer to equity, which was as follows, to-wit:

"Defendants state that, beginning in September, 1899, they borrowed money up to and including July, 1903, from the plain-

tiff; that from time to time during said period they executed to plaintiff about seventy-five notes, ranging in amount of from $500 to $12,000; that said notes were usually made payable in from thirty to one hundred and twenty days, and were discounted at the bank of said plaintiff by said defendants at the time of their execution, which notes were generally renewed from time to time during said period; that as many as fifteen or twenty notes were so made and renewed during each year covering said period; that the average amount borrowed or renewed each year amounted to about $20,000, or an aggregate of approximately $90,000; that during said period they also indorsed notes at said bank for other parties to the amount approximately of from $65,000 to $75,000; that, to secure said amounts, including the notes sued upon herein, and the indorsements made by them they deposited with said bank from time to time certain collateral security, ranging in amounts from $15,000 to $25,000; that at all times during said period there was always a surplus of several thousand dollars in value of collateral in excess of the amount defendants were indebted to said plaintiff; that at various times during said period collateral so deposited were realized upon by said bank, and the amounts collected thereon were applied to the payment of the various notes and interest executed by defendants.

"That it is impossible for defendants to state, owing to the large number of transactions between the parties, the calculations of interest on the various notes, the various offsets and appropriations of collateral to the various notes, just what amount is now due, if any, by said defendants upon the notes sued upon herein.

"That by reason of various loans, withdrawals, sales by the said Joseph and Helen Wolf of the 460 shares of stock in the Little Rock Building Association and the Ladies' Building Association, at various times, covering a period of several years, it is impossible for defendants to state, except approximately, what the building stock so transferred at various times was worth at the time said sales, loans and withdrawals were made and had, and in what amount defendants were damaged at various times on account of the negligence of said plaintiff in not having said stock recorded upon the books of the company according to law and in not having said collateral property preserved and applied to the payment of the said notes.

"That also by reason of the conduct of said plaintiff the value of said shares of stock were deteriorated in value on account of the delinquency of the said Joseph and Helen Wolf in not keeping said stock paid up and the assessments of fines, penalties and interest against said stock.

"That, for the purpose of ascertaining the exact amount as herein stated, it is necessary that an accounting be had between the parties; that the stating of the account between the parties will necesitate an examination of the books of said building association and of plaintiff, and the examination of the various accounts covering a period of several years.

"Wherefore they pray that this cause be transferred to chancery court, so that a master may be appointed for the purpose of stating the acount between the parties, to the end that it may be ascertained the amount due upon the note sued upon, and in what amount plaintiff is indebted to the defendants, if at all, on account of their said counterclaims."

The motion to transfer was overruled on April 6, 1907, and defendants excepted thereto. On the same day the defendants filed an amended and substituted answer and counterclaim, which is as follows, to-wit:

"Come the defendants and admit that they executed the notes set out in the complaint herein.

"But they state that on June 18, 1901, being indebted to plaintiff for various sums of money, aggregating about $15,000, they transferred and assigned to plaintiff one note for $4,000, dated June 18, 1901, payable six months after date, with interest from maturity at ten per cent. per annum until paid, executed by Helen and Joseph Wolf, and made payable to the defendant, Helen Loeb, which note was secured by an assignment and transfer from the said Helen Wolf of 260 shares of stock in the Ladies' Building Association of Little Rock, and of 200 shares of stock in the Little Rock Building Association of Little Rock, Arkansas, the value of said shares of stock at the time being $4,000; that, in addition to the transfer and assignment of said note by said Helen Loeb to said bank, she also transferred and delivered to said bank a separate instrument containing a sale and transfer of said 460 shares of stock by the said Helen Wolf to the said Helen Loeb; that said note containing said transfer

and assignment of said stock, as well as said other sale and assignment of said shares of stock, was assigned and transferred to said plaintiff as collateral security for any amounts then due said plaintiff by defendants, or for any other sum that might be due thereafter to said plaintiff, including the notes in controversy.

"That said plaintiff failed and carelessly neglected to have said assignments and transfers of stock duly recorded or transferred upon the books of said building association as required by law; that the said plaintiff at the time and for several years thereafter, knowing the said Helen and Joseph Wolf to be insolvent, allowed and permitted the said Joseph and Helen Wolf to sell and dispose of said shares of stock; that, the plaintiff knowing the financial condition of said parties, it was their (its) duty to use ordinary diligence to preserve the validity and legal force of said collateral, but instead thereof they (it) failed to have such collateral transferred and recorded according to law, or take any steps to realize on or protect said security in any way; that, by reason of said sale and transfer of said shares of stock by said Helen and Joseph Wolf to third parties, said collateral note and transfer of stock by said Helen and Joseph Wolf were rendered absolutely worthless, they being insolvent at the time; that at the time said shares of stock were sold and converted by the said Helen and Joseph Wolf the said defendants had other collateral deposited with said bank; that, instead of preserving said collateral of Helen and Joseph Wolf, it applied and appropriated to the payment of the indebtedness due it by said defendant other valuable collateral deposited by said defendants.

"That by reason thereof said defendants were damaged in the sum of four thousand dollars; that, but for the negligence of plaintiff, as herein stated, said shares of stock of Helen and Joseph Wolf should have been protected, appropriated and applied to the payment of the notes sued upon herein and other indebtedness due by said defendants to said plaintiff.

"Wherefore the defendants pray judgment on this their counterclaim against said plaintiff in the sum of four thousand dollars and for costs, etc."

The cause came on to be heard, and the court sustained a demurrer to the amended and substituted answer and counter-

claim; and, the defendants standing upon the same, judgment was entered for the notes sued upon, and the defendants appealed.

John W. Blackwood, for appellants.

1. The cause should have been transferred to equity. 74 Ark. 277; 71 *Id.* 323; 31 *Id.* 345, 352, 355; 49 *Id.* 575-6; 1 Story, Eq. Jur. (13 Ed.) § 450; 48 Ark. 435; Adams, Eq. 431; 1 Story, Eq. § § 441-3, 457.

2. Whenever funds or securities are placed in the hands of a creditor to secure a debt, he is a trustee; and, if such funds, securities, etc., are lost through want of ordinary diligence, the creditor is liable. 50 Ark. 229, 234; 74 *Id.* 241-8; Pingrey on Suretyship & Guaranty, § 128; Stearns on Suretyship, § 29; Jones on Pledges, (2 Ed.) § § 403-417; Colebrooke on Collateral Security, (2 Ed.) § § 88, 90; 1 Brandt on Suretyship & Guaranty, (3 Ed.) § § 498-506.

Ratcliffe, Fletcher & Ratcliffe, for appellee.

1. The motion to transfer to equity was for delay merely. No case of equity jurisdiction was alleged.

2. It was *primarily* the duty of the debtor to have the stock properly transferred. No request was made for the bank to act, and mere passive neglect of the creditor. The debtor must use diligence. 50 Ark. 239. Nor does mere inaction render the creditor liable. 64 Ark. 82; 2 Russ. 381.

HILL, C. J., (after stating the facts). I. The transfer to equity was properly denied. No equitable defense was pleaded in the answer; and, if it be taken that the motion to transfer should be treated as a part of the answer, still the result would be the same, because no equitable defense is therein stated. The execution of the notes is admitted, and it is not averred that the defendants are indebted to the plaintiffs, the amount thereof to be determined by an account to be stated; but it is merely averred that "it is impossible for the defendants to state, owing to the large number of transactions between the parties, the calculations of interest on the various notes, the various offsets and appropriations of collateral to the various notes, just what amount is now due upon the notes sued upon herein."

It is a mere invitation to have an accounting in order to

ascertain whether or not the defendants have a defense. The jurisdiction of equity to state an account in proper actions is well established; but there is nothing set forth, either in the answer or the motion, but what could be ascertained in a court of law without the necessity for an equitable accounting.

II. The demurrer to the substituted answer and counterclaim was properly sustained. The gravamen of the charge constituting the counterclaim is that the bank neglected to have the assignments and transfers of the stock recorded with the county clerk or transferred upon the books of the building association.

Under section 849 of Kirby's Digest, providing for the recording with county clerks of transfers of stock, it has been held that this does not apply to transfers for collateral security, but only applies to actual sales. *Batesville Tel. Co.* v. *Meyer-Schmidt Gro. Co.,* 68 Ark. 115; *Scott* v. *Houpt,* 73 Ark. 78.

Section 853 of Kirby's Digest provides that the stock of every corporation shall be deemed personal property, and be transferred on the books of such corporation in such form as the directors shall prescribe. But where there is a pledge of stock by delivery of the certificates, without notice to the corporation or transfer on its books, the pledge is valid as between the parties. Helliwell on Stocks and Stockholders, § 115. The object of such statutes as these, and by-laws made in conformity to them, is primarily for the benefit of the corporation; and transfers, so far as the corporation is concerned, are not valid without complying with the statute and the by-laws, where there is one; but this does not reach to transfers between parties as collateral security. Helliwell on Stock and Stockholders, § § 116 and 162.

It follows that the assignment of the Wolf shares to Loeb was good as between Wolf and Loeb without recording, either on the books of the company or in the county clerk's office; and likewise that the transfer of the shares from Loeb to the bank was good without recording on the books of the county clerk or the books of the corporation, as these statutes apply to sales and not to transfers of stock as collateral security. If it were necessary to protect either Loeb or the bank by having the assignment recorded, that duty rested primarily upon Loeb,

and he cannot accuse the bank of neglect of duty when he was primarily in default in the performance of this duty, if it is a duty necessary in order to safeguard the collateral.

The only averment in the answer that raises any doubt as to its sufficiency is wherein it is stated that the bank knew that said Helen and Joseph Wolf were insolvent, and allowed and permitted them to sell and dispose of said shares of stock. But, taking this averment in connection with the other allegations in the answer, the court understands it to mean that the bank, by failing to have the assignments and transfers recorded, thereby enabled the said Helen and Joseph Wolf to sell and dispose of said shares, in which event the bank would not be liable to Loeb, for, as stated, that duty rested primarily upon him. If more was intended to be alleged, it is only done in general terms, which do not specifically state facts relied upon, and amount to no defense.

If it was intended by this averment to charge that the bank turned over to the said Helen and Joseph Wolf the collateral, and by such surrender of it to them permitted them to sell it, thereby destroying it as collateral to Loeb, a far different question would be presented. This construction cannot be the correct one, however, for later in the answer the charge against the bank is that, but for the negligence of said plaintiff as herein stated, said shares of stock should have been protected, appropriated and applied to the payment of the notes sued upon; whereas, if the construction above indicated were the true one, there would have been a charge of conversion, instead of one of mere negligence in not having the instruments recorded.

The utmost that can be said of the other charges in the answer is that they charge mere delay in enforcing collections of securities; and it is well settled that this is not sufficient to exonerate a surety. *Grisard* v. *Hinson,* 50 Ark. 229; *Wilkerson* v. *Crescent Ins. Co.,* 64 Ark. 80; *First Nat. Bank* v. *Waddell,* 74 Ark. 241.

Judgment is affirmed.

GRISSOM *v.* STATE.

Opinion delivered November 16, 1908.

1. PERJURY—VARIANCE.—Where an indictment for perjury alleged that defendant falsely testified that he saw one A "set fire to and burn a certain house, the property of one Antnia Grissom," and the proof showed that he falsely swore that he saw A set fire to and burn a certain house on Antnia Grissom's place, the variance was not material, as it could not mislead the defendant or expose him to danger of being put twice in jeopardy for the same offense. (Page 116.)
2. INSTRUCTIONS—REPETITION.—It was not error to refuse to repeat instructions. (Page 117.)
3. PERJURY—WHEN ESTABLISHED.—The falsity of testimony alleged to be perjured is sufficiently established by the testimony of two witnesses and evidence of a contradictory statement of the defendant. (Page 117.)
4. SAME—MATERIALITY OF TESTIMONY FOR COURT.—Where there is no dispute about the facts sworn to, the question whether the testimony on which perjury is assigned is material is a question of law to be decided by the court, and not of fact to be decided by the jury. (Page 117.)

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

McKay & Lile, for appellant.

1. When the indictment contains only one assignment, a failure to prove *all* the statement substantially as assigned is fatal. 48 S. W. 169; 9 Enc. of Ev. 775; 118 Ga. 330; 23 Neb. 436; 90 Mo. 530; 85 Ark. 195; 54 *Id.* 584. The variance was fatal.

2. A conviction for perjury cannot be sustained on the testimony of one witness; there must be corroborating facts and circumstances. 51 Ark. 140; 9 Enc. of Ev. 760; Greenl. on Ev. (15 Ed.) vol. 1, § 257; 90 S. W. 223. There were none.

3. Materiality cannot be presumed; it must be proved. 32 Ark. 192; 64 *Id.* 474.

4. In view of the above authorities the instruction given were erroneous, and those refused or modified should have been given as asked.

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

1. The proof is responsive to the only issue. Substantial proof is sufficient. See cases cited by counsel.

2. A charge of perjury may be sustained by any legal evidence of a nature and sufficient to disprove the truth of the testimony upon which perjury is assigned. 53 Ark. 395. In this case there were two contradictory witnesses, and one who corroborates their statements. This is sufficient.

3. Our statute requires only that the indictment shall set forth the substance of the offense charged.

4. Counsel's citations show no error in the court's charge.

HILL, C. J. Jack Grissom was indicted for the crime of perjury, alleged to have been committed on the trial of Abe Mallory, charged with arson in the Columbia Circuit Court, in that he falsely testified that he saw Abe Mallory "set fire to and burn a certain house, the property of one Antnia Grissom." He was convicted, and has appealed.

I. It is alleged that there is a variance between the indictment and the testimony attributed to the defendant upon which the charge is founded, in that the evidence to sustain the charge does not conform to the charge in the indictment. The evidence was as follows: "Q. Do you remember the time the lodge was burned on Antnia's place? A. Yes, sir; some time in this last gone August. Q. Who burned it? A. Brother Abe Mallory. Q. Did you see him burn it? A. Yes, sir." And, further, it was shown that he described the house or lodge as a box house.

The defendant asked an instruction to the effect that the jury must be satisfied beyond a reasonable doubt that the defendant had sworn falsely that he saw Abe Mallory set fire to and burn a certain house, the property of Antnia Grissom, and the court modified the same by adding thereto, "or a certain house on the place of Antnia Grissom." The question presented is, whether there is a variance between the allegation that he "set fire to and burned a certain house, the property of Antnia Grissom," and the proof that he set fire to and burned a certain house on the place of Antnia Grissom.

The modern rule on the subject is thus stated: "A variance is not now regarded as material unless it is such as might mislead the defense, or might expose the accused to the danger of being put twice in jeopardy for the same offense." 3 Rice on Evidence, § 121.

"In determining whether a variance is material, the ques-

tion to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense? If this be not so, then the variance is material, and, the State having failed to prove the crime in substance as it is alleged, the acquittal of the accused should be directed." Underhill on Criminal Evidence, p. 41.

Applying this common sense rule to the question before the court, it cannot be seen wherein the variance misled the defense or could possibly expose the accused to the danger of being twice put in jeopardy for the same offense.

II. The next assigned error is the failure to give instruction number three as requested. But the substance of this was covered in instructions given.

III. It is insisted that it has always been the rule that a conviction on a charge of perjury cannot be sustained on the testimony of one witness, but there must at least be, in addition to the positive testimony of one witness, facts and circumstances strongly corroborating the testimony of the one witness. The correct rule on this subject is laid down in *Thomas* v. *State,* 51 Ark. 138, and *Marvin* v. *State,* 53 Ark. 395. In this case there was testimony of two witnesses, and evidence of a contradictory statement of the defendant. This evidence more than satisfies the rule announced in the cases above mentioned.

IV. Defendant asked, and the court refused to give, an instruction telling the jury that the State had failed to show that the statement made by the defendant was material, and that they must acquit the defendant. The evidence is undisputed that Mallory was on trial charged with the crime of arson, and the State, to sustain this charge, introduced the defendant, who swore he saw him set fire to and burn the house charged in the indictment at the time and place therein mentioned. There is the testimony of two witnesses, and some circumstances in addition thereto, that this testimony was false. There was no other testimony on the subject.

Chief Justice ENGLISH said: "When there is no dispute about the facts sworn to, the question whether the testimony on

which perjury is assigned is material is a question of law to be decided by the court, and not of fact to be passed on by the jury." *Nelson* v. *State,* 32 Ark. 192. The court left it to the jury to say whether the testimony was material or not; and, in view of the evidence just outlined, there could be no other finding than that it was material; but it would have been within the province of the court to have told the jury that the evidence was material. Certainly, there is no prejudicial error in refusing to direct a verdict because the State did not introduce testimony to prove that alleged perjured testimony was material when it went to the very gist of the case, and was shown by the undisputed evidence in the case.

Finding no error in the case, the judgment is affirmed.

SUMPTER v. BUCHANAN.

Opinion delivered November 16, 1908.

COUNTY—DISALLOWANCE OF CLAIM AGAINST—RIGHT OF COUNTY JUDGE TO APPEAL.—A county judge is not authorized to appeal from a judgment of the circuit court disallowing a claim against the county.

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; appeal dismissed.

STATEMENT BY THE COURT.

The subject-matter of this action is an allowance made by the county court of Garland County to M. J. Murphy for work and materials alleged to have been done and furnished by him for the plumbing and heating of the county jail.

Appellee, as a citizen and taxpayer of Garland County, duly prosecuted an appeal from the order of allowance to the circuit court.

After hearing the evidence, the circuit court rendered the following judgment:

"Now on this day, this cause having heretofore been submitted to the court, and the court, being well and sufficiently advised, finds, as a matter of fact, that the contract, as alleged to have been made by the county court with M. J. Murphy, in

the sum of $2,125 for plumbing and heating the county jail of Garland County, was void for the reason that the same was not made during term of the county court, and for the further reason that the contract was not advertised and publicly let; also because no previous appropriation had been made for making such improvement. In view of the above findings the court does not feel called upon to pass on the reasonableness or unreasonableness of the amount of the allowance, and therefore finds that the judgment of the county court in allowing the claim of M. J. Murphy for $2,125 was without authority of law and therefore void."

O. H. Sumpter, as judge of the county court, filed his motion for a new trial, and, upon the same being overruled, has duly prosecuted an appeal to this court.

Appellee moves to dismiss his appeal.

C. Floyd Huff and *Murphy, Coleman & Lewis,* for appellant.

Wood & Henderson, for appellee.

HART, J. (after stating the facts). Sec. 1493 of Kirby's Digest provides that when appeals are prosecuted in the circuit or Supreme Court, the judge of the county court shall defend the same. This court has held that this includes the right to take an appeal. Ex parte *Morton,* 69 Ark. 48; *Ouachita County* v. *Rolland,* 60 Ark. 516. These were cases where the county judge appealed from an adverse judgment. Here the judgment of the circuit court was in favor of the county, and the question is presented, can the county judge in such case take an appeal?

In discussing the statute above referred to, in the Ouachita County case, the court said: "It is obvious that the authority conferred by them (referring to the words 'shall defend the same') was given for the purpose of protecting the interest of the county, which may be involved. It would be against the liberal policy of the law to so limit it as to deny him the right to take an appeal when the county may be aggrieved by the judgment of a circuit court. As a general rule, all parties aggrieved are allowed to take appeals from all judgments of the circuit and inferior courts. There can be no good reason why counties should be denied the same right, except as to judgments of the county courts." Thus it will be seen that the statute pri-

marily imposes upon the county judge the duty of defending its suits on appeal, and, as an aid to him in the discharge of that duty, he may take an appeal from a judgment of a circuit court when he deems it necessary for the purpose of protecting the interest of the county. But in defending suits in which the county is interested he acts only as agent or representative of the county, and, unless the decision is adverse to the county, there is no occasion for the county judge to prosecute an appeal. His only duty is to make a defense for the county, and if the judgment of the circuit court is in its favor, he has discharged the duty imposed upon him, and his authority to act ceases.

The general rule is that a party who succeeds has no right to an appeal. Elliot on Appellate Procedure, § 147. This rule was applied by this court in the case of *Phillips* v. *Goe,* 85 Ark. 304, where the parties prosecuting the appeal had been granted the relief which they originally asked for.

This opinion is not to be taken as in any manner determining whatever rights, if any, Murphy may have by appeal or otherwise, and merely goes to the right of the county judge to prosecute an appeal from a judgment in favor of the county.

Ordered that the appeal be dismissed.

COMMERCIAL FIRE INSURANCE COMPANY *v.* WALDRON.

Opinion delivered November 16, 1908.

1. INSURANCE—FAILURE TO FURNISH PROOF OF LOSS.—Where a policy of fire insurance provides that the insured, within a certain time after a fire, shall furnish proof of his loss as a condition of recovery, a failure to comply therewith operates as a forfeiture of the policy. (Page 122.)
2. SAME—WAIVER OF FORFEITURE.—A forfeiture of a fire insurance policy for failure of the insured to furnish proofs of loss within the stipulated time was not waived by a declaration by the insurer that the proofs would be useless if such declaration was not made until the time for furnishing such proofs had elapsed. (Page 123.)

Appeal from Lawrence Circuit Court; *Frederick D. Fulkerson,* Judge; reversed and dismissed.

STATEMENT BY THE COURT.

On the 12th day of September, 1906, a policy of fire insurance was issued by the Commercial Fire Insurance Company in favor of J. D. Waldron. The property insured was a one-story frame house in the town of Portia, in Lawrence County, Arkansas; it was destroyed by fire on the 28th day of October, 1906, during the life of the policy.

On November 6, 1906, Waldron assigned his policy to C. W. Carter. On the 27th day of February, 1907, this suit was commenced by Waldron and Carter against the said insurance company to recover the amount of loss under said policy. The policy was made an exhibit to the complaint. The defendant answered and admitted the issuance of the policy sued on, but denied liability, averring among other things that by the terms of the policy itself there was a condition that a proof of loss should be filed with the company on or before thirty days after the fire occurred, and a failure on the part of the insured to comply with the condition.

There was a jury trial and a verdict for appellee. The insurance company has duly prosecuted an appeal to this court.

C. P. Harnwell, for appellant.

Under the terms of the policy it was necessary to furnish proof of loss within thirty days after the fire unless such time should be in writing extended by the company. This was not done, but on the contrary it appears in evidence that no proof of loss was given until December 14—more than forty-five days after the fire occurred. Such failure defeats recovery. 77 Ark. 84; 84 Ark. 224; 85 Ark. 337.

W. A. Cunningham and *W. P. Smith,* for appellees.

1. Rule IX of this court requires that the appellant's abstract shall set forth material parts of the pleadings, proceedings, facts and documents upon which he relies for a reversal. The judgment here should be affirmed for failure to comply with this rule, because appellant has not abstracted the complaint so as to give a clear understanding of the issues presented, nor does it sufficiently abstract the evidence, especially the testimony of witness Waldron, but purports to set out, not the substance of his testimony, but only *what appellant's attorney says it shows.*

No mention is made of his testimony in rebuttal. 80 Ark. 571; 75 Ark. 571; 73 Ark. 49; 76 Ark. 139; *id.* 217. Proof of loss was introduced in evidence, but there was no showing when it was made out, nor when received by the company, neither is it copied nor referred to in the bill of exceptions so as to identify it. The paper copied into the transcript, not being in any way identified, is not a part of the record, and cannot be considered here. 74 Ark. 90.

2. The company waived proof of loss by sending its adjuster to see appellee about the loss, after the fire, who made no objection as to proof of loss, and stated that the company would send another adjuster; and also by the letter of C. P. Harnwell denying any liability. 82 Ark. 235; 53 Ark. 494.

HART, J., (after stating the facts). The court gave a peremptory instruction in favor of appellees, to which the appellant duly excepted. Counsel for appellant urge that the judgment be reversed because the court did not direct a verdict for it, basing their contention on the fact that the condition of the policy in regard to furnishing proof of loss was not complied with by the appellees.

The condition in the policy in regard to making proof of loss is exactly the same as the one set out in the case of *Teutonia Insurance Company* v. *Johnson,* 72 Ark. 484, except that in the present case the policy required the proof of loss to be filed within thirty days. In that case the failure on the part of the insured to comply with these requirements was held to be a breach of the condition of the policy and to constitute a bar to his action. This has become the settled rule in this State, and has since been applied in the following cases: *Arkansas Mutual Fire Insurance Co.* v. *Clark,* 84 Ark. 224; *Home Insurance Co.* v. *Driver,* 87 Ark. 171. Was the proof of loss furnished in time?

J. D. Waldron testified that a proof of loss was made out for him by T. J. Scott, but does not state the date of it. Scott testified that he made out a proof of loss for Waldron, but did not remember the date of it. We quote from his testimony as follows:

"Q. Just examine that and see if you made that out?" (Here attorney presents a paper to witness purporting to be the proof of loss.) (Witness examines it.) "Yes, I made that

out." "Did you send it to the company?" "I don't remember, sir, whether I did or gave it back to Mr. Waldron." "Well, look at that letter attached to it and see about it, that letter on the blue paper." (Witness does so.) "Well, I presume that I gave it back to Mr. Waldron. I did the writing for them, I know." "This was made out on December the 14th?" "Yes, sir."

We have copied this excerpt from Scott's testimony because the attorneys for appellees contend that the witness, when he said "it was made out December the 14th," was referring to a date on the blue paper, and not to the date of the proof of loss. He was a witness for the appellee, and was being examined by his attorneys. We think his response to the question asked shows that he referred to the date on which he prepared the proof of loss; and, the above being all the testimony on that question, we are of the opinion that there is no evidence that any proof of loss was furnished within the time required by the terms of the policy.

Counsel for appellee also contend that the insurance company waived the condition as to proof of loss because Mr. Harnwell, the attorney for the insurance company, returned the proof of loss, accompanying it with a letter denying liability. In support of their contention, they cite the cases of *Arkansas Mut. Fire Ins. Co.* v. *Witham,* 82 Ark. 235, and *German Insurance Co.* v. *Gibson,* 53 Ark. 494. The rule announced in the latter cases is well established, and the reason for it is that the insurance company is estopped by its conduct from setting up the forfeiture as a defense. If, during the time within which the insured may furnish the proof of loss under the terms of the policy, the company denied liability, the presentation of the proof of loss can serve no useful purpose. The rule does not apply to the facts in the present case. The letter in question was written by Mr. Harnwell on the 2d day of February, 1907, after the stipulated time for furnishing the proof of loss as provided by the policy.

After the time fixed by the policy for furnishing the proof of loss has expired and the forfeiture has occurred, the action of the insurer in denying liability works no prejudice on the insured. He is not misled, and his failure to present his proof of loss has not been occasioned thereby. This is in harmony with the reasoning of the court in the case of *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475.

Mr. Cooley says: "It is evident that under the principle that an implied waiver of notice or proofs must be based on estoppel, the denial must take place while it is yet possible for the insured to fulfill the conditions of the policy. When the denial of liability relied on as a declaration that the proofs would be useless, or that any defect therein would not be noted, occurred after the time for furnishing proofs had elapsed, it can not be maintained that the proofs would have been furnished or corrected had not such declarations been made. Cooley's Briefs on Insurance, vol. 4, p. 3537, and cases cited.

Counsel for appellees insist that counsel for appellant has not complied with rule 9 of this court in making his abstract. While the abstract does not set out the matters required by the rule in orderly sequence so as to be of the greatest assistance to the court as was contemplated by the rule, still it has sufficiently complied with it to give the court a full understanding of the question upon which this decision is based.

The judgment is therefore reversed, and the cause is dismissed.

ASHFORD v. RICHARDSON.

Opinion delivered November 16, 1908.

ACTIONS—MISJOINDER.—It was not prejudicial error to permit an action for slander and one for malicious prosecution between the same parties to be joined, where they arose out of the same transaction; it being provided by Acts of 1905, p. 798, that when causes of action of a like nature or relative to the same question are pending before any of the circuit or chancery courts, the court "may consolidate said causes when it appears reasonable to do so."

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

STATEMENT BY THE COURT.

Carter Richardson brought this suit in the Garland Circuit Court against Fred C. Ashford, and united in the same

complaint an alleged cause of action for slander with one for malicious prosecution.

The complaint alleges: "That on the 10th day of May, 1906, the defendant in a certain discourse which he then and there had with the plaintiff in the presence and hearing of Walter Flowers, Arthur Owens, Bob Jones and divers other good and worthy persons, falsely, slanderously and maliciously spoke of and concerning the plaintiff the false, slanderous, defamatory and malicious words following, to-wit: 'You God damned son of a bitch, you went and raped a woman, and I am going to have you sent to the penitentiary for it.'" That subsequently on the same day, but on a different occasion, in the presence of the said Bob Jones and of divers other worthy persons, the said defendant in a certain discourse then and there had with the said Bob Jones and divers other persons, then and there being, falsely, maliciously and slanderously spoke of and concerning the plaintiff the following false, slanderous, defamatory and malicious words, to-wit: 'I've got the two sons of bitches in jail now (meaning the said plaintiff and Arthur Owens), and I'm out, so you see what my money will do. I am going to have both of them (meaning thereby the said plaintiff and Arthur Owens) sent to the pen for raping that woman. Carter Richardson did rape her, and Arthur held the other woman while he did it.' That said language in its common acceptation then and there amounted to charging this plaintiff with having committed a felony, and to bring into disrepute the good name and character of plaintiff, and was then and there knowingly and maliciously false and slanderous. That by reason of the speaking, publishing and uttering of said false, slanderous and malicious words the plaintiff has been damaged in his reputation in the sum of five thousand dollars.

"That said plaintiff, for a further cause of action against said defendant, alleges: That the said defendant on the 10th day of May, 1906, in the city of Hot Springs, Garland County, State of Arkansas, falsely and maliciously and without reasonable or probable cause procured one Emma Henderson to charge the plaintiff before one J. W. Alford, a justice of the peace within and for Hot Springs Township in said county of Garland, State of Arkansas, with the crime of assault with intent

to commit rape, and procured the said justice to issue a warrant for the arrest of the said plaintiff on said charge, and thereupon the said plaintiff was arrested under said warrant and imprisoned for —— hours, and compelled to give bond in the sum of five hundred dollars to obtain his release. That on the —— day of May, 1906, at the trial of said cause the plaintiff was acquitted of said crime and discharged, and the said prosecution is wholly ended and determined. That said charge and arrest was published in several newspapers by the procurement of the defendant, and the plaintiff was grievously injured in his credit and reputation, and incurred an expense of $..... dollars in costs and counsel fee in defending himself. That by reason of said matters the plaintiff has been injured and damaged in the sum of five thousand dollars.

"Wherefore plaintiff prays judgment against said defendant in the sum of ten thousand dollars and other relief."

The defendant demurred to the complaint, and moved to require plaintiff to elect on which count he would proceed.

The court overruled his demurrer and motion, and he duly excepted. Defendant then, without waiving his demurrer, filed his answer, which was a denial of all the material allegations of the complaint. There was evidence adduced at the trial tending to establish both slander and malicious prosecution.

The jury returned the following verdict: "We, the jury, find for the plaintiff, Carter Richardson, on the first count, 'charge of slander,' and assess his damages on said count at $1," "and also we find for the plaintiff on the second count 'charge of malicious prosecution,' and assess his damages on said count at $200."

The court rendered judgment accordingly, and the defendant has duly prosecuted his appeal to this court.

C. Floyd Huff and *C. V. Teague*, for appellant.

The two causes of action can not be joined in the same complaint. An action for slander comes under the fifth class, and for malicious prosecution under the sixth class, enumerated in § 6079, Kirby's Digest. This is essentially an action for injury to person and property. Had it not been for the arrest of appellee and the injury to his person, no suit could have been maintained under the second count of the complaint. 8 L. R.

A. 47. That it is an action for injury to the person is shown by the elements of damages which go to make up the case. 1 Joyce on Dam. § 438; 2 Sedgewick on Dam. § 457; 32 Ark. 457; 73 Ark. 437; 95 Ind. 349, 358; 40 Wis. 107, 113; 81 Pa. 232; 4 Sutherland, Dam. § § 1237-1238; 12 Mod. Rep. 208; Gilbert's Case Law and Eq., 201; 80 S. W. 776. Malicious arrest and false imprisonment is an injury to the person, and can not be joined to an action for slander, which is an injury to character. 2 Duvall (K. Y.) 520; 151 N. Y. 186; 45 N. E. 455; 75 N. E. 535; 39 Pac. 56.

Greaves & Martin, for appellee.

The sole issue raised is whether or not an action for slander and for malicious prosecution may be joined. That they may properly be joined is supported by authorities to the effect that actions arising from injuries to character are usually brought for libel or slander; yet malicious prosecutions, while they affect property in the expense they cause, are chiefly injurious to the character of those who thereby suffer. 73 Ark. 437; 8 Abb. Prac. 3; 42 Barb. 543; 15 Ohio St. 173; 32 Wis. 106; 36 Mo. 202; 1 Enc. Pl. & Pr. 193; 1 Estee's Pleading, § § 1671, 1795. See also 3 Hun, (N. Y.) 606; 4 Yeates (Pa.) 427; 95 Tenn. 293; 92 Mich. 498.

HART, J., (after stating the facts). The sole issue raised by the appeal in this case is whether the actions for slander and for malicious prosecution may be joined in the same complaint.

Section 6079 of Kirby's Digest is as follows:

"Several causes of action may be united in the same complaint where each affects all of the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes:

"Fifth. Claims arising from injuries to character."

"Sixth. Claims arising from injuries to persons or property."

Counsel for appellant contend that the action for slander is included in the fifth class, and that the action for malicious prosecution belongs to the sixth class; and, hence under the section above quoted that the two actions can not be joined in the same complaint.

We do not deem it necessary to decide this question.

The act of May 11, 1905, provides "that 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 1905, p. 798.

"The wrong of a malicious prosecution is akin to the wrongs known under the designation of slander and libel. Though it is injurious in that it is likely to subject the party to expense and trouble to make good his defense, it is also a most effective species of defamation, the defamatory matter being not only published, but made more formal, and apparently authoritative, by the machinery of the law being made use of for the purpose." Cooley on Torts, p. 225.

The court had jurisdiction of both causes of action, and, if no objection had been made, they could have proceeded to judgment in the same time. The causes of action were of a like nature. They arose out of the same transaction, and, if separate suits had been brought, the court could have consolidated the two actions. No exceptions were saved either to the introduction of testimony, or to the instructions of the court, nor is it claimed that the verdict is not sustained by the evidence. The verdict of the jury on the declaration for slander was only one dollar. Hence it is manifest that the action of the court in permitting the two causes of action to be united in the same complaint and to be tried together did not result in prejudice to appellant.

Section 6148, Kirby's Digest, provides that no judgment shall be reversed by reason of any error or defect which does not affect the substantial rights of the adverse party. This rule was applied in the case of *Mahoney* v. *Roberts,* 86 Ark. 130. The court said: "It was not a prejudicial error to join a cause of action for breach of 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 the act of May 11th, 1905."

Finding no error in the record, the judgment is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* ANDERSON.

Opinion delivered November 23, 1908.

1. TRIAL—OPENING STATEMENT—SUFFICIENCY OF GENERAL OBJECTION.—A general objection to the opening statement of plaintiff's counsel in reading from a paper showing what he intended to prove was properly overruled if some of the matters set up therein were competent to be proved, though others were incompetent. (Page 131.)
2. EMINENT DOMAIN—VALUE OF FIXTURES.—Where a building was erected for the purpose of installing certain machinery for a planing mill, and the machinery was securely fastened to the buildings, and a basement constructed for the purpose of attaching it permanently to the soil, the machinery became a part of the realty, and its value should be considered in a suit to condemn the land for a right of way. (Page 131.)
3. SAME—MEASURE OF VALUE OF LAND.—In determining the value of land being condemned for railroad purposes, the rule is to award the highest price which it would bring after reasonable and ample time has been taken to effect a sale. (Page 132.)
4. INSTRUCTIONS—ABSTRACT PROPOSITIONS.—It was not prejudicial to instruct the jury that "to sell real estate at its market value sometimes requires offer and negotiation for some weeks, and even for some months." (Page 133.)
5. EMINENT DOMAIN—INJURY TO PERSONAL PROPERTY.—In a suit by a railroad company to condemn for a right of way land which was being used in the manufacture of lumber, it was not error to exclude testimony as to the value of lumber and other personal property thereon, and to its depreciation in value and the cost of removing the same. (Page 133.)

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

S. W. Moore and *Read & McDonough,* for appellant.

1. The matters set up in the first paragraph of the answer were wholly inadmissible and harmful. 80 Ark. 158; 74 *Id.* 256.

2. A person who *knows* the market value may state it, but it is incompetent to bolster a witness by his own side by asking him to give the reasons upon which he bases his *opinion.* The reasons may be asked on cross-examination by *opposite side.* 49 Ark. 381.

3. It was inadmissible to permit plaintiff to state what his secret intention was when he attached the machinery to the building. 13 A. & E. Enc. Law, pp. 597, 599; 56 Ark. 55.

4. The value of the machinery was immaterial; it was personal property. 56 Ark. 58; 73 *id.* 227; 13 Am. & Eng. Enc. Law, p. 608; 9 Cal. 119; 46 Mich. 581; 5 Cow. 323; 24 Ill. 512; 63 Ark. 625.

Ira D. Oglesby, for appellee.

1. This court will not explore the record to pass upon objections. 132 Fed. 321.

2. The record does not sustain the objection as to the first paragraph of answer. But the ruling was in plaintiff's favor, and he could not be prejudiced.

3. The machinery was a fixture. The rule between vendor and vendee should be applied to determine fixtures. 73 Ark. 237; 39 App. Div. (N. Y.) 589; Lewis, Em. Domain, 448.

4. The instructions assailed are in accord with the decisions of the court. 49 Ark. 381.

5. Defendant was entitled to recover the special damages set up in his answer on his cross-appeal. 91 Mich. 149; 61 S. W. 303.

HILL, C. J. The railway company filed suit for the condemnation of the lots in the city of Fort Smith belonging to D. A. Anderson. The defendant answered in several paragraphs. Only parts of it are material on this appeal. He alleged that the property was occupied and used by him as a manufacturing plant, for the manufacture of finished lumber and mill products, and as a planing mill and lumber yard, upon which was located and used in said business valuable machinery; that the property had a peculiar value as a site for such business. He alleged that the total value of his property sought to be taken was $18,000, and that, after purchasing said land for a manufacturing site, it was essential, in order to use the same to better advantage, that he should erect necessary and suitable buildings and place therein necessary machinery, all of which was done; that the buildings were erected and machinery placed therein and attached thereto, not to be removed therefrom but as a permanent plant, and with the intent and purpose that same should remain and become a permanent accession to the freehold. He also alleged that at the time the petition was filed he had a large stock of lumber to be manufactured into dressed and finished

lumber, and that said stock could not be used or sold in its present condition without great damage and loss; and that to remove it to a new location would cost him $800, and without being manufactured he would suffer great loss upon it. He prayed for special damages in the sum of $800 as a fair and reasonable cost and expenses of moving the same.

The issues went to a jury, and, under the directions of the court to make special findings, they returned a verdict for $12,000, dividing it as follows: $6,000 for the lots, $2,800 for the machinery and $3,200 for the buildings on the lots; upon which verdict the court rendered judgment for $12,000, and the railroad company has appealed.

I. The first error assigned is in defendant's counsel reading to the jury from the first paragraph of the answer. This paragraph had been stricken out by the court prior to the trial. It contained many matters irrelevant to the issues, but contained allegations of other matters which might have been competent testimony. The record merely shows this: "Counsel for the plaintiff objected to counsel for the defendant reading from the first paragraph of the answer in this case and making a statement of the proof purposed to be introduced upon that point; objection overruled by the court, and plaintiff excepted." If any part of the paragraph stricken out contained any matter which would be proper to prove, then this record shows no error, because it does not show what part he read from or made a statement of the proof purposed to be introduced under it. There are allegations in it which might not have been improper to have mentioned in an opening statement, one of which was referred to by appellee's counsel at the bar, and there may be others not prejudicial. If it had been certain other irrelevant matters in the stricken out paragraph, certainly it would have been improper for counsel to have read them or offered to have proved them. This exception fails to lay its finger on the error.

II. The defendant offered evidence as to the character of the machinery and improvements on the property, tending to show that the same were intended to be permanent. This was objected to by the plaintiff, and the court said: "You are seeking to condemn these two lots, and not the improvements; if the improvements are a part of the realty, you condemn them; and

if they are not a part of the realty, you do not condemn them, and they may be moved off." This was a correct statement of the case, and the court then properly permitted evidence to develop whether the machinery was an irremovable fixture or personalty.

It was shown that the building was built for the purpose of installing this machinery for a planing mill, and for this purpose exclusively; that good machinery was put in and securely fastened to the buildings, and a basement was constructed in which it rested; that it was built in this manner for the purpose of attaching it permanently to the soil, and that Anderson intended to continue in this business at this place as long as he lived, and afterwards to turn it over to his boys if they wanted it. There was testimony from him and his son as to the manner of construction, all tending to show that it was intended from its nature and character to be a permanent accession to the freehold. This was all the testimony upon the point, and the court gave this instruction: "If the jury find that the buildings on the land constitute a manufacturing plant with such machinery therein as is necessary to carry on the business of the plant, you will find for defendant the value of the land, buildings and machinery."

This cannot be commended as an accurate statement of the proposition, but in view of the undisputed evidence it cannot have been prejudicial to the appellant. Under the undisputed testimony, the machinery became a part of the realty, under the tests applied in *Choate* v. *Kimball,* 56 Ark. 55, and in *Ozark* v. *Adams,* 73 Ark. 227. As said in those cases, "the intention of the permanency in the installation of the machinery is what fixes its character as an irremovable fixture;" and this intention is "inferred from the nature of the article affixed, the relation and situation of the party making the annexation, . . . the structure and mode of annexation and the purpose or use for which the annexation has been made."

III. The court gave this instruction: "The rule by which you are to be governed in determining the value of the property taken is the highest price which it would bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. This does

not mean the price that could be realized at forced sale upon short notice, but the price that could be obtained after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property. To sell real estate at its market value sometimes requires effort and negotiation for some weeks and even for some months." This is almost literally the words used by the court in *Little Rock Junction Ry. Co.* v. *Woodruff,* 49 Ark. 381.

Objection is made to the last paragraph, wherein the court stated that "to sell real estate at its market value sometimes requires offer and negotiation for some weeks, and even for some months." This was but stating a well-known fact of which the courts have long taken cognizance because it is common knowledge. It would be better not to have these abstract statements in instructions; but the court fails to see where any prejudice could have resulted from it.

IV. Other questions are presented, which largely go to the admission of testimony. Some of these are not properly abstracted, so that they are brought for review, and others become immaterial in view of the undisputed facts as to the machinery being realty, and others unimportant owing to the subsequent exclusion of some of the claims of the defendant. All the appellant's exceptions have been considered, but none of the others are found of sufficient moment to require discussion.

V. Defendant introduced testimony as to the value of the stock of lumber and other personal property sought to be condemned, and as to its depreciation in value and the cost of removing the same, over the objection of the plaintiff. At the conclusion of the testimony, the court decided to exclude all of this testimony, and did so, and told the jury that the sole question for their consideration was the value of the property sought to be condemned. The defendant excepted to this, and has cross-appealed upon this issue.

There are some cases which sustain the appellee's positon, and they may be found reviewed in *Blincoe* v. *Choctaw, etc., Rd. Co.,* by the Oklahoma Territorial Supreme Court, 16 Okla. 286, s. c. 8 A. & E. Ann. Cases, 689; but it will be seen by reference to the editor's notes in the latter report that the majority of the courts hold that compensation cannot be recovered in such cases,

either for damages resulting to personal property or for the cost of removing it from the premises. The controlling principle is thus stated by the New Hampshire court: "As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the surrender of the possession are not elements to be considered in determining the damages to which the owner is entitled." *Ranlet* v. *Concord R. Corp.*, 62 N. H. 561.

Mr. Lewis thus states the law upon this subject: "Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself. . . . But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid." 2 Lewis on Eminent Domain, (2 Ed.) § 488.

Many consequential losses to the land owner, such as injury to business, inconvenience, expense and losses from interruption of business, are not recoverable as damages in condemnation suits. These may be found discussed in 15 Cyc. 733 *et seq.*

In *Hot Springs Rd. Co.* v. *Williamson,* 45 Ark. 429, the court pointed out the difference between the Constitution of this State and some others. The Constitution of this State has broadened the right of the property owner to compensation, and included damage as well as taking and appropriating; and it is not necessary under it that there should be a physical invasion or spoliation of one's land in order to give a right of recovery. But this does not reach to damages to the business of the land owner which are incident to the enforced purchase of his property. These are not subjects for assessment in condemnation proceedings, under the weight of authority and the sounder reasoning on the subject. The court was right in excluding this evidence and confining the issues to the damages for the land taken; and this included the machinery which had become irremovably fixed to the freehold.

The judgment is in all things affirmed.

LEGRAND v. STATE.

Opinion delivered November 23, 1908.

1. CONTINUANCES—WHEN PROPERLY REFUSED.—After two continuances have been granted in a felony case for absent witnesses, a third continuance was properly refused where the applicant failed to show that he could not prove by any other witness the facts sought to be proved by the absent witnesses, and to show any reason for expecting to obtain said witnesses at any future date. (Page 136.)
2. MARRIAGE—HOW PROVED.—Proof that defendant told witness that he had married a certain woman, and that they lived together as husband and wife, and had a child born, is sufficient to establish their marriage. (Page 137.)
3. APPEAL AND ERROR—HARMLESS ERROR.—If a wife be incompetent to testify as to the fact of their marriage in a prosecution against the husband for bigamy, the error of admitting her testimony was not prejudicial if the marriage was proved by competent and undisputed testimony. (Page 137.)

Appeal from Sharp Circuit Court, Southern District; *John W. Meeks,* Judge; affirmed.

McCaleb & Reeder, for appellant.

1. It was a manifest abuse of the discretion of the court to refuse a continuance. The evidence needed was a complete defense, and the only evidence obtainable to prove the facts relied on. 24 Ark. 402; 30 *Id.* 72; 49 *Id.* 449; 50 *Id.* 276; 71 *Id.* 180; Kirby's Dig. § 3505; 50 Ark. 161.

2. The wife is incompetent to testify against the husband. 71 Ark. 192; 77 *Id.* 431; 17 L. R. A. 728. Bigamy is not such an offense as will permit the spouse to testify. Kirby's Dig. § § 3092-3; 44 Ala. 24; 67 Ga. 260; 172 Ill. 466; 110 Mo. 350; 58 Ia. 165; 33 Tex. Cr. 470; 15 La. An. 403; 137 U. S. 496; 62 L. R. A. 172; 34 Tex. Cr. App. 516.

3. The marriage license and certificate were not properly authenticated under the act of Congress (see Kirby's Dig. pp. 181-2) which applies to marriage certificates and records. 72 Mich. 184; 1 Cush. 391; 43 Vt. 20.

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

1. After one continuance the court can properly exercise its discretion more rigidly than upon a first application. 52 Ark. 165; 82 *Id.* 283.

2. In any criminal prosecution a husband and wife may testify against each other in all cases where an injury has been done against the person or property of either. Kirby's Digest, § 3092. This is sufficiently broad to cover a case of bigamy. 58 Iowa, 165; 55 *Id.* 217; 31 *Id.* 24; 107 N. C. 885; 61 Neb. 589.

HILL, C. J. Jack Le Grand was indicted by the grand jury of Sharp County for the crime of bigamy at the August, 1907, term. He was tried in August, 1908, and convicted, and has appealed, and assigns three alleged errors as ground for reversal, which will be discussed in their order.

I. The court overruled a motion for continuance, and it is said that this was an abuse of discretion which calls for a reversal. At the August, 1907, term, LeGrand made application to the court for an order permitting him to take the depositions of non-resident witnesses, and the order was made, providing that the depositions could be taken in pursuance of sections 2268 and 2270, upon notice to the prosecuting attorney, and the case was continued by consent. At the February, 1908, term, he moved the court for a continuance, and it was granted, and the case was set for the third day of the August, 1908, term. In January, 1908, he had a subpoena issued to Benton County for one witness, and to Lawrence County for two witnesses. These subpoenas were mailed to the sheriffs of said counties, and no returns were made of them. On the second day of the August, 1908, term he asked for a rule against the sheriff of Lawrence County for a return of the subpoena sent him, and on the third day of the term, the day on which the cause had been set for trial, he filed the motion for continuance referred to. He failed to show that he could not prove by any other witness the facts therein set forth; failed to show why he had not secured the attendance of the witnesses, other than that the subpoenas issued the preceding January had not been returned; and failed to show any reason for expecting to obtain said witnesses at any future date. In *Price* v. *State,* 57 Ark. 165, the court said: "After long delay, or several continuances have been granted, the discretion of the court in granting or refusing a continuance might well be exercised more rigidly than upon the first application." The same principle was applied in *Vanata* v. *State,* 82 Ark. 203. No abuse of discretion is shown in this matter.

II. Stella LeGrand, who claims to be the legal wife of the defendant, was placed upon the stand by the State, and testified to having married him November 3, 1903, at Independence, Kansas, and lived with him for two years as his wife. It was admitted in open court that he was married to Imo Woodliff on the 24th of June, 1907. Cases are cited by the appellant to sustain the position that, under statutes similar to sec. 3092 of Kirby's Digest, a husband or wife is not competent to testify against the other in a prosecution for bigamy. On the other hand, the Attorney General cites cases to the contrary. It is immaterial in this case to determine this question. Mrs. Maud Lamb testified that she is the sister of Stella LeGrand, and that, while her sister was on a visit to her, the defendant, LeGrand, and her sister Stella were married, and that they told her of it about an hour afterwards. That LeGrand said that they were married at the court house by Judge Sole, and that her sister also told her in LeGrand's presence that they were married. Mrs. Lamb said they lived together in Independence for about three weeks, and in the country near there about a month, and then they moved to a small town near by; then they went to Oklahoma, and later lived at Joplin. A child was born to them. This was competent evidence to prove a marriage. *Halbrook* v. *State,* 34 Ark. 511; 5 Cyc. 700; 4 Am. & Eng. Enc. 42. This testimony was uncontradicted, and the witness unimpeached, and her testimony in no wise weakened by cross examination. It must be taken, therefore, that the mariage was an established fact; and, being established, it is not prejudicial error if incompetent testimony was also adduced tending to prove the same fact already established by competent evidence. *Williams* v. *State,* 66 Ark. 264; *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588; *Meisenheimer* v. *State,* 73 Ark. 407; *St. Louis, I. M. & S. Ry. Co.* v. *Stewart,* 68 Ark. 606; *Henry* v. *State,* 77 Ark. 453; *Maxey* v. *State,* 76 Ark. 276.

III. An attack is made upon the admissibility of a certified copy of a marriage license and its return. If it be admitted that it was not properly certified, no prejudice results, for it would be merely incompetent evidence of a fact already established.

Judgment affirmed.

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

Opinion delivered November 16, 1908.

1. CARRIERS—LIVE STOCK SHIPMENT—EFFECT OF MISLEADING INFORMATION.—Evidence that a railroad station agent informed a shipper of livestock that he could get his cattle moved right away, upon which he relied and left his cattle loaded in the cars for over ten hours on a cold and rainy night in midwinter, before they were moved, instead of taking them out and caring for them during the delay, as he would otherwise have done, and that the cattle were materially injured by the delay, was sufficient to sustain a finding that the railroad company was negligent. (Page 145.)
2. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot complain that an instruction given by the court at the instance of the appellee assumed certain facts to amount to negligence if an instruction given at appellant's request submitted the same facts as constituting negligence. (Page 146.)
3. CARRIERS—NOTICE OF INJURIES—WAIVER.—A provision in a bill of lading of livestock to the effect that notice in writing shall be given of any damages claimed may be waived by the carrier. (Page 146.)

Appeal from Little River Circuit Court; *John W. Head*, Special Judge; affirmed.

STATEMENT BY THE COURT.

Vaughan brought suit against the St. Louis & San Francisco Railroad Company, alleging that he had six cars of cattle which were delivered to it in good order for shipment on January 6, 1906, and that the company carelessly and negligently allowed the cattle to remain in the cars on the side track at Ashdown for an unreasonable length of time, without food and water, and without being removed from the cars for exercise and rest, by reason of which twenty of the cattle died and 276 were reduced in weight, making a total damage in the sum of $872. The railroad company answered, denying all the allegations relating to its negligence, and setting forth a written contract for the transportation of the cattle, executed by the plaintiff in consideration of a reduced freight rate, limiting the liability of the company. The trial resulted in a verdict for plaintiff for $432, and the defendant company appealed, and the judgment was reversed by this court. *St. Louis & San Francisco Railroad Company* v. *Vaughan*, 84 Ark. 311.

The court said: "The complaint contained no allegations

of negligence on the part of appellant's servants in inducing the plaintiff to load his cattle in expectation of a train at an early hour to take them away, or at any particular time. No such issue was brought into the case by the pleadings, and it was error to permit proof to be introduced upon it, over the objection of defendant, or to submit it to the jury."

On the remand of the case, the plaintiff filed an amendment to the complaint, alleging that the defendant was negligent in that its station agent induced the plaintiff to deliver his cattle to the defendant in expectation of a train at an early hour and within a short time to take away and transport said cattle, and by reason of said negligent act the plaintiff delivered his cattle to the defendant to be transported, and the cattle were negligently delayed at Ashdown for a period of twelve hours. The case was tried upon this issue, and resulted in a verdict in favor of the plaintiff for $734. The defendant company filed a motion for a new trial, which was overruled by the circuit court on condition that the plaintiff enter a remittitur of $134, which was done, and judgment was rendered for $600 for the plaintiff; from which the railroad company has appealed.

Parts of the contract of shipment, the testimony of the train dispatcher and some other facts pertinent to these issues may be found in the opinion of the court in 84 Ark. pages 312 and 314. The substance of Vaughan's testimony was as follows: His cattle had been loaded at Locksburg, and were shipped to DeQueen, reaching there about one or two o'clock; they were then taken over the Kansas City Southern Railroad to Ashdown, the point of intersection of the Kansas City Southern with the Frisco Railroad, which place they reached between six and seven o'clock that evening. Immediately upon reaching the Frisco crossing at Ashdown, Vaughan left the train, and went to the Frisco depot, and asked the agent when he could get his cattle shipped to Boswell, I. T., and the agent told him right away, saying that there would be a train right away, and asked him for his way-bills. When told that he did not have them, he told Vaughan to hurry over to the Kansas City Southern train and get them, so that he could get out right away. He went back and got the way-bills and took them to the agent of the Frisco and filled out the contract of shipment to Boswell. He

wanted to ascertain if he could get out immediately, in order that, if he could not do so, he could unload the cattle in the Kansas City Southern stockyards, and keep them there, or herd them till ready for shipment over the Frisco. His reason for this was that cattle will stand with their heads up and not try to fight or hook one another as long as the cars are running; but when the cars are still they fight and hook each other all the time; and they are also more likely to get down when the cars are standing still than when they are running; that he is an experienced cattle man, and knows that the cattle will suffer more in one hour when standing than in five hours running. When the agent of the Frisco told him he could get them out right away, he had executed the contract of shipment, and had the cattle transferred from the Kansas City Southern Railroad to the Frisco railroad. This was about 7:00 o'clock P. M., and they were left in the cars until 5:30 the next morning, when they were taken up by a special engine sent from Hugo, and taken to Boswell, reaching there about one o'clock in the afternoon, making a good trip from Ashdown to Boswell. He says the cattle were in good condition when delivered to the Frisco, but that the next morning twenty of them were dead or in a dying condition, and, owing to their standing in the cars all night, the balance were terribly jaded, skinned and crippled. He says that he was familiar with the market at Boswell, and they would have been worth on the market there $2,941, had they been properly cared for; but that they were worth only $2,069 in the condition in which they arrived. He also tells of the notification to the agent at Boswell of their condition and of his claim, and that the agent made a detailed examination of them, pursuant to his notice of claim for damages.

The testimony of the station agent and the chief dispatcher shows that the next train due to leave Ashdown for Boswell was 9:30 the next morning; that the cattle could not be carried to Boswell earlier than that except by special train, and that could be procured only at Hugo, 88 miles distant; that the agent notified the train dispatcher at Hugo of the load of cattle awaiting shipment for Boswell, and that a special train was sent from Hugo to Ashdown, which took the cattle away at 5:30 next morning. Hugo is 88 miles from Ashdown, and the ordinary

time to make the run takes six or seven hours; and it would require about two hours to get the train crew ready to leave Hugo.

The first instruction was a statement that all the allegations of negligence contained in the complaint were withdrawn from the consideration of the jury, save and except that allegation pertaining to the negligent inducement by the agent of the defendant by the promise of an early train to take out his stock.

The second instruction was upon the question of waiving the provision of the contract about a written notice of any claim for damages. It is admitted to be abstractly correct.

The third instruction is as follows: "The court instructs the jury that a common carrier can not contract against its own negligence; and if you believe from a preponderance of the evidence that the defendant's station agent, prior to the time plaintiff received his cattle from the Kansas City Southern Railway Company, induced the plaintiff to deliver his cattle to it at Ashdown in the expectation that said cattle would be taken out by one of its trains at an early hour, when said agent in fact did not know when he could get a train to move such cattle, and that plaintiff relied upon such representations, and would not have delivered his cattle to defendant but for such representation, and that thereafter no train came to take such cattle until 5 A. M. the next morning, and by reason of such delay at Ashdown plaintiff's cattle or any of them were injured as a proximate result of such delay, then you are instructed that defendant was guilty of negligence for which it would be liable to plaintiff."

The fourth instruction limited the recovery to $16 per head or a proportional part thereof for any injury to the cattle, on account of the clause in the contract of shipment to that effect.

The fifth instruction told the jury that in no event could the plaintiff recover for any injuries that may have been done to the cattle by reason of their inherent weakness, viciousness or natural propensities.

The sixth instruction was upon the measure of damages.

At the instance of the railroad company the court gave ten instructions. The second, third and fourth are as follows:

"2. The jury are instructed that if from the testimony

they believe that the cattle that died after the shipment was received by the defendant would have died if they had been unloaded in the Kansas City Southern pens that night and reloaded January 3rd, or that the plaintiff would not, in fact, have unloaded his cattle in the pens at Ashdown, if he had an opportunity to do so, or that the plaintiff was not, in fact, by any statements or representations of the agent at Ashdown, induced to make the contract in this case and deliver his cattle to the defendant, then, in either of the above cases, your verdict shall be for the defendant.

"3. The jury are instructed that there was no actionable negligence on the part of the defendant and its employees in the handling of this shipment at Ashdown, and as to those allegations in plaintiff's complaint and the testimony relative thereto, to the effect that the cattle belonging to the plaintiff were negligently and carelessly permitted to remain in the cars on the side track before being removed toward their destination, your verdict should be for the defendant; or, to put this instruction differently, it was not negligence to leave the cattle on the transfer track from the time the proof shows they were delivered by the Kansas City Southern Railroad in Ashdown until 5:30 o'clock the next morning. The railroad company, the proof shows, moved the shipment with reasonable dispatch, and did all in reference to the movement of same that the law requires.

"4. You are instructed that the plaintiff is bound by the conditions and the limitations in the contract introduced in evidence in this case, and same precludes a recovery by him as to all damages sustained by him in connection with the actual handling and transportation of the shipment at Ashdown, and from Ashdown to Boswell. He alleges, however, that he was induced to deliver his cattle, and to make said contract by the negligence of the agent in representing that a train would arrive within a short time and carry said cattle to their destination. Now, in no event could said allegations apply, except to cattle that died after being received by the defendant at Ashdown, unless you find that written notice of damages was waived by defendant's agent. Before a recovery can be given the plaintiff under this phase of the case for the value of the cattle, if any, that you find died after same were received by the defendant at

Ashdown, or for any injuries sustained by the other cattle at Ashdown, if any, you must believe, in the first place, from a preponderance of the testimony, that the agent did in fact misrepresent the facts to the plaintiff in reference to the time when his shipment would be carried out; and then, in the second place, that the plaintiff relied solely upon said representations, and was induced by same to make the contract at the time he did and deliver the cattle at the time he did, and that he would not have made the contract and would not have delivered his cattle at the time he did unless such representations had been made; then, in the third place, you will have to find that, as a consequence of such misrepresentations on the part of the agent, and in reliance on the part of the plaintiff, something was done by the plaintiff that he would not have done, or something was left undone that he would have done, if such representations had not been made; and, further, as a direct consequence of having done such, or not having done such, the said cattle died. All this you must find from a preponderance of the testimony; and, if you do not so find, your verdict in this case must be for the defendant."

The other instructions presented various phases of the defendant's cause for the consideration of the jury in the way in which the defendant desired them to be presented.

Glass, Estes & King, for appellant.

1. A peremptory instruction for defendant should have been given. No negligence nor unnecessary delay was shown. 84 Ark. 311. It was error to give the third charge to the jury, as the facts do not bring this case within the rule in 63 Ark. 331. It controverts and neutralizes the contract of shipment, and assumes certain facts which were for the jury only. 101 S. W. 760; 63 Ark. 331; 21 Enc. Law (Rev. Ed.) 498-9; 110 S. W. 593.

2. Three elements are necessary, essential to the existence of negligence, a question of fact: (1) the existence of a duty to protect from injury; (2) failure to perform that duty; (3) injury from such failure. These three must unitedly operate to constitute actionable negligence. What the agent told plaintiff would be a contract, not negligence, and a failure to get the cattle out "right away" would be a breach. The damages recov-

erable would be governed by the law applicable to breach of contract. 8 Enc. Law (Rev. Ed.), 582; 61 Tex. 495; 71 *Id.* 76; 71 Ark. 511; 13 Cyc. 33; 110 S. W. 593.

3. Conceding that the agent misled plaintiff as to the time of the train's departure, *after that* he made a contract of shipment waiving these misrepresentations. Such contracts have been repeatedly upheld. 63 Ark. 551; 67 *Id.* 407; 101 S. W. 760; 50 Ark. 397; 103 S. W. 174.

4. To recover it was necessary to show, not only that the agent misled him as to the time the train would leave, but also that he would and could have done something he did not do, and by so doing would have avoided the injury. 63 Ark. 331; 21 Enc. Law (Rev. Ed.), subd. XI, p. 498. The agent should also have been apprised of the conditions and circumstances that made the damages likely to result from his misstatements. 71 Ark. 571; 76 *Id.* 220; 76 S. W. 1057; 88 *Id.* 870.

5. The court should have given the special charge grouping the particular facts relative to the matter in conformity with the testimony. 102 S. W. 695.

6. No waiver is shown; the burden was on plaintiff. 63 Ark. 331; 38 S. W. 515; 55 *Id.* 215; 68 *Id.* 249; 83 *Id.* 33; 101 *Id.* 760; 70 Ark. 68.

7. The damages were excessive. The plaintiff's testimony and opinion were irrelevant and incompetent. 68 Ark. 217; 57 S. W. 258.

G. G. Pope and *Will Steel,* for appellee.

1. Objection to an amendment to a complaint that even sets up a separate cause of action is waived by filing an answer to it. 81 Ark. 579; 67 *Id.* 14; 64 *Id.* 450.

2. No notice as to dead cattle is required, and notice as to living, damaged cattle may be waived and was. 63 Ark. 336; 70 *Id.* 406; 52 *Id.* 11.

3. A shipper has the right to rely on the statements and information given by agents and act upon same, and the company is bound by his misrepresentations. 81 Ark. 469; 63 *Id.* 337. It is the duty of carriers to inform shipper of unnecessary delays.

4. The alleged contract was void, (1) for misrepresentations of the agent before it was signed; (2) because it was the

only form the agent was authorized to execute, and the shipper had to take that or none. 1 Page on Contracts, § 77; 57 Ark. 112.

HILL, C. J., (after stating the facts). 1. The first matter submitted is that there should have been a peremptory instruction in favor of the defendant. It was held on the former appeal that the undisputed testimony showed that the railroad company exercised reasonable diligence in furnishing facilities and in transporting the cattle to the destination after delivery to it; and it was pointed out that the law does not require railroads to keep engines and cars at stations at all times to move freight offered for shipment; that this would be an unreasonable requirement; and that the requirement of reasonable care and diligence had been met in this case in furnishing the transportation after the cattle were delivered. The case, however, had been tried upon an issue which was not in the pleadings, and to the evidence to sustain it the defendant had objected; and for that reason the judgment was reversed. *St. Louis & S. F. Rd. Co.* v. *Vaughan,* 84 Ark. 311. It was held that under the undisputed facts no other cause of action appeared, and this one had been improperly introduced. It must be held that the facts adduced on behalf of the plaintiff were sufficient to make out a charge of negligence. Mr. Hutchinson says: "He must, at his peril, inform the shipper of the necessary delay, that the shipper may exercise his own discretion as to the propriety of making the shipment." 2 Hutchinson on Carriers, § 496. This principle was applied in *Kansas & Arkansas Valley Rd. Co.* v. *Ayres,* 63 Ark. 331.

While no negligence can be predicated upon the failure to get out the cattle earlier than they were shipped, yet the facts testified to by the plaintiff show that he was assured before seven o'clock in the evening that he could get out his cattle right away, when in fact no regular train was due to leave until 9:30 the next morning, and no special train could be got to him short of eight or nine hours. Upon this he relied, and left his cattle loaded in the cars, instead of taking them out and caring for them during the delay, as he would otherwise have done. The undisputed testimony is that cattle kept loaded in cars standing still will be materially injured by such delay. Especially would this be true on a cold and rainy night in midwinter. There was suffi-

cient evidence to have sent this question to the jury.

II. It is insisted that the third instruction given by the court of its own motion is erroneous, in that it assumes certain facts to constitute negligence, when the jury alone, under proper instructions, should determine that. But the instruction, read in the light of the plaintiff's testimony and the undisputed evidence as to the effect of such delay and the long delay necessary to get them out at the time that the assurances were given of getting them out right away, prevent this criticism of the instruction from being well founded in this instance. If it be error to assume that these facts were negligence *per se,* that error has been concurred in by the appellant, for the fourth instruction, given at its instance, in another way and in better form, submits the same facts to the jury as a predicate for recovery by the plaintiff if the jury believed such facts to be true.

III. It is urged that the representations of the agent were not the proximate cause of the damage; and it is argued that the evidence shows that the Kansas City Southern yards would not have held more than three cars of cattle, and that the damage could not have been averted had Vaughan known that the cattle would not be carried out right away. But he testified to facts which, if believed, showed that he would have cared for his cattle, either in these yards or elsewhere, in a way that would have prevented the injury which they received; and this testimony presented a question for the jury to determine, and was properly submitted upon instructions given at the instance of the appellant.

IV. The provision of the contract to the effect that notice in writing must be given of the damages is also invoked; but there was evidence tending to prove a waiver of this clause, and that question was sent to the jury under proper instructions, framed in conformity to the decision in *St. Louis, I. M. & S. Ry. Co.* v. *Jacobs,* 70 Ark. 401.

V. It is insisted that the verdict is excessive. The jury gave $734, which the court required the plaintiff to remit down to $600. The limitation of $16 per head, stipulated in the contract, is not exceeded by this verdict. According to the plaintiff's testimony, twenty of the cattle were dead, and the balance seriously injured and depreciated in value. The difference in value he put

at $872. The jury gave less than the testimony warranted, and the circuit court reduced that amount, for what reason is not shown. The court is unable to see wherein the verdict is excessive. It may be that the testimony was not accurate or truthful; but that was a matter to have been argued before the jury, and not elsewhere.

Finding no error in the case, the judgment is affirmed.

ON REHEARING.

Opinion delivered December 7, 1908.

HILL, C. J. Appellant's attorneys forcibly reargue the questions disposed of, but after a full consideration of them the court finds no reason for changing the decision or opinion. It is insisted that "the court erred in not upholding that clause in the contract which provided that the plaintiff would waive and release the defendant from any and all liability for or on account of delay in shipping the stock after delivery of the same to the defendant's agent, and from any delay in receiving this stock after tender of delivery, as set forth in the seventh instruction requested by the appellant and refused by the trial court.

This contention was not specifically discussed in the opinion, because it was thought that it was necessarily disposed of in the discussion of the other issues. It was held on the former appeal of the case that the railroad company exercised reasonable diligence in furnishing facilities and in transporting the cattle to the destination after delivery to it. Had it been held otherwise, then the question on the contract would have been pertinent. After the reversal of the cause, the complaint was amended so as to allege negligence in that the station agent induced plaintiff to deliver the cattle to the defendant on the assurance that a train would soon arrive to take away and transport his cattle; and that the plaintiff, relying upon these assurances, delivered his cattle to the defendant to be transported, and they were negligently delayed at Ashdown for a period of twelve hours. The action was then turned into one against the company for misleading assurances given by its agent which induced the shipment, and not for one growing out of the shipment itself. The contract relating to the shipment, but it went out of the

case when the action was predicated upon the false or negligent assurances which were made by the agent which induced the delivery of the cattle to the appellant company. Therefore, no discussion was called of the contract itself, nor any consideration of its terms, or whether in fact it was a binding contract.

The motion is overruled.

FIELD v. MORRIS.

Opinion delivered November 9, 1908.

REAL ESTATE—RESERVATION OF PERSONAL RIGHT—ASSIGNMENT.—Where a deed of a husband and wife conveying the fee simple to a tract of land owned by him reserved 1½ acres thereof in favor of the grantors, using the following words, "reserving to ourselves the use of the 1½ acres free of rent where the mill and gin stands in southwest corner of said tract, with the privilege of removing buildings and machinery therefrom, ... and we are to have the use of 1½ acres free of rent as long as we or others holding under us may want to use same for running machinery at said point," the reservation was personal and died with the husband.

Appeal from Lawrence Circuit Court, *W. E. Beloate,* Special Judge; reversed.

George G. Dent, for appellant.

There is here only a reservation of the *use* of the land, containing no words of inheritance. The reservation terminated upon the death of John Darter. Where a conveyance is made in fee, a reservation of the use of the land also in fee would be void. 1 Johns. Ch. 358; *Id.* 362; 82 Ark. 209; 26 Ark. 131.

The reservation in this case is in gross, and such a right is personal merely, not assignable nor inheritable. Washburn on Easements, 4th Ed. pp. 11 and 12, § § 8 and 9; *Id.* 13 § 10; *Id.* 45 § 29; *Id.* 17 §1; *Id.* 257 § § 161-162; *Id.* 35 § 2.

H. L. Ponder, for appellee.

Whether an easement in a particular case is appurtenant or in gross is determined mainly by the nature of the right and the intention of the parties creating it. The testimony shows

that the neighborhood needed the machinery at this point, and that Darter knew and appreciated the conditions, and made the reservation in the first deed to Townsend. Through all subsequent conveyances it was acknowledged and recognized. The original intention of the parties to create an easement appurtenant is manifest; such it grew to be, and, moreover, the presumptions are all in favor of appurtenant easements. 10 Am. St. Rep. 432; *Id.* 403, 405; 79 Ala. 288; 99 Am. Dec. 354; 113 Cal. 6366; 69 Ga. 455; 126 Ill. 542; 42 Ind. 44; 107 Mass. 591; 93 Mich. 599; 42 Minn. 398; 23 O. St. 614; 17 R. I. 495. No particular words are necessary to constitute a grant, and any words which clearly show an intention to give an easement which is by law grantable are sufficient. 10 Am. & Eng. Enc. of L., 2 Ed. 409, 411. Such an easement can be transferred. 81 Wis. 301; 90 Am. Dec. 161. It is assignable with the estate to which it belongs, although no words of inheritance were in the reservation. 107 Mass. 591; 133 Mass. 210. Appellant had notice of the reservation, and cannot now set up rights adverse to appellee. 10 Am. & Eng. Enc. of L. 2 Ed., 428; 116 Ill. 11; 46 O. St. 528. Long enjoyment of an easement will establish a right thereto. 2 Grant, Cas. 462; 22 Am. & Eng. Enc. of L. 2 Ed. 1186; 45 Conn. 409.

BATTLE, J. On the 2d day of February, 1892, John Darter and Mattie A. Darter, his wife, in consideration of $500 conveyed a certain tract of land to W. A. Townsend. They reserved the use of one and a half acres, using the following words, "reserving to *ourselves* the *use* of one and one-half acres free of rent, where the mill and gin stands in southwest corner of said tract, with the privilege of removing buildings and machinery therefrom, . . . and *we* are to have the *use of one and one-half acres free of rent* as long as we or others holding under us may want to use same for running machinery at said point."

On March 26, 1899, W. A. Townsend and wife, in consideration of $500, conveyed the same land to H. W. Townsend, "and unto his heirs and assigns forever," with the following reservation in the deed: "Reserving to *ourselves* the *use* of one and one-half acres where mill and gin now stand, free of rent with privilege of removing buildings and machinery therefrom; the same to be used for running machinery as long as *we desire*."

On the third day of October, 1901, H. W. Townsend conveyed three acres of the same land to B. W. Field, the same being in the southwest corner thereof, with a reservation in the deed in the following words: "reserving, however, to said *party of the first part* (grantor) and his grantors (grantees) the use of one and a half acres where mill and gin now stand free of rent, with privilege of moving the building and machinery therefrom, same to be used for running machinery as long as said *grantors desire.*"

On the 28th day of November, 1902, B. W. Field, in consideration of $200, conveyed the three acres of land to his wife, Laura C. Field; and on the 25th of September, 1903, she and B. W. Field conveyed the same to Carrie E. Stevenson, and she reconveyed it, on the second day of October, 1903, to Laura C. Field.

On the 28th day of October, 1903, John Darter conveyed to J. W. Morris "all the right, title, privilege and interest" reserved by him to the one and one half acres by his deed executed on the second day of February, 1892.

On the 19th day of December, 1905, J. W. Morris being in possession of the one and a half acres of land, Laura C. Field brought this action against him to recover them (the one and a half acres) and damages.

In the depositions taken in the case before the trial and read as evidence it was proved that John Darter was dead.

The issues in the case were tried by the court, sitting as a jury, by consent. He found that an "easement right" in and to the one and a half acres was created by the reservation contained in the deed executed by John Darter and Mattie A. Darter, his wife, to W. A. Townsend, on the second day of February, 1892, and that this right was acquired by the defendant; and rendered judgment in favor of the defendant for the same; and plaintiff appealed.

Was the right to use the one and a half acres appendant or appurtenant to land, or was it personal? If personal, it was not assignable or inheritable.

Professor Washburn says: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable nor inheritable, nor can it be made

so by any terms in the grant, any more than a collateral and independent covenant can be made to run with land." *Boatman* v. *Lasley*, 23 Ohio St. 614; Washburn on Easements (4th Ed.) pages 11 and 12, § 8.

"Where one granted an estate and in his deed reserved a right of way across it to a certain point, but made no mention or reference to any estate to which it was to be appurtenant, or with which it was to be used, it was held to be a way in gross, and not the subject of grant." *Wagner* v. *Hanna*, 38 Cal. 111; Washburn on Easements (4th Ed.) pages 11, 12, § 8.

Where "the owner of a certain lot of ground conveyed the same to trustees to be used as a grave yard, reserving 'the right and privilege to and for the said grantor, and every member of his family or their offspring, to mark off within the boundaries of the lot one square perch of ground in any locality thereof where they may think proper for their own and separate use forever for the burial of the dead,' it was held that the privilege thus reserved was personal to the grantor and his family, and was incapable of assignment to a stranger." *Pearson* v. *Hartman*, 100 Pa. St. 84.

In *Pierce* v. *Keator*, 70 N. Y. 419, where the owner of a farm conveyed a strip of it to a railroad company, "reserving to himself the privilege of mowing and cultivating the surplus ground of the strip not required for railroad purposes;" and where the farm was sold under a mortgage on it at the time the strip was conveyed, and the defendant who succeeded to the title of the purchaser, claiming under the reservation in the deed to the railroad company, entered upon the railroad land and cut and removed wheat growing thereon, it was held that the reservation in the deed to the railroad company was not an easement appurtenant to the remaining portion of the farm, but a right to the profits in the land conveyed, reserved to the grantors personally, not as owners of or for the benefit of the farm, and did not pass to purchaser at foreclosure sale or those holding under him.

In *Bates* v. *Duncan*, 64 Ark. 339, "where the owners of land, being engaged in erecting a building thereon, entered into a verbal agreement with a Masonic lodge that the lodge shall add a second story to the building, which it shall have the right to

use and occupy, it being understood, though not expressly provided, that it should be used as a lodge room, and afterwards the owners execute an instrument guarantying to the lodge the exclusive right to use and occupy such second story, together with the right of ingress and egress at such times as said lodge or its representatives may designate," it was held that the agreement conveyed only a personal right to the lodge, which was not assignable.

In Washburn on Easements it is said: "A right in gross (a personal right), whether an easement or a profit in the land, is clearly not assignable or inheritable if it is created by a grant in which the right is given to the grantee, without any mention of heirs or assigns or successors, etc., or other words which show an intent to extend the right beyond the person of the grantee. Such a grant conveys only a personal right to the grantee, and when he dies the right is extinguished, and no attempt which he may make in his lifetime to assign or transfer the right will be successful." Page 17, § 1.

In this case Darter and his wife conveyed all the land to W. A. Townsend in fee simple. The *use* of one and a half acres in the southwest corner of the land was reserved to themselves. "*We* are to have the use of 1½ acres free of rent," says the deed. How long? The deed says, "as long as we or others holding under us may want to use same for running machinery at said point." The last quotation from the deed shows only how long Darter and wife were to have the use of the land free of rent. "Others holding under us" refers to persons holding like tenants. No mention of heirs, assigns, or successor, or words of the same import is made in the reservation. It is exclusively to Darter and his wife; was personal, and died with Darter, his wife having had only the right of dower in the land and joined with him in executing the deed for the purpose of relinquishing dower.

Reversed and remanded for a new trial.

ON REHEARING.

Opinion delivered December 7, 1908.

BATTLE, J. Appellee files a motion for a rehearing in this case in which he says: "If the judgment of this court remains

as it is, the appellee will be deprived of all of his improvements and machinery, worth from $3,000 to $4,000." The right to the improvements on the land in controversy was not expressly determined by the judgment of this court. The only question decided was, "Was the right to use the one and a half acres appendant or appurtenant to land, or was it personal?" The case will go back to the circuit court for a new trial. Appellee can present his right to improvements and to remove the same to that court for consideration and adjustment.

The motion is denied.

DUNBAR v. BOURLAND.

Opinion delivered November 23, 1908.

1. PARTITION—JURISDICTION—Courts of law and equity have concurrent jurisdiction for the partition of real estate. (Page 159.)
2. COURTS—CONCURRENT JURISDICTION.—Where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain such jurisdiction, to the final determination of the action and the enforcement of its judgment or decree. (Page 160.)
3. SAME—Where an action was brought at law to obtain partition of real estate, a subsequent suit in equity seeking the same relief may not be maintained, though additional relief is sought in the latter court. (Page 161.)
4. ACTIONS—REFUSAL TO TRANSFER—REMEDY.—If the circuit court erroneously overrules a motion to transfer an action to equity, the remedy is by appeal and not otherwise. (Page 161.)
5. PLEADING—DUTY TO SET UP ALL DEFENSES.—A defendant, sued at law, must make all the defenses he has, both legal and equitable; and if any of them are exclusively cognizable in equity, he is entitled to a transfer to equity. (Page 161.)
6. PROHIBITION—CONFLICT OF JURISDICTION—Prohibition will lie to prevent a court of equity from entertaining jurisdiction of a suit for partition of certain lands where the circuit court previously had jurisdiction of the same subject-matter. (Page 163.)
7. SAME—TO WHOM DIRECTED—A writ of prohibition lies only to a court and probably in some exceptional cases to a judge in chambers. (Page 164.)

Prohibition to Crawford Chancery Court; *J. Virgil Bourland,* Chancellor; writ ordered.

STATEMENT BY THE COURT.

This is a petition for writ of prohibition against the chancery court of Crawford County and the Hon. J. V. Bourland, chancellor, seeking to prohibit the court and the chancellor from proceeding to entertain jurisdiction of a suit therein pending wherein E. C. Dunbar is plaintiff and W. T. Dunbar is defendant. The material facts are as follows:

W. T. Dunbar filed a suit in the Crawford Circuit Court against E. C. Dunbar, alleging that the plaintiff and defendant were joint owners in fee simple of a tract of real estate in said county known as the "Sharp Farm;" that the property mentioned is valuable property, and he is desirous of making valuable improvements thereon; that he cannot do so under the conditions that now exist, which were evidenced by a copy of a contract attached to the complaint and made a part thereof, unless a division and partition be had of the estate. The contract is signed by the plaintiff and the defendant, and relates in part to the management of the property. It was prayed that the lands be divided and partitioned according to the respective rights of the plaintiff and defendant, if the same could be done without prejudice; but that, if a division could not be had without prejudice, the lands be sold as the law directs, and the proceeds thereof, after the expenses of the suit were paid, equally divided between the plaintiff and defendant, and for other relief. This suit was filed on the 27th day of April, 1908.

The defendant filed the following answer thereto: "Comes the defendant, and for answer to plaintiff's complaint says:

"It is true that the plaintiff and himself are the owners of certain lands in Crawford County, Arkansas, but not the lands described in plaintiff's complaint. Defendant presumes that the plaintiff intended to describe the farm known as the "Sharp Farm," but, if so, this land is not correctly described in said complaint, and plaintiff and defendant do not jointly own lands of the description set out in plaintiff's complaint.

"Further answering, defendant says that the Sharp Farm owned by them, he presumes, can be divided between them, but

when said farm is divided it will be necessary to have an accounting between the plaintiff and the defendant of the rents and profits and expenditures made upon said farm for the past five years.

"In this connection, defendant says that a contract filed as 'Exhibit A' with plaintiff's complaint never became operative, and the plaintiff acquired no rights thereunder; but, so far as the land jointly owned by them is concerned, such lands and rents and profits thereof stand unaffected by this contract.

"Further answering, defendant says that since plaintiff and defendant became the owners of the Sharp Farm, the plaintiff has received and converted to his own use practically all the rents from said farm, which amounted to from $1,000 to $1,500 a year, for each of the years 1905, 1906 and 1907, and has not accounted to defendant for his part of said rents.

"Defendant has paid the taxes, paid for repairs and made improvements upon said farm, for which he has not been paid, and when said farm is divided, or can be divided, it will be necessary to have an accounting, so as to determine the amount of expenditures made by each of the co-owners, and the amount of rents received by each of the co-owners, so that the rights and equities of each of them can be settled at the same time in one and the same suit.

"As stated above herein, it may be that said farm can be divided, but this cannot be determined until it is examined by commissioners; and, if it should appear to the commissioners that the same cannot be divided, then it will be necessary to sell the same for division and the proceeds of the sale divided between the owners, which should not be done until settlement is had of the rents received by each and the expenditures made by each of them on said farm.

"In addition, there is a suit now pending in the chancery court of Crawford County, Arkansas, a suit brought by Cazort and others to foreclose a mortgage upon eighty acres of said land, and the lands cannot be divided and should not be until this suit is determined, which will be at the next term of the chancery court.

"In view of the fact that an accounting is necessary to determine the respective rights of plaintiff and defendant in the rents

and profits, and it being uncertain whether said land can be divided, and in view of the fact of the pending suit on part of said land in the chancery court, this case should be transferred to the chancery court of Sebastian County, so that reference may be had by said court to a master, to take and state an account of the dealings for the last four years between plaintiff and defendant, with respect to the rents and profits of said farm, the expenditures made in improving same, by it, and all the rights of the parties adjusted in one and the same transaction.

"Wherefore defendant moves the court to transfer this cause to the chancery court of Crawford County."

Defendant filed a motion with his answer to transfer the cause to the chancery court. The court denied the motion to transfer, and continued the cause for the term. Subsequent thereto, and before the next term of the circuit court, the defendant in the circuit court, E. C. Dunbar, filed suit in the chancery court of Crawford County against W. T. Dunbar, the plaintiff in the circuit court, the complaint being as follows, to-wit:

"Comes the plaintiff, and for his cause of action against the defendant says:

"That plaintiff and defendant are owners in equal shares of the following lands, situated in Crawford County, Arkansas, to-wit: (Here follows description of said lands, known as the Sharp Farm.)

"Plaintiff further states that the said above lands were purchased in partnership by plaintiff and defendant in August, 1905, and thereafter they have owned, run and operated same in partnership.

"Plaintiff now states that he now desires to dissolve the farming partnership heretofore existing between them, and under which they have heretofore rented, controlled and managed the said farm, and to have same divided between them, so that one-half may be allotted and set apart for plaintiff, and one-half to the defendant, plaintiff stating that the said lands are susceptible of being divided in kind.

"Plaintiff, however, states that, on the settlement of their partnership transaction, growing out of their partnership and management of said farm, it will be necessary to have an accounting to determine how much of net rents and profits have been

received by each. Plaintiff now states that the farm was at one time rented to a man by the name of Rushing, who executed a mortgage on certain live stock for $1,500, to secure the rents to be paid by him. The defendant, W. T. Dunbar, took charge of this stock and sold same, but has not accounted to plaintiff for any part of the money, having appropriated all of the same to his own use. When the plaintiff and defendant purchased the lands above described, they also bought in partnership a quantity of tools to run said farm, of the value of $245.60. The defendant, W. T. Dunbar, has appropriated all the tools to his own use, and should be held to account for same. The said defendant collected the rents for the year 1907, about $1,000, of which plaintiff has received about $185. The plaintiff paid the taxes on the farm for the year 1906, amounting to about $165. The rents for the present year are not due.

"Plaintiff is informed that he has a right to have the farming partnership dissolved, the lands divided and an accounting between defendant and himself of all transactions growing out of or connecting with their ownership of the said lands; and if either the plaintiff or defendant has received more than his proportion, the one receiving the same has a right to have the other account to him for the excess and have same charged against his interest in the joint property.

"Plaintiff however states that defendant has filed suit in the circuit court of Crawford County, seeking a partition of a part of the lands above described, but the plaintiff is informed and advised that a court of equity is the proper forum in which to have a settlement of their joint and partnership transactions, growing out of their joint ownership of said lands, and to avoid the multiplicity of suits, have all their rights and equities adjusted and determined in one proceeding, which cannot be done in the partition suit brought by defendant, as aforesaid, in Crawford County Circuit Court.

"The premises considered, plaintiff prays that the farming partnership heretofore existing between plaintiff and defendant, and under which they have managed and controlled the farm above described since its purchase by them, be dissolved; that an accounting be had for the rents, profits and expenditures made by each, growing out of their joint ownership of the said prop-

erty; and that, if either has received more than his share of the said rents and profits, then the excess be charged against his interest in the said farm and be declared a lien on same; that commissioners be appointed to divide the said land between plaintiff and defendant, according to their respective rights; that plaintiff be enjoined from further prosecution of the suit brought in the circuit court of Crawford County, Arkansas, to the end that in one proceeding all their rights be determined, and for such other and different relief as in equity plaintiff is entitled to receive."

He also made application for a receiver, and the chancellor, in vacation, appointed Ed Chastain as receiver of the property in controversy, the Sharp Farm; and the parties were ordered to turn the same over to him upon his making affidavit and executing bond as required, which was done. At the first term thereafter of the chancery court, in November, the defendant filed a demurrer to the complaint, in which he stated, first, that the complaint fails to state facts sufficient to constitute a cause of action; and, second, that the complaint shows on its face that there is another action pending between the parties in the Crawford Circuit Court involving the same cause of action; and, third, that the court has no jurisdiction of the person of the defendant or the subject-matter of the action. This demurrer was overruled by the chancery court, to which the defendant excepted; and the defendant thereupon filed his answer to the complaint in equity, in which he denied some of the allegations of the complaint, and admitted that he had filed a suit in the circuit court of Crawford County seeking a partition of the lands mentioned in plaintiff's complaint, and set forth the action of the plaintiff in this suit (the defendant in that) in moving to transfer the cause to equity, which was overruled, and to which he had saved his exceptions, and the record of the proceedings was asked to be made an exhibit to the answer. He alleged that the right of E. C. Dunbar to have the differences between himself and W. T. Dunbar tried in a court of equity had been adjudicated in the Crawford Circuit Court at its June, 1908, term when his motion to transfer the cause to a court of equity was overruled. The prayer of the answer was that the complaint be dismissed, and for other relief.

The chancery court appointed Byers, Hamer and Yoes as commissioners to divide the lands known as the Sharp Farm, a

description of which followed; said lands to be divided in two equal portions in value, if the same could be done, and to set apart and allot one-half in value to the plaintiff and one-half to the defendant. It was further ordered that Quesenbury, the clerk of the court, be appointed master to hear testimony and to take and state an account of all the matters of accounts and indebtedness growing out of and involved in the partnership between plaintiff and defendant in the joint partnership of the above described lands.

Petitioner also prays that Chastain, receiver, Quesenbury, master, and Byers, Hamer and Yoes, commissioners, be commanded to proceed no further under the orders of the chancery court, as well as that a writ of prohibition issue against the court and the chancellor thereof.

Youmans & Youmans and *E. Hiner,* for petitioner.

Ira D. Oglesby, for respondent.

HILL, C. J., (after stating the facts). W. T. Dunbar filed a suit for partition in Crawford Circuit Court against E. C. Dunbar, seeking a partition of a farm owned jointly by them known as the "Sharp Farm." E. C. Dunbar answered, and asked a transfer to the chancery court. The transfer was denied, and he excepted, and the cause was continued for the term. Thereafter, and before the next term of the circuit court, E. C. Dunbar filed suit in the Crawford Chancery Court against W. T. Dunbar, alleging that they had purchased the Sharp Farm in co-partnership, and thereafter conducted a farming partnership, which he asked to be dissolved, their accounts settled, and the land partitioned, and set forth the pendency in the circuit court of the action therein brought against him by the defendant in this suit, but asserted that he was entitled to have a court of equity settle and adjust their accounts. The defendant aptly objected to the jurisdiction of the chancery court, but that court entertained it, and the defendant has, after due notice, applied here for a writ of prohibition to the chancery court, and its chancellor. The facts are stated in detail in the preceding statement.

The circuit courts and the chancery courts have concurrent jurisdiction for the partition of real estate. The statutory remedy of partition is cumulative to the equitable remedy, and either

may be pursued. *Patton* v. *Wagner,* 19 Ark. 233; *Moore* v. *Willey,* 77 Ark. 317; *Lester* v. *Kirtley,* 83 Ark. 554.

While these remedies are concurrent, it must not be understood that concurrent remedies may be pursued concurrently. Mr. Works says: "Where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain and exercise such jurisdiction, to the final determination of the action and the enforcement of its judgment or decree." Works on Courts and their Jurisdiction, sec. 17.

Mr. Bailey says: "In the distribution of powers among courts it frequently happens that jurisdiction of the same subject-matter is given to different courts. Conflict and confusion would inevitably result unless some rule was adopted to prevent or avoid it. Therefore it has been wisely and uniformly determined that whichever court, of those having jurisdiction, first obtains jurisdiction, or, as is sometimes said, possession of the cause, will retain throughout, to the exclusion of another; and this jurisdiction extends to the execution of the judgment." 1 Bailey on Jurisdiction, § 77.

The Supreme Court of the United States says that this proposition is firmly established. "When a State court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases." *Harkrader* v. *Wadley,* 172 U. S. 148.

Judge Thayer, speaking for the Circuit Court of Appeals of this circuit, thus expresses it: "The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired. While property is so held, it cannot be sold under the judgment, sentence, or decree of any other tribunal. Moreover, so long as the property remains *in custodia legis,* no other court, unless by special leave of the court which first acquired jurisdiction, can

lawfully proceed with the trial and determination of a suit, the object of which is to establish a lien against the property, or to subject the specific property to the payment of debts, or which may result in creating conflicting rights or titles thereto. The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons." *Merritt* v. *American Steel-Barge Co.*, 79 Fed. 228.

The only difference between the suit in the circuit court and the suit in the chancery court is that in the latter court the complaint alleges that the lands were purchased in partnership, and that the plaintiff and defendant thereafter owned and operated the same in partnership. In each suit a partition of the lands is prayed. Other than asking for a dissolution of the farming co-partnership between them, the relief asked in the chancery court is the same as that asked in the answer in the circuit court, with the addition in the chancery court that the excess in plaintiff's favor on the accounting be declared a lien upon the property. In other respects the relief sought by both parties in each court is identical—the partition of the real estate and the adjustment of their respective rights growing out of a settlement of their joint ownership of the Sharp Farm.

In the circuit court the defendant set forth facts which he alleged entitled him to transfer the case to the chancery court. The circuit court overruled his motion to transfer. Whether that court erred in overruling it is not the question here. It had jurisdiction to rule upon that motion, and had jurisdiction of the parties and of the subject-matter of the suit; and if it erred in refusing to transfer the cause to the chancery court, that error can be corrected in this court on appeal, and not otherwise.

If the allegations of the purchase in partnership of the property and the farming partnership thereafter are true and are material to E. C. Dunbar's rights, they should have been made in the answer in the circuit court and the lien sought therein prayed. Section 6098 of Kirby's Digest says that "the defend-

ant may set forth in his answer as many grounds of defense, counterclaim and setoff, whether legal or equitable, as he shall have." In construing that section, this court said: "They had no right to bring a separate action in chancery to obtain relief they might have had in the original suit by making full defense, or preparing to do so, in their application to set aside the judgments." *Ward* v. *Derrick,* 57 Ark. 500.

In *Daniel* v. *Garner,* 71 Ark. 484, it was said: "Under the statutes of this State a defendant, when sued at law, must make all the defenses he has, both legal and equitable. If any of his defenses are exclusively cognizable in equity, he is entitled to have them tried as an equitable proceedings, and for this purpose to a transfer of the cause to the equity docket or chancery court, as the case may be." To the same effect see *Church* v. *Gallic,* 76 Ark. 423, and authorities there cited. The Code does not tolerate a partial defense in one court, reserving other defenses to be asserted in another court, in event of failure in the first court. All defenses must be interposed, and then the cause will be tried in the appropriate court. If not interposed, they are waived, and cannot be made the subject-matter of an equitable action.

If it be admitted that the suit in chancery has set forth an equitable cause of action and an equitable remedy in favor of the plaintiff therein, such cause and remedy are not available to the plaintiff in that suit; for, as defendant in the circuit court, it was his duty to have pleaded this equitable cause and equitable remedy in his answer in the circuit court, and upon it move to transfer to the chancery court. And, as above stated, if the court had erred in refusing to transfer it, that was an error that could have been corrected on appeal. But this was not done; and now an alleged equitable cause of action and equitable remedy are sought to be brought in a court of chancery after an opportunity had been given him to plead it in a court of law and pray a transfer to chancery; and this is not permissible. It would necessarily bring courts of co-ordinate jurisdiction into unseemly and unnecessary conflict. If the statutes are obeyed, these conflicts in this respect are impossible. Either court had jurisdiction to partition the land. If there were any matters exclusively cognizable in chancery, the right to trial there could

only be obtained by pleading it and moving the transfer. If error is committed in refusing to make a transfer when the transfer is proper, it can be corrected in this court on appeal, but cannot be corrected by assertion of the same defense or an omitted defense in the chancery court while the circuit court has jurisdiction of the parties and the subject-matter of the controversy. This being true, then the question before this court is as to the proper remedy.

A suit was brought in the Superior Court of Detroit, proceeded to judgment and to appeal to the Supreme Court of Michigan. While the cause was still pending in the Supreme Court, one of the parties brought a suit in the Wayne Circuit Court in chancery, seeking in effect to obtain a new trial of the matter adjudicated in the superior court. The superior court and the circuit court in chancery were of co-ordinate jurisdiction. Application was made to the Supreme Court of Michigan for a writ of prohibition to the circuit court in chancery, and the Supreme Court, speaking through Mr. Chief Justice Cooley, said: "It is a familiar principle that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action. The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such consideration exclusively, but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process. If interference may come from one side, it may from the other also, and what is begun may be reciprocated indefinitely. The country has witnessed some such conflicts in which Federal and State courts of co-ordinate powers have unguardedly or unadvisedly undertaken to hamper or restrain each other's action; and the mischiefs of which such cases are suggestive are quite as likely to arise when courts existing as part of the same system intrude with their process upon each other's authority. The writs prayed for should issue." *McLean* v. *Wayne Circuit Judge,* 52 Mich. 258.

This reasoning of this great jurist is so manifestly sound and so throughly in line with the decisions of this court upon

the office and use of the writ of prohibition that it is unhesitatingly accepted as a sound precedent to follow.

The writ of prohibition only lies to a court, and probably in some exceptional cases to a judge at chambers. Section 5157, Kirby's Digest. *Russell* v. *Jacoway,* 33 Ark. 191; *Reese* v. *Steel,* 73 Ark. 66. Relief is asked against the receiver, commissioners and master appointed by the chancery court. The writ of prohibition would not run to them; but it is not to be assumed that they would, in the face of the judgment of this court, holding the proceeding in which they were appointed to be void, proceed in the discharge of the duties imposed upon them in that void proceeding. If they should do so, however, the remedies of the petitioner, both for prevention and redress, are ample.

It is the order of the court that the writ of prohibition issue to the Crawford Chancery Court, and its chancellor, prohibiting the entertainment of the said suit of E. C. Dunbar against W. T. Dunbar in that court and all proceedings therein.

RED RIVER LEVEE DISTRICT NO. 1 v. RUSSELL.

Opinion delivered November 23, 1908.

LEVEE DISTRICT—POWERS OF PRESIDENT—Under act of March 16, 1905, § § 16, 33, providing that the president of the Red River Levee District No. 1 may, in case of emergency, "take such action in the case as may best promote the interests of the district," and that "for such emergency service all persons serving thereon shall be paid at such rate as may be fixed by such board," the president of the district was authorized, in an emergency, to employ men to strengthen an old levee behind which the new one was being constructed, in order to protect the latter.

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

Henry Moore, Jr., for appellant.

HILL, C. J. This is a suit by J. C. & W. H. Russell against Red River Levee District No. 1, seeking to recover for certain services rendered to said Levee District; and they recovered judgment for $1,000, and the Levee District has appealed.

An act of the General Assembly became effective March 16, 1905, which created Red River Levee District No. 1, described its boundaries, named its directors and conferred powers and duties upon them and their officers. Acts of 1905, p. 231.

The 16th section of the act provided that at a regular annual meeting the directors should decide on the amount of work for that year, and the president should contract for the construction and performance of the work, letting it to the lowest responsible bidder after public advertisement, and other details; and contained this proviso: "Provided, further, that in case of a break in the levee, or a break threatened by caving bank, or other cause demanding immediate attention, the president of said board may, and is hereby authorized to, take such action in the case as may best protect the interests of the district."

Section 33 authorizes any member of the board of directors, or any person appointed by said board, in case of threatened danger or urgent necessity, to order out all, or as many as may be necessary, of the persons living within the levee district who are liable for road duty under existing laws, and cause them to work on the levees. "For such emergency service all persons serving thereon shall be paid by the board at such rate as may be fixed by said board."

The plaintiff's testimony tended to prove these facts: That prior to the passage of the act by the General Assembly above referred to there was an old string levee on his and other places which protected their plantations from overflow. This levee was between the river and the levee being constructed by the Levee District. High water was coming on, and an overflow was expected, and the Russells were directed by the president of the Levee Board to hold their private levees regardless of expense. This was done in order to protect the new levees and the country sought to be protected by the levees then in process of construction from the overflow then impending. The request came direct from the president of the Levee Board, and the work done was done under the immediate supervision of the chief engineer of the Levee District. The chief engineer laid out the levees, and had charge of their construction, and appeared to be in full authority of the work being done thereupon, and assumed direction of the work on the private levees which was directed by the pres-

ident. The vice president of the levee district controlled or owned a plantation adjoining the Russells, and similar work was done on the private levee on his place and others. The cost of the work done on the private levees is the subject-matter of this suit. This work was done upon the Joella and Dickson plantations. On the Joella plantation the district had partially constructed a levee, but had not built any levee on the Dixon plantation. The levee district had not acquired any right of way upon either plantation, but did so after this work was done. The private levees reinforced by the work done upon them held back the overflow, and protected the new levees and the country sought to be protected by them. Payments were made for some work done on private levees by the levee board.

Much of the testimony went to the details of the bills rendered and services performed, and the reasonableness of the same. On the other side, the testimony contradicted the Russells in most of the material matters.

The court gave, at the instance of the plaintiff, instructions numbered two, three and four, and at the instance of the defendant instructions numbered two, four and five, which will be found in the footnote.*

The testimony of one of the plaintiffs is attacked, and it is said that no credit should be given to his evidence, for the reasons set forth in the argument. But this was a matter exclusively for the consideration of the jury. As far as this court is concerned with it is to test its sufficiency, if true, to sustain the ver-

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*The following instructions were given at plaintiff's instance:

"2. The jury are instructed that if they find from a preponderance of the evidence that A. S. Johnson, president of the Levee Board, for cause demanding immediate attention, employed plaintiffs to do work upon certain private levees owned by them to protect the levee then in course of construction by said Levee District, and that the said plaintiffs under employment, performed the labor sued for herein, then your verdict as to such labor will be for the plaintiffs in such amount as said services were reasonably worth.

"3. The jury are instructed that if they find from the evidence, by a preponderance thereof, that the plaintiffs herein made advances to laborers in the employ of the defendant, at the request of the defendant, then your verdict will be for the plaintiffs for amounts so advanced, together with interest thereon at six per cent. per annum from the date of such advances.

"4. The jury are instructed that if they find from the evidence in this case, by preponderance thereof, that board, rodman, axeman, teams

dict; and that can not be denied if the district is responsible for the work which he testifies he did under the circumstances detailed by him.

There is also an attack made upon some of the items authorized by the chief engineer; and in this connection an instruction was asked, which was refused by the court, to the effect that the chief engineer had no authority by virtue of such position to authorize or request the plaintiff to advance to employees or to laborers sums due them by the levee board and to bind the levee board to repay the plaintiffs the sums paid out on wages due the laborers by the levee board. But the testimony of Russell was that the work which he did was emergency work ordered by the president of the levee board, and that that work was carried out, as was all other work done at that time, under the supervision and directions of the chief engineer. Necessarily, it would follow, if the work was authorized and placed in charge of the chief engineer, that his action in furtherance of that work would be binding upon the district. Without the authorization of the president, certainly the chief engineer would not have this authority; but the plaintiff's case was based upon the directions of the president, and if that was given then the chief engineer in charge of it would be acting within the scope of his authority in carrying out the work, if it was within the power of the president to bind the district.

The only question which is of any moment in the case is the authority of the president of the levee board to bind the district

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and hacks and labor for cutting levee right of way were furnished defendant by plaintiffs, and this at defendant's request, then, as to these items of account, your verdict will be for the plaintiffs in the amount such services and accommodations were then reasonably worth, less any amount or amounts they may have been paid by defendant as credit thereon."

And the following at defendant's instance:

"2. The jury are instructed that unless they believe from the evidence that the Levee Board of Red River District No. 1, through its president or duly authorized agent, ordered or requested the plaintiffs to advance the sums they claim to have paid for rodman, axeman, laborers, etc., no recovery can be had against the defendants for said sums, even though the jury may believe said sums or part of said sums were paid by the plaintiffs to such rodman, axeman, laborers, etc.

"4. The jury are instructed that, even though the plaintiffs paid certain laborers or employees of the Levee Board certain amounts on

for work done upon levees not owned or controlled by the district and upon private land and not upon right of way owned by it—in other words, upon private levees. There is evidence to sustain the finding that work upon these private levees was necessary in order to protect the district from overflow and the levees of the district then in process of construction. The authority of the president to act in these emergencies is broadly given in section sixteen. The act evidently contemplated that the district should pay for work done in emergencies, as evidenced by the other section quoted. It would be an idle power conferred upon the president if he could not authorize work to be done at places other than upon land to which the board had acquired right of way, or upon which it had constructed levees, if the other work was in fact necessary to protect the levee system and the country to be saved from overflow by the levee system.

The power conferred in cases of emergency was to protect the best interests of the levee district; and it can not be said that work done upon an old line of levees, behind which the new levees were being constructed, is beyond the power conferred.

Counsel for appellant has favored the court with a discussion of the *ultra vires* acts of officers of public corporations, but none of them are in point here, as the court regards the acts done by the president of the levee board as within the power conferred by the act.

Judgment affirmed.

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memoranda showing the number of days work done by such laborer for the Levee Board of Red River Levee District No. 1, this does not entitle them to any recovery for such sums paid or advanced, unless it is shown said sums were paid on the order or at the request of the Levee Board through its president or duly authorized agent.

"5. The jury are instructed that if you believe from the evidence that the levee on which work is claimed to have been done by the plaintiffs, W. H. and J. C. Russell, was on land belonging to said plaintiffs, and that the levee and right of way had not been donated to the defendants, or condemned by them at the time the work was done, and that the work was not done under instructions, or orders, of the president or engineer, or duly authorized agent of the defendant Levee Board, your verdict must be for the defendant as to the amount claimed for such work." (Rep.)

CARPENTER *v.* CARPENTER.

Opinion delivered November 23, 1908.

COVENANT OF WARRANTY—EVICTION—NOTICE.—A judgment for the recovery of land against a covenantee in possession, rendered after notice to the covenantor of the pendency of the suit, is conclusive of the existence of a paramount outstanding title in another, and constitutes an eviction entitling the covenantee to his action on the covenant.

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

Allen Hughes and *Charles D. Frierson,* for appellant.

1. Neither knowledge of pendency of the action against the covenantee, nor even the fact that the warrantor is called to testify as a witness in the case, is such notice to the warrantor as is contemplated by law; but, on the contrary, he must have notice from the covenantee requiring him to defend in the action, and this notice must be distinct and unequivocal, preferably in writing, although some courts have held verbal notice to be sufficient. 2 Black on Judg. § 569; 8 Am. Eng. Enc. of L. 2d Ed., 205; 1 Jones on Conveyancing, § 924; 11 Cyc. 1105, note 90; Rawle on Covenants for Title, (5 Ed), § 119; 58 S. E. 568; 19 S. W. 640; 2 Devlin on Deeds, § 935; 6 Mo. App. 588; 24 Wis. 417; Freeman on Judg., § 181; 62 Tex. 531; 38 Mich. 132; 20 Ind. App. 26; 87 Ky. 82; 65 Tex. 235; 9 Cal. 213.

2. The decree of the chancery court is not *prima facie* evidence of paramount title. 8 Am. & Eng. Enc. of L. (2 Ed.), 207, and cases cited; 2 Black on Judg., § 571; 1 Jones on Conveyancing, § 923; Rawle on Covenants for Title, § 123; 2 Devlin on Deeds, § 937; 86 Pac. 411; 8 Nev. 190; 109 Wis. 316; 50 Pac. (Wash.), 932; 30 S. E. 656; 117 Ga. 845.

Lamb & Caraway, for appellee.

1. The decree in the case of Clove Carpenter against appellee is conclusive of the rights of appellant in this case. He had, as is conclusively shown, full information as to the nature of the suit, the parties, their rights and interests, and knew and approved the defense made, voluntarily testified as a witness, and repeatedly conferred with counsel. Notice in writing from ap-

pellee to him was not necessary. 57 Miss. 275; 15 Wend. (N. Y.) 426; 24 Wis. 417; 19 Ark. 447; 52 Ark. 325.

2. If not conclusive of the rights of appellant, the decree in that case is at least *prima facie* evidence of paramount title. 4 Bin. (Pa.) 352; 13 Vt. 379; 57 Miss. 275; 3 Watts (Pa.), 306; 9 Lea (Tenn.), 455; 2 *Id.* 533; 5 Watts (Pa.), 323; 38 Mich. 132.

HART, J. This is a suit brought by W. A. Carpenter against J. T. Carpenter in the Craighead Circuit Court for breach of warranty of title to certain lands in said county.

The complaint alleges that on November 1, 1901, appellant conveyed to appellee the lands in controversy, and in his deed warranted and covenanted that he was the owner in fee simple of said land, and had full and lawful right to convey the same. That appellant was not the owner of said land, and had no right, title or claim thereto, but that Clove Carpenter was the rightful owner. That at the November term, 1905, of the Craighead Chancery Court for the Eastern District, in a case therein pending wherein Clove Carpenter was plaintiff and the appellee and others were defendants, a decree was rendered by said court vesting the title to said lands in Clove Carpenter and divesting the title thereto out of the plaintiff. Judgment was prayed for the recovery of the purchase price of the land, $600, and interest.

The answer admitted that the appellant, on November 12, 1901, made to the appellee the deed described in the complaint, with covenants as therein alleged; that the defendant at the time aforesaid and for a long time prior thereto was and had been the owner in fee simple of the land described in the complaint; was in possession of the same at the time said deed was made, and forthwith delivered said land to the plaintiff; denied that at the date of said conveyance Clove Carpenter was the owner of the land or had any right, title or interest therein; admitted that at the November term, 1905, of the Craighead Chancery Court for the Eastern District, in a cause therein pending wherein Clove Carpenter was plaintiff and W. A. Carpenter and Penelope Carpenter, his wife, and J. C. Hall as trustee for the New England Security Company were defendants, a decree was rendered in said court, decreeing the title to said lands to be in said Cove Carpenter, and not in the plaintiff.

A jury was waived, and the case was heard by the court sitting as a jury, and upon consideration of the evidence the court gave judgment for the plaintiff.

W. A. Carpenter testified substantially as follows: I am a brother of J. T. Carpenter and a cousin to Clove Carpenter. Clove Carpenter is a son of J. W. Carpenter. I paid J. T. Carpenter $600 for the lands in controversy. Clove Carpenter brought suit against me for the lands, claiming to own them under a prior title. A few days after Clove Carpenter brought suit against me I met my brother, J. T. Carpenter, and told him about the suit. He told me not to be uneasy; that Clove Carpenter could not get the land, but that if he did he would pay every dollar of my money back. That he had frequent conversations with his brother about the conduct of the trial and that his brother was a witness in the case. The case was determined in favor of Clove Carpenter, and the decree was read in evidence in this case. J. T. Carpenter admitted the conversations had with his brother about the case with Clove Carpenter.

Osceola Butler testified that he was attorney for W. A. Carpenter in his suit against Clove Carpenter; that he had always been J. T. Carpenter's attorney and counsel in any manner affecting his interest; that he had several conversations with him in regard to the conduct of the case of W. A. Carpenter *v.* Clove Carpenter, but that in that case he was employed by W. A., and not by J. T. Carpenter. The case has been duly appealed to this court.

In the case of *Collier* v. *Cowger,* 52 Ark. 322, the court held that a judgment against a covenantee in possession upon the foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance, and cited in support of the opinion the case of *Boyd* v. *Whitfield,* 19 Ark. 447. In the latter case the covenantor had notice of the pendency of the suit in ample time to afford him an opportunity to be made a defendant, but there was no formal notice by the covenantee demanding him to defend the action. These cases are conclusive of the propositions of law involved in this case. They have been followed by the courts of this State for many years, and have become the settled law. Counsel for appellant

have shown no good reason why they should be overruled. Most of the authorities cited by them are not applicable to the facts of this case. They discuss the question under the state of facts not only where there was no request made to defend, but where the covenantee did not even give the covenantor any notice of the pendency of the suit. The reason for the rule requiring notice is that the covenantor may have an opportunity to come in and defend the suit, and, as being more familiar with the source of title, he could more likely succeed in maintaining a defense. In the present case the parties were brothers. W. A. Carpenter told J. T. Carpenter only a few days after the suit was brought of its pendency. Our statute (Kirby's Digest § 6012) provides that where in an action for the recovery of real or personal property any person having an interest in the property applies to be made a party, the court may order it to be done.

The evidence shows that W. A. Carpenter made a vigorous as well as a *bona fide* defense. He held frequent conversations with his brother in regard to the conduct of the case, employed the lawyer with whom his brother always consulted and employed in his own affairs, and had his brother's deposition taken as evidence in the case.

The defense made met the approval of J. T. Carpenter, and he even went to the extent of promising to pay back the purchase money if his brother should lose the suit.

Finding no error in the record, the judgment of the circuit court must be affirmed.

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LITTLE ROCK & MONROE RAILWAY COMPANY v. RUSSELL.

Opinion delivered November 23, 1908.

1. RAILROADS—DUTY TO TRESPASSER ON TRACK.—Trainmen owe to a trespasser on the track no duty except to exercise ordinary care, after discovering his perilous position, not to injure him. (Page 175.)
2. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by himself. (Page 175.)
3. RAILROADS—NEGLIGENCE—ABSTRACT INSTRUCTION.—Where the testimony of the plaintiff in a suit against a railroad company for personal injury

showed that he was walking along a foot path near the railway track out of danger of passing trains until he started across the track at a crossing, and that as soon as he stepped upon the track some one called to him to look out, and that before he had time to jump aside the train struck him, it was error to instruct the jury to find for the plaintiff if the trainmen saw his danger in time to stop the train after it appeared that plaintiff was in danger and from all appearances would not see or hear the train in time to avoid injury. (Page 176.)

Appeal from Union Circuit Court; *George W. Hays,* Judge; reversed.

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

The sixth instruction is erroneous in that it places upon the appellant a degree of care which the law does not require in cases of trespassers; erroneous also in suggesting to the jury that appellee may have had the appearance of not seeing or hearing the train in time to avoid the injury, whereas there is no evidence whatever on which to base such suggestion or instruction. No duty is owing to a trespasser on railroad right of way except ordinary care *after* discovering the trespasser's peril, and it is equally well settled that the negligence of a trespasser offsets the negligence of trainmen in failing to keep a lookout. 61 Ark. 558; 65 Ark. 359; 82 Ark. 522; 76 Ark. 224; 78 Ark. 60, 61; 36 Ark. 371; 40 Ark. 250; 47 Ark. 497; 49 Ark. 257; 50 Ark. 483; 64 Ark. 364; 66 Ark. 494; 76 Ark. 10; 77 Ark. 401; 67 Ark. 235; 65 Ark. 233; 69 Ark. 382; 82 Ark. 267; 83 Ark. 300.

W. E. Patterson, for appellee.

The sixth instruction is right. The evidence clearly shows that appellee not only had the appearance of not seeing and hearing the train in time to avoid the injury, but that he did *not* see it in time, and that the track was level, open and straight, that plaintiff was seen on the track, and that with the least degree of care the train operatives could have seen him, if they did not, in time to have avoided the injury. 85 Ark. 326; 23 Am. & Eng. Enc. of L. 742; 62 Ark. 253; 36 Ark. 374.

HART, J. D. Gill Russell brought this suit in the Union Circuit Court against Little Rock & Monroe Railway Company to recover damages which he alleges he sustained by reason of the defendant negligently backing its train over him while he

was crossing its railroad tracks at a public crossing in Huttig, Arkansas.

The defendant answered, denying the material allegations of the complaint, and alleged contributory negligence on the part of the plaintiff.

Russell, the plaintiff, testified substantially as follows: "I am sixty-six years old and live at Felsenthal, Union County, Arkansas. I am an attorney at law. On the 28th day of August, 1906, I was at Huttig in said county, and, desiring to go to Farmerville, I went to the depot for the purpose of taking one of defendant's trains to that place. While at the depot, the Monroe train came in, going north. I got tired of waiting for my train, and crossed over to the east side of the main track, intending to go to a neighbor's to borrow a horse to ride to Farmerville. I walked south on a toe path along the side of the main track towards a public crossing. When I got near the crossing, I turned around to see if the track was clear. I looked north and south, and did not see anything to interfere. The south bound train was late. I knew that the rules and regulations of the Railway Company prescribed that trains on schedule time had the right of way, and also that northbound trains had the right of way over southbound trains. When I looked back, the northbound train was on the main track in front of the depot and was standing still. I walked leisurely along to the road crossing which was about twenty-five steps distant. The public crossing was about seventy-five or one hundred yards from the depot. When I got there, without looking back, I started across the track. As soon as I stepped on the track, some one hallooed: 'Lookout!' I looked up, and did not have time to jump to either side. I threw up my hands as the train carried me under. There was a man on the back end of the platform, but he looked like he did not know what to do. The train was backing rapidly, and wasn't making any noise. The train crew did not give me any warning, and if they had rung the bell or blown the whistle I would have heard it. I had a piece of cotton in my ear, but it was placed there loosely, and did not interfere with my hearing. I did not know of the approach of the train until the boy hallooed: 'Lookout!' after I had stepped upon the railroad track. I was walking along the east side of the track because the path

on the west side is too near the rails. My injuries were severe and are permanent. The accident happened in daylight."

Other testimony was adduced by the plaintiff tending to corroborate his statement.

The defendant adduced evidence to establish its defense.

The defendant has appealed from a verdict and judgment in favor of the plaintiff.

Counsel for appellant base reversal upon the court giving, over their objection, the following instruction:

"6. The court instructs the jury that if they could find from the testimony that plaintiff was walking on or down defendant's track when the backing train struck and injured him, but that if any of defendant's train crew operating said train saw or could have seen plaintiff's danger in time to apprise him of it, or in time to stop the train after it appeared that plaintiff was in such danger, and that from all appearance (he) would not see or hear the train in time to avoid injury, and such trainmen failed to warn plaintiff or to stop the said train, although they may further find that plaintiff was at the time a trespasser on said track, they will find for the plaintiff."

This instruction was erroneous in telling the jury that if any of appellant's train crew could have seen appellee's danger in time to apprise him of it and failed to warn him, they should find for appellee, although they might further find that he was at the time a trespasser. It has been repeatedly held by this court that the servants of a railroad company owe a trespasser no duty, except to exercise ordinary care, after discovering his perilous position, not to injure him. *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 86 Ark. 306; *St. Louis, I. M. & S. Ry. Co.* v. *Evans,* 87 Ark. 628; *Adams* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 300, and cases cited; *Chicago, R. I. & Pac. Ry. Co.* v. *Bunch,* 82 Ark. 522.

But appellant has waived this error because the instruction given to the jury at the request of its counsel contained the same error. "Appellant can not complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by himself." *Choctaw, Okla. & Gulf Rd. Co.* v. *Hickey,* 81 Ark. 579; *Klein* v. *German Nat. Bank,* 69 Ark. 140; *St. Louis, I. M. & S. Ry. Co.* v. *Baker,* 67 Ark. 532; *Railway*

Co. v. *Dodd,* 59 Ark. 317. The same error was repeated in other instructions given at the instance of the appellee, but it was invited error as declared in the above decisions for the reason that appellant asked instructions substantially to the same effect on the same point.

The instruction is also erroneous in regard to the appearance of appellee, which is contained in the following clause: "and that from all appearance (he) would not see or hear the train in time to avoid injury." There was no testimony upon which to base this part of the instruction. Appellee's own testimony shows that he was walking along a foot path by the side of the track out of all danger of passing trains until the very moment he started across the track at the public road crossing. That as soon as he stepped upon the track some one cried "Lookout!" and that before he had time even to jump aside the train struck him. There was nothing to indicate that he intended to cross the track until he changed his course and stepped upon it. He was in full possession of all his faculties, and there was nothing to indicate that any infirmity prevented him from seeing the approaching train. He bases his right to recover solely on the fact that he was crossing the track at a road crossing, and that appellant negligently backed its train upon him. He seeks to avoid the general rule that it is negligence as a matter of law for one approaching a railroad crossing to fail to look and listen for the approach of trains by bringing himself within the exception to the rule announced in the cases of *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.,* 78 Ark. 55, and *Scott* v. *St. Louis, I. M. & S. Ry. Co.,* 79 Ark. 144. He adduced evidence tending to show that the circumstances were so unusual that he could not reasonably have expected the approach of a train at the time he went upon the track. This proposition was sharply contested by the railroad company, which adduced evidence strongly tending to show that there were no unusual circumstances. This was the real issue in the case. That part of the instruction above quoted as to the appearance of the appellee directs the minds of the jury to an issue not in the case, was calculated to divert them from the real issue, and was misleading and prejudicial. As was aptly said in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Woodward,* 70 Ark. 441, "under the circumstances, it can not be determined

whether the jury based their verdict upon the proper instructions given in the case or upon the erroneous instruction. The instructions, especially in a case like this where every issue is sharply controverted by the evidence, should be direct and to the point, and not at all misleading as to the real issues involved; otherwise there can be no fair trial."

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Denty,* 63 Ark. 177, it was also held that the giving of an instruction not applicable to any issue raised in the case, and with no evidence upon which to base it, and which from the attendant circumstances was likely to mislead the jury, was prejudicial error.

Counsel for appellant insists that there is not sufficient testimony to support the verdict, but a majority of the court think that the existing circumstances were sufficient to bring the case within the exceptions to the general rule as declared in the Scott and Tiffin cases *supra,* and that, under the circumstances presented by the record, it was for the jury to determine whether the appellee exercised the care the law requires. The case, therefore, will not be dismissed, but for the error indicated in the opinion in regard to the appearance of appellee at the time he was hurt the judgment must be reversed, and the cause remanded for a new trial.

PINE BLUFF & WESTERN RAILROAD COMPANY *v.* MCCASKILL.

Opinion delivered November 23, 1908.

1. INSTRUCTIONS—CONFLICT—REPETITION.—It was not error to refuse an instruction which either conflicted with other proper instructions given or was fully covered by them. (Page 180.)
2. DEPOSITIONS—AUTHORITY OF CLERK TO TAKE.—Depositions taken in a proper case by the clerk of the circuit court under the directions of that court are not invalidated because the court's order styled the clerk "a commissioner," since the clerk as such is authorized by Kirby's Digest, § 3162, to take depositions. (Page 180.)
3. SAME—REASONABLE NOTICE.—A notice to take depositions on the day the notice was given is sufficient if it gave the adverse party reasonable opportunity to attend. (Page 181.)

4. SAME—VERBAL NOTICE—WAIVER—The objection that a notice to take depositions was not in writing as provided by the statute (Kirby's Digest, § 3167) was waived where the adverse party attended the examination of the witness and cross-examined him.

5. TRIAL—DELAY FOR PURPOSE OF TAKING PARTY'S DEPOSITION.—It was within the court's discretion to postpone a trial until the plaintiff's deposition could be taken.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; affirmed.

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

1. There is no statutory provision for taking the testimony of a witness in the unusual manner adopted in taking the appellant's deposition in this case. While the statute permits the taking of a witness' deposition on account of infirmities, etc., that must be upon notice. It does not authorize the procedure followed here.

2. The court erred in refusing the fourth instruction requested by appellant. Certainly, the mere fact that appellee received a fall, and that the injuries were received while she was going on the train, did not entitle her to recover, but there must have been negligence on the part of appellant, either in the failure to perform some duty, or in performing it in a negligent manner. Other instructions given authorized the jury to find for plaintiff, if they found defendant guilty of negligence. Hence this instruction was necessary. 85 Ark. 117.

Nixon & Shaw, for appellee.

1. The statute authorizes the taking of the deposition of a witness, in case of infirmity, etc. Kirby's Digest, § 3157. The witness lived within three blocks of the court house, hence the statutes with reference to notice, while not in this case in writing, were substantially complied with. *Id.* § § 3166, 3172. Appellant by counsel appeared and took part in the examination. It can not now complain. 15 Ark. 491; 9 Ark. 418; 87 Ark. 243.

2. The fourth instruction requested was fully covered by another given at appellant's request. The record ought not to be incumbered by a multiplicity of instructions announcing in effect the same legal principle. 43 Ark. 193; 51 Ark. 147; 52 Ark. 181; 46 Ark. 141; 34 Ark. 383.

McCULLOCH, J. Mrs. M. E. McCaskill became a passenger on one of appellant's trains, and sues to recover damages for injuries alleged to have been received by reason of negligence of appellant's servant while she was boarding the train at Pine Bluff. Her contention, as set forth in her complaint and the testimony adduced in support of it, is that she was ascending the steps of the train with a suit case in her hand, and that the train porter undertook to assist her, and, while so doing, grasped hold of the suit case and negligently shoved it with sudden and violent force against her, so as to throw her down on the step or platform of the coach, thus inflicting serious injuries. Appellant's contention is that appellee tripped herself while ascending the steps of the coach by treading on her skirts, and that if she received any injury at all it resulted from that accident, and not on account of any negligence on the part of the train porter. There was evidence sufficient to sustain either theory.

The court submitted the case to the jury on instructions requested by each party, telling the jury in substance that, while it was not the duty of the train porter to assist appellee in getting on the train, yet, if he undertook to do so, it was his duty to exercise ordinary care, and that appellant would be responsible for any damage resulting from his negligence in this respect. Other instructions, given by the court at appellant's request, told the jury that, unless the alleged injury resulted from negligence on the part of the porter, or if it resulted from appellee's own negligence, the company would not be liable, and that the burden of proof was on appellee to prove that the injury was caused by a neglect of the porter.

In addition to this, appellant requested the court to give the following instruction, which was refused:

4. "If you believe from the evidence that the plaintiff did, in getting upon defendant's train, fall and was injured thereby, then, before she is entitled to recover against the defendant in this case, she must prove by a preponderance of the evidence that the defendant or its employees were guilty of negligence, either in omitting to perform some duty, or in the performance of such duty it owed the plaintiff, of which plaintiff complains, in boarding its said train which caused the injury."

This instruction was properly refused because it conflicts with the other instructions in stating that, in order to render appellant liable, there must have been negligence in the performance of a duty which it owed to appellee. The other instructions told the jury that it was not the duty of the porter to assist the passenger in boarding the train, and the jury might have understood from the above refused instruction that there was no negligence on the part of the porter because he owed the passenger no duty to assist her. This put it in conflict with the other instructions, which stated that, while it was not the duty of the porter to assist the passenger in getting on the train, yet if he undertook to do so he must exercise ordinary care. If the refused instruction be not susceptible of that interpretation, it is fully covered by other instructions given to the jury, and no prejudice resulted from the court's refusal to give it.

Other refused instructions were, we find, fully covered by those given, and there was no error committed by the court in its charge or in refusing instructions.

On the day the case was set for trial in the circuit court appellee's attorneys presented to the court a petition asking that the court designate a commissioner before whom her deposition could be taken, on the ground that by reason of physical infirmity she was unable to attend the session of court. The court granted the prayer of the petition and appointed the clerk of the court as commissioner to take the deposition. Said commissioner, together with the respective attorneys for both parties in the case, repaired to appellee's residence, where her deposition was taken by examination in chief and cross-examination. On the same day both parties announced themselves ready for trial, a jury was impanelled, and the trial proceeded. When the deposition of appellee was offered, appellant objected to its introduction, but the court overruled the objection and allowed the deposition to be read. Learned counsel for appellant assigned this ruling as error, and insist upon it here, but they point out no reason for the objection, further than to say that the method of taking the deposition is novel and unusual and not expressly authorized by statute.

The statute provides that depositions of witnesses may be read in all actions, either in equity or at law, "where from age,

infirmity or imprisonment, the witness is unable to attend court." Kirby's Digest, § 3157. No contention is made that appellee's physical condition was not such as to fall within the provision of this statute. The statute further provides that depositions may be taken upon reasonable notice, which must be in writing. Kirby's Digest, § 3166 *et seq.* It is therefore seen that the taking of the deposition was clearly authorized by statute, though there is no provision for the appointment of a commissioner by the court for the taking of a deposition under such circumstances. The appointment, however, did not affect the validity of the deposition, as the clerk of the court was authorized by statute to take depositions. Kirby's Digest, § 3162.

The notice was reasonable, as it gave the adverse party reasonable opportunity to attend. It was not in writing, as provided by statute, but that was waived by attendance at the examination and by cross-examination of the witness. *Caldwell* v. *McVicar,* 9 Ark. 418.

The court's action in delaying the trial until the deposition could be taken was a matter of discretion, the exercise of which will not be disturbed where no abuse of it nor prejudice therefrom is shown.

No error being found, the judgment is affirmed.

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

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Opinion delivered November 23, 1908.

1. MASTER AND SERVANT—OBSERVABLE DEFECT—NEGLIGENCE.—Evidence that a brakeman was injured, when he attempted to climb up on a freight car, by a hand hold or "grab iron" pulling loose, and that a tap was gone from a bolt which should have held the grab iron, was sufficient to prove that there was a defect which might have been discovered by proper inspection. (Page 184.)

2. SAME—WHO ARE FELLOW SERVANTS.—A car inspector and brakeman were not fellow servants, under Kirby's Digest, § § 6658-60. (Page 184.)

3. PLEADINGS—AMENDMENT—DISCRETION OF COURT.—When objection is made to the introduction of evidence not in support of an issue prop-

erly raised, the court in its discretion may permit or refuse to permit an amendment of the pleadings to be made; and this discretion will not be disturbed on appeal unless an abuse is shown which prejudiced substantial rights of the appellant. (Page 185.)

4. SAME—DISCRETION TO REFUSE AMENDMENT.—Where the plaintiff in a personal injury suit was engaged by a conductor on a freight train to work for the company as brakeman, and did regular work for some time under two conductors and received his pay from the company before he was injured, it was no abuse of discretion to refuse to permit the company, in the midst of the trial, to amend its answer so as to deny the authority of the conductor to employ him. (Page 185.)

5. MASTER AND SERVANT—WHEN RULES BINDING.—An employee is not bound by a rule adopted by his master if he has no knowledge of its existence. (Page 186.)

6. SAME—DUTY TO MAKE INSPECTIONS.—The rule which imposes upon the master the duty to exercise ordinary care to provide his servants with a reasonably safe place in which, and reasonably safe appliances with which, to work requires the master to make reasonable inspection to see that the place and appliances are safe. (Page 187.)

7. INSTRUCTIONS—GENERAL OBJECTION.—A general objection to an entire instruction is insufficient to point out an ambiguity in a part of it. (Page 188.)

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

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

1. The court erred in refusing to permit appellant to amend its answer so as to deny the employment of appellee by the company, and the authority of the conductor to employ him. 65 Ark. 422; 43 Ark. 451; 62 Ark. 262; 85 Ark. 217; 84 Ark. 37. If the conductor had no authority to employ him, appellant owed him no duty as to providing safe appliances or making inspection of cars, and it would not be liable for his injury unless wantonly or wilfully inflicted. 67 L. R. A. 701.

2. The court erred in refusing the eleventh instruction requested by appellant. The inspector and brakeman were fellow servants, appellee's injury having occurred prior to the Fellow Servants Act of March 8, 1907; 46 Ark. 555; 51 Ark. 467; 67 Ark. 295; Kirby's Digest, § § 6658-60. And in not seeing to it that the cars were inspected appellee was guilty of contributory negligence.

3. The thirteenth instruction requested should have been given. The company is not an absolute insurer of the safety of its cars, and reasonable care in inspection is all that is required.

4. The instruction given by the court on its own motion was erroneous in making it obligatory upon appellant to have provided a thorough system of inspection at Newport, whereas it was not its duty to provide for inspection at any particular point, but only at reasonable intervals along its line. 67 Ark. 295.

Oldfield & Cole, for appellee.

1. Under the circumstances the court properly refused to permit appellant to amend its answer after the evidence was in. The answer contained no denial of appellee's employment, but, on the contrary, admitted it. 32 Ark. 244; 1 Enc. Pl. & Pr. 499; 16 Ark. 120; 22 Ark. 166; 54 Ark. 444; 59 Ark. 165; 60 Ark. 526; 68 Ark. 314; 53 L. R. A. 817; 56 L. R. A. 341.

2. The car inspector and appellee were not fellow-servants, even at the common law; certainly not under the law of this State. 67 Ark. 295; 51 Ark. 467; 3 Elliott on Railroads, § 327; 4 Thompson on Negligence, § 5089; 94 Fed. 781; 116 U. S. 642; 37 S. W. 75; 117 Ind. 439; Kirby's Digest, § 6659; 67 Ark. 1; 84 Ark. 377. Appellee was not informed of any rule requiring him to see that cars were inspected. An employee is not bound by any rule which is not brought to his attention. 48 Ark. 333; 142 Fed. 650; 73 C. A. 646.

3. Appellant's objection to the instruction given on the court's own motion was general and not specific. Objections to the rulings of a trial court should be specifically pointed out to that court. 38 Ark. 528; 59 Ark. 312; 75 Ark. 181; 76 Ark. 41; *Id.* 482. Moreover, Newport being the terminus of this line of railroad, it was appellant's duty to inspect the car there. 51 Ark. 467.

MCCULLOCH, J. This is an action instituted by appellee against appellant railway company to recover damages for personal injuries alleged to have been received while working for appellant as brakeman. He alleges that he was a minor at the time of his injury, as well as at the time when he subsequently executed a release to appellant; and, as the jury found this to be true, we must treat it as an established fact, though the testimony

on the point is conflicting. It is alleged in the complaint, and the evidence tended to show, that appellee was working as a brakeman on one of appellant's freight trains, and was attempting, while the train was running, to climb up on a freight car for the purpose of setting brakes when a hand-hold or "grab-iron," as it is called, which he grasped on the side of the car gave way and pulled off, causing him to fall to the ground. Negligence of appellant is alleged in permitting the grab-iron to become insecure, and in failing to inspect the car and discover its insecure condition.

The evidence was sufficient to sustain a finding that the grab-iron was defective and insecure, and that the defect could have been discovered by proper inspection. One end of the grab-iron came loose at the time of the injury to appellee. It was found that the tap was off the bolt which should have held the loose end, and that the bolt had a string wrapped around the threads on the end of it, thus establishing the fact that there was no tap on the bolt when it came loose. This showed that there was a defect which might have been discovered by proper inspection. *St. Louis & S. F. Rd. Co.* v. *Wells,* 82 Ark. 372. The defective car was taken into the train at Newport, where car inspectors were kept on duty. The rules of the company required inspectors to see that freight cars were in good running order and fully supplied with proper appliances, etc.

It is insisted that the inspector was a fellow-servant with appellee, a brakeman, and that no recovery can be had on account of the former's negligence. Under the statutes of this State in force at the time of the injury complained of, as construed by this court, a brakeman and a car inspector were not fellow-servants. *Kansas City, Ft. S. & M. Rd. Co.* v. *Becker,* 67 Ark. 1; *St. Louis, I. M. & S. R. Co.* v. *Dupree,* 84 Ark. 377.

The complaint alleges that appellee was duly employed by appellant as brakeman on the road, and the answer contains no denial of this allegation. On the contrary, it is claimed in the answer as a defense that appellee assumed the risk of danger incident to his employment, and that by his "own negligence and inattention to his duty as an employee of defendant" he contributed to his own injury. During the progress of the trial appellant drew out from appellee on cross-examination that he

had never made written application in the regular way for employment, but had been employed by a conductor on the road to act as brakeman. Appellant then attempted to show that a conductor had no authority to employ brakemen, and to rebut this appellee introduced testimony tending to show that the conductor had authority to employ him, and that he had been working for appellant for some time as brakeman pursuant to this employment. After the introduction of evidence was concluded, appellant's counsel asked permission of the court to amend the answer so as to insert a denial that appellee was employed by appellant, and that the conductor had authority to employ him. The court refused to permit the amendment to be made. Appellant also requested the giving of instructions, which the court refused, defining the duty of appellant to appellee if he was not employed. These rulings are assigned as error.

When testimony is introduced, without objection, upon an issue not specifically raised by the pleadings, the court should treat the pleadings as amended so as to correspond wth the proof, or may permit an amendment of the pleadings to be made. *Sorrels* v. *Self,* 43 Ark. 451; *Davis* v. *Goodman,* 62 Ark. 262; *Nicklace* v. *Dickerson,* 65 Ark. 422; *Roach* v. *Richardson,* 84 Ark. 37; *Wrought Iron Range Co.* v. *Young,* 85 Ark. 217.

The proof must, however, be confined to the issues raised by the pleadings; but, when objection is made to the introduction of testimony not in support of an issue properly raised, the court may, in the exercise of its discretion, permit an amendment to be made. This court will not disturb a ruling of the trial court in this respect unless an abuse of discretion is shown which prejudiced substantial rights of the appellant. *Kempner* v. *Dooley,* 60 Ark. 526; *Mooney* v. *Tyler,* 68 Ark. 315; *Railway Co.* v. *Dodd,* 59 Ark. 317; *Bloch Queensware Co.* v. *Metzger,* 70 Ark. 232.

Appellee objected to the introduction of certain evidence tending to show that the conductor was not authorized to employ him in appellant's service, and also objected to the offered amendment to the pleadings, as well as the instructions requested by appellant on that issue. These were appropriate and timely objections to the bringing in of the new issue as to appellee's employment in the service of appellant, and we can not say that the

court abused its discretion in sustaining the objections and in refusing to permit the amendment to be made at that stage of the proceedings.

We do not overlook the decisions of this court reversing trial courts for refusing to allow amendments to pleadings during the progress of trials. *McMurray* v. *Boyd,* 58 Ark. 504; *Southern Insurance Co.* v. *Hastings,* 64 Ark. 253. But each case must be judged according to its peculiar facts. In the present one we find nothing to justify a conclusion that the trial court abused its discretion. Appellee was engaged by a conductor on one of appellant's freight trains to work for the company as brakeman. He did regular work for some time under two conductors, and received his pay from the company. These facts are undisputed, and the only other facts for inquiry under the offered amendment would have been whether or not the conductor had authority to employ appellee, or whether the company ratified the act of the conductor by accepting appellee's services and paying him therefor. The complaint contained a specific allegation to the effect that appellee was employed as brakeman, and the answer contained no denial, but on the contrary expressly admitted it. Now, it would appear to have been unjust to appellee to have required him, in the midst of the trial, to meet a new issue thrust into the case as to the authority of the conductor to employ him and the knowledge of the company as to an unauthorized act of the conductor in employing him. Certainly, no abuse of discretion is shown in refusing to permit this amendment to be made.

Error of the court is assigned in refusing to give the following and certain other instructions of like import, requested by appellant:

"11. If it was the duty of brakemen to see that inspection of the cars was made, and upon such failure of inspection to inform or make complaint to the conductor or any other person relating thereto, and if the plaintiff did not perform this duty, and make such complaint or give such information, then plaintiff can not recover."

There was some evidence tending to show the existence of a rule of the company requiring brakemen to see that inspection of the cars had been duly made and to make complaint to conduc-

tors of failure to inspect. There is, however, no evidence that appellee knew of the existence of such rule. Therefore it was improper to give this instruction telling the jury, in effect, that he was guilty of contributory negligence as a matter of law if he failed to comply with the rule. *Little Rock, M. R. & T. Ry. Co.* v. *Leverett,* 48 Ark. 333.

The court gave instructions submitting to the jury generally the question whether or not appellee was guilty of contributory negligence in failing to exercise proper care for his own safety in the discharge of his duties as brakeman, and gave the following at appellant's request, which is perhaps too favorable to appellant:

"14. If such defect as to the grab-iron complained of by plaintiff existed, and such defect was open to the observation of plaintiff by an examination upon his part, as well as open to such investigation as was the custom to be made of such car at Newport, the plaintiff having knowledge of such custom and mode of inspection at that place, then in that event the plaintiff can not recover."

We think that appellant has no just grounds of complaint at the instructions of the court on this subject. It was a question of fact for the jury to determine from all the proof whether or not appellee was guilty of any negligence in failing to discover the defective condition of the grab-iron, or in attempting to use it.

The following instruction requested by appellant was refused:

"13. The mere fact that defendant or its inspectors may have failed to inspect the said grab-iron in question, or to examine the inside of the car to ascertain the condition of the bolt holding such grab-iron to the car, raises no presumption of negligence, and is not sufficient proof of negligence upon the part of the railway company." The instruction was incorrect.

It is the duty of the master to exercise ordinary care to provide his servants with a reasonably safe place in which to work and reasonably safe appliances with which to work. This duty also includes one of making reasonable inspection to see that the place and appliances are safe. *St. Louis, I. M. & S. Ry. Co.* v. *Rice,* 51 Ark. 467. Where a defect is shown to have existed in

the grab-iron which could have been discovered by reasonable inspection, it would have been improper to tell the jury, as a matter of law, that a failure to inspect on the part of the master is not sufficient proof of negligence to warrant a recovery for injury resulting from the defect. Such was the effect of the instruction.

The court instructed the jury at appellant's request that "the mere fact that plaintiff may have received an injury, or the mere fact that the nut or tap of the bolt holding the grab-iron in question to the car may have been found absent or missing, and a string tied around such bolt, does not raise any presumption of negligence, or in itself make sufficient proof of negligence upon the part of the defendant; the mere fact that the grab-iron in question may have given way when plaintiff took hold thereof, and by reason thereof he received an injury, does not raise any presumption of negligence upon the part of defendant railway company." This was sufficient on that subject.

The court gave the following instruction on its own motion: "If you believe from the greater weight of the testimony in this case that the plaintiff, while working as a brakeman for defendant, was injured by a fall from one of defendant's cars, or car hauled by it, that such fall was caused by a hand-hold or grab-iron coming loose at one end, that such grab-iron was not properly fastened at both ends, but was wrapped with a string, instead of having a nut, that the condition of such grab-iron was known to the defendant railway company, or might have been known by a reasonably careful inspection before the car left Newport, then you may find for plaintiff, unless you further find that he was over the age of twenty-one years when he signed the release introduced in evidence."

A general objection was interposed by appellant to this instruction, and it was also specifically objected to on the ground that it excluded all defenses except that of appellee being over twenty-one years of age.

The only objection urged here to the instruction is to that part which refers to the duty of appellant to make an inspection of the car before it left Newport. It is urged that this part of the instruction imposed upon appellant the specific duty of inspecting the car at Newport, notwithstanding it had provided

for inspection at other reasonable intervals along the line. We do not think the instruction is open to this objection, under the peculiar circumstances of this case; but, if it was, the objection should have been specifically pointed out. The only question before the jury as to negligence in failing to inspect was at Newport. True, the proof shows that it was customary to inspect cars for this line, and the fourteenth instruction given at appellant's request referred, in so many words, to Newport as the customary place of inspection.

There are other assignments of error which we do not consider of sufficient importance to discuss here. We have considered them all and find no error, so the judgment is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* SKINNER.

Opinion delivered November 23, 1908.

1. CARRIERS—SUIT CASE AS BAGGAGE.—A suit case purchased for his own use by a passenger which he was carrying home inside of his trunk constituted baggage. (Page 190.
2. SAME—ARTICLES FOR USE OF FAMILY AS BAGGAGE.—Articles purchased by a passenger while on a journey for the use of members of his family fall within the term baggage. (Page 191.)
3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Where a complaint seeking to recover from a carrier for lost baggage contained a list of the articles alleged to be lost, and the answer failed to deny that any of the articles constituted baggage, the question whether they were proper to be claimed as baggage cannot be raised on appeal for the first time. (Page 191.)
4. INSTRUCTIONS—WHEN HARMLESS.—The defendant cannot complain of errors in the court's instructions in a case wherein the court might properly have given an instruction to find for the plaintiff. (Page 192.)

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

Read & McDonough and *S. W. Moore,* for appellants.

1. "Baggage" does not include everything a traveler puts in his trunk. 65 Ark. 365. For "baggage," see also 106 Mass. 146; 74 Ark. 125; L. R. 6 Q. B. 612; 12 Wall. 274. Such articles

only as are ordinarily taken by travelers for their *personal use and convenience.* 12 Wall. 274. What is baggage is for the jury under *proper* instructions. 30 N. Y. 594; 14 Am. Rep. 356; 35 Vt. 605; 74 Ark. 125; 122 Ill. App. 359.

2. The instructions asked should have been given. 60 Ark. 434; 74 *Id.* 125; 63 *Id.* 363.

McCULLOCH, J. This is an action instituted by appellee to recover of appellant the value of his lost baggage which was checked over appellant's railroad for him as a passenger from Texarkana to De Queen, the undisputed proof showing that it was destroyed by fire while in appellant's custody after it arrived at the last-named place within forty-eight hours after arrival, which, under the statute, rendered the company responsible for it as common carrier. Kirby's Digest, § 6617.

The case was submitted upon the testimony of appellee alone—no other testimony being introduced except the baggage check issued to him. The evidence is therefore undisputed, and the only ground for reversal urged by appellant is that some of the articles in appellee's trunk were not baggage, within the proper meaning of that term when used in connection with the question of a carrier's liability to a passenger, and that the court erred in refusing to submit the question whether the disputed articles were or were not baggage.

Appellant was on a journey from the State of Nevada to his home at De Queen, Arkansas, and carried his trunk, which was checked as baggage. He stopped off at Texarkana, and resumed his journey home on appellant's road from that place where he purchased a ticket and had his trunk checked. The trunk contained numerous items, which, according to his own inventory and valuation, were of the total value of $170.25, including the value of the trunk, but which the jury found to be of the value of $160. The only two items which we think can be seriously questioned as coming within the term baggage are a suit case, valued at $10, which appellant purchased at Texarkana and carried home inside the trunk, and a dress pattern containing twelve yards of woolen goods valued at $8.85 which he purchased at Texarkana and was conveying it home for a member of his family.

We find little difficulty in reaching a conclusion that the suit

case was baggage, though it was purchased at Texarkana and was carried inside the trunk. He purchased it for his own use, and was conveying it home for that purpose. Its character as baggage was not destroyed because it was inside the trunk, and was not being made use of on that journey.

The only other question is whether the dress pattern purchased and carried home for use by a member of appellee's family, not being literally for his own personal use or convenience, was baggage for which appellant was responsible as carrier. This court, as a general definition of the term "baggage," has given its approval to this statement of Lord Chief Justice Cockburn in *Macrow* v. *Great Western Ry. Co.*, L. R. 6 Q. B. 612: "Baggage is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey." *Kansas City, P. & G. Rd. Co.* v. *State*, 65 Ark. 365; *Little Rock & H. S W. Rd. Co.* v. *Record*, 74 Ark. 125.

An examination of the facts of our cases shows that a liberal, rather than a literal, interpretation of that definition was intended. In the case last cited the court held that two shotguns of the value of $250 carried by the passenger to hunt with on reaching his destination constituted baggage.

Difficulty arises more in the application of the law on this subject to the particular facts of a case, rather than to a statement of the law itself. We do not construe our former decisions to mean that the articles carried as baggage must be for use only while on the journey or for strictly personal use. There seems to be no good reason why an article for use at the end of the journey or for the use of the traveller's wife, child or other member of his immediate family should not fall within the definition of the term personal baggage. 3 Hutchinson on Car. § 1246; *Withey* v. *Pere Marquette R. Co.*, 141 Mich. 412.

The New York Court of Appeals in *Dexter* v. *Syracuse, etc., Rd. Co.*, 42 N. Y. 326, held that material purchased in a distant city and carried by a passenger to be used for dresses for members of his family was properly considered as baggage. We think that decision is correct.

There is still another reason why the judgment in this case

should be affirmed. A bill of particulars accompanies the complaint containing a list of all the articles in the trunk, and the complaint alleges that they were carried as baggage. The answer contains no denial that any of the articles constituted baggage, and the question can not be raised here for the first time. *St. Louis Southwestern Ry. Co.* v. *Johnson,* 82 Ark. 365.

There was therefore no prejudicial error in giving or refusing instructions, as there was no conflict in the evidence, and the court could well have given a peremptory instruction in favor of appellee.

Affirmed.

HARR v. FORDYCE.

Opinion delivered November 23, 1908.

TRUSTS—WHEN TRUSTEES REMOVED.—Courts of equity have power to remove trustees, but this power will not be exercised for every mistake or neglect of duty, but for such only as endanger the trust property or show a want of honesty or capacity to execute their duties or of reasonable fidelity.

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

J. H. Harrod and *J. G. & C. B. Thweatt,* for appellant.

1. Equity prohibits a purchase by parties in position of trust of confidence. 20 Ark. 381. A trustee can not sell to himself, or for his own benefit. 23 *Id.* 622; 41 Ark. 264.

2. The trustee had no authority to sell the property as acreage; only by lots. He can not sell at great sacrifice. The powers of a trustee are strictly construed; no presumptions are indulged. 27 Ark. 122.

Moore, Smith & Moore, for appellee.

1. It is clear the trustee had power under the contract and deed to sell by acreage. 72 Ark. 630; 55 *Id.* 20; 52 *Id.* 65.

2. No fraud or dishonesty is shown. Mere mistakes of judgment by a trustee do not warrant a court of equity in inter-

fering. 2 Perry on Trusts, § 511; 1 *Id.* p. 350; 2 Pom. Eq. Jur. p. 1070; 44 N. J. Eq. 211.

3. The trustee acted according to its best judgment, after due consideration. 82 N. Y. 65; 38 Mich. 582; 47 Ark. 254, 265.

BATTLE, J. On the 19th day of August, 1905, S. L. Harr filed a complaint in equity in the chancery court of Prairie County against S. W. Fordyce and the Southwestern Improvement Association, alleging that on the 3d day of January, 1888, Richard Sutcliffe, being the owner in fee of the N. W. ¼, section 32, T. 1 S., R. 4 W., in Prairie County, Arkansas, entered into an agreement with the defendant Fordyce that Fordyce would cause the above described property to be platted in convenient shape for a town site with streets and alleys, and cause said plat to be filed in the proper office in the county, and that Fordyce would cause to be erected a suitable and proper depot at said place for business. Sutcliffe agreed to execute and deliver to Fordyce, as trustee, a deed to all said property, so that Fordyce could make transfers of the lots. It was expressly agreed that the conveyance was to be in trust, and that Fordyce and Sutcliffe were to be jointly interested in the transaction; Fordyce to hold the title for the benefit of Sutcliffe and his assigns.

"It was agreed that Fordyce, as trustee, was to take charge of the property and, through his agents, collect the money derived from the sale thereof, and, after paying the taxes, the net revenues were to be divided every twelve months—one-half to Sutcliffe and his heirs and assigns, and the other half to Fordyce and his heirs and assigns. That Fordyce caused a portion of said land to be platted in April, 1889, same being spread upon the record upon the 29th of July, 1889. The complaint makes the agreement and plat exhibits.

"On the 30th of May, 1888, Sutcliffe delivered to Fordyce a trust deed to said land. The deed reciting it was made in pursuance of the agreement before mentioned. On July 25, 1889, Sutcliffe conveyed to R. S. Giles all his title, claim and interest in said land, subject to the contract between Sutcliffe and Fordyce. On the 20th of February, 1889, Giles and wife conveyed to Harr a one-fourth interest in said land, subject to the contract between Sutcliffe and Fordyce. All the deeds were made exhibits to the complaint.

"On the 9th day of June, 1888, Fordyce, as trustee, conveyed to the Southwestern Improvement Association said tract of land, subject to the terms and conditions of the contract between Sutcliffe and Fordyce. The defendant has sold and collected for said lots over $2,000, and has not accounted to plaintiff for his interest therein. The complaint then gives a list of the lots sold by the defendants.

"The complaint then alleges that the defendants have sold fractional parts of said ground in acreage property in violation of the agreement. It then recites the instances of the sales of the acreage property. It is further alleged that for one or two years the defendants settled with the plaintiff for his part of the land, but that for fifteen or sixteen years no settlement has been made, although he had a one-fourth interest in the proceeds of the sales.

"The complaint closes with a prayer that the defendants be enjoined from selling any more of the lots; that a master be appointed to state the accounts between the parties, and that the remainder of the lots be sold by a commissioner; that the trust estate be administered, and the amount paid to plaintiff that was due him."

Both defendants answered.

On the 30th day of May, 1888, Richard Sutcliffe and his wife conveyed to S. W. Fordyce, trustee, the party of the second part, the northwest quarter of section 32, township 1 south, range 4 west, to have and to hold "and all and singular the rights, privileges, appurtenances, immunities and privileges thereunto belonging or in anywise appertaining to the said party of the second part, his heirs, successors and assigns, forever; giving and granting unto said party of the second part, his heirs, successors and assigns, the absolute right, power and authority to sell and dispose of the property hereinbefore conveyed as to him may seem best, without restraint or condition and without the necessity on the part of the purchaser to see to the application of the moneys realized therefrom except as the application thereof is regulated and controlled by said contract dated January 3, 1888, hereinbefore referred to as the consideration for this deed."

This conveyance was made and executed in pursuance of an agreement made and entered into on the third day of January,

1888, by Richard Sutcliffe and S. W. Fordyce. It is in part as follows:

"1. Said Fordyce is to hold said property as trustee for the benefit of said Richard Sutcliffe, his heirs and assigns, to the extent of one-half of the whole interest conveyed to him, and for the benefit of said Fordyce and his associates, their heirs and assigns, to the extent of the other half interest so conveyed.

"2. Said Fordyce is to cause the said property to be platted in convenient shape for a town, with streets and alleys, with a railroad reservation such as is suitable and proper for the convenient handling of the business of said railway at said point, and file in the proper office said plat for record, and do all the same at his own expense; and will also put in a siding and platform where the depot at such town is located as soon as said platting is done as practicable."

The various conveyances of the land specified in the complaint were executed as therein stated.

The court found that there was no equity in plaintiff's complaint, and decreed that upon the payment by defendant into the registry of the court of $820, admitted by defendant to be due complainant, the complaint would be dismissed for want of equity; and plaintiff appealed.

A part of the land conveyed to Fordyce in trust was sold by the trustee as acreage. Appellant insists that he was without authority to sell in this manner. But we think he was authorized to do so. The deed conveying the land to him gives and grants "to him, his heirs, successors and assigns, the absolute right, power and authority to sell and dispose of the property conveyed as to him may seem best, without restraint or condition;" and the agreement, pursuant to which the deed was executed, provides: "Said Fordyce is to cause the said property to be platted in convenient shape for a town, with streets and alleys, with a railroad reservation such as is suitable and proper for the convenient handling of the business of said railway at said point." There is nothing in the deed or agreement prohibiting the trustee from selling by acres, if it should be to the interest of those concerned to do so.

It is next insisted that the property was sold at a sacrifice, and that for that reason the trust should be closed. Upon this

subject this court in *Williams* v. *Nichols,* 47 Ark. 254, said: "It is well settled that courts of equity have power to remove trustees for neglect or breach of duty. It is not, however, every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce courts of equity to adopt such a course, but the acts or omissions must be such as to endanger the trust property, or to show want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity. If a trustee fails in the discharge of his duties from an honest mistake or a mere misunderstanding of them, or from a misjudgment of them, it is not ground for removal unless such failure shows a want of proper capacity to execute the duties."

After a careful reading of the evidence in the case we find no want of honesty, fidelity, or capacity on the part of the trustee in the discharge of his duties; and that in the sales of property he has exercised a reasonable judgment, and that he should not be removed.

It would serve no useful purpose to examine separately each sale made and decide whether it is a good sale. That would needlessly consume much time and space. Hence we have given our conclusion, collectively, as to all.

Decree affirmed.

O'NEILL v. DAVIS.

Opinion delivered November 23, 1908.

MARRIAGE—PRESUMPTION—Assuming without deciding that a marriage according to the common law is valid in this State, where a man and woman cohabited illegally before he was divorced from his wife, proof that they continued to cohabit after such divorce raises no presumption of a legal marriage.

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

Greaves & Martin, for appellant.

In Missouri, where appellant and O'Neill assumed this relation, common law marriages are valid. 66 Mo. 391; 63 Mo.

501; 103 Mo. 191; *Id.* 266; 81 Mo. 562; 112 S. W. 282. Valid also in this State. 28 Ark. 19; 82 Ark. 77. There is no presumption of law that relations which were illicit in their beginning continued so after the impediment to marriage was removed, but on the contrary all legal presumptions are in favor of marriage. 19 Am. & Eng. Enc. of L. (2 Ed.), 1208-9; *Id.* 1203. The presumption is that appellant and O'Neill remarried after his prior marriage was dissolved. 24 Col. 510; 66 Ill. App. 526; 51 Am. Rep. 742; 144 Ind. 189; 22 Am. Rep. 245; 45 Md. 144; 8 B. Mon. (Ky.), 113; 88 Mich. 279; 4 Am. Dec. 244; 8 Paige (N. Y.), 574; 18 Johns. (N. Y.), 346; 8 Hun (N. Y.) 68; 3 L. R. A. (N. S.), 244, and note.

M. S. Cobb, for appellee.

The presumption is that a connection which was meretricious in the beginning continues so; and, while this presumption is not conclusive, it holds until removed by proof, and the burden is upon the party asserting a subsequent valid marriage. 82 Ark. 77; 4 N. Y. 230; 95 N. C. 551; 57 Am. Rep. 448; 114 Mass. 566; 102 N. Y. 714; 49 Miss. 751; 53 Miss. 37; 42 Md. 297; 45 Md. 144. And a mere continuance of cohabitation after the removal of the impediment to marriage is not sufficient to constitute, or to raise a presumption of, a valid marriage. 14 L. R. A. 364. There is no proof that the illicit relation existing between these parties was ever changed after the 27th of August, 1904.

BATTLE, J. Annie O'Neill claims to be the widow of John O'Neill, deceased, and that she was entitled to the homestead of which he died seized and possessed, and to dower in his estate. The court, by consent, sitting as a jury, found the facts in the case as follows:

"I. That in the year 1890 John O'Neill was the head of a family, consisting of himself, his wife, Lillie O'Neal, and two girls, all of whom are still living. On or about said time he became acquainted with a girl by the name of Annie Lewis; that from and after said time defendant and the said Annie Lewis have lived and cohabited together, that he introduced her to his friends and acquaintances and held her out to be his wife; that they maintained an establishment in the city of St. Louis, and

he furnished and supplied the same as a home, paying the bills and expenses incidental, and they were regarded among their friends and acquaintances as husband and wife.

"II. No ceremony of marriage was performed between the said John O'Neill and Annie Lewis; and if they ever were man and wife, it was by virtue of a contract entered into by them according to the common law..

"III. During all said time that John O'Neill and Annie Lewis lived together until August 27, 1904, said John O'Neill had a wife living from whom he was not divorced.

"IV. On August 27, 1904, the superior court of King County in the State of Washington entered a decree on the complaint of Lillie O'Neill, wife of the said John O'Neill, in which the said Lillie O'Neill was granted a divorce from the said John O'Neill.

"V. That after the 27th of August, 1904, the said John O'Neill and Annie Lewis lived together as man and wife in the city of St. Louis, Missouri, until about November or December of that year.

"During said time they lived in a flat where they received their friends and acquaintances and held themselves out to the public and acquaintances as man and wife. The said John O'Neill introducing the said Annie as his wife, and both of them acting and conducting themselves in a manner usually observable, between man and wife.

"VI. That in the latter part of the year 1904, John O'Neill visited Hot Springs, Arkansas, purchased the property involved in this action, and took steps to have erected thereon a cottage home; and that while said cottage was being built the said John O'Neill brought the said Annie Lewis to Hot Springs, and they boarded at the home and residence of one George Hagerman until their own home could be completed. Upon his arrival at Hot Springs with the said Annie, he introduced her at the Hagerman House and elsewhere as his wife, and while they stayed there they occupied one room and were known as Mr. and Mrs. O'Neill and in no other way. Afterwards, when this cottage was completed, they took up their residence in said cottage, and there they dwelt together as man and wife until the death of John O'Neill, which occurred on the 17th day of February, 1905.

That while they so resided in said cottage he introduced her as his wife; that no one resided in said cottage except them; that she looked after the household and performed such duties as are usually done by the housewife or mistress of the house. Upon the death of John O'Neill, the said Annie gave directions for the obsequies, selected a lot in the cemetery for the burial, selected a casket and attended the funeral."

The evidence sustains this finding of facts.

And the court declared the law of the case as follows: "Upon the facts found, the court declares as matters of law:

"I. Prior to August 27, 1904, there was an impediment to the marriage of John O'Neill and Annie Lewis, consisting of the fact that the said John had a living wife from whom he was not divorced and could not enter into a valid contract of marriage with the said Annie Lewis.

"II. Subsequent to the rendition of the decree for divorce August 27, 1904, the said John O'Neill and Annie Lewis continued to live together just as they had for years prior thereto, there being no evidence that their relations were changed after this date of divorce. The court holds that their continuing to live together as husband and wife, holding themselves out as such, establishing a home and other facts detailed by the evidence are not sufficient evidence of a contract of marriage entered into between them either before or subsequent to August 27, 1904, except their living together and holding themselves out as man and wife as aforesaid, no contract of marriage existed between said parties.

"III. The claimant, Annie Lewis, is not entitled to dower and homestead in the property in controversy, under the laws of the State."

Assuming, without deciding, that marriages according to the common law are valid in this State, we find that there is no evidence before us that appellant and John O'Neill contracted such marriage, or any other marriage.

In *Darling* v. *Dent*, 82 Ark. 76, 82, this court said: "While it is true that if it be shown that the relations between Darling and Mrs. Williams were illicit in the beginning the burden is upon those asserting a valid marriage agreement to show that such an agreement was afterwards entered into, still there is no pre-

sumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit or whether it was changed to a legal or moral status." In this case there was no evidence that Annie and John O'Neill entered into any present agreement to take each other for husband and wife after he was divorced from a former wife on the 27th of August, 1904, or that they ever passed from a state of concubinage into that of marriage. Their continued cohabitation after the divorce does not prove that they changed their intent, which was to live together without being married. The concomitants of their illicit relations are not sufficient, by their unasserted probative force, to prove that when they were at liberty to marry they embraced the opportunity. As Chief Justice Beasley said of such evidence, in *Collins* v. *Voorhees,* 14 L. R. A. 364, "to treat evidence which was in all respects and to the utmost degree in accord with the original purpose as proving, *proprio vigore,* a change of such purpose appears to be not only inadmissible according to the legal rules, but as being in logic ridiculous." *Collins* v. *Voorhees,* 14 L. R. A. (N. J. Eq.), 364, and note; *Harbeck* v. *Harbeck,* 102 N. Y. 714; *Ferrall* v. *Broadway,* 95 N. C. 551; *Jones* v. *Jones,* 45 Md. 144.

Judgment affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* PEARSON.

Opinion delivered November 23, 1908.

1. CARRIERS—CALLING STATION PREMATURELY—COMPENSATORY DAMAGES.—Where the conductor called a station before it was reached, and plaintiffs, relying thereon, got off when the train stopped, and had to walk several miles in the night, they were entitled to recover substantial compensatory damages for any inconveniences, annoyance, sickness or injury directly flowing therefrom. (Page 202.)

2. SAME—CALLING STATION PREMATURELY—EXEMPLARY DAMAGES.—It was error, in an action against a carrier for damages caused by the trainmen calling plaintiffs' station prematurely at night, inducing them to alight before they reached their destination, to instruct the jury that they might award punitive damages if the trainmen, knowing that the train had not arrived at plaintiffs' destination, caused plaintiffs to

leave the train prematurely by representing to them that the train had arrived at such place; there being no evidence of wilfulness, wantonness, or conscious indifference to consequences from which malice will be inferred. (Page 203.)

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

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

1. It was error to submit the question of punitive damages to the jury. "The element of willfulness or conscious indifference to consequences, from which malice may be inferred, is lacking." 53 Ark. 7; 78 Ark. 331; 87 Ark. 123; 80 Ark. 260.

2. As to Newson, there was no actual damage, as appears by the verdict. Where there is no actual damage sustained, punitive damages are not recoverable. 12 Am. & Eng. Enc. of L. (2 Ed.), 29; 13 Cyc. 109. See also 84 Ark. 42.

J. H. Harrod, for appellees.

HILL, C. J. J. L. Newson and R. P. Pearson were school teachers, teaching school at Hunter, Arkansas. On Friday, the 9th of August, they bought from the station agent at Hunter tickets to Fair Oaks and return. They boarded the train of the appellant railroad company on their return, at Fair Oaks, on the night of August 11th. The train which they boarded did not make a regular stop at Hunter, and the auditor so informed them when he took up their tickets, but they said they did not know that fact, and asked the auditor as an accommodation to stop for them. After consulting the conductor, the auditor agreed to do so, and, according to the plaintiff's statements, about a minute afterwards the conductor called "Hunter!" and the auditor said, "This is Hunter. Get your suit case and be ready to get off." They say the train stopped, and they at once went forward and got off, in the presence of the conductor, auditor and brakeman. They thought they were at Hunter, and got off on the side opposite from the depot because they lived upon that side, and did not know they were not at Hunter until the train had moved. As a matter of fact, they were three miles and a quarter from Hunter. This occurred at 11:20 at night, and they walked into Hunter. Pearson was made ill for a day and incurred a doctor's bill, and Newsom fell off the dump some eight or ten feet when

he got off the train. They brought suit against the railroad company, and their suits were consolidated and tried together. The above is a summary of the testimony which they gave.

The trainmen denied that such an occurence took place as that related by the plaintiffs, in regard to their being notified that they had reached Hunter and their getting off the train in the presence of the conductor, auditor and brakeman, and said that they did not know the plaintiffs were off the train until the train reached Hunter, where it stopped for their accommodation and for no other purpose; and that the conductor and auditor went through the train, looking for them, but failed to find them, and that they then learned for the first time of their having got off. There was also testimony that the train had not stopped after leaving Fair Oaks until it reached Hunter, but that it had slowed down before reaching there on account of some cattle on the track. Hunter is a village containing five or six stores and five or six hundred people.

The court gave instructions which in effect authorized the plaintiffs to recover, if the jury believed their testimony, for actual damages; and also gave an instruction authorizing recovery for punitive damages if the jury found that the employees in charge of the train, knowing it had not arrived at Hunter, caused the plaintiffs to leave the train at a late hour in the night, out in the woods away from any station, by representing to them that the train had arrived at that place.

The jury returned a verdict in favor of Pearson for $10 actual damages and $75 punitive damages, and in favor of Newsom for $75 punitive damages and no actual damages. The railroad company has appealed.

If the plaintiff's testimony is true—and, the jury having accepted it, it must be so treated in this court—they were each entitled to recover some substantial amount for the inconvenience, annoyance, sickness or injury directly flowing from the action of the conductor and auditor in telling them that they had reached Hunter and inviting them to leave the train when in fact they were over three miles from that station, and had to walk to it in the middle of the night. This damage may not be large; certainly the jury did not regard the actual damages of any amount, as the man who was made sick was only given $10 and

the other given nothing; but, however small, it is something more than nominal damages that they are entitled to recover under this view of the testimony.

A different question is presented as to their right to recover punitive damages. "In *Railway* v. *Hall,* 53 Ark. 7, Mr. Justice SANDELS, speaking for the court, in his terse style distinguished the elements of exemplary and compensatory damages, and said of the former that it must contain 'the element of wilfulness or conscious indifference to consequences from which malice will be inferred;' and that 'a careless unsconsciousness of plaintiff's possible danger' was not sufficient to constitute a basis for exemplary damages." *St. Louis, I. M. & S. Ry. Co.* v. *Stamps,* 84 Ark. 241.

The same proposition has been thus stated: "Negligence, however gross, will not justify a verdict for exemplary damages, unless the negligent party is guilty of wilfulness, wantonness, or conscious indifference to consequences from which malice may be inferred." *Arkansas & La. Ry. Co.* v. *Stroude,* 77 Ark. 109; *Choctaw, O. & G. Rd. Co.* v. *Cantwell,* 78 Ark. 331; *Harris Lumber Co.* v. *Morris,* 80 Ark. 260.

The evidence of the plaintiffs fails to show that the train operatives were "guilty of wilfulness, wantonness, or conscious indifference to consequences, from which malice will be inferred." The utmost that their testimony amounts to is that the trainmen were guilty of negligence in notifying them that Hunter had been reached, when as a matter of fact it had not been reached. The trainmen were familiar with the road, or should have been familiar with the road, and should not have invited passengers to alight three miles and a quarter out from the station when ordinary care would have shown that they had not reached the station. This would certainly be negligence—possibly gross negligence—but that is not sufficient upon which to base a recovery for exemplary damages.

It is undisputed that the conductor and auditor agreed to stop the train for them at Hunter as a matter of accommodation. Whether the train stopped before it reached Hunter, and they were invited off, or whether they got off when the train slowed down for the cattle to get off the track, are the disputed matters. It is also undisputed that the train did stop at Hunter for the sole

purpose of letting them off. All these facts show that the trainmen were seeking to accommodate these gentlemen, who had got upon the wrong train; and there is absolutely nothing to show that they were consciously indifferent to the consequences of their alighting from the train away from the station, and nothing to indicate that the train was stopped in the woods for the purpose of putting these men off, away from their destination, in order to inflict upon them inconvenience or annoyance. The utmost this testimony shows is a mistake at the stopping place, and a mistake which the trainmen should have avoided.

The evidence failing to establish the requisite basis for an assessment of punitive damages, it was error for the court to send that issue to the jury. For this error the judgments are reversed and causes remanded for new trial.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY v. PUCKETT.

Opinion delivered November 23, 1908.

1. RAILROADS—KILLING BY TRAIN—PRESUMPTION.—Under Kirby's Digest, § 6773, as construed by the court, proof that an employee was injured by the running of a train raises a *prima facie* case of negligence against the railroad company. (Page 207.)

2. SAME—WHEN QUESTION FOR JURY PRESENTED.—When, to overcome the presumption of negligence arising from proof that a person was killed by a train, the railroad company proved that the trainmen gave sufficient warning before the train was started, testimony on the part of the plaintiff of a witness who was near deceased when he was killed that witness did not hear any signal of warning, and that he would have heard it if such warning had been given, presented an issue of fact for the jury. (Page 207.)

3. MASTER AND SERVANT—RULES—NOTICE.—A servant is not bound by a rule of the master which was not brought to his attention. (Page 209.)

4. SAME—VIOLATION OF RULE BY SERVANT—WHEN MASTER LIABLE.—Where a servant was killed while in a place of danger in violation of a rule of the master which had been brought to his knowledge, such fact does not preclude his personal representative from recovering for the master's negligence if the rule was habitually violated with the master's knowledge or acquiescence, or if the servant went there under the direction of his foreman. (Page 209.)

5. INSTRUCTIONS—WHEN ABSTRACT CHARGE PREJUDICIAL.—Reversal will be ordered for error in the giving of an abstract instruction only where, under the circumstances, it cannot be determined whether the verdict was based upon the abstract instruction. (Page 209.)

6. SAME—GENERAL OBJECTION.—A general objection to an instruction is insufficient to call attention to the fact that it lacks a qualification which the court would doubtless have made had its attention been called thereto. (Page 210.)

7. RAILROADS—DUTY TO KEEP LOOKOUT.—The statutory requirement that railroads shall keep a constant lookout for persons and property upon their tracks (Kirby's Digest, § 6607) applies to railroad yards as well as other places, and is for the benefit of employees as well as others. (Page 210.)

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

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

1. The record here is not sufficient to show negligence on the part of appellant. Under the facts as developed in this case, to hold appellant to a measure of precaution that would have prevented such an accident would be to make it an absolute insurer against any injury or accident that might occur in the operation of its trains in or out of its yards. Such is not the law. The only duty resting on appellant in moving its train of cars was to take ordinary and reasonable precautions to warn workmen out of the way. 67 Ark. 377.

2. An instruction on the question of negligence, without defining what constitutes negligence, is abstract and misleading, and it is error to give such an instruction. 76 Ark. 599; 77 Ark. 261; *Id.* 567; 78 Ark. 177; 82 Ark. 424.

3. The court's modification of the eighth instruction requested by appellant was erroneous. Before a habitual violation of the company's rule would justify the abrogation or disregard of such rule, it must be shown that such violation was with the knowledge and acquiescence of the company or its superior officers. 77 Ark. 405.

It can not be said which of the two disjointed propositions submitted by the court's modification the jury followed. 70 Ark. 443; 58 Ark. 324.

J. H. Harrod and *A. J. Newman,* for appellee.

1. The burden was on appellant to show that its employees

were not guilty of negligence. The testimony of Jones shows that no warning was given. The fact that none was given is sufficient to sustain the verdict.

2. Instructions are to be considered as a whole. The court fully explained what would constitute negligence in this case, in instructions given at request of appellant.

3. The eighth instruction as modified was still more favorable to appellant than it had the right to ask for. There is no proof that any of the company's rules had ever been made known to the deceased. An employee is not bound by rules that have not been brought to his attention. 48 Ark. 333.

HART, J. This is a suit for damages brought by W. D. Puckett as administrator of the estate of A. G. Puckett, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. The cause of action, as stated in the complaint, is substantially as follows: The deceased, A. G. Puckett, was an employee of the defendant, and was working as a carpenter, repairing cars on track four. At that time there were a number of cars standing on track seven that had been repaired and had been left standing there. That there was a space of three or four feet between the cars standing on said track seven that had been left open for the employees of the company to go through in passing over said track in their work in said yards. That on July 28, 1906, about 9 o'clock in the morning, the deceased, in the performance of his duty and in obedience to the command of his foreman, went on said track seven to hunt washers that he needed in the work of repairing cars. That while he was engaged in picking up washers on track seven, between said cars in the space that had been left open, the cars were run against each other, and he was caught between them and crushed. That he suffered great bodily pain and mental anguish from the time he was hurt until twelve o'clock that day, when he died. That the injury and death of Puckett were caused by the negligence of the defendant in running said cars together without giving him any notice or warning that the cars were about to be moved. Prayer for judgment both for the estate and for the father as next of kin for his pecuniary damage, the complaint showing that the father was his next of kin and that the deceased had contributed to his support.

The defendant answered, denying the material allegations of the complaint, and charged contributory negligence on the part of plaintiff's intestate.

Evidence was adduced by the plaintiff to sustain the allegations of the complaint as above set forth. The defendant adduced evidence to establish its defense. The defendant has appealed from a verdict and judgment in favor of plaintiff for $3,250.

Counsel for appellant contend that in any view of the case it only presents a matter of an unfortunate accident, and that the record is not sufficient to show any negligence upon the part of appellant.

The facts leading up to and causing the death of Puckett are not disputed. The accident occurred in the morning on track No. 7 in the yards of appellant company. The cars were placed there for the purpose of being repaired, and were separated, that is, not coupled together. This was for the convenience of the men engaged in repairing them. Some of the servants of the company were engaged in coupling them up, preparatory to taking them out. They cocked the levers and fixed the couplings so they would make themselves if properly opened. The engineer was given the signal to couple, and they tied to or coupled six cars together. The seventh car did not, and the impact of the engine and other cars against it shunted it down against the eighth car and crushed Puckett, who was between the eighth and ninth car from the engine. This made a *prima facie* case of negligence against appellant.

Under section 6773 of Kirby's Digest, placing responsibility upon railroads where injury is done to persons or property by the running of trains, a *prima facie* case of negligence is made out against the company operating the train by the proof of the injury. *Kansas City S. Ry. Co.* v. *Davis,* 83 Ark. 217, and cases cited; *St. Louis, I. M. & S. Ry. Co.* v. *Stell,* 87 Ark. 308; *St. Louis, I. M. & S. Ry. Co.* v. *Briggs,* 87 Ark. 581; *St. Louis, I. M. & S. Ry. Co.* v. *Fambro, ante* p. 12; *Little Rock & Ft. Smith Ry. Co.* v. *Blewitt,* 65 Ark. 235.

Counsel for appellant claim to have overcome this *prima facie* case of negligence by its testimony as to the warnings given before the engine started. They introduced evidence tending

to show that, immediately prior to the accident, its servants warned all the men to get from under and between the cars, and that they shouted warnings to all persons that the engine was about to start and for every one to beware of the danger. They testified that the engineer commenced to ring the bell before the engine started to couple the cars. This testimony, standing alone and uncontradicted, would have been sufficient to overcome the *prima facie* case of negligence. But appellee introduced a witness named Jones, who testified that he had just passed through the place where Puckett was hurt, and had not gone more than one hundred feet away when the accident occurred. He says that he did not hear the whistle or bell sounded, and thinks that he would have heard it if the whistle had been blowing or the bell ringing. He also says he did not hear the warnings given by the persons who were engaged in coupling the cars. This presented an issue of fact for the jury. Jones was in possession of all his faculties. The jury had a right to assume that the warnings were not given or the bell sounded, or else he would have heard it, and that if he did not hear them the deceased likewise did not hear the warnings. The deceased at the time he was hurt was not a member of the crew engaged in coupling together the cars, but appellee adduced evidence tending to show that his intestate was there pursuant to a command given him by his foreman, who had authority to direct his movements. We have no concern as to the weight of the testimony. That was peculiarly in the province of the jury. We think the facts and surrounding circumstances warranted their finding of negligence on the part of appellant.

Counsel for appellant in their brief admit that there was sufficient testimony to make the verdict of the jury conclusive on the question of contributory negligence. According to the testimony of appellee, his intestate had a right to go between the cars, and, for aught the record discloses, he may have gone in there immediately prior to the accident.

Counsel for appellant asked the court to give the following instruction:

"8. The court instructs the jury that if they find from the testimony that, under the rules and regulations of the defendant railway company, it had its regular established place for ma-

terials, where employees at work should come and get such tools and materials as they needed, then it was the duty of the deceased to have gone and gotten his material from that source, not attempting to go in a dangerous place around the yard, hunting for the same, and if you find that this was what he was engaged in at the time of his death, this would not excuse him or justify his placing himself in a dangerous place, between the cars."

The court gave it by adding thereto the following: "unless it appears that the rules and regulations were habitually violated, or Puckett had been directed by his foreman to get the washers anywhere he could."

Counsel for appellant objected to the modification, and now predicate reversal upon it because it left out the qualification that the rule in question was habitually violated with the knowledge or acquiescence of the company. In support of their contention, they cite the cases of *St. Louis, I. M. & S. Ry. Co.* v. *Dupree,* 84 Ark. 377, and *St. Louis, I. M. & S. Ry. Co.* v. *Caraway,* 77 Ark. 405. In both these cases it was shown that the servant knew of the existence of the rule. In the present case the record does not show that Puckett knew of the existence of such a rule. An employee is not bound by a rule of the company not brought to his attention. *Little Rock, M. R. & T. Ry. Co.* v. *Leverett,* 48 Ark. 333; *St. Louis, I. M. & S. Ry. Co.* v. *Holmes, ante,* p. 181. Besides, appellee bases his right to recover, not on the abrogation of any rule by its habitual violation with the knowledge or acquiescence of the company, but upon the fact that his foreman commanded him to do the act in question. It will be observed that the modification only directs the jury to disregard the main direction of the instruction in a certain alternative. The body of the instruction is not applicable to any theory of the case, and is purely abstract. It is manifest that the jury was not misled by it, and that the verdict was not based upon it. Appellee, both in his complaint and in his evidence, places the right of his intestate to be at the place where he was hurt on the ground that he was commanded by his foreman to go there in discharge of the duties for which he was employed. This phase of the case was fully and explicitly covered by other instructions asked by appellant and given by the court. "An incomplete instruction upon the subject of contributory negligence may be

aided by other and more explicit instructions given upon the same subject." *Little Rock & H. S. W. Rd. Co.* v. *McQueeney,* 78 Ark. 22. It is only where, under the circumstances, it can not be determined whether the verdict was based upon the proper instructions or the abstract instructions that a reversal will be had for the error in giving an abstract instruction. *St. Louis, I. M. & S. Ry. Co.* v. *Woodward,* 70 Ark. 441. Moreover, counsel for appellant only made a general objection to the modification of the instruction. Had they called the court's attention to the qualification, doubtless the court would have corrected it.

Counsel for appellant contend that the act of April 8, 1891, does not require a lookout to be kept by persons running engines in a railroad yard, and insist that the court erred in giving an instruction based upon that statute. This is not correct. "The statutory requirement that railroads shall keep a constant lookout for persons and property upon their tracks applies to railroad yards as well as other places, and is for the benefit of employees as well as others." *St. Louis S. W. Ry. Co.* v. *Graham,* 83 Ark. 61; *Kansas City S. Ry. Co.* v. *Morris,* 80 Ark. 528.

Counsel for appellant also object that one of the instructions given for appellee was too general, and that the court refused a concrete instruction asked by it. It is a well-known general rule that all the law of the case can not be given in one instruction, and that the instructions should be considered as a whole. We have carefully examined the instructions given by the court and are of the opinion that every phase of the case was fully, fairly and explicitly presented to the jury.

We find no error in the proceedings of the court below prejudicial to appellant. The judgment is therefore affirmed.

SEARCY v. TURNER.

Opinion delivered November 23, 1908.

1. MUNICIPAL ORDINANCE—ADOPTION OF STATUTE—Under Kirby's Digest, § 5463, authorizing municipal councils "to prohibit and punish any act, matter or thing which the laws of this State make a misdemeanor," a city ordinance adopting certain statutory provisions relat-

ing to misdemeanors will be held to have made such provisions a part of the valid ordinances of the city. (Page 212.)

2. MUNICIPAL COURT—JURISDICTION.—A mayor of a city of the second class, under Kirby's Digest, § 5634, has the same jurisdiction to hear and determine cases under the criminal laws of the State as a justice of the peace, and may enforce the laws prohibiting the illegal sales of liquor. (Page 213.)

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

STATEMENT BY THE COURT.

On the 30th day of May, 1908, J. N. Rachels made the following affidavit before T. B. Rogers, mayor of the city of Searcy, Arkansas:

"Affidavit for Search Warrant.

"County of White, City of Searcy:

"Comes J. N. Rachels, and on oath states that a firm doing business in the city of Searcy on Spring Street, by the name of Turner & Slaughter, are keeping alcoholic liquors in their place of business for sale and to be given away, under a method known and commonly called the "Blind Tiger" method, and prays a warrant from T. B. Rogers, mayor of the city of Searcy, Arkansas, authorizing C. M. King, marshal of the city of Searcy, to enter said house and search for the same.

"J. N. Rachels.

"Subscribed and sworn to before me on this 30th day of May, 1908.

"T. B. Rogers, Mayor."

And on that date the said T. B. Rogers, mayor of Searcy, issued search warrant directing the marshal of said city to search the building then occupied by Turner & Slaughter for alcoholic liquors, which was returned on the 30th day of May, 1908, as follows: "I have this the 30th day of May, 1908, in the night time, duly served the within warrant by searching the within named Turner & Slaughter's place on Spring Street, and found Government license and six bottles of Schooner Brew, and which I have the said Turner & Slaughter and Schooner Brew in custody, and at the command of the court as herein commanded.

"Claud M. King, City Marshal."

The cause was set down for a hearing before the mayor of Searcy on June 1, 1908, at which time the defendant filed a demurrer to the charge, which was by the court overruled, and, after the introduction of evidence and argument of counsel, the defendant was found guilty of running a "blind tiger" and fined $100. From the decision of the mayor's court the defendant appealed to the circuit court, and, upon the calling of the cause for trial at the July term, 1908, of said court, the court sustained the defendant's demurrer and dismissed said cause. From which judgment of the court in sustaining the demurrer to the affidavit, the city of Searcy by her attorney has taken this appeal.

S. Brundidge, Jr., for appellant.

The affidavit was made and warrant issued under the provisions of § § 5740-5746, and § 5137, Kirby's Digest, which had been adopted by the city council of appellant and incorporated into the laws and ordinances of the city, as it had the right to do. Kirby's Digest, § 5463; 85 Ark. 403; Kirby's Digest, § 2083, subdiv. 4. The affidavit charged appellee with running a "blind tiger," and was sufficient. 45 Ark. 538; *Id.* 245; Kirby's Digest, § § 2482-83. If the mayor had no jurisdiction under the ordinance, he still had jurisdiction as *ex-officio* justice of the peace, and on appeal the case should have been tried *de novo*. 68 Ark. 247.

WOOD, J., (after stating the facts.) Section 5463 of Kirby's Digest is as follows: "The town or city council in all cities or incorporated towns in this State are hereby authorized and empowered to prohibit and punish any act, matter or thing which the laws of this State make a misdemeanor, and to prescribe penalties for all offenses in violating any ordinance of said city or town not exceeding the penalties prescribed for similar offenses against the State laws by the statutes of this State."

The statute was passed February 19, 1897. This record shows that the city council of the city of Searcy on February 1, 1900, incorporated into its laws and ordinances the statutes of the State as now contained in § § 5140-6, and § 5137 of Kirby's Digest, prohibiting the sale, etc., of liquors by the "blind tiger" and authorizing their destruction, etc.

This action of the city council made these various provisions

valid ordinances of the city of Searcy. Kirby's Digest, § 5463; *Burrow* v. *Hot Springs,* 85 Ark. 403.

But for another reason the mayor had jurisdiction, and the demurrer should have been overruled. Under section 2083, Kirby's Digest, 4th clause, *supra,* the mayor of the city of Searcy had the same jurisdiction over offenses against the laws of the State committed within the city limits as a justice of the peace. The case is ruled therefore by *Marianna* v. *Vincent,* 68 Ark. 247, where we said: "There is no mention of an ordinance, or reference to one, in the affidavit or warrant. The crime alleged in them was at all events a violation of the State law; that is a violation of section 4862 of Sandels & Hill's Digest. The mayor of a town has the same jurisdiction to hear and determine cases under the criminal laws of the State as has a justice of a peace. See section 5256 of Sandels & Hill's Digest. The mayor having once obtained jurisdiction, the case should not have been subsequently dismissed for want of jurisdiction by the circuit court, merely on mistake of law made by the mayor or for any other irregularity; but it should have proceeded to try the case *de novo,* and render such judgment as was proper therein."

The affidavit and the arrest under it gave the mayor jurisdiction. *Kinkead* v. *State,* 45 Ark. 538; *Elmore* v. *State,* 45 Ark. 245; sections 2482-3 Kirby's Digest; *McCall* v. *Helena,* 86 Ark. 442.

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

BOSTON STORE *v.* SCHLEUTER.

Opinion delivered November 30, 1908.

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1. EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.—Where a written contract for making alterations and additions to a certain building was unambiguous, and, taken in connection with the plans and specifications, contained all the elements to which the bids referred, it was not error to exclude the written bids upon which the contract was based. (Page 221.)

2. BUILDING CONTRACT—CONCLUSIVENESS OF ARCHITECT'S DECISION.—Where a building contract stipulated that the work should be done "to the perfect satisfaction of the architect," and that the architect was at liberty "to make any deviation from or alteration in the plan, form, construction, detail and execution of the work," "to reject the whole or any part," and if the work was "retarded unnecessarily" to furnish labor and materials to facilitate the completion of the work, a provision that the architect's opinion, certificate, report and decision should be binding on the contractor meant that the architect's decision should be binding only as to those matters which were within the scope of his authority, and did not contemplate that his decision as to the amount which was due to the contractor should be conclusive. (Page 221.)

3. SAME—MUTUALITY.—Notwithstanding a building contract stipulates that the architect's decision shall be binding upon the contractor, without saying whether it shall be binding on the owner of the building, his decision concerning matters properly submitted to him under the contract is binding upon both parties. (Page 223.)

4. SAME—CONCLUSIVENESS OF ARCHITECT'S DECISION.—A stipulation in a building contract that the contractor shall be bound by the architect's decision is binding upon both parties, in the absence of fraud or such gross mistake as necessarily implies bad faith on part of the architect. (Page 224.)

5. SAME—EFFECT OF ARCHITECT'S BAD FAITH.—Where there was evidence tending to prove that the delay of a contractor in completing work which was to be finished within a certain time was due to fraud or bad faith on part of the architect, this issue was properly submitted to the jury. (Page 224.)

6. SAME—EFFECT OF ARCHITECT'S HONEST MISTAKE.—Where a building contract stipulated for liquidated damages for delay in completion of the work, it was error to instruct that if the delay in finishing the work was caused by the architect the contractor was not liable for delay unless the act of the architect in causing the delay was in good faith and necessary; on the contrary, if the architect, exercising ordinary care and honest judgment, made a mistake in directing something that was unnecessary, this would not prevent the contractor from being liable for delay. (Page 224.)

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

STATEMENT BY THE COURT.

The appellee sued appellant, alleging: "That on September 15, 1906, the plaintiff and the defendant entered into a contract for certain alterations and additions to be made to the building known as the Boston Store and the building adjoining said

Boston Store on the west side thereof, situated in the city of Ft. Smith, Arkansas; that "the plaintiff agreed to furnish all materials with the exceptions of the plate glass and iron, which was agreed to be furnished by the Boston Store; and the plaintiff further agreed to do all of said work for the sum of nine hundred and seventeen ($917.00) dollars, and the defendant agreed to pay the plaintiff the sum of $917, and further to pay for the cost of all additions to said work." That "the plaintiff has constructed and completed the following additions and alterations to the work mentioned in said contract:

Extra windows	$45.00
Extra flooring	6.50
Extra work for extending ceiling not provided for in the contract	2.85
Putting in two panels not provided for in the contract	2.00

Making a total of $973.35; that the defendant has paid to the plaintiff on said contract the sum of $625.00, leaving a balance due from the defendant to plaintiff of $348.35." The complaint further alleges that the plaintiff has fully and completely performed the said contract, and has made the alterations and additions to said building, and said work has been approved and accepted by the architect and superintendent, A. Klingensmith, and has also been accepted and approved by the defendant, and defendant refuses to pay said sum." The prayer was for $348.35 and interest.

The appellant answered, and, after admitting the contract, states: "This defendant denies that plaintiff has fully and completely performed said contract, and has made the alterations and additions to said building and said work at the time and in the manner prescribed by said contract; and denies said work has been approved and accepted by the architect and superintendent, A. Klingensmith; and denies that the same has also been accepted and approved by the defendant; admits that the defendant refused to pay said sum or any other sum whatsoever because the terms and conditions of the aforesaid contract had not been observed and complied with, and because said architect and superintendent has not accepted or approved same. And defendant denies that the plaintiff is entitled to judgment against

this defendant for the sum of $348.35, or in any other sum or amount whatsoever, with interest and costs.

"The appellant by way of further defense, and for cross complaint, alleged: That under and by virtue of the written contract made and entered into by and between the plaintiff and this defendant on September 15, 1906, it is provided in said contract as follows, to-wit: 'The finishing of said works, including all alterations and additions in said contract provided, or hereafter agreed upon, is to be proceeded with with all reasonable dispatch, and the same shall be completed and delivered up to said party of the first part, in perfect good order and condition, fit for use and occupation, on or before eight days after the delivery of the glass on the ground as per specifications; it being agreed that the said party of the second part shall forfeit the sum of twenty-five dollars for every day expiring after that day, before the completion and delivery of said work, as aforesaid, to the said parties of the first part; and this condition not to be made or rendered void by any alteration or additional work being performed, but in such case the time shall be extended as may be necessary for the performance of such alteration or additional work.'

"That the iron work and glass was delivered on the ground as per specifications on October 6, 1906, and that the work of alterations and additions were not completed so that the building could be occupied by the defendant until November 3, 1906; that, under the terms and conditions of the aforesaid contract, after allowing plaintiff eight days after the delivery of the iron and plate glass on the ground, excluding October 6, 1906, and all Sundays, that the work provided for should have been finished and completed on October 16, 1906; that, as provided for in said written contract for such delay, on failing and neglecting to comply with the said contract, the plaintiff has forfeited the sum of $25 for each and every day that lapsed after the 16th day of October, 1906, a period of sixteen days, which at $25 per day amounts to $400." The appellant then alleges other items of damage growing out of the alleged failure of appellee to comply with his contract, which, together with the alleged $400, amounts to the sum of $615. The prayer of appellant's cross-complaint was that so much of the said sum of $615.15 may be set off against any claim which the said plaintiff may have against this

defendant as equals the same, and that the said defendant may have judgment against the said plaintiff for the balance. All the material allegations of the cross-complaint were denied.

The appellee read in evidence the contract and the plans and specifications which, by provision of the contract, were made a part thereof. The appellant only contends here that the contract was not performed by appellee within the time specified therein. We will therefore only set forth such portions of the contract as may throw light upon that issue, when taken in connection with the other evidence. The contract contains these provisions:

"The finishing of said works, including all alterations and additions in said contract provided, or hereafter agreed upon, is to be proceeded with with all reasonable dispatch, and the same shall be completed and delivered up to said party of the first part, in perfect good order and condition, fit for use and occupation, on or before the eight days after the delivery of the iron and glass on the ground as per specifications; it being agreed that the said party of the second part shall forfeit the sum of twenty-five dollars for every day expiring after that day before the completion and delivery of said work, as aforesaid, to the said parties of the first part, and this condition not to be made or rendered void by any alteration or additional work being performed, but in such case the time shall be extended as may be necessary for the performance of such alteration or additional work.

"The architects' and superintendents' opinion, certificate, report and decision on all matters to be binding and conclusive on the party of the second part, and in case the said party of the second part should fail or refuse to fulfill the orders of said architects and superintendents, then said architects and superintendents shall have full power and lawful right to terminate forthwith any further work by said party of the second part under this contract, and to have the work done by other parties at the cost of said party of the second part and his sureties.

"The said parties of the first part agree and bind themselves, for and in consideration of the faithful performance of said work as aforesaid, to pay unto the said party of the second part the sum of nine hundred and seventeen dollars ($917.00) upon certificate of the architects, issued from time to time in the follow-

ing manner, to-wit: During the progress of the work, for amounts aggregating eighty-five per cent. of the value of the labor performed and materials furnished, and in the building, forming part of its actual construction; and for the remaining fifteen per cent. upon the completion and delivery of said work by the said party of the second part, and its acceptance by the architects and superintendents."

The plans and specifications among other things provided:

"The work to commence within twenty-four hours after contract was awarded and to be rushed to completion as rapidly as possible with two forces of workmen, one working in day time and one working at night, and finished within eight days after the iron and glass work is on the ground. * * * The contractor in all cases to be held liable for the amount set forth as liquidated damages, unless he shall certify to the architect in writing, within six hours after stopping the work, that it is no longer possible to proceed without certain items of material specified to be furnished by the Boston Store. In case of such certification by the contractor the architect shall at once examine the work, and his decision as to the necessity of stopping the work shall be final and binding on all parties. If the bid for working two shifts of men is accepted, the work to be finished within eight days after all material to be furnished by the Boston Store is on the ground. If the bid for working one shift is accepted, the work shall be finished within twelve days after the material is on the ground."

The appellee testified that he had performed his work according to the contract, and that same had been accepted by the architect in writing. The appellant offered in evidence appellee's bid for this work, which bid was as follows:

"Fort Smith, Ark., September 13, 1906.

"I agree to remodel building for Boston Store according to plans and specifications for the sum of $892.

[Signed] "Fred Schleuter.

"If I work at night, add $50."

The court excluded said testimony, for which action by the court the appellant excepted.

Appellant offered in evidence a certificate of the architect, given on completion of the building, showing the status of the

account between appellant and appellee. The court excluded the testimony, to which ruling appellant excepted. The certificate was to the effect that under the terms of the contract between appellant and appellee the liquidated damages that had accrued to appellant amounted to $400, *i. e.*, for sixteen days at $25 per day, and that the account between the parties, giving appellee credit for the full amount to which he was entitled under the contract, towit, $968.50, and charging him with the amount he had received and the amount he owed for labor and material furnished him by appellant, towit, $654.15, together with the liquidated damages on overtime *supra* $400, left appellee indebted to appellant in the sum of $85.15.

A witness by the name of Ragland testified substantially as follows: "I am a house-moving contractor; was employed by the plaintiff to shore up the walls at the Boston Store. I did this work in the proper way before I was interfered with by the architect. (The defendant objected to this testimony; his objections were overruled, and he saved his exception.) In my judgment the work was properly done; the architect interfered, made us change it. Part of it was changed back like it was at first. It was changed about three times. He ordered it changed two different ways; we put that like he instructed, and he came back, and said we did not have it right, and had to change it again, and then came back, and had us cut holes through the floor. In my opinion the wall was safe at first. (The defendant saved its exceptions to the above testimony.) A part of this was safe and a part not. We changed it back nearly like we had it at first. Could not say exactly how long we were delayed on account of these changes, but about two weeks or over."

This and other testimony to the same effect was admitted over the objection of appellant, and he excepted to the ruling of the court. The appellant adduced evidence which tended to prove that the appellee had not placed the props so as to give sufficient support to the wall resting upon them, and that the architect had ordered the changes in the props to be made by appellee, in order to make the work safe. The proof on behalf of appellant tended to show that the changes which appellee alleges delayed him were directed by the architect because he considered them necessary to make the building secure.

At the request of appellee, the court gave among others the following instruction:

"7. The court instructs the jury that if the delay, if there was any, was due to the failure of the defendant to do its part of the contract, or if it was due to the action of the defendant, either through itself or the architect, stopping the work of plaintiff, then there should be nothing allowed defendant for any such delay so caused by said defendant, unless the act of the architect was in good faith in line of his duties of supervising the work, and was necessary act in the supervision of the work."

And the court refused to grant, among others, the following prayers by appellant.

"8. If you believe from the evidence that the signed agreement between plaintiff and defendant provided that the architect's certificate on all matters in said contract should be binding or conclusive upon the plaintiff, then you are instructed that the plaintiff is bound by the report and certificate of the architect in evidence in this case, and your verdict must be in favor of the Boston Store against Fred Schleuter in the sum of $85.15 with interest from the 16th day of October, 1906, unless you further find that said certificate was procured by fraud from the said architect.

"10. Under the law and evidence in this case, it was the duty of the architect, A. Klingensmith, to supervise the work done by plaintiff, Fred Schleuter, and to see that same was done in accordance with the contract, plans and specifications. And the said A. Klingensmith, by the terms of the agreement between plaintiff and defendant, had the exclusive right to pass upon said work, and the plaintiff, Fred Schleuter, can not defeat the payment of the forfeit of $25 per day for delays, if any, which were caused by said architect in supervising said work."

The court modified prayer number ten by inserting the words "and, in the absence of fraud upon the architect's part, his findings are binding upon both plaintiff and defendant."

The appellant duly excepted to the rulings of the court in granting and refusing prayers for instructions.

The jury returned a verdict in favor of the appellee for $319.20. Judgment was entered accordingly, and this appeal followed.

Brizzolara & Fitzhugh, for appellant.

1. Court erred in refusing to admit the two written bids of plaintiff to do the work.

2. It erred in excluding the certificate of the architect given on completion of the building.

3. The court erred in giving instruction seven for plaintiff. 48 Ark. 522.

4. Mere payment of sums on account before completion of the work is not a waiver of the condition that an architect's certificate shall be given, nor is the mere taking of possession of the house after completion. Lloyd on Buildings, § § 19, 20, a.

Read & McDonough, for appellee.

1. Provisions in building contracts of this kind must be binding upon both parties, or else they are binding upon neither. Clark on Contracts, 165.

2. Under contracts where it is provided that the architect's decision shall be binding upon *both* parties, in the absence of fraud, they are so binding. 83 Ark. 140.

3. No certificate in writing was necessary. The appellee was proceeding with the work with all possible speed. The architect stopped him, and the notice was unnecessary. 51 Ark. 302.

4. There was no provision in the contract by which the time for the completion of the contract was fixed. Hence the rule is—a reasonable time. 32 Me. 515; Clark on Cont. p. 31-596.

WOOD, J. (after stating the facts.) We will dispose of the assignments of error in the order presented by appellant's counsel.

1. The court did not err in excluding the written bids that were offered in evidence. These were prior to and no part of the written contract. The contract was unambiguous, and it was complete as to the time and manner for the performance of the work, as well as the consideration to be paid therefor. The parties were bound by the terms of the contract, which, taken in connection with the plans and specifications, contained all the elements to which the bids referred.

2. The court did not err in excluding the certificate of

the architect. There is no provision in the contract making the architect the arbiter of all matters of difference between the parties on final settlement after the completion of the work. The certificate of the architect showed what was due from appellee to appellant, according to his opinion and his statement of the account between them. But, when all the provisions of the contract with reference to the architect's powers and duties are construed, it will be observed that he had no power to certify as to what was due from appellee to appellant under the contract. The contract provides that "the achitects' and superintendents' opinion, certificate, report and decision on all matters to be binding and conclusive on the party of the second part." The words "on all matters" used in this clause of course refers to all the matters about which the architect, under the contract, was authorized to make a certificate. The duty of the architects under the contract was to see that the work was done according to the plans and specifications which they had furnished, and which they were authorized to furnish as the work progressed. The work was to be done to "the perfect satisfaction and approbation of the architects," and the architects were "at liberty to make any deviation from or alteration in the plan, form, construction, detail and execution" of the work. They had "full power and lawful authority to reject the whole or any part." If their orders were not fulfilled, they had power to "terminate forthwith further work by party of second part (appellee) and to have the work done by other parties at his cost." If they believed the work was "retarded unnecessarily," they could, as often as appeared to them necessary, "furnish such labor and materials as they might deem necessary to facilitate the completion of the work." They were authorized "during the progress of the work" to issue certificates "for amounts aggregating 85 per cent. of the value of the labor performed and material furnished," and for the remaining 15 per cent. upon the completion and delivery of said work and its acceptance by them. The above were "all the matters" upon which the architect might give his "opinion, certificate, report and decision." But the certificate which appellant offered in evidence, and which it sought by its prayer number eight to have made conclusive against appellee, is beyond the scope of

any authority given the architect by the terms of the contract. The rulings of the court in rejecting the certificate and refusing the prayer were correct.

But we do not concur in the view of counsel for appellee "that the architect's decision in every instance is null and void for the reason that it is in no manner binding upon the Boston Store." The architect was the agent of appellant vested with full power to act for it, and in all matters coming within the purview of his powers and duties as specified in the various provisions of the contract, his "opinion, certificate, report and decision" were as binding on appellant as appellee. This notwithstanding the contract in express terms specified they were "binding and conclusive on the party of the second part." The appellant could not escape the binding force and effect of the decision of one whom it expressly appointed and authorized to make decisions for it. The architect, in the matters designated for him to pass upon in the contract, was the *alter ego* of appellant. The language used by the Supreme Court of Texas in *Boettler* v. *Tendrick,* 73 Tex. 488, is apposite here: "The owner did not undertake to supervise the work himself and to raise objections to workmanship or material, but selected persons of skill and experience to do this for him, and those persons were made the arbiters, and necessarily in the discharge of their duty to their employer were compelled from time to time to pass upon the workmanship and material. * * * The right of the builder to exercise his own judgment was subordinated to the judgment of the architects to whom power was given to determine what was proper workmanship or fit material," etc. The decisions of the architect concerning these and the other matters designated ought to be held binding upon both parties. As Mr. Wharton says: "The owner has no right to complain, since the architect was selected by him and charged by him with this very power; the builder has no right to complain since he took the work on this very condition." Wharton, Con. 594. Under the provisions of this contract, there is no doubt that the decision or opinion of the architect concerning the manner of the execution of the work, the necessity for changes in the method by which appellee was propping up the walls, and all alterations that were necessary,

was binding upon the parties to the contract. The acceptance of the work by the architect was necessary before appellee could recover. Had the certificate of the architect been confined to these matters, it would have been admissible. It embraced other things, and in the form presented was not admissible. It was offered as a whole.

3 and 4. Notwithstanding the contract makes the certificate, report, opinion, decision of the architect conclusive on the parties, the law writes into this provision that the conduct of the architect must be free from fraud. Fraud on his part destroys the effect of the provision. Therefore, if the architect fails to exercise his honest judgment, or makes such gross mistakes as necessarily imply bad faith, his decision, report, certificate and opinion are not binding on the parties to the contract. *Hot Springs Ry. Co.* v. *Maher,* 48 Ark. 522; *Ozan Lumber Co.* v. *Haynes,* 68 Ark. 185; *Ark-Mo Zinc Co.* v. *Patterson,* 79 Ark. 506; *Carlile* v. *Corrigan,* 83 Ark. 140; *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618; *Martinsburg & Potomac Rd. Co.* v. *March,* 114 U. S. 549; Lloyd, Buildings, p. 32, § 22.

It was a question for the jury under the evidence to determine whether the delay in completing the work according to the contract was caused by any fraud or bad faith upon the part of the architect in directing and supervising the work as it progressed. The testimony of Ragland and other witnesses was relevant to this issue and was competent evidence. It is not within the province of this court to pass upon its weight. The court did not err in admitting the testimony.

5. In the seventh instruction the court in effect told the jury that if the delay in finishing the work was caused by the architect, then appellee was entitled to recover, unless the act of the architect in causing the delay was in good faith and necessary. In other words, appellant could not claim any liquidated damages for delay caused by his architect, unless the delay was a necessary act in the supervision of the work, and also was caused in good faith on the part of the architect. This added a burden upon appellant that neither the contract nor the law authorized. All that was necessary, as we have seen, under the contract, was for the architect to act in good

faith and use his honest judgment. If he did this, appellant got the benefit of the delay, whether it was caused by a necessary act in supervising the work or not. If the architect, exercising ordinary care and honest judgment, made a mistake in directing something to be done that was entirely unnecessary, still under the contract that would not defeat appellant's right to recover liquidated damages for delay in completing the work within the time specified.

It was not reversible error to give prayer number ten as modified, but the law would have been more accurately stated by simply adding the words "in the absence of fraud upon the architect's part," after the word "Schleuter" where it last appears in the prayer, making the instruction to read as follows:

"Under the law and evidence in this case, it was the duty of the architect, A. Klingensmith, to supervise the work done by plaintiff, Fred Schleuter, and to see that same was done in accordance with the contract, plans and specifications. And the said A. Klingensmith, by the terms of the agreement between plaintiff and defendant, had the exclusive right to pass upon said work, and the plaintiff, Fred Schleuter, in the absence of fraud on the architect's part, cannot defeat the payment of the forfeit of $25.00 per day for delays, if any, which were caused by said architect in supervising said work."

The instruction was in conflict with number 7.

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

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

Opinion delivered November 16, 1908.

1. CARRIERS—CALLING STATION PREMATURELY — NEGLIGENCE. — Where a train was stopped at night on a bridge just before a station was reached, but after the station had been announced, and a passenger, thinking that the station was reached, attempted to alight and was injured, a finding that the railroad company was negligent will be sustained. (Page 228.)

2. SAME—PASSENGER ALIGHTING BEFORE REACHING DESTINATION.—A passenger is not compelled to remain aboard the train until he reaches his destination, but when a station is announced in such a way as would amount to an invitation to other passengers for that station to debark, he, too, relying upon the implied assurance of safety in alighting, may leave the train for refreshment, exercise or other matters of convenience or necessity, provided he exercises due care in doing so. (Page 228.)

3. INSTRUCTIONS—REQUEST.—One who desires more specific instructions should ask for them. (Page 229.)

4. EVIDENCE—PROOF OF LIFE EXPECTANCY.—The introduction of mortuary tables is not the only method of proving life expectancy; the question may be submitted to the jury upon testimony showing the age, health, habits, physical condition, etc., of the individual, so that the jury may estimate the probable duration of life. (Page 229.)

5. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—A verdict of $8,000 for personal injuries of a painful and permanent nature, which seriously impaired plaintiff's earning capacity for life and disfigured him in person, was not excessive. (Page 229.)

Appeal from Drew Circuit Court; *Henry W. Wells,* Judge; affirmed.

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

1. All the circumstances point to the fact that the train had not reached the station, and under the circumstances appellee could not reasonably conclude that it had done so. 70 Ark. 264; 75 Ark. 165. And appellant could not be held responsible where the appellee, as the facts and circumstances show, failed to use the ordinary sense of sight. 7 L. R. A. 323; 12 Am. & Eng. R. Cas. 165.

2. Appellee was not a passenger for this station or destination, and if he undertook to alight it was his duty to know that he was alighting in a safe place. "Where a passenger enters a railway train and pays the regular fare to be transported from one station to another, his contract does not obligate the corporation to furnish him with safe egress and ingress at any intermediate station." 11 S. W. 326; 3 Am. & Eng. R. Cas. 463; 58 Me. 184; 10 Allen 387.

3. While a passenger has the right, for convenience or necessity, to go into another car, yet, if he assumes to alight from the car for that purpose, he does so at his own risk, and espe-

cially so if he alights from a car for that purpose that is not at a station. 51 Mich. 236; 47 Am. Rep. 566.

4. The court's instruction as to the measure of damages is erroneous in assuming that the duration of appellee's injury would be for life—in assuming facts in dispute as proved. 66 Ark. 506; 74 Ark. 563; 71 Ark. 38. There was nothing in the evidence to show what the rest of his natural life would be. His life expectancy was not proved. It was also error, in this instruction, to tell the jury to assess his damages "in such sum as will compensate him" for the different items therein enumerated. 15 S. W. 504.

5. The damages assessed was excessive. 64 Tex. 463; 19 Barb. (N. Y.) 461.

R. W. Wilson and *Joe T. Robinson,* for appellee.

1. There is no error in the first instruction given by the court of which complaint is made. Other instructions given placed upon appellee the burden of showing that he had properly used his sense of sight and hearing. Moreover, a general objection is not sufficient. The court's attention should have been called specifically to any defect in the instruction.

2. The relation of passenger is not severed by the passenger's temporarily leaving the train at intermediate stations for business or other reasonable purposes. 148 Mass. 216; 88 Ill. 608; 73 N. Y. 606; 29 Fed. 268; 8 Ore. 60; 113 N. Y. 365; 1 Fetter on Car. Pass. § 234; 2 Hutchinson on Car. § § 1012, 1165, 3 Thompson on Neg. § 2659; 19 Tex. Civ. App. 440; 23 *id* 415; 88 Fed. 455.

3. In arriving at the expectancy of life, it is admissible to introduce life tables, but they are not absolutely essential. The jury may make their own estimate of probable life from other evidence before them pertinent to the issue. 4 Elliott on Railroads § 1813 and cases cited.

4. The verdict is not excessive. The injury is shown to be permanent, the pain very severe and of long duration, the resulting deformity marked, and his disability from labor probably lifelong. The amount of damages being exclusively within the province of the jury, their finding will not be disturbed unless so manifestly excessive as to indicate passion or

prejudice, or unless shocking to a fair sense of justice. 56 Ark. 594; 53 N. Y. 625; 11 S. W. 333; 38 Ia. 592; 64 Miss. 584; 18 S. E. 278; 79 Ill. App. 632.

McCULLOCH, J. Appellee took passage at Dermott, Arkansas, on one of appellant's trains on the Warren branch, bound for Monticello, Arkansas, and sues to recover compensation for personal injuries alleged to have been received on account of the negligence of appellant's servants in charge of the train. The train left Dermott about six o'clock in the evening on November 15, 1906, and the coaches were crowded with passengers who had attended the circus in Dermott that day. Just before the train reached Baxter, a station about four miles distant from Dermott, the conductor, in order to gain time for the auditor to collect all the fares before stopping at Baxter, caused the train to be halted on a bridge or trestle across Bayou Bartholomew, and appellee, who was standing on the platform of the rear coach, stepped off, receiving the severe injuries complained of in this action. He alleged in his complaint, and adduced testimony tending to prove, that the rear coach which he entered was so overcrowded that he could not obtain a seat, and that it was unlighted; that one of appellant's employees called the station of Baxter, and the train immediately came to a stop; that he thought the stop was made for the station, and, being unable to get through the coach, he attempted to alight in order to go forward to the next coach to procure a seat. He testified that when he started to alight it was dark, and he looked about but could see nothing to indicate that the train had not stopped at the station.

The evidence was sufficient to justify a finding of negligence on the part of appellant's servants in calling the station prematurely, thus inducing appellee to attempt to alight, and that he exercised due care in attempting to alight. Such a state of facts rendered appellant responsible for any injury which resulted. *Memphis & Little Rock Railroad Co.* v. *Stringfellow,* 44 Ark. 322; *Railway Company* v. *Johnson,* 59 Ark. 122; *St. Louis, Iron M. & S. Ry. Co.* v. *Farr,* 70 Ark. 264; *Davis* v. *K. C. So. Ry. Co.,* 75 Ark. 165.

It is insisted, however, that a different rule should prevail when a passenger attempts to alight from the train at a station

which is not his destination, in reliance on a premature announcement of the station. We do not think this is a sound distinction. Appellant did not cease to be a passenger by alighting or attempting to alight from the train before he reached the end of his journey. *Arkansas Central Railroad* v. *Bennett,* 82 Ark. 393; *Parsons* v. *Railroad Co.,* 113 N. Y. 355; *Dodge* v. *Boston & Bangor Steamship Co.,* 148 Mass. 207; 2 Hutchinson on Carriers, § 1012.

A passenger is not compelled to continuously remain aboard the train until he reaches his destination. He may, at regular stopping places, leave the train for refreshment, exercise or other matters of convenience or necessity, provided he exercises proper care; and he does not change his status as passenger by doing so. And when a station is announced in such a way as would amount to an invitation to other passengers bound for that station to debark, he too may accept the invitation and rely upon the implied assurance of safety in alighting.

The instructions given by the court at the instance of appellee are questioned on the alleged ground that they omit the idea that, before the announcement of the station can be accepted as an invitation to alight when the train comes to a stop, there must be an absence of circumstances indicating that the station has not been reached. We do not think the instructions are open to this criticism. But, if they are, it was the duty of appellant to ask for instructions more specific.

The evidence tended to show that appellee's injuries were of a permanent nature. No effort was made to prove his expectancy of life by the introduction of mortuary tables, and it is insisted that the court erred in submitting to the jury the question of compensation for permanent injuries. Introduction of mortuary tables is not the only method of proving life expectancy. The question may be submitted to the jury upon testimony showing the age, health, habits, physical condition, etc., of the individual, so that the jury may estimate the probable duration of life. *Kansas City Southern Railway Co.* v. *Morris,* 80 Ark. 528; 4 Elliott on Railroads, § 1813.

The amount of the verdict is questioned as being excessive. The jury assessed the amount of the damage at $8,000, and we are of the opinion that it is warranted by the evidence. The

testimony tends to establish a painful injury and a permanent one, which not only seriously impairs appellee's earning capacity for life, but also disfigured him in person.

Judgment affirmed.

BUNCH v. STATE.

Opinion delivered November 30, 1908.

LIQUORS—SALE IN ORIGINAL PACKAGE.—Under Kirby's Digest, § 5093, providing that manufacturers of alcohol, vinous, ardent, malt or fermented liquors can sell liquors in original packages containing not less than five gallons, without license, a distiller may draw five gallons of whisky from a barrel, place it in a keg, and when properly stamped sell it as an original package. *State* v. *Southard,* 60 Ark. 247, followed.

Appeal from Mississippi Circuit Court, Chickasawba District; *Frank Smith,* Judge; reversed.

W. J. Driver, for appellant.

This case is settled by Kirby's Digest, § 5093; 60 Ark. 247.

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

The court erred. The record shows no violation of the law. 60 Ark. 247.

BATTLE, J. Sam Bunch was indicted by the grand jury of the Mississippi Circuit Court for the Chickasawba District of Mississippi County for selling liquor without license. He was tried and convicted, and appealed to this court.

The defendant was a licensed distiller and manufacturer of whisky in Mississippi County. He manufactured a certain barrel of whisky, which was placed in a warehouse of the government and remained there the prescribed time, seven years, and thereafter became subject to his disposal, and was delivered to him after he paid the tax thereon, one dollar and ten cents a gallon, and it was stamped to show such payment. When he paid the tax on the barrel, the United States Government furnished him stamps, free of charge, to stamp each five gallons thereof when transferred into kegs of that capacity. When he

transferred five gallons of any barrel of whisky into such a keg, he sold the residue of the whisky in that barrel in the same manner, five gallon kegs, believing that he could not lawfully sell it in any other manner. In this case Will Pillow said to him that he wanted a five-gallon keg of whisky. He then drew from the barrel five gallons of the whisky into a keg of the proper size and stamped it as the law requires, and then sold and delivered it to him, he paying therefor, and signing a receipt for the same. Under the statutes of this State he had the right to sell in such packages without license. The barrel when stamped was delivered to him with no understanding, expectation or requirement that it should be sold as delivered. That was not the package in which it was offered only for sale. He was furnished with the requisite stamps for selling it in five-gallon kegs, and it stood offered in the barrel for sale in quantities of five gallons in kegs, and when sold in that quantity, after being transferred to such kegs and stamped, it was sold in original packages containing not less than five gallons, within the meaning of the statute authorizing the sale of whisky by the manufacturers thereof in that manner. *State* v. *Southard,* 60 Ark. 247.

Reversed and remanded for a new trial.

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

88 231
90 23

Opinion delivered Nov. 30, 1908.

1. RAILROADS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE.—Where, in an action for personal injuries sustained in a collision at a public crossing, it appeared that plaintiff in the night time was driving a wagon which made a noise, that the situation was such that he could not see a rapidly approaching engine until he reached the dump of the track, that the engine was being backed on its own momentum and without much noise, and that the only lights on it were two lanterns hung on either side of the tender, the question whether plaintiff was guilty of contributory negligence was properly left to the jury. (Page 233.)

2. SAME—LIABILITY FOR INJURIES AFTER DISCOVERY OF PERIL.—An instruction to the effect that the railroad company would not be liable for plaintiff's injuries if he was negligent "unless you find that the

trainmen in charge of the locomotive by the use of ordinary diligence could have prevented the injury" should have been modified by adding, "after discovering the danger of the plaintiff." (Page 234.)

3. SAME—NEGLIGENCE IN BACKING LOCOMOTIVE.—It was not error to instruct the jury as follows: "If you find from the evidence that it was more dangerous to back the engine than to run it in the usual way with the headlight to the front, it was negligence in defendant's employees to so run the engine if said employees could have turned the engine . . . so as to have run the engine with the headlight to the front." (Page 235.)

4. INSTRUCTIONS—RELEVANCY TO EVIDENCE.—Where plaintiff was injured by an engine being backed over him in the night time, it was error to instruct the jury that plaintiff was not guilty of contributory negligence if without fault or carelessness he thought that the engine was going in the opposite direction, if there was no evidence tending to prove that he was misled in this manner. (Page 235.)

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

Buzbee & Hicks and *George B. Pugh,* for appellants.

1. Failing to stop, look and listen, plaintiff was guilty of such negligence as to bar a recovery. 54 Ark. 431; 56 *Id.* 457; 61 *Id.* 549; 62 *Id.* 157; 65 *Id.* 235; 3 App. Cases, 1155; 2 Wood on Railways (Minor's Ed.) 1518; 78 Ark. 55, 355, 520; 81 *Id.* 325; 62 *Id.* 235.

2. Review the instructions and contend that under the authorities *supra* the court erred in its instructions to the jury.

John W. Goolsby, for appellee.

1. The cases cited by appellant are not applicable. They ignore the doctrine laid down in 54 Ark. 159.

2. The burden was on appellant to show want of negligence. Kirby's Digest, § § 6607, 6773; 63 Ark. 636; 65 *Id.* 235; 69 *Id.* 380.

3. The question of negligence was for the jury, and the matter was submitted on proper instructions. Cases *supra.*

HILL, C. J. This is an action by R. G. Moon, as next friend of Robert J. Moon, his son, and in his own behalf, to recover damages of the Chicago, Rock Island & Pacific Railway Company for injuries received by Robert J. Moon at a railroad crossing. He recovered, and the railway company has appealed.

Evidence to establish the following facts was adduced on behalf of the plaintiff:

Robert J. Moon, a lad of seventeen years, was driving a wagon and team on a public highway leading across the track of the appellant railroad company. The road he was traveling ran almost parallel with the railroad track for some distance, and then turned diagonally towards the track and crossed it where the track was laid upon a dump. Before reaching this dump, the road came down a little hill, and then was on level ground, and then rose on to the dump and crossed the track. There was a fence between the road on which the boy was traveling and the railroad. The boy approached the crossing in the same general direction in which an engine came which struck him at the crossing. The accident occurred about seven o'clock, on a moonlight night in November. The engine was backing, and was running rapidly; the steam had been cut off, and it running down grade on its own momentum and not making much noise. It had no lights on the rear end, which was the approaching end, except two lanterns; one hung on each side of the tender. (The engineer said it had only one lantern upon it; but the other witnesses say it had two.) No whistle was sounded within half a mile of the crossing. The boy was seriously injured, and his memory has been impaired, and he is unable to recall the facts leading to his injury. The court at the conclusion of the testimony gave instructions which excellently stated the law governing the facts of the case, except as hereinafter set out.

1. The first contention of the appellant is that the evidence establishes the fact that Robert Moon received his injuries by reason of his own negligence, and that the case should have been withdrawn from the jury. The court is unable to concur in this view of the evidence. The boy was driving a wagon, which was making a noise, and which might have deadened his hearing of the approaching engine; but this, of course, would not excuse his duty to look and listen for the approaching engine. The situation of the road would make it more difficult to see the engine than if the engine were approaching on a level, as he had to go down a depression and then drive up the dump in order to cross the track; and the fence was between him and the engine.

None of these facts would excuse him from the duty to look and listen, but they might explain why he did not see or hear the approaching engine if he did look and listen.

The only lights to be seen on the approaching engine were the two lanterns hung on either side of the tender; and in the night time an ordinarily prudent and careful person might easily be misled as to the distance the engine so equipped and moving was from the crossing when the attempt was made to cross in front of it. One of the witnesses, who was about to walk across a bridge near the crossing, was deceived as to its distance, and he would have attempted to cross but for his brother, who was with him, who saw that the engine was too close for them to safely cross the bridge. They had an unobstructed view of the approaching engine, and were walking toward it; and it would naturally be easier for one approaching with less opportunity for an accurate view to be deceived than were these men on the track. A somewhat similar situation was presented in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Johnson,* 74 Ark. 372, and the court held that the deceptive appearance of an approaching train in a dim light was sufficient to send the question of contributory negligence to the jury.

2. It is insisted that the court erred in modifying the eleventh instruction requested by the defendant, in which the court added thereto this clause: "Unless you find that the trainmen in charge of the locomotive, by the use of ordinary diligence, could have prevented the injury," making the instruction read as follows: "If you find from the evidence in these cases that R. J. Moon saw or heard the engine backing down the railroad track towards the crossing, but thought he would have time to cross the track before the engine reached the crossing, your verdict will be for the defendant in both cases, notwithstanding you may believe that the engine was backing at a dangerous rate of speed, and that no signals for the crossings were given, unless you find that the trainmen in charge of the locomotive, by the use of ordinary diligence, could have prevented the injury."

There was evidence tending to prove negligence after discovering the boy's dangerous proximity to the track, which would have made the modification proper if it had been correctly worded; but it was not, owing to the omission from it of the discov-

ery of the danger of the negligent traveler. It should have been, "unless you find that the trainmen in charge of the locomotive, by the use of ordinary diligence, could have prevented the injury *after discovering the danger of the plaintiff.*"

3. Objection is made to the seventh instruction, which reads as follows: "If you find from the evidence that it was more dangerous to back the engine than to run it in the usual way with the headlight to the front, it was negligence in defendant's employees to so run the engine if said employees could have turned the engine when they left the cars at Mansfield and Booneville, when they went for water, so as to have run the engine with the headlight to the front."

There was evidence tending to prove that it was owing to an emergency happening in the run which caused the trainmen to back the engine from Booneville to Mansfield. Appellant's witnesses testified that it was more dangerous to back an engine than to run it with the headlight in front. The run made with the engine in this condition was nineteen miles, and between Booneville and Abbott, near where the accident occurred, there were eight crossings of the track by public roads. Whatever emergencies may render the running of an engine in this way, a proper discharge of the employees' duties to the company, they do not excuse them to travelers on public highways crossing the tracks. The act of May 28, 1907, requires any company, corporation or officer of court, owning or operating a railroad over fifty miles in length, in whole or in part within this State, to equip, maintain and use upon each and every locomotive being operated in road service in the State in the night time, a headlight of power and brilliancy of 1500 candle power. Acts of 1907, p. 1018. Careful train service, even without statutes, would necessarily require locomotives to be equipped with headlights when traversing highways in the night time. 3 Elliott on Railroads, § § 1159 and 1162.

4. The court gave this instruction over the objection and exception of the defendant: "If the jury find from the evidence, either direct or circumstantial, that plaintiff, R. J. Moon, drove upon the railroad track of defendant at the crossing mentioned in the complaint, and before driving thereon he saw the approaching train, or could have seen it, and without fault or

carelessness on his part honestly thought, by reason of the headlight being on the end of the locomotive in the direction from which the train was coming, that it was going in the opposite direction from the crossing, then he would not be guilty of contributory negligence, and your verdict should be for the plaintiff."

No evidence is found that the headlight upon the engine was burning on the rear of the engine, but the inference from the whole evidence is that the only light upon it was from the lanterns on the tender, which was then being used as the forward end. But, passing that point, the instruction tells the jury that if R. J. Moon, without fault or carelessness on his part, honestly thought, by reason of the headlight being on the end of the locomotive in the direction from which it was coming, that it was moving in the opposite direction from the crossing, then he would not be guilty of contributory negligence. The witness introduced on the part of the plaintiff who saw the accident, said that he could and did see that the engine was moving towards him. This witness and his brother were walking in the direction of the approaching engine, and one or the other was evidently deceived as to the nearness of the engine to them, but not as to the direction it was traveling. There are no circumstances in evidence tending to prove that the boy was misled by the appearance of the engine, or that any one would be misled as to the direction it was going by reason of its being reversed and carrying the lanterns in front instead of a headlight.

This instruction amounts to an invitation to the jury to find for the plaintiff upon a mere surmise that he was in this way misled, when there is no evidence whatever that he was so misled, nor any evidence that the appearance of the backing engine would appear as if it were going in the opposite direction; and certainly it is not a matter of common knowledge that an engine so operated would appear to be going in an opposite direction. Hence it can not be seen whether this verdict is responsive to the issues properly sent to the jury, or to this one improperly sent to it.

For the errors indicated in the instructions, the judgment is reversed and the cause remanded.

PAGE v. STATE.

Opinion delivered November 30, 1908.

1. EVIDENCE—COMPETENCY.—The prosecuting witness in a criminal assault case should not be permitted to say with reference to the accused: "If I had had a pistol, I would have shot him; I ought to have killed him." (Page 239.)
2. WITNESSES—IMPEACHMENT.—It was error to permit the prosecuting witness, in a prosecution for an assault growing out of the misplacement by defendant of a paper belonging to witness, to say: "I did not believe the defendant when he said he had lost or misplaced the affidavit. I would not have believed anything he had said then, and would not believe anything he would say now." (Page 239.)
3. SAME—IMPEACHMENT.—It was error to permit the prosecuting witness in a case of criminal assault to impeach defendant's witnesses by saying: "The defendant can get a lot of prostitutes and perjurers to testify to anything that he wants them to testify to." (Page 239.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed.

Wood & Henderson and *A. J. Murphy,* for appellant.

1. A hatchet is not necessarily a deadly weapon. 16 S. W. 257.

2. The State must prove the assault with a deadly weapon with the *intent* to inflict bodily injury, etc. Kirby's Digest, § 1583.

3. The court allowed incompetent, improper and prejudicial testimony to go to the jury without even rebuke.

4. It was error to refuse the charge that the fact that defendant was a negro and the prosecuting witness a white man should have no effect in determining the guilt or innocence of defendant.

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

Suggest error in this: (1) incompetent and prejudicial testimony was admitted; (2) in refusing to instruct the jury that defendant being a negro and prosecuting witness a white man, should have no effect in determining guilt or innocence. 67 Ark. 606; 16 Ill. 17.

HILL, C. J. The grand jury of Garland County indicted

J. D. Page for an assault with a deadly weapon committed upon J. H. Scroggins. He was convicted, and has appealed. Page is a negro lawyer, and Scroggins is a white lawyer, and each is a notary public. They had offices in the same building, and for many years exchanged professional favors and services. Scroggins gave Page an affidavit which he had drawn, and which he desired signed and sworn to by Dr. Hornor, and requested Page to take the affidavit as a notary public. Scroggins thereafter asked him for it several times, and Page told him that he had lost or misplaced it, but would continue to look for it and render the requested service. Finally, on the 25th of September, 1907, Scroggins went into Page's office and again demanded the affidavit. Page again told him he had lost or misplaced it, but would continue to look for it. Scroggins told him he did not believe he had lost it, but that he thought he had stolen it; and unless he produced it he would have him before the court for it.

So far their stories run together, but from here they diverge. Scroggins said that Page ordered him out of his office, rose from his seat, and struck him on his head, and knocked him down and out into the hallway. Later he said that Page struck him with a hatchet. He said there were no persons present but himself and Page and a white man, whose name he did not know.

Page said that when Scroggins charged him with stealing the affidavit, and threatened prosecution, he told him that he wanted no trouble with him, and that he (Scroggins) was angry, and asked him to leave his office; that this seemed to make Scroggins still more angry, and he then rushed upon him and struck him, while he was seated, across the arm with a stick; that he arose from his chair and pushed Scroggins out of his office, and then Scroggins went and got a knife in another room, and came back breathing threats and oaths and denouncing Page, and he, Page, then picked up a hatchet without a handle, and pushed or shoved him out of the office into the hall with the hand holding the hatchet.

Ada Oliver and Gertrude Robinson each testified to being in Page's office when Scroggins came in, and that they witnessed the altercation and subsequent struggle; and each gave testimony substantially the same as that of Page. Other testimony corrob-

orative of Page, and some contradictory of Scroggins, was introduced by the defendant, as well as evidence as to the defendant's good reputation for peace and quietude.

Scroggins was recalled, and denied several statements made by Page; denied that he got a knife in another room, and denied that he left Page's office and re-entered it. He stated that neither Gertrude Robinson nor Ada Oliver were there. Scroggins was permitted, on his direct examination, to testify, over the objection and exception of the defendant, that "if I had had a pistol I would have shot him; I ought to have killed him;" and also to testify over the objection and exception of the defendant: "I did not believe the defendant when he said he had lost or misplaced the affidavit. I would not have believed anything he had said then, and would not believe anything he would say now." In his rebuttal testimony, Scroggins was permitted to testify, over the objection and exception of the defendant, that the testimony of Gertude Robinson and Ada Oliver amounted to nothing, that it was perjured testimony; and further: "Page could just as well, and could have as easily, gotten fifty other prostitutes to testify to the same thing. It amounts to nothing." He was likewise permitted to repeat, over the objection and exception of the defendant, that "the defendant can get a lot of prostitutes and perjurers to testify to anything that he wants them to testify to;" that he has around him a lot of prostitutes, perjurers and disreputable negroes of all kinds.

The Attorney General properly confesses error, and of this testimony says: "We believe that all of this testimony was not only incompetent, but highly prejudicial, and should have been excluded from the jury as soon as it passed witness' lips, and we believe that the prosecuting witness should have been rebuked by the court."

Instead of overruling the defendant's objections to this kind of testimony, the court should have sustained them and rebuked the witness for the use of such abusive, violent and denunciatory language, and upon a repetition of it should have sent the prosecuting witness to jail until his tongue and temper were so under control that he could properly conduct himself on the witness stand. His statement that he ought to have killed the defendant was inflammatory, and shockingly improper from a witness in a

court of justice. His reflections upon Page's veracity were the least of his offendings, but as a lawyer he was bound to know that veracity can not be attacked in that way. His charges that the women witnesses who contradicted him were prostitutes should not have been tolerated for a moment, and their repetition prevented, instead of permitted. If, in fact, they were prostitutes, evidence of their general reputation would have been admissible; and in this way, and this way only, could that fact have been established. If a lawyer in argument had been permitted to make these charges, without evidence to sustain them, unquestionably it would have been reversible error; and much graver is the error of permitting a prosecuting witness under oath to make such a declaration as to the character of witnesses who contradicted him.

His statement that he would not believe the defendant, and that the defendant procured perjured testimony, was likewise prejudicial. The admission of all such testimony as above set out is against the elementary principles of evidence.

Other errors are alleged in the trial, but it is not necessary to discuss them, as none of the questions presented will necessarily arise on the second trial. Defendant did not have a fair and impartial trial, and the confession of error is sustained. The judgment is reversed, and the cause remanded for a new trial.

STRONG v. STATE.

Opinion delivered November 30, 1908.

1. CRIMINAL LAW—ACCESSORIES IN MISDEMEANORS.—All persons concerned in the commission of crime less than a felony, if guilty at all, are regarded as principals. (Page 242.)
2. LIQUORS—PROCURING SALE FROM DISTILLER.—Where a person, desiring to buy a smaller quantity of liquor than five gallons from a distiller who was not authorized to sell less than that quantity, procured authority from several others to purchase for each of them a small quantity until the amount of five gallons was made up, and then purchased that amount from the distiller and distributed it among them as ordered, he is guilty of selling liquor unlawfully, whether the distiller was liable or not. *Hunter* v. *State*, 60 Ark. 312, followed (Page 242.)

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

Dene H. Coleman and *McCaleb & Reeder,* for appellant.

One who assists another in procuring liquor, or acts as his messenger in procuring same, notwithstanding both money and liquor may pass through his hands, provided he has no interest in the liquor or price, and acted as agent of the buyer and not of the seller, is not guilty of selling, or being interested in the sale of liquor. 23 Cyc. 182; 37 Am. St. 406; 57 S. E. 371; 68 Ark. 468; 72 *Id.* 14; 51 *Id.* 550; 82 *Id.* 488.

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

In misdemeanors all who procure, participate in or assent to the commission of a crime are principals. 45 Ark. 361; 60 *Id.* 312. No trick, device, subterfuge or pretense can evade or defeat the policy of the liquor laws, if liquor be thereby procured, where it is unlawful to sell or give it away. 43 Ark. 389.

HILL, C. J. The prosecuting attorney filed information against Strong in Independence County, charging him with an unlawful sale of liquor in prohibited territory. He was convicted, and has appealed; and the only question presented is as to the sufficiency of the evidence to sustain the conviction. The prosecuting witness, Matheny, desired to purchase some whisky, and went in search of parties to make up a subscription for the purchase of a keg of whisky, and was referred to Strong. He went to Strong, and told him that he wanted a quart of Old Standard whisky; Strong said that he wanted a gallon, and said that he would get up a subscription to purchase a keg. Matheny headed the subscription list, and put down his initials and opposite them marked seventy cents, which money he delivered to or left with Strong. Other parties joined in the subscription until a sufficient amount was raised to buy a keg of whisky, which was then purchased from one Earnheart, presumably a manufacturer of liquor, although the evidence does not show that fact definitely. Strong told Matheny where the whisky would be delivered, and Matheny went to that point and drew his share from the keg. The other subscribers were present for like purpose. It was delivered at a spring near the town of Batesville,

and the keg carried back to Earnheart's. The evidence showed that Earnheart habitually paid fifty cents for returned kegs. Matheny does not know who actually purchased the whisky or who carried it to the place where Strong told him it would be. This brand of whisky was sold at $2.80 per gallon, and it required $14 to purchase a five-gallon keg of it, which was the quantity purchased in the keg from Earnheart.

"The rule of the common law is that all persons concerned in the commission of a crime, less than a felony, if guilty at all, are principals." *Foster* v. *State,* 45 Ark. 361, and cases there cited. The same rule prevails under sections 1560, 1561 of Kirby's Digest. See cases cited in the annotations to those sections.

It is immaterial in such cases as this whether the seller of the liquor—the principal in the first degree—might or might not be convicted; for that does not affect the guilt of the principal in the second degree. *Foster* v. *State,* 45 Ark. 361. The question is, whether this evidence established that the accessory was guilty of procuring a sale of liquor in violation of the liquor laws of the State.

This evidence discloses a combination of persons subscribing for the common purchase of a quantity of liquor which the dealer, if a manufacturer, might have lawfully sold in an original package of not less than five gallons, but, if not a manufacturer, which he could not lawfully sell in this prohibited district. This combination made it a sale to various individuals, in quantities which they could not in any event lawfully purchase. The evidence shows that Strong was one of the procuring causes of this violation of the law, and he is therefore an accessory, or principal in the second degree, which, under the statute, renders him liable to be indicted and convicted as a principal in the first degree. The principles involved are fully discussed in *Foster* v. *State,* 45 Ark. 361, and *Hunter* v. *State,* 60 Ark. 312.

While there is a conflict in the authorities upon this subject, this court has, after full consideration in the Hunter case, *supra,* adopted the principle that such sales as the one at bar render the participating parties guilty; and it is not proper to reopen the subject. The law is thus written; let it be thus enforced.

Judgment affirmed.

JOHNSON v. MAMMOTH VEIN COAL COMPANY.

'88 243
'90 538

Opinion delivered November 9, 1908.

1. MASTER AND SERVANT—ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE.—Assumption of risk and contributory negligence are separate defenses; and while it frequently happens that there is no practical importance in distinguishing them, yet they rest upon different bases. (Page 247.)
2. SAME—DEFENSES OF ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE.—The defenses of assumed risk and contributory negligence are tested by the same standard when the danger is obvious, and the distinction between them in such case is more theoretical than practical. (Page 247.)
3. SAME—Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor, while contributory negligence rests on some fault or omission of duty on the part of the plaintiff but for which the injury would not have happened. (Page 248.)
4. MINES AND MINING—STATUTORY DUTY—ASSUMED RISK.—Where a mine owner, agent or operator neglected to furnish a sufficient amount of timber to be used as props in the mine, as required by Kirby's Digest, § 5352, the defense will not be open to him that the servant who was injured thereby assumed the risk arising from such neglect. (Page 249.)
5. SAME—CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY WHEN.—Where the evidence does not clearly establish that the mine in which plaintiff was injured was in such defective condition for want of props that no man of ordinary prudence and care would work there, the question whether plaintiff was negligent in working there was properly left to the jury. (Page 257.)

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

STATEMENT BY THE COURT.

Johnson brought suit against the Mammoth Vein Coal Company for a personal injury received in its mine; and, after hearing the evidence adduced, the circuit judge directed a verdict to be returned in favor of the defendant. The sole question on this appeal is whether the plaintiff's testimony presented such facts as would justify the case going to the jury. Johnson's testimony was to the following effect:

He was an experienced miner, working in room No. 2, east entry of the mine of the Mammoth Vein Coal Company on the 5th of March, 1906. The room was approximately one

hundred and fifty feet long by twenty feet wide. It was properly secured on both sides to within fifteen or twenty feet of the face of the coal, the props being on both sides and in the middle. On the west side there were no props for fifteen or twenty feet of the face of the coal, and on the east side there were props to within eight or ten feet of it. Johnson was injured on Wednesday, and on the preceding Monday, when he finished his work, he called upon the boss driver for props to be placed in his room by the next morning. The boss driver was the proper person upon whom to make this demand, as it was his business to furnish props to the miners upon demand. Johnson wanted these props to place under the west side of his roof, as he had discovered that that side was drummy for a space of four to eight feet. A drummy condition of a roof is where the rock is loosened to some extent, and such condition is dangerous, and this fact was known to him.

Johnson had placed two shots, one on the west side and one on the east side of the room, and they had been fired, evidently after he had ceased work on Monday. He did not work on Tuesday, principally because he did not have the props. He demanded of the boss driver props again on Tuesday for Wednesday, and they were promised for that time. He also saw the pit boss, and had a promise from the pit boss that he would have the props on Wednesday; and, according to the custom of the mine, they should have been taken to him Wednesday morning on the first trip of the driver. The driver failed to bring them to him on that trip, and told him he had been unable to get them. After this default of the boss driver and the pit boss to furnish him props as demanded and as promised, Johnson continued to work on Wednesday until he was injured, which occurred sometime after the failure to bring the props. He worked on the east side of his room, under that part of the roof which was not drummy, and which he regarded as properly propped.

He tested the roof on Monday and again on Wednesday after the shots had been fired, and found it in the same condition that it was on Monday before the shots were fired. Four or five feet of the coal had been shot out on the west side by the firing of the shot there, and this would have some tendency to loosen the roof; but on sounding it in his opinion its condition had not been

changed. Had he received the props, he would have placed two or three on the west side six or eight feet from the face of the coal, and he would have considered that sufficient to have made that side safe. He did not consider that any were needed on the east side to make that side safe, as the props extended to within eight or ten feet of the coal on that side.

When the drummy part of a roof falls, it may fall without affecting the other part, or it might possibly bring down some of the adjoining roof with it. While mining on the east side, close to his shot, the drummy part on the west side fell and brought down some of the roof over him, which hit him on the head and shoulders and knocked him down, and in falling he stumbled over a pick handle which struck him in the groin. This fall over the pick handle ruptured him, and he has been permanently disabled thereby. When he fell, his light was put out, and he does not know how much of the roof fell.

At the conclusion of the evidence, the trial judge granted the motion of the defendant for a peremptory instruction, on the ground that under the decision of *Patterson Coal Co.* v. *Poe,* 81 Ark. 343, the plaintiff assumed the risk, and is not entitled to recover in the action. The plaintiff has properly brought the case here.

C. T. Wetherby, for appellant.

The peremptory instruction for defendant under the authority of *Patterson Coal Co.* v. *Poe,* 81 Ark. 34, should not have been given, because:

1. A master may not avail himself of the defense of assumption of risk where the injury results from his neglect of a duty imposed by statute. *Patterson* v. *Poe* should be overruled. 122 Fed. 836; 71 Ark. 518; Bailey on Personal Injuries, § § 3073, 3080-1-2; 48 Am. R. 669; 40 Ohio St. 148; 153 Ind. 107-113; 70 Pac. 310; 85 S. W. 679; 87 *Id.* 506; 61 N. E. 335; 156 Mo. 56; 200 Ill. 493; 66 N. E. 29; 111 Ill. App. 294; 94 *Id.* 74; 192 Ill. 41; 96 Fed. 298; 40 N. E. 725; Labatt on Master & Servant, c. 22, § § 423-4-5-9-30; 77 Ark. 867; 92 S. W. 244.

2. There was no contributory negligence, as plaintiff was working in a safe place where the danger was not obvious nor imminent to a man of ordinary prudence and care. 92 S. W. 244; 77 Ark. 367. and cases *supra.*

Read & McDonough, for appellee.

This case is controlled by *Patterson Coal Co.* v. *Poe,* 81 Ark. 343, and the court properly directed a verdict for defendant. 83 Ark. 571; 71 *Id.* 518; 53 Oh. St. 43. The case in 83 Ark. 571 refutes every argument and point of counsel on the questions of assumed risk and contributory negligence.

HILL, C. J., (after stating the facts.) This case is predicated upon section 5352 of Kirby's Digest and upon section 5350 as amended by the Acts of 1905, which sections are as follows:

"Sec. 5352: The owner, agent or operator of any mine shall keep a sufficient amount of timber when required to be used as props, so that the workmen can at all times be able to properly secure the said workings from caving in, and it shall be the duty of the owner, agent or operator to send down all such props when required and deliver said props to the place where cars are delivered."

"Sec. 5350: For any injury to persons or property occasioned by the willful violation of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to any party injured for any direct damages sustained thereby; provided that, should death ensue from any such injury, a cause of action shall survive in favor, first, of the widow and minor children of such deceased; if there be no widow or minor children, then to the father if living, then to the mother; if no mother, then to the brothers and sisters and their descendants." (Acts of 1905, p. 569.)

Briefly stated, the facts are: Johnson found part of his room needed props; he thrice demanded them; the company failed to furnish them; with knowledge that they would not be furnished at that time, he continued to work and was injured by a falling roof. As will be seen from an examination of the foregoing statement, the facts of the case bring it within *Patterson Coal Co.* v. *Poe,* 81 Ark. 343. In that case, as in this one, the miner proceeded with his work without waiting for the props which he had requested, and which the mining company had failed to furnish him; and it was there held that "he was aware of the risk which, to some extent, attended the situation, but his continuance of the work manifested his willingness to assume that risk."

In the case of *Mammoth Vein Coal Co.* v. *Bubliss,* 83 Ark. 567, the facts were essentially the same as in *Patterson Coal Co.* v. *Poe,* but the court preferred placing the ground of the decision upon the contributory negligence of the miner in working in an obviously dangerous place, rather than to follow *Patterson Coal Co.* v. *Poe* in placing it upon the assumption of risk; and pointed out in cases like those two, where the plaintiff exposes himself to a danger that is obvious and imminent, it is not of much practical importance whether the case is disposed of on the ground of assumed risk or contributory negligence. This case is memorable in the court as the last judicial work of the late Mr. Justice RIDDICK.

Since the subject was reviewed in the Bubliss case, the soundness of the decision in the Patterson-Poe case has been questioned in the consultation room; and now it has been questioned at the bar in the instant case. The circuit judge properly directed a verdict for the defendant company on its authority. In view of this doubt, the subject has been carefully examined and fully discussed in order to determine whether to follow this case or disapprove it.

Assumption of risk and contributory negligence are separate defenses; and while it frequently happens that there is no practical importance in distinguishing the two where the same state of facts would make out a defense, whether called by the one name or by the other, striking instances of which are found in the Bubliss and Poe cases; yet they rest upon different bases, and each should be approached from a different viewpoint. However, where the danger is obvious, the two defenses are tested by the same standard in that particular, and then the differences are more theoretical than practical. This is pointed out in *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367; *St. Louis, I. M. & S. Ry. Co.* v. *Mangan,* 86 Ark. 507; and by Judge Taft in the Narramore case, hereinafter referred to.

There is a class of cases where the distinction is vital, and this case happens to be such an one; for, as will be seen in the discussion later on, it presents a question of fact as to whether the plaintiff was guilty of contributory negligence. Hence, the case can not be turned, as a matter of law, upon contributory negligence. But the facts make out a case of assumption of risk

for the master's breach of the statute above quoted if such breach is the subject-matter of an assumption of a risk by the servant in continuing in the service with knowledge of the master's breach of said statute.

In the beginning of this discussion, it may be well to point out the differences between the two defenses. In *St. Louis Cordage Co.* v. *Miller,* 126 Fed. 495 (s. c. 63 L. R. A. 551), Judge Sanborn, speaking for the Circuit Court of Appeals for this circuit, said: "Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort."

Mr. Justice Holmes, speaking for the Supreme Court of the United States, in the case of *Schlemmer* v. *Buffalo, etc., Ry. Co.,* 205 U. S. 1, said: "An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well known case of *Farwell* v. *Boston & Worcester Rd. Co.,* 4 Met. 49. But, at the present time, the notion is not confined to risks of such negligence. Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree, rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then,

unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

In *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367, the court said: "The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff but for which the injury would not have happened. * * * On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid."

The object of this statute is the protection of men engaged in the dangerous occupation of mining. In considering a statute for a similar purpose, passed by Congress, regulating the operation of coal mines, where said act was in force in New Mexico, the court said: "The act of Congress does not give to mine owners the provilege of reasoning on the sufficiency of appliances for ventilation or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. * * * This is an imperative duty, and the consequence of neglecting it can not be excused because some workman may disregard instructions. Congress has prescribed that duty, and it can not be omitted, and the lives of the miners committed to the chance that the care or duty of some one else will counteract the neglect and disregard of the legislative mandate." *Deserant* v. *Cerillos Coal Rd. Co.,* 178 U. S. 409.

In *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, the "Safety Appliance Act" of Congress was before the court, and it was said: "Where an injury happens through the absence of a safe draw-bar, there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such in-

juries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard."

Applying the principles above quoted, it follows that the statute is imperative; that the company which fails to comply with it is guilty of negligence *per se* and is liable for all actions which proximately flow from such failure to perform this statutory duty, unless the negligence of the employee concurs with that of the master. The authorities are practically uniform in holding that contributory negligence is a defense to a breach of statutory duty. This was directly ruled in *Kansas & T. Coal Co.* v. *Chandler,* 71 Ark. 518, under this same statute, and again in *Mam. Vein Coal Co.* v. *Bubliss,* 83 Ark. 567. Whether it is open to the master, when he violates the statutory duty where the statute is one which the State, in a kind of paternalism, passes for the protection of persons who are deemed incapable of properly protecting themselves, to avail himself of the defense of assumed risk, is quite another question. These statutes are more frequent in dangerous employments, like railroad service, mining, and work around dangerous and complicated machinery.

The question above stated has been before the courts many times, and the decisions are in hopeless conflict upon it. The confusion is worse confounded because of many erroneous applications of the one doctrine when, under the facts, the other doctrine should have been applied. A learned writer on the subject calls attention to this, and gives many illustrations of it from courts of great learning and distinction (1 Labatt on Master & Servant, § 309), and of it he says: "The inexactness of terminology which has been discussed above is doubtless responsible, principally, if not altogether, for the doctrinal confusion between the two defenses which is often found in the arguments of judges."

The continuance of Johnson to work in his room after the company had refused to give him props was clearly an assumption of the risk of working without the props, if such risk was capable of being assumed in the face of this statute; whether his continuance without the props was negligence depends upon the obviousness of the danger he encountered in so doing. His con-

duct measures the one defense, and his relation to the master measures the other. That relation rests in contract, and the assumption of risks impliedly grows out of the contract, and is contractual in its nature.

Proceeding to the exact question—that is, whether there can be an assumption of risk against a violation of a statutory duty where the statute is for the protection of the safety of the employee:

A summary of the decisions is found in a note to *Denver & R. G. Rd. Co.* v. *Norgate,* 6 L. R. A. (N. S.), 981, in which it is stated that the Alabama, Massachusetts, Iowa, Rhode Island, Minnesota, New York, Ohio and Wisconsin courts have held that the risk of non-compliance with these statutory duties may be assumed, while the courts of Illinois, Indiana, Louisiana, Michigan, Missouri, Vermont and Washington have held to the contrary. Not all of these cases have been examined in this investigation, but all of the leading ones have been.

In the Federal courts, the situation is not bettered. The Circuit Court of Appeals of the Sixth Circuit, in *Narramore* v. *Cleveland, &c., Ry. Co.,* 96 Fed. 298, held that an assumption of risk is not a valid defense where the statute is for the protection of employees.

On the other hand, the Court of Appeals of this Circuit in two cases, *St. Louis Cordage Co.* v. *Miller,* 126 Fed. 495, and *Denver & R. G. Rd. Co.* v. *Norgate,* 141 Fed. 247 (6 L. R. A., N. S. 981), holds to the contrary. In the latter case Judge Carland says: "It is, however, conceded that there is nothing in the terms of the law which expressly repeals the law of assumption of risk; but it is contended that, if the defense of assumption of risk is allowed in actions like the one at bar, then the servant can contract the master out of the statute, and thereby render the statute of no force or effect. In other words, it is contended that, as the law of assumption of risk is a term of the contract between the master and servant, to allow the master the defense of assumption of risk in the case at bar would be to allow private parties to render nugatory by their contracts a public statute of the State of Colorado. The error in this contention is in assuming that the law of assumption of risk is created by the contract between master and servant. This error, we believe, has

led some courts to enunciate a false doctrine in regard to the question under discussion. A representative case among those which hold that statutes imposing a positive duty upon the master by implication repeal the law of the assumption of risk, is the case of *Narramore* v. *Cleveland, C. C. & St. L. Ry. Co.,* 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298. As this case has been followed by at least one of the State Supreme Courts (*Green* v. *Western American Co.,* 30 Wash. 87, 70 Pac. 310), we propose to show wherein we think the reasoning of the learned court in the Narramore case is not only faulty, but that, so far as the decision is based upon the decisions in England, a wrong conclusion was drawn as to what those decisions hold the law to be." *Denver & R. G. Rd. Co.* v. *Norgate,* 141 Fed. 247, 6 L. R. A. (N. S.) 981. And the Court of Appeals of the Second Circuit has held to the same effect in *Higgins Carpet Co.* v. *O'Keefe,* 79 Fed. 900.

It seems strange that the Court of Appeals of this (Eighth) Circuit should repudiate the doctrine of contract being the basis of assumption of risks, for in the earlier decision of *St. Louis Cordage Co.* v. *Miller,* 63 L. R. A. 551, 126 Fed. 495, where the same conclusion was reached as to the assumption of the risk for a violation of a statutory duty, that court had, in the language heretofore quoted, through Judge Sanborn, stated that assumption of risk is based upon contract. In that case Judge Thayer delivered a dissenting opinion which well states the reasoning on the other side of the question, as will be seen from the following excerpt:

"I do not concur in the foregoing opinion. The laws of Missouri (Rev. Stat. 1899, § 6433) required the defendant company to keep the gearing which occasioned the plaintiff's injury 'safely and securely guarded when possible' for the protection of its employees. This statute was enacted in pursuance of a sound public policy; that is to say, to insure, as far as possible, the safety of the many thousand artisans and laborers who are daily employed in mills and factories throughout the State, and while so employed are exposed to unnecessary risks of getting hurt if belting, gearing, drums, etc., in the establishments where the work are left uncovered when so situated that they may be covered readily. The act was inspired by the same motives which induced the Congress of the United States (Act March 2, 1893,

chapter 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174), to require cars to be equipped with automatic coupling appliances when it was discovered that hundreds of brakemen were annually killed or made cripples for life by the use of the old-fashioned couplers that do not couple by impact. A wise public policy demands that, as far as possible, human life shall be preserved, and that there shall not be in any community a large class of persons who are unable to earn a livelihood because they have become maimed and crippled through exposure to unnecessary risks. The statute in question is not only a wise measure of legislation, but was prompted by a humane spirit. For these reasons it should not be so applied or construed by the courts as to defeat the objects which the Legislature had in view, nor in such a way as to render it less efficient than it was intended to be in the promotion of such objects."

In the Narramore case, the reasoning of Judge Taft is as follows: "If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement, express or implied, on his part, to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that." *Narramore* v. *Cleveland, etc. Ry. Co.*, 96 Fed. Rep. 298. This case has been approved by this court in the Jones, Bubliss and Mangan case elsewhere cited.

This question was before the Indiana Supreme Court, under a statute requiring, as this one, the mine owner to furnish timber for the miners to prop their working places when demanded. The court said: "If a statute is a mere affirmation of the common-law duty of the employer with respect to providing safe working places and tools, the rule as to assumption of risk remains in force. The standard of care continues to be the conduct of the reasonably prudent person under like circumstances; and the means of measuring up to it may still be the subject for the joint judgment and agreement of the employer and the employee.

"If, however, the statute, as in this case, sets up a definite standard, and requires specific measures to be taken by the employer in providing safe working places and appliances, other considerations come into view. The very fact of such legislation indicates that the law-makers believed that the operation of the common-law rules did not afford the employee sufficient protection; that, under the development of the modern industrial system, tending to centralization of capital and impersonal management, the employer did not stand upon a footing of equality with the employer in contracting for his safety; and that the necessity of earning the daily wage frequently constrained the employee to put up with defective place and tools without complaint, by reason of his fear of the consequences of complaining."

And again the court said: "If the Legislature has clearly expressed the public policy of the State on a matter within its right to speak upon authoritatively, and if that public policy would be subverted by allowing the employee to waive in advance his statutory protection, the contract is void as unmistakably as if the statute in direct words forbade the making of it." *Davis Coal Co.* v. *Polland*, 158 Ind. 607.

The State of Missouri passed a statute providing that it should be no defense to an insurance company that the insured committed suicide, unless it should be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary should be void.

In a case wherein there was a contract containing stipulations contrary to the terms of the statute, the effect of the statute and the stipulation came before the Supreme Court of the United States, and that court, through Mr. Justice Harlan, said: "An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. . . . . The contract between the parties, evidenced by the policy, is, we think, an evasion of the statute, and tends to defeat the objects for which it was enacted. . . . . Looking at the object of the statute, and giving effect to its words, according to their ordinary, natural meaning, the legislative intent was to cut up by the roots any defense, as to the whole and every part of the sum insured, which was grounded upon the fact of suicide." And the court approved this language from the St. Louis Court of Appeals: "This was in effect a legislative declaration of the public policy of this State." *Whitfield* v. *Aetna Life Insurance Co.*, 205 U. S. 489.

In *Little Rock & F. S. Ry. Co.* v. *Eubanks*, 48 Ark. 460, it was attempted by contract to avoid a master's liability for negligence to a servant, and this court said: "If he can supply an unsafe machine, or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutory rule;" and it was held contrary to public policy to permit it.

A fortiori, if the parties could not directly contract, there could be no implied contract for the assumption of the risk by the mere continuance in the employ, in the face of the violation of the statutory duty by the master. It would not be profitable to review further the decisions upon this subject. That has been well done by Judge Taft in the Narramore case, and by Judge Carland in the Norgate case, on opposite sides of the question, and in the opinion of the court, by Judge Sanborn in *St. Louis Cordage Co.* v. *Miller, supra,* and on the other side by Judge Thayer in his dissenting opinion in that case; and also by the editors of the Lawyer's Reports Annotated, in the note

to the Norgate case (6 L. R. A., N. S. 981). A recent compilation says: "There is some conflict of authority as to whether a master may avail himself of the defense of assumption of risk where the injury complained of resulted from his neglect of a duty imposed by statute. Where the defense is forbidden by the statute itself, he cannot of course rely upon it; and where there is no such inhibition, the weight of authority seems to be to the same effect, although there are decisions which maintain a contrary doctrine. If the object of the statute is other than the protection of the servant, the master's neglect of the duty imposed will not prevent his relying on the servant's assumption of risk." 26 Cyc. 1180.

It is the duty of this court to decide which is the sounder reasoning; and in pursuance of this duty the court decides that this statute is of that class referred to by the Supreme Court of the United States where the duty is imperative on the master to furnish these props in order to enable the employee to make safe his working place; and it is for the protection of a large class of laborers engaged in a dangerous occupation who are, by such legislation, not deemed capable of properly safeguarding themselves. The General Assembly has deemed it proper in this act to require protection in this particular, as in many others reaching to the safety of the men engaged in this hazardous work, and has thereby evinced the public policy of the State in this regard. And for a breach of such statutes the defense of assumption of risk is not applicable to the violator of the statute.

These statutes usually provide for a safe working place for the employee, or safe appliances with which to do his work; and it has been said in argument that cases holding that there can not be an assumption of risk for a violation of such statutes would not apply here, because this statute does not reach to the safety of the working place of the miner, as he makes his own room safe. It is true that, according to the mining custom, as developed from the evidence here, as in the preceding similar cases, the duty rests upon the miner himself to examine the roof and determine when it needs props; but it is for the company to furnish him the props with which to make his room safe when

he discovers the need of props and demands them. The relation of the master's duty in this regard to the working place was explained in *Kansas & T. Coal Co.* v. *Chandler,* 71 Ark. 518, where the court said: "The duty of the master to use due care to furnish a safe place for the servant to work would, under the circumstances here, be discharged by furnishing the servant an ample supply of suitable timbers with which to make the room safe." Thus the court recognized, and properly so, that the furnishing of props rested upon the master in order to provide a safe place for the servant to work. While it is true that the immediate act of making safe the room is in the hands of the miner himself, yet he cannot make brick without straw. (Exodus, 5:6-19.)

If this statute was a single enactment, there would be more force in the contention that it is a matter left open to contract, directly or impliedly, between master and employee, as the duty of discovering the need of props is placed upon the employee, and he must determine when his room is to be safeguarded; but it is a part of a statute containing many other provisions for the safety of miners, and the whole purpose of the legislation is to put an imperative duty upon the master engaged in this dangerous occupation to protect a class deemed incapable of properly protecting themselves without this legislation.

In the Patterson-Poe case, the attention of the court was not called to the difference between violations of statutory duties and common-law duties nor the class of statutes involved, and the court merely applied the general doctrine of assumption of risks without looking into the effect of this statute upon that general doctrine. Since examining this question, however, the court has come to the conclusion that it would not do to follow *Patterson Coal Co.* v. *Poe,* and so much of the language of it as indicates that there could be an assumption of risks as therein mentioned is disapproved. The case was correctly decided, as pointed out in the Bubliss case, but the decision should have been on the ground that the undisputed evidence showed contributory negligence.

II. That leaves for consideration the question of whether Johnson was guilty of contributory negligence in working in the mine after the company was in default in its duty to furnish

him props. Had he been working under the drummy side of his room, which needed propping, then his case would have been exactly parallel with the Patterson-Poe case and the Bubliss case, and the court should have given a peremptory instruction upon the ground of contributory negligence. But this case differs from them in this: Instead of working in the dangerous part of the room, he worked upon the other side of the room, which he considered to be safe; he says that part of the roof was sufficiently propped; and, as near as can be gathered from the evidence, he was not nearer than twelve feet from the drummy part of the roof which was insufficiently propped. He was an experienced miner, and had tested the roof that morning. His evidence shows also that it might occur that the drummy part of the roof would fall without affecting the adjacent roof, but it might bring down other parts, as it did in this instance.

The question remains, whether his working in the room, a part of which was apparently secure and part of which was dangerous, must be declared as a matter of law negligence *per se*. The court cannot say that, under these facts, the danger was so obvious and imminent that no man of ordinary prudence and care would work there. The exact question is fully discussed in both the Chandler and Bubliss cases (71 Ark. 518, and 83 Ark. 567, respectively), and in *Hamman* v. *Central Coal & Coke Co.*, 156 Mo. 232, and *Diamond Block Coal Co.* v. *Cuthbertson*, 76 N. E. 1060.

This question should have gone to the jury under proper instructions.

Judgment reversed and cause remanded.

McCULLOCH, C. J., (dissenting). I do not hesitate in following the line of cases which are approved in the majority opinion, holding that the servant does not assume the risk of danger created by the failure of the master to perform the statutory duty of furnishing a safe place. While the authorities on that question are nearly evenly divided numerically, I think those which hold against the servant's assumption of risk under those

circumstances are more in accord with sound reason and with natural justice. But what I object to in the decision of the majority is the application of that rule to a statute which does not require the master to furnish a safe place in which the servant is to work. The statute in question merely requires the master to furnish props for the servant to use in making his working place safe. It clearly contemplates—what is shown to be the custom in mining—that the servant is to look to the safety of his working place, and he is the sole judge from time to time of its safety. No duty is put upon the master except to furnish props. The latter is not even required to inspect the place, nor to ascertain whether it is kept safe. The working place of a coal miner is more or less dangerous at all times, for he is constantly extending his walls as he works out the coal; and because of the very nature of the work he must determine for himself when he can safely proceed beneath an unpropped roof. He calls on his employer for props as he needs them; and the fact that he calls for them manifests his knowledge of the fact that the roof of his room needs to be propped.

Now, the miner being the sole judge of the safety of his working place, and it being his duty to decide for himself when props should be used, it seems plain to me that when he proceeds with his work beneath an unpropped roof, or beneath one which, according to his own judgment, is insufficiently propped, he necessarily assumes whatever danger there is in so doing. He is guided entirely by his own judgment in determining whether or not it is safe to work in the place. It being a part of the contract that he shall make the place safe, it follows as a part of the contract that he should bear the loss of injury which results from a failure to keep it safe; and he is not absolved from that responsibility by the failure of the employer to furnish material with which to make the place of work safe. Notwithstanding the failure of the employer to furnish props, it is still the miner's duty to decide for himself whether or not it is safe to proceed without them, and he assumes the risk of proceeding.

It is different where the statute imposes upon the employer the duty of making the working place of his employee safe by doing certain things prescribed by the statute. The servant

does not assume the risk of danger arising from the negligence of the master in failing to make the working place safe; and when the statute specifically requires the master to do certain things in order to make the place safe, it would practically nullify the statute to hold that the servant assumes the danger in continuing to work. The effect of the statute is to make the master responsible for failure to comply with its terms, and the parties themselves cannot contract away the direct force of the statute and thereby shift the responsibility which it has placed upon the shoulders of the master.

Not so with a statute which merely requires the master to furnish material for the servant to use in making his own working place safe, which does not shift or alter the responsibility for failure to make the working place safe. All the cases holding that the servant does not assume the risk arising from the master's non-performance of a statutory duty relate to statutes which require the master to make the working place of the servant safe. *Narramore* v. *C. C. C. & S. L. Ry. Co.,* 96 Fed. 298; *Chicago-Coulterville Coal Co.* v. *Fidelity, etc., Co.* 130 Fed. 957; *Green* v. *Western American Co.,* 30 Wash. 87; *Spring Valley Coal Co.* v. *Patting,* 210 Ill. 342; *Diamond Block Coal Co.* v. *Cuthbertson* (Ind.), 76 N. E. 1060; *Hailey* v. *T. & P. Ry. Co.,* 113 La. 533; *Murphy* v. *Grand Rapids Veneer Wks.,* 142 Mich. 677; *Durant* v. *Lexington Coal Mining Co.,* 97 Mo. 62.

There are numerous other decisions to the same effect by the courts in the States above mentioned, but they all relate to similar statutes. The Indiana case above cited was based on a statute requiring coal operators to furnish props for use in the mines; but the statute also made it the duty of the master to inspect the working places of the miners and see that they were made safe by being securely propped. Our statute is different; it requires nothing of the master except to furnish props when requested by the servant to do so.

I think, therefore, that when the coal miner concludes that it is necessary to have props in order to make his working place safe, and calls for them, if the same are not furnished, and he

continues at work in the place where his judgment tells him more props are needed, he thereby assumes the risk of the danger.

HARDGRAVES v. STATE.

Opinion delivered November 30, 1908.

HOMICIDE—CHARACTER OF DECEASED.—In a prosecution for murder it is not competent to show the violent and dangerous character of the deceased by evidence of isolated facts or particular acts of violence.

Appeal from Johnson Circuit Court; *Hugh Basham,* Judge; affirmed.

Cravens & Covington, for appellant.

It was error to exclude the evidence of Freeman. 13 Ark. 236; 22 *Id.* 354; 29 *Id.* 262. The evidence of both Freeman and Golden was competent to show the general malevolence of deceased, and explanatory and in support of the assault. 24 S. W. 413.

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

We can see no error in this cause prejudicial to appellant. By the introduction of the evidence of Freeman and Goldman, counsel were endeavoring to make his disposition and reputation known by *specific* acts. This is not allowable.

HART, J. Walter Hardgraves has appealed from a judgment of conviction for involuntary manslaughter. His punishment was fixed by the jury at a term of eight and one-half months in the State penitentiary. The indictment under which he was tried charged him with the crime of murder in the first degree. The killing is admitted, but appellant claims that it was done in self-defense.

J. F. Smith, on behalf of the State, detailed the circumstances connected with the killing substantially as follows:

Hardgraves, the defendant, and Vanlue, the deceased, were standing near his wagon talking. They were having words about a previous difficulty which Vanlue had had with another man on the same day. Smith did not pay much attention to the conversation. Vanlue was talking and motioning with his hands. Hardgraves suddenly turned, took a rock weighing about one and one-half pounds from his pocket, and hit Vanlue on the head with it. Vanlue's skull was broken in. He died about twenty-four hours afterward.

Hardgraves testified that Vanlue grabbed him by the collar and at the same time ran his hand in his pocket. That he, Hardgraves, reached back, picked up a rock, hit Vanlue with it, and walked away. Other evidence was adduced tending to corroborate his statement. Evidence was also adduced tending to show that Vanlue was under the influence of whisky, and that when drinking he was a violent and overbearing man.

The only error complained of by appellant's attorneys is that the trial court excluded from the jury the testimony of Everette Freeman and John Golden to the effect that each one separately had passed the house of deceased a short time previously on the same day of the killing, and that he had picked up a rock and told them to get by in a hurry. Appellant's attorneys contended that this testimony was admissible for the purpose of showing that deceased was a man of turbulent, violent and overbearing disposition. The precise question has been decided adversely to their contention in the case of *Campbell* v. *State,* 38 Ark. 498. In that case the court held that in criminal prosecutions for homicide the violent and dangerous character of the deceased can not be shown by evidence of isolated facts or particular acts of violence.

Finding no error in the proceedings in the trial court, the judgment is affirmed.

HELENA v. MILLER.

Opinion delivered November 30, 1908.

1. MUNICIPAL CORPORATIONS—REGULATION OF HOUSES OF ENTERTAINMENT.—The power "to regulate hotels and other houses for public entertainment," conferred upon cities and towns by Kirby's Digest, § 5454, includes the power to license hotels, boarding houses and livery stables as a means of regulating them; and a fee may be charged for the license to defray the reasonable expense of issuing the same and the enforcement of such police inspection or superintendence as may lawfully be exercised over the business. (Page 264.)
2. MUNICIPAL ORDINANCE—VALIDITY.—The question whether a municipal ordinance imposes a reasonable license fee upon hotels, boarding houses and livery stables is to be judged by its purport and effect, and not by the motives or intentions of the individual lawmakers who participated in its enactment. (Page 265.)
3. SAME—PRESUMPTION OF VALIDITY.—Every reasonable presumption is to be indulged in favor of the validity of a municipal ordinance, which should not be declared void unless it plainly appears to be so. (Page 265.)
4. SAME—LICENSE FEE—REASONABLENESS.—The license fee fixed by a municipal ordinance may be so high that the court will on its face declare it to be unreasonable, or so low that the court will declare it to be reasonable. (Page 266.)
5. SAME.—A municipal ordinance which imposes an annual license fee of $25 upon hotels, of $15 on boarding houses, and of $20 on livery stables is not unreasonable. (Page 266.)
6. SAME.—An ordinance imposing a reasonable license fee on hotels, boarding houses and livery stables is not void because it contains no provision for inspection or superintendence of the business to be licensed. (Page 266.)

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

W. G. Dinning, for appellant.

1. In construing the validity of municipal ordinances, a court will not consider the purpose the council had in view in its passage. 109 S. W. Rep. 526; 1 Dillon on Mun. Corp. (2 Ed.) 363.

2. Municipal corporations have authority to regulate hotels and make a reasonable charge for such regulation. Kirby's Digest, § 5454; 41 Ark. 485; 53 *Id.* 342.

3. Unless the ordinance on its face appears to be unreasonable, or its unreasonableness is established by competent evidence, the court should presume it reasonable. 52 Ark. 301; 72 *Id.* 563. The council are the persons most familiar with the mischiefs to be remedied, and the best judges of the necessity of the enactment of the new law, and of the extent to which it is advisable to exercise the power granted. 64 Ark. 152. The ordinance is a valid exercise of the police power. 70 Ark. 28; 72 *Id.* 556; 52 *Id.* 301; 56 *Id.* 370.

J. M. Vineyard and *J. M. Jackson,* for appellee.

The court, in construing an ordinance, will consider the evidence by the mayor, and adopt his construction thereof. 70 Ark. 221. But the court is not bound by the facts agreed upon by the parties, but should possess itself of all facts obtainable upon the subject. 85 Ark. 134. And the court is presumed to have considered only competent evidence. 77 Ark. 258. The council may prescribe a sufficient fee to cover cost of issuing license and of enforcing the ordinance. 56 Ark. 370; 52 *Id.* 301; 22 Fed. 701; 83 Ark. 351.

McCULLOCH, J. This appeal brings in question the validity of an ordinance of the city of Helena entitled "An ordinance for the Regulation of Hotels, Boarding Houses and Livery Stables," which makes it unlawful to engage in business of the kinds named without first having obtained a license so to do, and fixed the license fees at $25 for hotel keepers, $15 for boarding-house keepers, and $20 for livery stable keepers. Only the validity of that part of the ordinance fixing the license fee of hotel keepers is involved in this case. It is contended that the ordinance is void for the reason that the fee is so large that it stamps the provision as a tax, and not merely a police regulation.

Authority for the passage of such ordinance is found in the statute which empowers citizes and towns "to regulate hotels and other houses for public entertainment." Kirby's Digest, § 5454.

The power thus conferred upon municipalities to regulate includes the power to license as a means of regulating. *Russellville* v. *White,* 41 Ark. 485; *Fort Smith* v. *Ayers,* 43 Ark. 82. A fee may be charged for the license to defray the reasonable expense of issuing the same and the enforcement of such police inspection or superintendence as may be lawfully exercised over the business. *Fayetteville* v. *Carter,* 52 Ark. 301; *Arkadelphia Lumber Co.* v. *Arkadelphia,* 56 Ark. 370; *Waters-Pierce Oil Co.* v. *Hot Springs,* 85 Ark. 509.

The only debatable question presented is whether or not the fee fixed by the ordinance is reasonable. The learned trial judge before whom the case was tried permitted appellees to introduce as witnesses members of the city council, who testified in substance that the city was in need of additional revenues for the general expenses of the city government, and that this ordinance was passed for the purpose of raising revenue. It was improper to admit this evidence, as the ordinance must be judged by its purport and effect, and not by the motives or intentions of the individual law-makers who participated in its enactment. *Kirst* v. *Street Improvement District No. 120,* 86 Ark. 1; *Hot Springs* v. *Curry,* 64 Ark. 152; 1 Dillon, Mun. Corp. 311.

This court, in dealing with this question in a similar case, said: "A fee sufficient to cover the expenses of issuing the license, and to pay the expenses which may be incurred in the enforcement of such police inspection or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot in all cases be ascertained in advance, and that it would be futile to require anything of the kind. The result is, if the fee is not plainly unreasonable, the courts ought not to interfere with the discretion of the council in fixing it; and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, they should presume it reasonable." *Fayetteville* v. *Carter,* 52 Ark. 301. The same principle was announced by this court in *Hot Springs* v. *Curry,* 64 Ark. 152.

Now, there is nothing on the face of this ordinance, nor in the evidence, to show that the amount of fee is unreasonable.

There is nothing to show what amount of money the collection of this and similar license fees will raise, nor what is the expense of issuing the license and reasonable expense of inspection and superintendence. The testimony tends to establish the fact that no additional policemen or sanitary officers have been employed for the purposes of inspection and of enforcing sanitary measures, but this does not prove that the sum raised by the ordinance is more than reasonably necessary for inspection and superintendence.

It is our duty to indulge every reasonable presumption in favor of the validity of the ordinance, and not to declare it void unless it plainly appears to be so. *Fayetteville* v. *Carter, supra.*

It is difficult for the court to draw the line precisely between amounts which are reasonable and those that are unreasonable. The license fee fixed by an ordinance may, however, be so high that the court will, on the face of it, declare it to be unreasonable (*Stamps* v. *Burk,* 83 Ark. 351), or so low that the court will declare it to be reasonable.

We are of the opinion that the fee fixed by this ordinance is not unreasonable, and that it is a valid police regulation.

This court held in *Arkadelphia Lumber Co.* v. *Arkadelphia, supra,* that a charge of $25 license fee for operating a ferry is not unreasonable, and we see no reason why the charge of that amount for hotel license should be unreasonable.

It is contended, on authority of *Stamps* v. *Burk, supra,* that the purpose of this ordinance must be held to have been to raise revenue, and not to regulate, for the reason that it contains no provision for inspection or superintendence of the business to be licensed thereunder. We do not understand the case just cited to rule that the ordinance must, in order to sustain a charge for license, contain a provision for inspection. Judge RIDDICK, in delivering the opinion of the court, merely gave that as one of the reasons why the license fee appeared to be excessive.

Reversed and remanded for a new trial.

PARTRIDGE v. STATE.

Opinion delivered November 30, 1908.

1. LIQUORS—SALE BY EMPLOYEE WITHOUT AUTHORITY.—One who was conducting a stand for the sale of lemonade, soda pop and candy at a picnic, and who was not engaged in the sale of liquors, will not be liable for an unlawful sale of liquor made thereat by his employee without his knowledge, consent or connivance. (Page 268.)

2. SAME—UNLAWFUL SALE—DIRECTING VERDICT.—It was error to direct a verdict for the State, in a prosecution for selling liquor without license, where there was evidence tending to prove that the liquor in question was sold by an employee of defendant inadvertently and without authority from defendant. (Page 269.)

Appeal from Clark Circuit Court; *Jacob M. Carter,* Judge; reversed.

John E. Bradley, for appellant.

No crime is made out, even by the State's own evidence, and appellant's explanation of the presence of the beer in his stand and his purpose in having it there made out a case for the jury. The court's instruction was, therefore, not only an invasion of the province of the jury, but amounted in effect to a denial of the right to trial by a jury. Art. 7, § 23, Const.; 1 Bishop, Crim. Proe., 3d Ed. § 979, *id.* § 989; 16 Ark. 568; 37 Ark. 592; 56 Ark. 391; 43 Ark. 289; 45 Ark. 165; *id.* 492; 57 Ga. 503; 43 Ala. 33; 3 Am. & Eng. Enc. of L. 730-1; 26 Ala. 135; 4 Park. (N. Y.) 527; 25 Ga. 667; 41 N. H. 550; Art. 2 § 10, Const. Ark.

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

Error is confessed. The truth or falsity of the defendant's story was wholly within the province of the jury to determine. Art. 7, § 23, Const.; 37 Ark. 164; *Id.* 239; 34 Ark. 469; *Id.* 743; 83 Ark. 246; 84 Ark. 620.

MCCULLOCH, J. Appellant was tried upon an indictment charging him with unlawfully selling intoxicating liquor without license, and the court gave to the jury a peremptory instruction to find him guilty as charged.

The following is the state of the testimony: Appellant was conducting a stand at a picnic in Clark County for the sale of lemonade, soda pop, candy, etc., and employed a salesman named Worley. A witness named Palmer went to the stand in appellant's absence and called for a drink of hop ale, whereupon Worley handed him out a bottle of beer, for which he paid Worley the sum of twenty-five cents. Worley testified that he did not know the bottle sold to Palmer contained beer, and that appellant had employed him to sell for him, but did not give him particular instructions what to sell. Appellant testified that he kept no intoxicating liquor for sale; that he put four bottles of beer in a box at the stand to keep for his own private use, and did not authorize any one to sell it; that the bottles of beer were not put in the ice-box where other cold drinks were kept for sale, and that he intended, when he got ready to drink it, to shave ice in it to cool it. He also testified that Worley and the other salesman in the stand were grown men, and that he supposed they knew better than to sell the beer.

If appellant's statement of the facts was true, he was not guilty of any offense, and he had the right to have the jury pass upon the question. It was error to take the case from the jury.

If appellant kept the beer at his place of business solely for his own consumption, and gave no authority, either express or implied, for its sale, the fact that his clerk sold it by mistake would not render him guilty of the unlawful sale.

The statute under which appellant stands accused provides that it shall be an offense for any person to "sell, either for himself or another, *or be interested in the sale*" of the prohibited liquors, without license. Kirby's Digest, § 5112. This court held that, under a statute making it a criminal offense for any one to sell or to be interested in the sale of intoxicating liquor to a minor, a sale by one partner, in the absence and without the knowledge, consent or connivance of his copartner, rendered both liable criminally for the unlawful act. *Robinson* v. *State,* 38 Ark. 641. The court, speaking through Chief Justice ENGLISH, in giving a reason for a departure from the well-established rule that a person who is not a party to the commission of a criminal offense can not be adjudged guilty of the offense, said: "The law

says to persons wishing to engage in selling spirituous liquors, or be interested in the sales thereof, you must be careful in the selection of your partners, or servants, and watchful of their conduct in your business; for, if they make forbidden sales, you are responsible. You must see that sales, in which you are interested, are not made without license, nor made to minors, without proper permission from their parents or guardians. If you are not willing to engage, or be interested in the business, on these terms, there is no compulsion on you to do so."

There can not be, we think, any application of this rule to a person not engaged nor interested at all in the liquor traffic, whose employee inadvertently or without authority from him makes a sale of liquor at his place of business. In that case he is not interested in an unauthorized sale and does not come within the statute. The case should have been submitted to the jury upon the question whether the sale was made by mistake and without authority from appellant, or whether it was a mere subterfuge to cover an unlawful sale of liquor.

The Attorney General confesses error, and we think his views of the case are correct.

Reversed and remanded for a new trial.

JOSEY v. STATE.

Opinion delivered November 30, 1908.

1. SALE OF CHATTEL—DELIVERY TO CARRIER—EFFECT.—Before a delivery of goods by a vendor to a carrier can be held to be a delivery to the vendee, so as to vest title in the latter, there must be an agreement, either express or implied, that there shall be such delivery, and the goods must be properly consigned to the vendee. (Page 272.)
2. LIQUORS—DELIVERY OF PACKAGE TO CARRIER.—Where whisky was ordered by two persons severally, a delivery of the whisky in a single package to a carrier addressed to them jointly did not constitute a delivery to either of them until actual delivery was made. (Page 272.)

3. SAME—WHAT CONSTITUTES SALE.—One who took an order for whisky in a prohibition territory and delivered the whisky there will be held to be the vendor. (Page 273.)

4. SAME—LICENSE—BURDEN OF PROOF.—The burden is upon the vendor of whisky to prove that he had a license to sell the same. (Page 273.)

5. CRIMINAL LAW—DIRECTING VERDICT.—It is not error, in a proper case, to direct a verdict of guilty in a misdemeanor case not involving imprisonment. *Roberts* v. *State,* 84 Ark. 564, followed. (Page 273.)

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

STATEMENT BY THE COURT.

Appellant was indicted for the crime of selling liquor without a license in Hempstead County, Arkansas, on the 19th day of October, 1907. Witness Lewis testified that he gave appellant an order for some whisky, gave him the money in the morning, and in the afternoon appellant handed him a quart of whisky at the head of the stairs in the Opera House. The whisky was delivered to the witness in the town of Hope, Hempstead County, Arkansas, in October, 1907, before he went before the grand jury. The whisky was labeled to witness when he got it, and he supposed it was like all the whisky he had ordered through express that way. He suposed the whisky had come when the train did. He saw a gentleman go over with the box and supposed that was the whisky. He went around and telephoned appellant about the whisky, and appellant handed it to witness as before stated. When witness gave Josey the money that morning, he said he thought he had time to get the order off on that train. The bottle was wrapped up and witness' name was on a card attached to the bottle. He received the whisky in the evening after the train arrived from Texarkana. That was the only order he ever gave appellant for whisky. Such was the evidence of the State. A witness on behalf of appellant testified as follows: "I live in Hope, Arkansas, and was running a butcher shop prior to October term of Hempstead Circuit Court, 1907. My shop was located on the first floor under the opera house. I received a box or package by express which contained two quarts of whisky. One bottle was labeled to me and one to W. G.

Lewis. This express package came addressed to either 'Lewis and Hamilton,' or 'Hamilton and Lewis,' and when I opened the package I carried the bottle labeled to Lewis up stairs, and turned it over to Mr. Josey. It was not mine, and I did not want it. I was expecting whisky that day, and went to the express office to get it. I had telephoned my order in for mine. It came from Texarkana Bank Saloon. Package addressed to Lewis and Hamilton. My quart had my name on it. I paid express charges 25 cents. I did not get my money back. I did not see him when he came after his, and I did not fool with it. I did not tell Mr. Josey to collect the express. I did not turn it over to Paul Briant because it was further up there than it was up stairs. Everything that came that way I would turn it over to Mr. Josey. Josey was not running an express office that I know anything about. I had not ordered any whisky through Mr. Josey and never had. I don't know why I thought Mr. Josey the proper party to turn this whisky over to. He had said nothing to me before about it. I did not wait for Mr. Lewis to come to me for his whisky. I wanted mine, and I took it out and left Mr. Lewis's with Mr. Josey. I opened the package at my shop. I did not want to deliver the whisky to Mr. Lewis."

The court directed the jury to return a verdict of guilty. Appellant asked, and the court refused, the following prayer:

"If the jury believe from the evidence that the witness, Bill Lewis, met the defendant, William Josey, and handed him money, accompanied by the request to order for him the liquor mentioned in the indictment, and that the defendant accepted the money and sent the same to Texarkana, Texas, to a liquor dealer of that city, and that said liquor dealer at Texarkana put up, labeled and directed the package to Lewis, at Hope, Arkansas, and delivered the same to the express company at Texarkana, Texas, then the sale occurred at Texarkana and not at Hope, and you will acquit."

Appellant duly excepted to the rulings of the court, and seeks by this appeal to reverse the judgment.

Jobe & Carrigan, for appellant.

1. The sale occurred at Texarkana, and not at Hope. 43 Ark. 343; 51 *Id.* 153.

2. It was error to direct verdict for plaintiff. 6 Thompson on Neg. § 7394.

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

This case comes within the rule announced in 42 Ark. 275 and 41 *Id.* 355.

WOOD, J. (after stating the facts.) This court, in *Herron* v. *State,* 51 Ark. 133, held that "the delivery of goods to a carrier, when made in pursuance of an order to ship them, is in effect a delivery to the consignee." See also cases cited in the opinion.

This is upon the theory that the common carrier is the agent of the consignee who orders the goods shipped. See *State* v. *Carl,* 43 Ark. 353, and cases cited. The rule with reference to a delivery to a public carrier being a delivery to the consignee is very carefully and correctly stated by the Supreme Court of Massachusetts as follows: "When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser, or, when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or where there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected, the goods when delivered to the carrier are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage *in transitu.*" *Wheelhouse* v. *Parr,* 141 Mass. 787.

This is in accord with the previous rulings of the court. *Gottlieb* v. *Rinaldo,* 78 Ark. 123; *Templeton* v. *Equitable Mfg. Co.,* 79 Ark. 456. The result of this rule is that, before a delivery by the vendor to a carrier can be held to be a delivery to a vendee so as to vest title in the latter, there must be an agreement, either expressed or implied, that there is to be such delivery, and also that the goods are to be properly consigned to the vendee.

In the present case there was no express agreement concerning the mode of delivery; and, as Lewis and Hamilton were not joint purchasers, there can be no agreement implied from the circumstances of the case that the delivery should be made to a carrier consigned to them jointly. A delivery to the carrier in that way did not constitute a delivery to either of the joint consignees, and the title to the liquor did not pass to either of them until actual delivery took place in the town of Hope.

But the proof does show that appellant received the money for the whisky, and delivered the whisky to Lewis in Hope, Hempstead County, Arkansas. It must be held under such circumstances that appellant was the owner and vendor of the whisky. This, under *Yowell* v. *State,* 41 Ark. 355, and *Blackwell* v. *State,* 42 Ark. 275, would make the sale complete in Hope. Appellant did not show any license, and the burden as to this was on him. *Willams* v. *State,* 35 Ark. 430; *Rana* v. *State,* 51 Ark. 481; *Evans* v. *State,* 54 Ark. 227.

The court was therefore correct in refusing appellant's prayer for instruction and in directing a verdict in favor of the commonwealth. *Roberts* v. *State,* 84 Ark. 564.

The judgment is affirmed.

ZINN *v.* STATE.

Opinion delivered November 30, 1908.

LIQUORS—SOLICITING ORDERS IN PROHIBITION TERRITORY.—Acts 1907, c. 135, prohibiting the soliciting or taking of orders for intoxicating liquors in prohibition territory "through agents, circulars, posters or newspaper advertisements," is a valid exercise of the police power of the State, and does not conflict with the power of Congress "to establish post offices and post roads," and to designate what shall be carried by and excluded from the United States mails.

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

STATEMENT BY THE COURT.

The grand jury of Perry County, Arkansas, at the August term, 1908, returned the following indictment against appellant:

"The grand jury of Perry County, in the name and by the authority of the State of Arkansas, accuse Julius Zinn of the crime of soliciting orders for the sale of intoxicating liquors in prohibited territory, committed as follows, to-wit: The said Julius Zinn, in the county and State aforesaid, on the 25th day of July, 1908, did commit the offense of soliciting orders for intoxicating liquors in territory of this State, in which territory it would be unlawful to make sales of intoxicating liquors; the said Julius Zinn being a licensed liquor dealer in the city of Little Rock, county of Pulaski, and State of Arkansas, and being engaged in the sale of intoxicating liquors in said city of Little Rock; the said Julius Zinn did, on or about the 25th day of July, 1908, deposit for delivery in the United States mail a circular addressed to J. V. Ryan, at Perry, in Perry County, State of Arkansas, which said circular is in words and figures as follows, to-wit:

" 'To the public: I beg to announce that I am now making a specialty of the jug liquor trade, and it shall be my aim to give the very best values for the money in order to hold my old friends and make new ones, with a view of doubling my present shipping business. I need no introduction in a large territory tributary to Little Rock, but, to people who read this circular, and who do not know my business methods, will say that it will be my earnest endeavor to give the very best goods possible for the money, and all I ask is one trial order, and I feel sure that you will be convinced that I mean what I say. In addition to a first-class line of bulk whiskies, gins, wines and alcohol, I handle a fine line of bottled in bond whiskies, and, should you feel interested, my price list will be mailed upon application. Hoping to receive your orders, I remain, yours truly, Julius Zinn, 225 West Fifth Street, Little Rock.'

"Which said circular was received by J. V. Ryan, at Perry, Arkansas, the said Perry, Arkansas, being in territory in the county of Perry in which the sale of intoxicating liquor is pro-

hibited, and in which territory it is unlawful to grant a license to make sales of intoxicating liquors, against the peace and dignity of the State of Arkansas."

The defendant demurred to the indictment on the ground that the facts therein stated did not constitute a public offense against the laws of Arkansas.

The demurrer was overruled, to which the defendant excepted.

The case coming on for trial before a jury, the State introduced as a witness J. V. Ryan, who testified as follows: "I live at Perry, Arkansas. On the 27th of July, 1908, I received at the post-office at Perry an envelope addressed to me at that place. On opening it I found therein the following circular. (The circular was then read to the jury, and was just the same as the one described in the indictment.) The envelope was postmarked Little Rock, July 25, 1908. The circular came through the United States mail. The defendant told me he had mailed the circular at Little Rock, July 25, 1908. The circular was all print."

It was admitted that appellant is a licensed liquor dealer at Little Rock, Ark., and that it is unlawful to sell liquor at Perry, in Perry County, Arkansas. The appellant asked the following: "Even if you find from the evidence beyond a reasonable doubt that the defendant is a licensed liquor dealer in Little Rock, Pulaski County, Arkansas, where it is lawful to grant license to sell liquor, and that he did on July 25, 1908, in Little Rock, Ark., put the printed circular that has been introduced in evidence into an envelope and address this envelope to J. V. Ryan, in Perry, Ark., and place it in the post-office in Little Rock, and further find that said Ryan received the circular in Perry, Ark., through the mail, and that it is unlawful to grant license to sell liquor at Perry Ark., still the defendant in so doing violated no law, and you will find him not guilty." The court refused to grant the prayer, but gave the following instruction: "If the defendant sent the circular, he should be found guilty, although he may have sent it through the mail, if you find that it was unlawful to sell liquor at Perry, Arkansas, and Ryan received the envelope at Perry." The ap-

pellant excepted to the rulings of the court in refusing and granting prayers. The jury returned a verdict of guilty. Thereafter the defendant moved the court in arrest of judgment, on the ground that the facts stated in the indictment did not constitute an offense within the court's jurisdiction. The motion in arrest of judgment was overruled on the same day, to which the defendant excepted. Thereafter the defendant filed his motion for a new trial, which assigned as errors the rulings to which he excepted. The motion was overruled, and this appeal was taken.

J. H. Harrod, for appellant.

The language of the indictment charges nothing else than putting the circular in the mail. It is not within the power of a State Legislature to prescribe what shall or shall not be carried in the mails, for that power belongs exclusively to Congress. Art. 1, § 8, Const. U. S.; 6 Otto, 727; 1 Otto, 275; 5 Otto, 465.

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

No Federal question involved. The act does not seek to regulate or interfere with the mails.

WOOD, J., (after stating the facts.) The statute under which appellant was indicted and convicted is as follows:

"Section 1. It shall be unlawful for any liquor dealer, firm or corporation engaged in the sale of intoxicating liquors in this State, to, in any manner, through agents, circulars, posters, or newspaper advertisements, solicit orders for such sales of intoxicating liquors in any territory of this State wherein it would be unlawful to grant a license to make such sales. Provided, that the term 'newspaper advertisement' as used in this section does not refer to liquor advertisements in papers published within licensed territory, unless said papers are sent into prohibition territory by the saloon-keepers or their agents for advertising purposes.

"Section 2. The presence of any such liquor dealer, firm or corporation, through agents or otherwise, in such prohibition territory, soliciting or receiving orders from any person therein, shall constitute a violation of this act, and on conviction thereof

shall be fined not less than $200 nor more than $500 for each such offense." Acts 1907, c. 135.

The statute is a valid exercise of the police power of the State, and does not conflict in any particular with the power of Congress "to establish post-offices and post roads" and to designate what shall be carried by and what excluded from the United States mails." Const. U. S., art. 1, § 8; Ex parte *Jackson,* 6 Otto, 727.

The statute does not relate to that subject at all. It simply prohibited the soliciting of orders for the sale of intoxicating liquors in territory where the sale of such liquors is prohibited. The gravamen of the offense is the soliciting of orders for the sale. It matters not how the circular for that purpose reaches the prohibited territory, and the statute does not undertake to designate or condemn the manner by which the circulars may be carried into or excluded from the prohibited territory. It is the presence of the circular there for the unlawful purpose of soliciting that the statute denounces and prohibits, not the method by which they may be conveyed there or distributed. Had the statute made the use of the United States mail for sending circulars into districts where the sale of intoxicating liquors is prohibited the crime, then the argument of the learned counsel for appellant would be sound. But as such is not the case his contention can not be sustained. The judgment of the circuit court is right.

Affirmed.

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

Opinion delivered November 30, 1908.

1. PENALTIES—CONSTRUCTION OF STATUTE.—No recovery can be had under a statute imposing a penalty unless plaintiff shows that he has strictly complied with the terms of the statute; nothing being taken by way of intendment. (Page 281.)

2. MASTER AND SERVANT—PENALTY FOR NONPAYMENT OF WAGES.—Under Acts 1905, p. 538, imposing a penalty for nonpayment of an employee's wages in certain cases, it is necessary that the employee should make "request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept" before the right to the penalty accrues. (Page 281.)

Appeal from Drew Circuit Court; *Henry W. Wells,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee sued appellant in a justice's court, alleging that appellant was a corporation; that he was employed by it on May 28, 1907, and was to be paid $108 per month, and that he continued in its employ until June 11, following, a period of fifteen days, when he was discharged and refused further employment by the appellant. That there was due him at the time of his discharge $54, and that he asked that the money or a valid check be be sent to him at Monticello, Arkansas, a station of the defendant at which an agent was kept. That check was not sent as requested, and that the said sum has never been paid him, and is still due and unpaid. That, by the failure to send the money or a valid check within seven days after his discharge, the wages of the plaintiff continued for sixty days at the contract rate, or $216; that nothing has been paid thereon, and the same is due and owing. And plaintiff prayed judgment for $270, with interest from the time same became due.

Appellee adduced evidence to show that he was employed by appellant to serve in the capacity of station agent at Monticello, Ark.; that he worked for appellant fifteen days, and was to receive for his wages the sum of $52.50; that after he was discharged he made written demand on appellant's superintendent for his wages, wrote him three times; that he asked the station agent at Monticello to send in his time. Appellee introduced the following letter:

"Memphis, Tenn., Sept. 23, 1907.

"Mr. J. G. Lorton, Supt.,

"Monroe, La.

"Dear Sir:

"Enclosed please find voucher No. 5457 for $19.80 in favor of myself for services rendered at Monticello, Arkansas, in the

absence of O. J. Lindsay, agent, account of sickness. I cannot accept this amount for my service, as I was running the station while the agent was sick. Your division agent, Mr. Wright, stated that he would see that I was paid well for my service, and I don't think this amount is right, therefore I demand more. I think that I am entitled to more, and this amount of $19.80 is only clerk's salary, and I am entitled to more than clerk's salary. Below is the amount that I claim for my service. Hoping you will give this your immediate attention, I would like to receive settlement as soon as possible.

"Yours truly,

"R. C. McClerkin, Jr.,

"585 Linden Ave., Memphis, Tenn.

"St. L., I. M. & S. Ry. Co. Dr.

"To R. C. McClerkin, Jr.

"For services rendered at Monticello, Ark., from May 28th to June 11, 1907, total of fifteen days, as relief agent, account illness of regular agent, O. J. Lindsay, fifteen days at $3.50—$52.50."

Appellee showed that he was employed by one Wright, who was appellant's division agent, and who had authority to employ appellee. Appellee testified that the only demand he made was on Lorton, the superintendent of appellant; that his letters were ignored, and that he had never been paid; that about three months after his discharge, and nearly three months after he made the first demand for payment of the wages due him, he received a voucher for $19.80, which he returned; that this voucher was mailed to the station agent at Monticello, and sent to appellee from there by his brother.

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

"Acts of Arkansas, 1905, page 538.

"Section 1. That section 6649 of Kirby's Digest shall be amended so as to read as follows:

"Section 6649. Whenever any railroad company, or corporation, or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages

of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then, as a penalty for such non-payment, the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ at the same rate until paid. Provided, such wages shall not continue for more than sixty days, unless an action therefor shall be commenced within that time. Provided, further, that this act shall apply to all companies and corporations doing business in this State, and to all servants and employees thereof, and any such servants or employees who shall hereafter be discharged or refused further employment, may request or demand the payment of any wages due, and if not paid within seven days from such discharge or refusal to longer employ, then the penalties hereinbefore provided for railway employees shall attach."

Appellant asked the court to direct a verdict in its favor, which the court refused to do.

The verdict was in favor of the plaintiff in the sum of fifty four dollars salary, and for a penalty of one hundred and sixteen dollars.

Motion for new trial was overruled which reserved as assignments of error the rulings of the court in refusing and giving the prayers for instructions, and the further assignments that the verdict was excessive, and contrary to the evidence.

Judgment was entered in accordance with the verdict, and this appeal was taken.

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

The court erred in refusing to instruct the jury that plaintiff could not recover because there was no testimony to support the verdict. The cause of action was an unliquidated demand, upon which penalty could not accrue. 82 Ark. 377; 83 *Id.* 447.

P. Henry, for appellee.

The cases cited are not in point. In this case *three* demands were made, and they were ignored for three months. The jury were properly instructed, and the evidence amply supports the verdict.

WOOD, J. (after stating the facts). Before appellee can recover the penalty claimed by him under the statute quoted above, he must show that he has strictly complied with its terms, for the statute is highly penal.

The appellee does not show that he made a request "of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept."

It appears that he (appellee) was employed by one Wright, who was the division agent having supervision of agents. He was, therefore, the "foreman" of appellee or "the keeper of his time," in the meaning of the statute. At least it must be so held, in the absence of any evidence that it was the duty of some one else to keep appellee's time. The evidence does not show that appellee made any request of Wright. Appellee made a demand of Lindsay, the station agent at Monticello, to send in his time, but it is not shown that this was the duty of Lindsay. If it were conceded that demand made upon Lorton, the superintendent, would be sufficient, still it is not shown that any such demand as the statute requires was made of him. He was not notified to send the money to any particular station "where a regular agent is kept."

The fact that a voucher was received at Monticello, a regular station, some three months after appellee's employment ceased, does not show that the superintendent was notified to send the money to Monticello. Appellee says he wrote three letters, but he sets out only one as the evidence of his demand. This was written from Memphis, three months after appellee's employment ceased, and mentions no station where the money is to be sent. Nothing can be taken by intendment to show compliance with statutes of this kind.

The case is ruled by the recent decision of this court in *St. Louis, I. M. & S. Ry. Co.* v. *Bailey,* 87 Ark. 132.

The appellee's evidence fails to establish his right to a penalty, but it does establish his claim for wages due. The judg-

ment will therefore be reversed and modified by remitting the penalty, and judgment will be entered here for the sum of $52.50 with interest from June 11, 1907.

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

Opinion delivered November 30, 1908.

1. CARRIERS—MISTAKE IN TICKET—EXPULSION OF PASSENGER.—A railroad company is responsible to a passenger improperly expelled from its train on account of a mistake on the face of his ticket which was due to the negligence of the agent who issued it. (Page 286.)
2. SAME—EXPULSION OF PASSENGER—MEASURE OF DAMAGES.—A passenger wrongfully expelled from a passenger train may recover all compensatory damages resulting therefrom, such as for delay in completing his journey and for such humiliation as he suffered in being put off, but he cannot recover punitive daamges unless the element of malice, recklessness or wantonness entered into the motive with which the injury was done. (Page 287.)
3. SAME—DAMAGES FOR EXPULSION—EXCESSIVENESS.—Where a passenger was expelled from a train, without circumstances of aggravation, solely on account of error in the making out of his ticket, and by reason thereof lost a valise which, with its contents, was worth $66, and was delayed several hours before taking another train, a judgment awarding $1,000 as compensatory damages is excessive, and will be reversed unless a remittitur of $750 is entered. (Page 289.)

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

STATEMENT BY THE COURT.

This is an action for tort brought by W. H. Baty against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for an alleged wrongful expulsion from one of its passenger trains.

W. H. Baty has resided in and near Neches, Texas, for the past twelve years. His family consists of himself, wife and two children. In 1906 he contemplated making a trip with his fam-

ily to Hot Springs, and made inquiry of the local agent of the International & Great Northern Railroad Company. He also talked with the assistant general passenger agent of said railroad, who stated to him that his railroad sold a ninety-day ticket, good from Palestine, Texas, to Hot Springs, Arkansas, and return, for $16.65. On the 2d day of April, 1906, he purchased at Palestine from Mr. Armes, assistant ticket agent, four round-trip tickets, asking at the time for 90-day tickets, and paying $16.65 for each ticket. At the suggestion of the agent, he signed all four of the tickets. He received his tickets a very few minutes before the train on which he left for Hot Springs started, and at once boarded his train with his family. They went to Hot Springs, using the tickets so purchased. On his arrival at Hot Springs he deposited the tickets in a bank for safe-keeping. His wife and boys desiring to return home first, he went to the bank and took the tickets out. In looking over them, he discovered how they were punched, and carried them to the local railroad agent, and asked him if they were good for ninety days. Upon being informed that they were only good for 60 days, he sent back the tickets by registered mail to the agent at Palestine, called his attention to the mistake, and asked that they be extended to 90 days. The agent at Palestine complied with his request by again punching the ticket so as to show that the return limit was 90 days, and returned the tickets to him. He gave his wife and boys three of the tickets, and they returned home, using them for passage. When Baty got ready to return, he carried the remaining ticket to the local railroad agent, and had him to sign and date it. He commenced his return journey on the 17th day of June, 1906, by taking passage on a train of the Little Rock and Hot Springs Railway to Benton, Arkansas. His ticket called for passage from Benton to Texarkana over defendant's line of road. At Benton he embarked on one of defendant's trains for Texarkana. The train auditor took up his ticket, told him that it was for a female, and that he could not ride on it. Baty offered to write his name, and to telegraph to the ticket agent at Palestine, with whom he was well acquainted, as a means of identification. The auditor refused these offers of identification, telling him that the ticket was for a female passenger, and that he could not honor it.

When the train arrived at Malvern, Baty was ejected by the auditor and other members of the train crew. His valise was thrown on the platform beside him, and, there being a crowd around him, it was lost in the confusion, and has not yet been found. The value of the articles in the valise amounts to $66.10. He stopped at Malvern several hours and then took another train home, paying his fare, the exact amount of which he does not remember. This is substantially the statement of the whole transaction as testified to by the plaintiff, W. H. Baty.

The ticket provides that it is void for passage if any alterations or erasures are made on it, or if more than one date is cancelled.

The ticket also provides that it is not transferable, and that, to prevent imposition, the holder must identify himself or herself as the original purchaser to the satisfaction of any conductor or agent by signature or otherwise when requested. It also provides that it shall not be good for return passage unless the holder identifies himself or herself by signature on back thereof and otherwise as original purchaser to the satisfaction of the agent of the terminal line at destination of ticket, and when officially signed and stamped by said agent it shall then be good for return passage of the original purchaser.

The ticket also contains the following: "I acknowledge the description as indicated by the words opposite the punch marks which appear in the margin hereof as being a correct description of my personal appearance."

(Signed) "W. H. Baty,
"Original Purchaser."

The punch marks in the margin appeared on the words "female," "stout," "medium," "dark." The plaintiff was five feet nine inches high, and weighed about 170 pounds. His wife was low, weighed about ninety-seven pounds, and had dark colored hair.

W. J. Taylor testified that he is now and was in April, 1906, local agent of the International & Great Southern Railroad Company at Palestine, Texas. That there was on sale in his office on the 2nd day of April, 1906, tickets good for first-class passage from Palestine, Texas, to Hot Springs, Ark., and return; said tickets read *via* International and Great Northern Railroad Com-

pany, Texas & Pacific Railroad, St. Louis, Iron Mountain & Southern Railway Company, and Little Rock & Hot Springs Western Railway Company. That the rate of said tickets was $16.65, and the time limit within which to make the return trip was 90 days. That, if a shorter limit was made, it was a mistake. That he did not issue the tickets in question. That his office record shows that they were issued on the 2nd day of April, 1906, and they must have been issued by his assistant, W. S. Armes.

H. E. Martin testified that he was the superintendent of the Little Rock & Hot Springs Western Railway Company. That a part of the business of the ticket agents on his road was to sign coupon tickets. That they had authority to sell tickets over the lines of connecting carriers, and over any other road in America or Canada.

V. L. Wagner testified that he was the train auditor who put plaintiff off of the defendant's train at Malvern. He detailed the circumstances substantially as follows: When the train left Benton, he went through it in the discharge of his duties. The plaintiff presented him a return-trip ticket, reading from Benton to Texarkana. He told plaintiff that it was a ladies' ticket, and that he could not ride on it. Plaintiff replied that his wife and children had gone on, and he supposed he had the tickets mixed. The auditor refused to let him ride on the ticket, and when the train arrived at Malvern put him off. He said that the plaintiff had money with which to pay his fare, and that he did not let the plaintiff ride on the ticket because it was out of date, and because it was for a female passenger.

Other witnesses testified at the trial, but their evidence is either corroborative of that abstracted, or is not material to the issues raised. Hence it will not be necessary to abstract it.

There was a jury trial and a verdict for the plaintiff in the sum of one thousand dollars.

The defendant has duly prosecuted its appeal to this court.

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

1. The conditions in the ticket were binding upon plaintiff; they were reasonable, and must be complied with. 132 U. S.

132-140; 2 Hutch. on Car. (3 Ed.) § 1054; 28 A. & E. Enc. Law (2 Ed.) p. 179, § 11 and cases cited; 134 Mich. 391; 96 N. W. 925.

2. Plaintiff was not entitled to recover for any humiliation or damage for being ejected, as he brought it about by his own negligence. 40 Ill. 503; 21 *Id.* 188; 79 S. W. 642; 2 Hutch. on Car. § 1061; 37 Mich. 342; 52 S. W. 1067; 37 A. M. St. 354; 52 Fed. 197; 17 L. R. A. 800; 79 Ark. 484; 43 *id.* 136; 62 *id.* 357; 83 Md. 245; 179 Mass. 247; 117 Ala. 415, headnote 6; 97 Md. 563; 63 Ala. 1087; 189 Ill. 384; 123 Mich. 247; 34 W. Va. 65; 68 Ill. 499; 37 Mich. 342.

3. The verdict is excessive, as plaintiff was guilty of negligence which brought about the confusion resulting in his ejection.

W. H. Arnold, Gregg & Brown, Hart, Mahaffy & Thomas, for appellee.

1. If there was any mistake, it was made by the agent of the company at Palestine, and the company is liable. 45 S. W. 1025; 102 *Id.* 380; 79 *Id.* 1187; 94 *Id.* 1093.

2. The face of the ticket does not control if the agent issuing the ticket is at fault. 71 Tex. 491; 64 Mich. 631; 31 N. W. 544.

3. The damages are not excessive. 102 S. W. 391. Humiliation, shame and mortification, besides loss of time, baggage and money paid out, are all elements of damage, and entitle appellee to every dollar of the judgment.

HART, J., (after stating the facts.) The objection of counsel for appellant to the instructions given by the court, and their insistence that the instructions asked by them should have been given, are both based upon the same proposition, and that is that the face of the ticket presented by the passenger was, as to the train auditor, conclusive of the terms of the contract of carriage between the passenger and the railroad company.

The precise question has been determined adversely to their contention by this court in the case of *Hot Springs Railroad Co.* v. *Deloney,* 65 Ark. 177.

In that case the plaintiff purchased from the defendant's agent at Hot Springs, Arkansas, a ticket for passage of himself

from Hot Springs to Atkins, the agent having authority to sell tickets over the defendant's line to Malvern and the connecting line extending from there to Atkins. In making out the ticket the agent left off or omitted the coupon or that part of the ticket calling for passage from Hot Springs to Malvern. The plaintiff did not discover the mistake and embarked on defendant's train for Malvern. The conductor refused to accept the ticket, and plaintiff was ejected for nonpayment of his fare. He brought suit against the railroad company for wrongful expulsion from its passenger coach; and the same defense was made as is done in this case.

The court referred to the conflicting decisions on the question, citing the leading cases on each side, and then said:

"Some modifications of the rule, as contended for by each party to the controversy, have been attempted, but efforts to reconcile the two have not so far been crowned with any great degree of success. There is this much to be said, however, and that is that the tendency of more recent decisions is towards at least a conservative view of the principle contended for by appellee's counsel; and we adopt that in this case, towit, that, notwithstanding the conductor has only carried out the company's rules and regulations, and these are reasonable, and he therefore may be exonerated from blame personally, yet, as the company, through its ticket agent acting for it, was guilty of doing that which produced all the injury the plaintiff may have suffered from being put off the train, it is liable for such, and can not shield itself behind the faithfulness of its servant, the conductor, for its negligence in not delivering a proper ticket to the plaintiff, and has not only injured the plaintiff, if indeed he was injured, but placed the conductor in the attitude of participating in the wrongdoing, while yet performing his duty personally, while of course ignorant of the wrong done to the plaintiff, if any was done."

Continuing, on the measure of damages, the court said: "We think, therefore, that plaintiff is entitled to all damages that may have grown out of his expulsion, such as for the delay in completing his journey, for the time and trouble of having to walk back to the Hot Springs, depot, and for such humiliation as

he was made to undergo by being put off. These damages are all, however, only compensatory, unless the element of malice, recklessness or wantonness entered into the motive with which the injury was done, if done at all."

In the case of *Little Rock Railway & Electric Company* v. *Goerner,* 80 Ark. 158, there is language used in the opinion which is in seeming conflict with the rule announced in the Deloney case. But in that case the complaint alleged that the conductor of the street car used insulting language to the plaintiff, assaulted him, and that unnecessary force was used in removing him from the car. The court held that under such circumstances the plaintiff was entitled to recover punitive as well as compensatory damages. The language referred to was used in discussing whether the plaintiff was entitled to punitive damages under the allegations of the complaint, and was not necessary to a determination of that question. The Deloney case was nowhere referred to in the opinion, and the rule announced by it was not involved by the issue raised in the Goerner case. Hence so much of the language of the opinion in the Goerner case as may be construed to be in conflict with the rule established in the Deloney case is *obiter.*

As stated by the court in the Deloney case, the question whether "a conductor, collecting tickets and fares, is justified in relying solely upon the face and appearance of the ticket to determine his duty as to the acceptance of the same, and as to his expulsion of a passenger for refusing to pay fare, in case of his rejection of the same, has given rise to one of the most protracted discussions in all the domain of the law pertaining to the relative duties of carriers and passengers."

The direct question was involved in that case, and the issue was fully presented by able counsel on both sides. No new or additional reasons are given to cause the court to recede from the rule there established. Whatever may be the rule elsewhere, the question may be considered settled in this State.

The undisputed evidence shows that the additional punch marks were made by the agent of the initial carrier who sold the ticket, and that they were made to correct a mistake as to its time limit made by him in issuing it. There was also sufficient evidence to warrant the jury in finding that the description of

the original purchaser as a female was a mistake made by the agent who issued the ticket, and that there was no negligence on the part of appellee in presenting it for passage. He had purchased four tickets to be used respectively by his wife, himself and their two children. Of course, the jury might have found that he had got his ticket mixed up with that of his wife. On the other hand, they might have found, as they did find, that the agent in issuing the ticket made the mistake. The description was indicated by punch marks opposite the words. The rest of the description, as indicated by the punch marks, fitted the appellee, and not his wife. The other ticket had been accepted as passage for his wife without question.

We think the issues were fairly presented to the jury under proper instructions, and that no errors of law were committed in the trial.

Counsel for appellant also raise the question that the damages are excessive. In this we think they are correct. The jury returned a verdict for $1,000. The circumstances under which Baty was ejected show that the servants of the railway company were actuated by no other motive than what they considered a proper discharge of their duties. Baty had the money with which to have paid his fare. He was given an opportunity to do so. He was told that he was ejected solely on the ground that under the rules and regulations of the company they could not accept his ticket for passage.

A careful consideration of the testimony convinces us that it does not warrant a verdict for exceeding $250.

In this case there is no error of the court in the proceedings below, and we require the plaintiff to remit down to an amount that we would be willing to approve, if the jury had returned a verdict for that amount. If the plaintiff will within two weeks remit the judgment down to $250, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial.

GREENE v. STATE.

Opinion delivered November 30, 1908.

1. CRIMINAL LAW—PLEA OF GUILTY—ENTRY OF JUDGMENT AT SUBSEQUENT TERM.—Upon a plea of guilty entered at one term of court, judgment may be entered at a subsequent term of the court. (Page 291.)
2. SAME—RIGHT TO WITHDRAW PLEA OF GUILTY.—Where one accused of selling liquor illegally entered a plea of guilty in the circuit court under an agreement with the prosecuting attorney that no fine should ever be assessed against him in the case unless he should again be convicted of violating the liquor laws of the State, and he was subsequently convicted of violating the liquor laws before a justice of the peace, and appealed therefrom to the circuit court, whereupon the prosecuting attorney asked that judgment be entered against him on his plea, it was not an abuse of the trial court's discretion to refuse to permit him to withdraw his plea of guilty and substitute a plea of not guilty. (Page 291.)
3. SAME—TIME OF RENDITION OF JUDGMENT.—Where one accused of selling liquor illegally entered a plea of guilty under agreement with the prosecuting attorney that no fine should be assessed against him unless he should again be convicted of violating the liquor laws, and he was convicted of such crime before a justice of the peace and appealed to the circuit court, it was not error to render judgment on his plea of guilty without awaiting the final determination of his appeal. (Page 292.)

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

W. W. Bandy, for appellant.

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

Sentence may be pronounced on a plea of guilty at a subsequent term, and courts may suspend sentence during good behavior and, upon his subsequent arrest for another crime, may pronounce judgment in the case to which he has pleaded guilty or of which he has been found guilty. 54 Ark. 120; 31 Hun, 382.

HART, J. On the 11th day of February, 1908, during the February term of the Greene Circuit Court, R. J. Greene was under indictment, charged with the illegal sale of intoxicating liquors, and the following order of court (caption omitted) was entered of record:

"On this day comes the State of Arkansas by her attorney, L. C. Going, and the defendant, R. J. Greene by his attorney, S.

R. Simpson, and the defendant by leave of the court enters a plea of guilty, and this cause is continued."

On the third day of April, 1908, being a day of an adjourned term of the February term, 1908, of said court, the court of its own motion set aside the order of continuance and assessed the punishment of Greene at a fine of five hundred dollars. Judgment was entered accordingly.

The facts under which this was done as detailed by Greene himself are as follows:

At the regular February term, 1908, of the court, Greene, being under indictment charged with the illegal sale of intoxicating liquors in three cases, made a compromise with the prosecuting attorney. He entered a plea of guilty in three cases upon condition that he should pay a fine of $500 in one case, and that no fine should ever be assessed against him in the other two cases unless he again should be convicted of violating the liquor laws of the State.

Since the regular and before the adjourned term, 1908, of the circuit court, he was arrested and convicted before a justice of the peace court for the offense of illegal sale of intoxicating liquors. He took an appeal to the circuit court, and the appeal was pending at the time the proceedings above set forth were had. Greene asked leave to withdraw his plea of guilty, which was by the court denied, and his punishment fixed as aforesaid. Greene has duly prosecuted his appeal to this court.

In this case, the judgment was entered at an adjourned term of the court, the plea of guilty having been entered at the regular term. In the case of *Thurman* v. *State,* 54 Ark. 120, it was held that the statute does not require that the sentence shall be pronounced and judgment entered at the same term at which a plea of guilty is entered, and that the entry of the judgment at a subsequent term does not alter or conflict with anything done by the court at the previous term. It follows, therefore, that there was no error in the mere act of entering judgment at the adjourned term.

Section 2296 of Kirby's Digest provides that at any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

The sole question raised by this appeal is, did the court abuse

its discretion in not permitting Greene to withdraw his plea of guilty and to substatute a plea of not guilty? Subsequent to the date of his entering his plea of guilty, and before sentence was pronounced, appellant was again convicted of the illegal sale of intoxicating liquors. True, he has appealed from the judgment, but the conviction was had before a court of competent jurisdiction. That was sufficient. We do not think the trial court owed him any duty to await the final determination of his appeal; nor that the prosecuting attorney acted in bad faith toward him.

Finding no error in the proceedings below, the judgment is affirmed.

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MURCH BROTHERS CONSTRUCTION COMPANY *v.* HAYS.

Opinion delivered November 23, 1908.

1. MASTER AND SERVANT—NEGLIGENCE—INSTRUCTION.—Where an employee, a carpenter, was killed in a fall due to the breaking of a plank in a temporary platform, and there was evidence tending to prove that deceased had the exclusive supervision of the laying of the platform, it was error to instruct the jury that the employer was liable if deceased's fall was caused by a defective plank in the platform, as the employer was not liable if deceased was responsible for the use of defective material. (Page 296.)
2. SAME—DUTY TO FURNISH SAFE PLACE.—Where, in erecting a building, it becomes necessary to construct scaffolds and platforms upon which his employees may work, the master owes to them the duty to exercise such care and diligence in so doing as an ordinarily prudent man would exercise under like circumstances. (Page 296.)
3. SAME—DUTY OF EMPLOYEES TO INSPECT MATERIALS.—An instruction that it was the duty of the employer, when furnishing materials to build platforms, to use reasonable and ordinary care to inspect said materials was erroneous in permitting the jury to infer that there was no duty of the employees to inspect the materials after they were furnished. (Page 297.)

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

Ashley Cockrill, for appellant.

1. The rule requiring the master to furnish a safe place in which to work is not applicable where the insecurity com-

plained of occurred in the progress of the work. 76 Ark. 69; 65 Fed. 48; 67 Fed. 507; 111 U. S. 313, 318; 58 Fed. 525; 12 C. C. A. 507. That rule is also not applicable in this case because the deceased was charged with the duty of preparing the place to work and of keeping it safe. 26 Cyc. 1183; *Id.* 113,

2. The first instruction is wrong. It assumes as a fact that appellant supplied its employees materials with which to build a platform, a matter which ought to have been submitted to the jury; and it is further erroneous in placing upon appellant the absolute duty to find out whether the platform was sound and suitable for use.

Malloy & Danaher, for appellee.

1. The evidence clearly shows that deceased had nothing to do with the making, placing or selecting the platform, or any part of the work on that floor prior to the accident. There is no evidence that any changes were being made in the platform by deceased, or that the accident was caused by reason of the progress of the work or changes being made thereby. Authorities cited by appellant are not applicable. Whether or not it was the duty of deceased to prepare the place in which to work and to keep it safe, the master in this case, having assumed that duty and furnished a place to work and walk upon, will be held liable, if it did so in such a careless and negligent manner as to result in the injury complained of. 26 Cyc. 113, 1183, 1205, cases cited in notes; 20 Am. & Eng. Enc. of L. 81; 63 N. Y. Supp. 357; 102 Ga. 64; 182 Mass. 368; 39 La. Ann. 1011; 85 Minn. 142; 25 So. 903; 84 N. W. 321; 89 S. W. 1091; 57 Texas, 491; 159 Pa. 403; 73 N. E. 853.

2. It is not error to state as a fact, in an instruction to the jury, a matter about which there is no dispute in the evidence. However, the first instruction, taken in connection with others given, does not assume that appellant supplied employees with materials to build a platform. Moreover there was no specific objection to it. 76 Ark. 377; 52 Ark. 180; 65 Ark. 54; 87 Ark. 396.

BATTLE, J. This action was brought by Nellie Hays, as administratrix of John H. Hays, deceased, against Murch

Brothers Construction Company. Plaintiff states her cause of action in her complaint as follows:

That "the defendant, on the 29th day of June, 1907, and prior thereto, was engaged as contractor in the erection of a certain building in the city of Little Rock, Arkansas, known as the Iron Mountain Railway Station, and as such contractor had full and exclusive charge, management and control of said building and the work thereon. That on the 29th day of June, 1907, plaintiff's intestate, John H. Hays, was employed by defendant as carpenter in and about the erection of said building, and it was the duty of the defendant to provide him with a good, safe and secure place for plaintiff's said intestate to perform his work and with good, safe and secure joists, planks, beams, scaffolds and platforms where plaintiff's intestate was directed and sent to work upon. That prior to the 29th day of June, 1907, defendant erected and caused to be erected joists and beams upon which were placed planks for the purpose of enabling plaintiff's intestate and workmen to stand and work while engaged in their employment." * * * That it "erected or caused to be erected said place to work with beams, joists, planks, platforms and scaffold, loose, unfastened, in a dangerous and unsafe and improper manner, rendering said place of work and appliances unfit for the purpose for which they were to be put. That on the 29th day of June, 1907, plaintiff's intestate was directed to go upon said joists, planks, beams, and went upon same in the performance of his duties at defendant's order, and while engaged in his work said joists, beams and planks, by reason of their defective condition and improper construction and fastening, gave way, and plaintiff's intestate was thereby precipitated a great distance below, and received from the fall severe injuries, which resulted in his death a few minutes later."

Defendant answered and denied each and every material allegation in the complaint.

The facts of the case are, in part, as follows: The defendant was engaged in the construction of a railroad depot at Little Rock. John H. Hays was a carpenter, and was employed in that capacity by it to assist in building the depot, and was foreman of the carpenters engaged in the same work, with power and control over them. Defendant had reached the construction

of the third floor of the building when Hays fell from that floor and was killed.

Evidence was adduced in the trial by the plaintiff tending to prove that Heinze, the defendant's superintendent, caused a platform or temporary floor to be laid in the third story of the depot to be used as a place for standing and walking by those engaged in the construction of that building; that, in the laying of the platform or floor, a plank with a large knot in it was used and was insufficiently supported. Hays stepped on it, broke it at the knot, and fell to the ground, and was fatally injured. On the other hand, evidence was adduced tending to prove that Heinze had nothing to do with the laying of the temporary floor, and that Hays had the exclusive supervising of it, and was not standing on a plank at the time he fell, but was standing with his feet on the wall, and was thrown from that place in an effort to lift a heavy joist.

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

"1. It was the duty of the defendant, when supplying its employees materials with which to build the platform which the plaintiff complains of as defective, to use reasonable and ordinary care to inspect said materials, and find out, before using it, whether it was sound and suitable for the use to which it was to be put. If you believe from the evidence that the defendant neglected this duty and, in consequence of such neglect, placed, for use as a platform, an unsound plank, not strong enough to sustain a man's weight, and that the plaintiff's intestate was ignorant of the unsoundness of said plank, and stepped upon it, while in the proper discharge of his duties as an employee of the defendant, and in the exercise of due care, and was thrown to the ground and injured thereby; and if you further believe from the evidence that plaintiff's intestate could not, before stepping upon it, by the use of ordinary care, detect the unsoundness of said plank as it lay where the defendant had placed it, but that the same could have been discovered by the defendant, by the use of ordinary care, before placing it where it lay, then the defendant is liable for the injuries so inflicted on the deceased, and your verdict should be for the plaintiff, provided that said defect was the proximate cause of the injury."

Other instructions were given. The jury returned a verdict for $1,500 for the administratrix and $6,000 for the widow and next of kin. Plaintiff entered a remittitur of the $1,500; and judgment was entered for the $6,000. Defendant appealed.

The foregoing instruction, which was given over objection of the defendant, is erroneous, because it virtually told the jury that the defendant was liable for the injury of Hays if his fall was caused by a defective plank in the temporary floor breaking while he was standing or walking upon it, regardless of the evidence that tended to prove that Hays had the exclusive supervision of the laying of the temporary floor and was himself responsible for the defective material used. The court, in effect, told the jury in this instruction to return their verdict as if Hays was not in any way responsible for the construction of the temporary floor or platform. The instruction was at least misleading, and should not have been given.

Appellant insists that it was not its duty to furnish the appellee a safe place in which to work, and cites *Grayson-McLeod Lumber Company* v. *Carter*, 76 Ark. 69, to support its contention. In that case "appellee was engaged in tearing down a bridge, and in continually changing his place of work, and sometimes in making it more insecure." "His employment made it his duty to tear down and to change and destroy his places for work, and to make them safe and unsafe as his work rendered them; and was such as to place it out of the power of his employer to perform such duty." In this case appellant was erecting a building, and as his work progressed scaffolding and platforms upon which to work became necessary to enable his employees to do their work. Finding it necessary and practicable, it was its duty to exercise such care and diligence in so doing as an ordinarily prudent man would exercise under like circumstances. *Little Rock & Fort Smith Railway Co.* v. *Eubanks*, 48 Ark. 460; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Rice*, 51 Ark. 467; *Park Hotel Company* v. *Lockhart*, 59 Ark. 465.

Reversed and remanded for a new trial.

ON REHEARING.

Opinion delivered December 21, 1908.

BATTLE, J. Appellee has filed a motion for a rehearing, insisting that this court erred in reversing the judgment in this action for a defect in an instruction which was cured by another instruction, numbered seven, which is as follows:

"Even though you find from the testimony that deceased fell by reason of the insecurity of the plank or board upon which he stepped or was standing, still if you believe that deceased was the foreman of defendant in charge and control of the carpenters and their helpers at work on said building, and that defendant delegated to him the duty of overseeing and directing the details of said work and of choosing and following his own manner and method of laying the joists and planks, and that defendant delegated to him as foreman the duty of keeping the place in which he and his fellow workmen were to work in a safe condition, and you further find that the work was done by the carpenters and helpers so working under his direction and control, and that the insecure condition, was thus created by said carpenters thus working under him, then you are instructed that plaintiff can not recover for any injury to deceased occasioned by such insecurity of the place or other defect."

Instruction numbered one, copied in the opinion of the court, was held by us to be misleading. In that instruction the trial court told the jury that "it was the duty of the defendant, when (at the time of) supplying its employees materials with which to build the platform which the plaintiff complains of as defective, to use reasonable and ordinary care to inspect said materials and find out, before using it, whether it was sound and suitable for the use to which it was to be put." From this language it could have been reasonably inferred by the jury that there was no duty of the employees to inspect the materials after they were furnished, as that had already been done. The court further told the jury: "If you believe from the evidence that the defendant neglected this duty (inspection), and in consequence of such neglect placed for use as a platform an unsound plank, not strong enough to sustain a man's weight, and that the plaintiff's intestate was ignorant of the unsoundness of said plank, and

stepped upon it, while in the proper discharge of his duties as an employee of the defendant, and in the exercise of due care, and was thrown to the ground and injured thereby; and if you further believe from the evidence that plaintiff's intestate could not, before stepping upon it, by the use of ordinary care, detect the unsoundness of said plank as it lay where the defendant had placed it, but that the same could have been discovered by the defendant, by the use of ordinary care, before placing it where it lay, then the defendant is liable for the injuries so inflicted on the deceased, and your verdict should be for the plaintiff, provided 'that said defect was the proximate cause of the injury.'" The court did not tell the jury in this instruction that it was the duty of any employee to inspect the materials after they were supplied, but left it to be inferred in the manner stated that there was no such duty, and consequently that no wrong was done by the employee using the defective plank without inspecting it, but that appellant was responsible for injuries caused by the defective plank if it failed to properly inspect it at the time it was supplied. The jury could have reasonably inferred from this instruction that if appellee's intestate was injured in consequence of the neglect of appellant to inspect materials when supplying them, the appellant was liable for damages. In addition to the defects mentioned, it is further defective for the reasons stated in the opinion of this court.

Appellee insists that these defects were cured by instruction numbered seven. But this is not true. In instruction seven the court told the jury that appellee could not recover upon a state of facts which did not include or mention a fact which, if true, according to a construction the jury might have placed upon instruction one, as indicated, rendered appellant liable, that is the failure to use proper diligence in inspecting the materials when it was supplying them. In the way indicated instruction one was defective and misleading, as held by this court in the opinion delivered, and, the evidence sustaining the verdict being very weak and unsatisfactory, was prejudicial.

Motion denied.

RUSHTON v. McILLVENE.

Opinion delivered November 30, 1908.

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1. MORTGAGES—DEED ABSOLUTE IN FORM—SUFFICIENCY OF EVIDENCE.—While a deed absolute on its face is presumed to be an absolute deed, equity will permit parol evidence to be introduced to show that it was intended as a mortgage; but to overcome the presumption of law and establish the character of a mortgage the evidence must be clear, unequivocal and convincing. (Page 301.)

2. SAME—EXISTENCE OF DEBT AS TEST.—The test whether an absolute conveyance was intended as a mortgage is whether there was a debt existing which the conveyance was intended to secure. (Page 301.)

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

Stevens & Stevens, for appellant.

No fraud is alleged or shown. A deed absolute on its face will not be construed as a mortgage, unless the evidence is clear and decisive that it was given and accepted as a mortgage. 19 Ark. 278; 31 Ark. 163; 40 Ark. 146; 75 Ark. 554.

C. W. McKay, for appellee.

BATTLE, J. The question in this case is, was the deed executed by R. L. Emerson and his wife to A. Rushton, on the 9th day of December, 1905, whereby they conveyed to him block thirty in the town of Emerson, and covenanted with the grantee that they would forever warrant and defend the title thereto against all claims whatever, a mortgage? The trial court held that it was a mortgage, and Rushton appealed.

The block was sold by R. L. Emerson to J. M. McIllvene on time. Emerson executed to McIllvene a bond for title and bound himself to convey to McIllvene when the purchase money was paid. McIllvene, being unable to pay the purchase money at the time it became due, applied to Rushton for a loan of money, and offered to secure the same, if made, by mortgaging the block.

Rushton testified as follows: "He refused to loan him the money, but purchased the block from him, agreeing to pay therefore the sum of $225. On the 9th day of December, 1905, the day after the agreement to pay $225, McIllvene caused Emerson to convey the block to Rushton, and in a few days thereafter Rushton paid the $225 to McIllvene, who was to remain in pos-

session of the block, free of rent, until the first day of July following. About two weeks after the conveyance McIllvene offered to purchase the block at $250, and Rushton agreed to sell at that price, and to give him until the first of July following to pay for it. On the 27th of July, 1906, he tried to get him to pay as much as $50 of the purchase price, and he (McIllvene) said he was unable to do so, and moved off and left the place, and Rushton took possession. About the last of December, 1906, he (McIllvene) offered to return the $225 and interest to Rushton, and he refused to accept it, saying that the block was his, and he had a deed for it."

J. M. McIllvene testified: In December, 1905, he applied to Rushton for a loan of $225, and offered to secure the loan by a mortgage on the block. He (Rushton) refused to loan the money at ten per cent. per annum, but said he would loan it to witness until the first day of July, 1906, if he would pay him $25 for the use of it, and witness promised to do so, and upon "this agreement caused Emerson to make the deed executed by him (Emerson); and Rushton loaned witness the $225 until the first of July following. This agreement was not reduced to writing, witness believing that Rushton would perform his contract. About the 27th of July, 1906, Rushton urged witness to pay him as much as fifty dollars of the amount he loaned him, and he, witness, replied that he was unable to do so, but he was going to leave the houses, "and if he (Rushton) could rent them out until Christmas, he, witness, would give him the rent above the interest on his money," and he said he would do it. In December, 1906, witness offered to return the money and interest, and he, Rushton, refused to accept it. On cross-examination witness testified that it was not stated by Rushton or himself or both of them in the presence of Alex. Mullins that Rushton had agreed to re-sell witness the place for $250, to be paid on the first day of July, 1906.

Henry Rushton, the son of A. Rushton, testified: A night or two before Emerson executed the deed for the block McIllvene applied to his father for a loan of money, and he (father) refused.

Alex. Mullins, a son-in-law of A. Rushton, testified: "A. Rushton called him to witness a transaction he had with Mc-

Illvene in respect to lands, and stated that he was to give McIllvene $225 for the land, and McIllvene was to have the use of it until July, 1906, and until then was to have the privilege of buying it at $225."

Is this evidence sufficient to prove that the deed executed by Emerson to Rushton was intended for a mortgage?

Mr. Pomeroy says: "The general doctrine is fully established, and certainly prevails in a great majority of the States, that the grantor and his representatives are always allowed in equity to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance can not be a mortgage; if there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be, an absolute conveyance of the land; to overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal and convincing, for otherwise the natural presumption will prevail." *Hays* v. *Emerson,* 75 Ark. 551; *Williams* v. *Cheatham,* 19 Ark. 278; *Trieber* v. *Andrews,* 31 Ark. 163; *Harman* v. *May,* 40 Ark. 146; *Coyle* v. *Davis,* 116 U. S. 109; *Cadman* v. *Peter,* 118 U. S. 73; 3 Pomeroy's Equity Jurisprudence (3 Ed.), § 1196, and cases cited.

According to the foregoing test, which is correct, the evidence is not sufficient to overcome the presumption arising from the deed of Emerson and wife to Rushton, and it must be treated as it purports to be, an absolute conveyance.

Reversed and remanded with directions to the court to enter a decree in accordance with this opinion.

PRYOR v. PRYOR.

Opinion delivered November 30, 1908.

1. DIVORCE AND ALIMONY—WIFE'S MISCONDUCT.—Equity has power to allow alimony to a wife against whom a decree for divorce is granted on account of her misconduct. (Page 307.)
2. SAME—ALTERATION OF ALLOWANCE OF ALIMONY.—Under Kirby's Digest, § 2683, equity has power to alter an allowance of alimony at any time. (Page 308.)
3. SAME—ALTERATION OF ALLOWANCE BASED ON AGREEMENT.—The fact that an allowance of alimony is based upon an agreement entered into between the parties does not prevent the court from subsequently altering the allowance, so far as it depends upon the decree of the court. (Page 308.)
4. HUSBAND AND WIFE—SEPARATION—CONTRACT.—Where a separation between husband and wife has already taken place or is about to take place, they may contract with each other for the payment by him of a sum or sums of money for her support. (Page 308.)
5. SAME—CONTRACT OF SEPARATION—EFFECT OF DIVORCE.—A contract entered into by husband and wife after or in contemplation of separation whereby he agrees to pay a sum or sums for her support will not be annulled by a subsequent decree of divorce. (Page 308.)
6. SAME—VALIDITY OF CONTRACT OF SEPARATION.—A contract between husband and wife, entered into in contemplation of an immediate divorce, whereby he agrees to pay her certain sums of money at stated intervals during her life, is valid and enforceable. (Page 309.)
7. ALIMONY—STIPULATED ALLOWANCE—REDUCTION.—Where husband and wife, in contemplation of immediate divorce, entered into a contract whereby he agreed to pay her certain sums of money at stated times, and they voluntarily caused this contract to be made part of the decree for divorce, the decree cannot subsequently be modified in so far as it is based on the contract, for a modification of the decree would be a modification of the contract itself; but, should the court find the allowance excessive, it may decline to permit its extraordinary process to be used to collect more than a just and reasonable allowance. (Page 309.)

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; affirmed.

Vaughan & Vaughan, for appellant.

1. The provisions of the decree sought to be modified are classed in law as *alimony,* and can not be anything else. It is not a *debt;* nor can it be reached by creditors, etc. 44 Iowa, 567; 129 N. Y. 566; 44 Wis. 354; 184 Ill. 375; 45 *Id.* 167; 64 Vt.

302, 495; 99 S. W. 830; Kirby's Digest, § 2682; 184 Ill. 375; 181 U. S. 183.

2. The power of a court of equity to alter or modify the terms of a decree relating to *alimony* is well settled. Kirby's Digest, § § 2861-3; 2 Bish. Mar. Div. & Sep., § § 872, 875; 1 Cur. Law 74; 9 *Id.* 95; 7 *Id.* 112, n. 94, 1189 (sec. 6), 1190; 14 Cyc. 784 c. note 95; 38 Ark. 119 (127); 51 S. W. 819; 5 Paige, Ch. 509; 4 *Id.* 516.

3. The facts in this case justify a modification of the decree. Kirby's Digest, § 2683; 73 Ark. 470-2; 2 Bish. Mar. Div. & Sep. § 875; 77 Ill. 346; 75 Wis. 342; 37 *Id.* 219; 38 Ark. 119; 51 S. W. 818; 42 Ark. 495; 40 L. R. A. 585; 57 Ark. 229.

Ratcliffe, Fletcher & Ratcliffe, for appellee.

Courts favor agreements and settlements of this kind, and always approve and sustain them unless greatly unjust and inequitable, and when the court passes upon them and approves them they are *final.* 28 Oh. St. 596; 74 Mo. 26; 49 N. H. 69; 25 N. J. Eq. 548. Courts have no power to grant relief in such cases. 60 Ill. 241; 125 *Id.* 608; 77 Me. 377; 25 Ind. 458; 3 Paige, 483; 64 Me. 484; 108 N. W. 8; 64 Oh. St. 369; 40 Ore. 477; 52 Kans. 724; 38 Vt. 248; 80 S. W. 1187; 18 Ark. 320; 38 *Id.* 119; 59 *Id.* 441.

McCULLOCH, J. In the year 1906, appellant, James F. Pryor, a resident of Pulaski County, Arkansas, instituted in the chancery court of that county a suit against his wife, appellee Laura E. Pryor, for divorce on the ground of willful desertion. It appears that they had been living separate and apart from each other for several years, appellee having resided in Indianapolis, Indiana, since she deserted her husband.

On April 21, 1906, during the pendency of the suit for divorce, they entered into the following agreement, which was reduced to writing and signed by both parties:

"This agreement between James F. Pryor and Laura E. Pryor, his wife, witnesseth:

"That for the purpose of mutually settling the property rights between the parties hereto as involved in the case of said J. F. Pryor *v.* Laura E. Pryor, in the Pulaski Chancery Court, wherein the said James F. Pryor is seeking a divorce from Laura E. Pryor, it is hereby agreed:

"First. That the said James F. Pryor shall execute to the said Laura E. Pryor a warranty deed to the property now occupied by her in the city of Indianapolis, State of Indiana, said property to be conveyed in fee to her.

"Second. That the said James F. Pryor shall pay the dues and expense charges upon one thousand dollars of the stock of the Argenta Building & Loan Association, now standing in the name of the said Laura E. Pryor, until the said stock is fully matured in accordance with the charter and by-laws of the said building and loan association, at which time the full amount of said stock shall be drawn by the said Laura E. Pryor from the said building and loan association.

"Third. That the said James F. Pryor shall pay the said Laura E. Pryor the sum of five hundred dollars ($500.00) in cash; that he will also pay the fees of Ratcliffe & Fletcher to the amount of one hundred dollars ($100) and the fees of J. H. Harper to the amount of fifty dollars ($50), as the attorneys of said Laura E. Pryor in said matter.

"Fourth. That the said James F. Pryor shall also pay the said Laura E. Pryor the sum of sixty dollars ($60) per month, on the first day of each and every month after this date, so long as she may live, unless she shall again marry, in which event the payment of the said sixty dollars ($60) per month shall cease; but nothing except the remarriage of the said Laura E. Pryor shall excuse or relieve the said James F. Pryor from the payment of the said sixty dollars ($60) per month; and in case of his death prior to the death of said Laura E. Pryor the said sixty dollars ($60) per month shall remain and continue an obligation against his estate and a lien upon the property hereinafter mentioned, towit: lots one (1), two (2), and three (3), and fractional lots ten (10), eleven (11), and twelve (12), in block forty-one (41), in the city of Argenta, Pulaski County, Arkansas.

"Fifth. That the said James F. Pryor will pay towards the support of the three children of the said James F. and Laura E. Pryor the sum of fifteen dollars ($15) per month, each, until they shall respectively arrive at the age of twenty-one (21) years. If said children, or either of them, shall be living with the said Laura E. Pryor, the amount for the support of such child or

children as may be living with her shall be paid to her on the first day of each and every month.

"Sixth. That, in order to secure the faithful and prompt performance of the obligations herein contained on the part of the said James F. Pryor, towit, the payment of the said building and loan association dues and expenses, the payment of the said sum of sixty dollars ($60) per month to the said Laura E. Pryor, and the payment of the said sums of fifteen dollars ($15) per month for the benefit of each of the children aforesaid, the said James F. Pryor shall execute to the said Laura E. Pryor a mortgage upon the Argenta property as aforesaid; and it shall also be specified in any decree of divorce that may be rendered in the cause aforesaid that the performance of the agreements of the said James F. Pryor, as aforesaid, shall be a charge and a lien upon the property aforesaid, and that on failure to pay said amount, or either thereof, an execution may issue as at law against the said James F. Pryor, and may be enforced against the property aforesaid or any other property of the said James F. Pryor, and the lien of said mortgage and of said decree shall remain upon the property as aforesaid until the agreements as aforesaid shall be fully complied with in accordance with the terms as aforesaid, such execution to issue at the end of twenty (20) days thereafter from any default as may be directed by the said Laura E. Pryor.

"Seventh. That the said James F. Pryor shall pay all the costs in the case aforesaid, and shall pay the costs of recording the mortgage aforesaid."

On April 23, 1906, a decree was entered by the Pulaski Chancery Court granting a divorce to appellant from his wife and awarding the custody of the three children to the wife. The decree recites the execution of the aforesaid agreement, copying it in full, and proceeds as follows:

"It is considered and ordered that the said agreement be and is hereby made a part of the decree of this court in this case. That said Laura E. Pryor have and recover of and from the said James F. Pryor the several amounts mentioned in accordance with the terms thereof. That, for the purpose of securing the full and complete performance of said agreement, the same is hereby declared a lien upon the property mentioned therein prior

to all other liens or claims, and, in default of payment of said amounts or either thereof for twenty days at any one time, then execution shall issue as at law for the amount or amounts that may be due, which may be enforced against said property, or any part thereof, or any other property which may belong to the said James F. Pryor.

"It is further ordered that said James F. Pryor promptly pay all taxes and assessments that may be levied upon or assessed against said property as the same may become due in accordance with the laws of the State of Arkansas, and in case of failure to do so execution may issue therefor, as hereinbefore provided in case of failure to comply with other terms of said agrement."

Pursuant to said agreement and the decree of court, appellant on April 24, 1906, executed to appellee a mortgage on the Argenta property to secure payment of the amounts named in the agreement. He paid the dues on the building and loan association stock until it was matured and the face value, $1,000, was paid over to appellee; and he paid to appellee the sum allowed for support for herself and sons up to August, 1907, and thereafter paid her only the sum of $65 per month.

He then filed his petition in the Pulaski Chancery Court, praying for an alteration of the allowance to appellee by reducing it to $50 per month for herself, alleging that his property in Argenta, which was all he owned, was unproductive, and that he was earning $125 per month in his work as railroad conductor, and was financially unable to continue the payment of $105 per month to his wife and children. He further alleged that the two eldest boys, then seventeen and twenty years old respectively, were earning reasonably good salaries sufficient for their living expenses, and that the youngest boy belonged to the United States Navy.

Appellee appeared by her solicitors, and resisted the alteration of the decree, and asked that the court order execution for the unpaid amount due in accordance with the terms of the agreement and decree.

The court denied the prayer of the petition on the ground that the original decree fixing the amount of alimony and settling the property rights of the parties by their consent and agreement in writing was "a complete and final settlement of all matters as

to said divorce, and binding upon the parties, and this court has no power to alter or amend the same for any of the causes in said petition." And the court awarded execution against appellant for the sum of $370 found to be due and unpaid under the provisions of the decree.

The first question presented is whether or not the chancery court had jurisdiction to decree an allowance of alimony to a guilty wife against whom a decree for divorce was granted, for, if the court could not award such an allowance, the decree itself was void and any contract between the parties to accomplish the same result was void for want of consideration. The agreement purports to relate to a settlement of property rights between the parties, but the court and the parties have manifestly treated the provision now under consideration as one for continuing alimony.

"According to ecclesiastical practice," says Mr. Nelson, "the guilty wife received no alimony, although there may have been some mitigating circumstances in her favor, and she might have brought a considerable dowry to her husband. Her offense relieved her husband from all duty of support. But the severity of this rule soon became manifest, and it was customary to make some provision for the wife when a divorce was granted by parliament to the husband. The divorce court now has discretionary power to grant her alimony, but will ordinarily refuse to do so." 2 Nelson on Divorce & Separation, § 907. The same author says in another place that while courts have power to allow alimony to a guilty wife it is error to do so when there are no mitigating circumstances in her favor.

A statute of this State provides that "when a decree (for divorce) shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest, § 2681. Similar statutes in other States have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife. *Spitler* v. *Spitler,* 108 Ill. 120; *Luthe* v. *Luthe,* 12 Colo. 421.

So, whether dependent upon enlarged powers conferred by the statute or not, we think it is settled that a court has the power

to allow alimony to a wife against whom a decree for divorce is granted on account of her misconduct. If error is committed by the court in making the allowance under the particular circumstances of the case, it must be corrected by appeal. The decree is not void.

The statutes of this State also contain the following provision:

"The court, upon application of either party, may make such alterations from time to time, as to the allowance of alimony and maintenance, as may be proper, and may order any reasonable sum to be paid for the support of the wife during the pending of her bill for divorce." Kirby's Digest, § 2683.

The court, therefore, has the undoubted power to alter an allowance of alimony at any time. *Kurtz* v. *Kurtz*, 38 Ark. 119.

Does the fact that the allowance is based on an agreement entered into betwen the parties hamper the power of the court to subsequently alter it? We think not, so far as the dependence of the allowance on the decree of the court is concerned. The statute gives the court the power to alter any of its decrees allowing alimony. The court is not, in the first instance, bound by the agreement of the parties concerning the amount of alimony to be allowed to the wife (2 Nelson on Divorce and Separation, section 915, *Calame* v. *Calame*, 25 N. J. Eq. 548); and, *a fortiori*, the agreement can not, in the face of the statute, hinder the court in altering its own decree of allowance. The decree is not entirely dependent upon the agreement, and therefore the power to subsequently alter can not be controlled by it. *Parsons* v. *Parsons* (Ky.), 80 S. W. 1187. The agreement of these parties was not merely one as to the amount the court by its decree should fix as alimony, but it was manifestly intended to be an independent agreement, in contemplation of divorce, for the payment of alimony.

The question then arises whether or not such a contract is valid and, if it is, whether or not a court of equity can alter or modify it. We have already said that the court, when it comes to fix the amount of alimony to be allowed a wife, is not bound by the agreement of the parties. This is so because the court is moved to action by principles of justice and equity, and is not bound to follow the agreement of the parties against what ap-

pears to be the justice of the case. But the question of the power of the court to subsequently alter or modify an agreement relating to alimony is different from that of the power or duty of the court to follow the agreement in fixing the amount of alimony. The last-named power may exist without the former if the agreement is valid. The difference arises in the fact that one is a question of enforcement of an agreement relating to alimony and the other is a question of fixing by decree of court the amount of alimony to be allowed. Was the independent agreement for payment of alimony, made in contemplation of immediate divorce, valid as such? We say that it was. Husband and wife may, when separation has already taken place or is to immediately take place, contract with each other for the payment by him of a sum or sums of money for her support. *Bowers* v. *Hutchinson,* 67 Ark. 15; *Walker* v. *Walker,* 9 Wall. 741; *Randall* v. *Randall,* 37 Mich. 563; *Chapman* v. *Gray,* 8 Ga. 341; *Fox* v. *Davis,* 113 Mass. 255; *Hutton* v. *Hutton,* 3 Pa. St. 100; *Scott's Est.,* 147 Pa. St. 102.

A decree of divorce granted subsequently does not annul the contract. *Carpenter* v. *Osborn,* 102 N. Y. 552; *Galusha* v. *Galusha,* 116 N. Y. 635.

Why, then, should not they be permitted to contract for the payment of alimony in contemplation of an immediate divorce? It violates no rule of public policy, for the husband is liable for the wife's support during the continuance of the marriage relation, and it is within the power of the court to grant alimony payable after the relation is dissolved. The agreement was, in effect, contemporaneous with the decree granting the divorce, and we see no sound reason nor policy which forbids the making of such a contract. The contract relating to the amount to be paid for support of the wife survived the decree for divorce, and when it has been fairly entered into a court of equity should not alter or set it aside. *Carpenter* v. *Osborn, supra.*

The parties voluntarily caused this contract to be made a part of the court's decree, instead of waiting to have it enforced by an independent action after payments, according to its terms, should be refused. We are therefore of the opinion that the court can not alter or modify the decree, in so far as it is based on the contract of the parties, for a modification of the decree

would be no less than a modification of the contract itself.

We are not confronted with the question whether or not the court should, by the exercise of its extraordinary powers in inflicting punishment for contempt for failure to comply with the decree, lend its aid to the enforcement of an obligation which, by reason of changed financial condition of appellant, has become harsh and unjust.

No such remedy for the enforcement of the decree has been asked or granted. If it follows from what we have said with respect to the force and effect of the decree that, so far as concerns its enforcement by the extraordinary powers of the court, it depends, not upon the contract between the parties, but upon the equitable principles which underlie all decrees for alimony, and that it may be altered to the extent of adjusting such extraordinary remedies to the enforcement only of an allowance of alimony which is found from time to time to be just and equitable.

The issuance of execution of collection of monthly allowance fixed by the contract and by the order of the court, being only such a remedy as would be afforded as a matter of right for enforcement of the contract if an independent action should be brought upon it, is not an extraordinary remedy, and it was not inequitable for the court to grant it, instead of remitting appellee to an action on the contract to recover the amount in excess of what now appears to be a just and fair allowance of alimony. We must not be understood as holding that individuals have the right to contract for a certain remedy for the enforcement of contractual or other rights. It is the decree of the court which affords a foundation for issuance of process for its enforcement, and not the contract itself. That portion of the contract concerning the issuance of execution must be treated as surplusage.

Nothing in the chancellor's ruling conflicts with the views here expressed, and his decree is therefore affirmed.

DELONEY v. STATE.

88 311
89 435
90 599

Opinion delivered November 30, 1908.

1. GAMING—PERMITTING GAMBLING TABLES TO BE MAINTAINED.—An indictment which alleges that defendant, owning, using and controlling a certain building described, "did unlawfully and knowingly suffer and permit gambling tables to be maintained and gambling with dice and cards to be carried on and exhibited in his said house," etc., charges a violation of Kirby's Digest, § 1735. (Page 312.)
2. CRIMINAL LAW—SUFFICIENCY OF INDICTMENT.—Under Kirby's Digest, § § 2228-9, an indictment which charges the offense with such a degree of certainty as to enable the court to pronounce judgment on conviction is not rendered insufficient by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits. (Page 313.)
3. STATE—BOUNDARY LINE.—As the determination of the boundaries of a State is a political, rather than a legal, question, it is the duty of the courts to respect the pronounced will of the legislative department. (Page 316.)
4. STATE—BOUNDARY LINE.—The boundary line between the State of Arkansas and the State of Texas is the south bank of Red River, and not the thread of the stream. (Page 316.)
5. SAME—CHANGES IN RIVER AS AFFECTING BOUNDARY.—Where a river bank constitutes the boundary line between two States, this line may change with the gradual changes of the bank by accretion or reliction, but not where the bank is changed suddenly by avulsion. (Page 316.)
6. EVIDENCE—PRIVATE SURVEYS.—Evidence of a private survey which was made without authority of either State was inadmissible to prove the boundary line between Arkansas and Texas. (Page 317.)
7. SAME—PROOF OF STATE BOUNDARIES.—Ancient public boundaries may be proved by general reputation, by tradition and by hearsay declarations of persons with knowledge, made before the controversy arose. (Page 317.)

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

An indictment was returned against Jack DeLoney in Little River Circuit Court, as follows (omitting caption):

"The Grand Jury of Little River County, in the name and by the authority of the State of Arkansas, accuse the defendant, Jack DeLoney, of the crime of running a gambling house, committed, as follows, viz, the said defendant in county and State aforesaid, on the 1st day of January, 1908, then and there owning, using and controlling a certain building or outhouse situated north of the south bank of Red River adjacent to what is known

as "the cut-off," did unlawfully and knowingly suffer and permit gambling tables to be maintained and gambling with dice and cards to be carried on and exhibited in his said house or outhouse, against the peace and dignity of the State of Arkansas."

There was evidence tending to prove that defendant was guilty of permitting gambling to be conducted in a house owned by him situated north of the south bank of Red River, on an island therein which is now north of the main channel of that river, but which, until about thirty years ago, was south of the main channel.

The court charged the jury as follows:

"The line between Little River County, State of Arkansas and the State of Texas is the south bank of Red River, unaffected by any sudden changes or cut-offs in said river."

Defendant was convicted and fined $200, and has appealed.

Jobe & Carrigan, for appellant; *Hart, Mahaffy & Thomas* (of Texas), of counsel.

1. The indictment charges two offenses, and the demurrer should have been sustained. Kirby's Digest, § 2230, 1732-5-9; 83 Ark. 254; 45 *Id.* 62; 13 *Id.* 680.

2. The venue was not proved. Under the treaty with Spain and the act of Congress admitting the State into the Union, the middle of the main channel of Red River was the boundary line, and not the south bank. Kirby's Digest, p. 174; 8 St. at Large, 252-3-4, art. 3; 143 U. S. 621; 64 *Id.* 505 (16 L. Ed. 557); 5 Wheat. 374; 143 U. S. 361. A sudden avulsion does not change the boundary line. 64 U. S. 515; 143 *Id.* 361.

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

1. Only one crime is charged in the indictment, the violation of § 1735 of Kirby's Digest. 45 Ark. 62.

2. The boundary line of Arkansas is the south bank of Red River unaffected by any sudden change or cut-off. This is admitted virtually by defendant.

HILL, C. J. Jack DeLoney was indicted by the grand jury of Little River County "of the crime of running a gambling house." The indictment will be found in the statement of facts.

1. The first question raised is the sufficiency of the indict-

ment. It is said that it contains two offenses, being those created in sections 1732 and 1735 of Kirby's Digest. The court does not agree with the contention, and is of the opinion that it is a sufficient indictment under section 1735. It charges the offense therein described with sufficient certainty to enable the court to pronounce judgment on a conviction according to the right of the case; and the only defects therein, if any, do not prejudice any of the substantial rights of the defendant; and, under sections 2228, 2229 of Kirby's Digest, these are the tests of the sufficiency of an indictment.

II. The next contention—and, in fact, the principal contention of the case—is that the testimony has failed to prove that the place where the crime was committed was in the State of Arkansas. The State proved these facts: That the defendant DeLoney owns a plantation on Red River, and has a saloon and gambling house on what is known as "The Island," which is a body of land cut off by a change in the channel of the river, called the "Rochelle Cut-off;" the present channel being on the south side of the island, and the old channel being the north boundary of the island. This occurred about thirty years ago. There has been little caving of the banks since the island was formed. DeLoney built a house some forty yards north of the saloon, and built it on stilts over the old bed of the river, about twelve or fifteen feet from the old south bank, with a walk running out to it from the saloon. The bank at that place is ten or twelve feet high. The gambling house stands over what was the bed of the river prior to the cut-off. The question is, whether the middle of the channel of Red River, or the south bank thereof, is the boundary line between Arkansas and Texas. If the south bank is the boundary line, the evidence of the State clearly shows that this house is situated north of the south bank of the river.

The Texas Court of Appeals, in the case of *Spears* v. *State*, 8 Tex. Ct. of App. 467, held that under the Treaty of 1819 between the United States and Spain, which fixed the Rio Roxo of Nachitoches, or Red River, as one of the boundaries between the two nations, the jurisdiction of Texas extended to the middle of Red River. The reasoning is based on the theory that the treaty was silent as to which bank of the stream should constitute

the boundary, and that the general rule is that the designation of a river as a boundary, in the absence of further description, means the middle of the stream. This is the correct general rule, as will be seen from an examination of the cases cited in said opinion. But it was incorrect in this particular instance because the language of the treaty, construed in the light of the negotiations leading to it and the subsequent action of the United States and of the States of Arkansas and Texas, shows that this construction was not intended, even if permissible from the language employed. The history of the negotiations leading up to the treaty between the United States and Spain may be found in *United States* v. *Texas,* 162 U. S. 1, this being one of the cases involving the controversy between the United States and the State of Texas over the jurisdiction of Greer County. It will be seen therefrom that negotiations pended for some time between the two governments, and one of the points of negotiation was as to the boundary line along the Sabine and Red and Arkansas rivers. Finally, Mr. Adams, Secretary of State, submitted a proposition to the Spanish minister covering this, among other points, proposing that the Sabine and Red and Arkansas rivers, and all islands in the same, wherever said rivers were the boundaries between the two governments, should belong to the United States, and the western bank of the Sabine, and the southern banks of the Red and Arkansas, throughout the courses there described, should be the limit of the jurisdiction of Spain. The Spanish minister required that "the boundary between the two countries shall be the middle of the rivers, and that the navigation of the said rivers shall be common to both countries." Mr. Adams replied that the United States had always intended that "the property of the river should belong to them," and he insisted on that point, "as an essential condition, as the means of avoiding all collision, and as a principle adopted henceforth by the United States in its treaties with its neighbors." He agreed, however, "that the navigation of the said rivers to the sea shall be common to both people." The Spanish minister assented to this, and the result was the treaty, the third clause of which contained the following: "The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing

north, along the western bank of that river to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red River; then following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River, and running thence, by a line due north to the river Arkansas. * * * All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States."

The fourth clause provided for commissioners to be appointed to fix with more precision the lines between the two nations. The treaty may be found in full in 8 Statutes at Large 252 *et seq.* By the treaty of 1828 between the United States and the United Mexican States (8 Stat. at L. 372), the same language was followed fixing the line between Mexico and the United States as was used in fixing the line between Spain and the United States, so far as the Red River was concerned.

The Republic of Texas, by an act passed in 1836, declared that the civil and political jurisdiction of that republic extended to the boundaries therein described, and accepted the boundary line with the United States in this particular as declared in the said treaty between Spain and the United States.

In 1845 Texas was admitted as a State into the Union by act of Congress, and was described as territory properly included in and rightfully belonging to the Republic of Texas, and one of the conditions of admission being that Texas should be formed subject to the adjustment by the United States of all disputes as to boundaries, etc.; and these conditions and all other conditions of the enabling act were accepted by Texas.

The act admitting Arkansas to the Union, passed June 16, 1836, described the boundaries of the State at this point as follows: "And from thence to be bounded on the west to the north bank of the Red River by the lines described in the first article of the treaty between the United States and the Cherokee Nation of Indians, * * * and to be bounded on the south side of Red River by the Mexican boundary line to the northwest corner of the State of Louisiana." Kirby's Digest, p. 174. The Constitution of 1836 contains the same language describing

the boundaries of the State. All of the subsequent Constitutions contain the same language, except that the boundary of the State of Texas is substituted for the Mexican boundary line.

It is clear, from the act of Congress admitting the State and the Constitutions of the State, that all of Red River at this point was intended to be included within this State; and the court might well stop at that point, for this is a settled principle: "A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question; and, in its discussion, the courts of every country must respect the pronounced will of the legislature." *United States* v. *Texas,* 143 U. S. 621. But, as the Texas Court of Appeals had reached the conclusion that the jurisdiction of that State extended to the thread of Red River, it has been thought best to point out wherein that court erred in applying the general rule which it did in reaching that conclusion.

These treaties between the United States and Spain, and between the United States and the Mexican States, and the acquiescence therein by the Republic of Texas and the State of Texas, demonstrate that the boundary line was the south bank of Red River, and not the thread of the stream; and this jurisdictional line was adopted when Arkansas was admitted into the Union, and is embedded in its Constitution.

The question is therefore narrowed to whether this gambling house was erected in the bed of Red River or upon the south bank of it. Appellant asked, and was given, an instruction to the effect that "a sudden cut-off or change in the channel of the river will not alter or change the line, but the south line of the old river will remain the same;" and this is unquestionably the settled doctrine upon that subject. Applying it here, the evidence shows that the cut-off was made by a sudden change of the channel, and not by reliction. A jurisdictional line changes with the gradual changes of the shore by accretion or reliction, but not where the change is suddenly made by an avulsion. *Nebraska* v. *Iowa,* 143 U. S. 359; *Nix* v. *Pfeifer,* 73 Ark. 199. Therefore, the determining test under this evidence was the location of the south bank of Red River prior to the cut-off, and the case was properly tried on that theory, as shown by the instructions.

The court excluded evidence of surveys which was offered, whereby it was sought to prove the true boundary line between the States of Arkansas and Texas at this place; but they were predicated upon a former survey known as the Cullen McKinney Head Right Survey, which was made prior to the admission of the State of Arkansas into the Union. It was not shown to be a survey authorized by either government, but was the survey of private property. This would not be admissible. 2 Enc. Ev. pp. 706 and 707 and notes.

Testimony was also rejected of a witness who was a flag staffman in a corps of surveyors employed by the "Dawes Commission" in the Indian Territory, which corps surveyed the line between said Territory and the States of Texas and Arkansas, and that by said line the place where the house in question was located was in Texas. The knowledge of this witness as to this survey, and the data upon which it was based, was purely hearsay. No governmental authority, certainly so far as Arkansas and Texas were concerned, was shown for this survey. For this reason it was inadmissible. 3 Wigmore on Evidence, 1665. It does not fall within the rule which permit surveyor's oral testimony to be admitted. 2 Enc. of Ev. p. 713. Testimony as to the actual location of the house, as to whether it was north or south of the former bank of Red River, was admitted on each side, and this was proper; and this conflict has gone to the jury upon proper instructions. Evidence of ancient public boundaries may be shown by general reputation, by tradition, and by hearsay declarations of persons with knowledge, made before the controversy arose. 2 Enc. of Ev. p. 722. None of the rejected evidence was entitled to admission under this rule.

It is also insisted that the evidence is insufficient to support the verdict, and fails to show that the appellant "knowingly permitted or suffered gaming to be carried on in said house with sufficient frequency to render him liable criminally for so doing." The court is of opinion that the evidence is amply sufficient to justify the finding of the jury. It would serve no useful purpose to review the testimony here. Other questions have been presented and considered, but no error is found in the trial.

The judgment is affirmed.

LANGHORST v. ROGERS.

Opinion delivered November 2, 1908.

1. ADVERSE POSSESSION—SUFFICIENCY OF EVIDENCE.—Evidence that the tenant of one who, without color of title, claimed a certain unenclosed tract of land, cut rails, posts and building and board timber, as well as firewood, therefrom is insufficient to establish adverse possession. (Page 319.)
2. SAME—EXTENT OF POSSESSION.—One who, under claim but without color of title, takes actual possession of a part only of a tract of land will be held to have adverse possession only of so much as is within such actual possession. (Page 320.)
3. APPEAL—REOPENING CHANCERY CASE.—Where, on account of the court's misconception of the law, a chancery case was not fully developed, on reversing it this court will remand the case with directions to reopen the case and hear testimony. (Page 321.)
4. QUIETING TITLE—RECOVERY OF TAXES.—Where the plaintiff in a suit to quiet title recovered judgment as to a part of the land only, but proved that he had paid taxes on the entire tract, he is entitled to have a decree refunding the taxes on the portion of the tract not recovered by him. (Page 321.)
5. NEW TRIAL—EFFECT OF GRANTING.—Where a new trial was granted in a chancery cause, the effect was to open up the cause for rehearing, and the decree previously rendered did not become final at the end of the term. (Page 321.)
6. APPEAL AND ERROR—CONCLUSIVENESS OF RECORD.—The Supreme Court is bound by the record in a case. (Page 322.)

Appeal from Logan Chancery Court, Northern District; *J. Virgil Bourland,* Chancellor; reversed in part.

S. R. Allen, for appellant.

Appellant concedes that the south one-half of north-east one-fourth in controversy was forfeited to the State and by it in due form conveyed to appellee in 1888, and that he took and has held possession more than seven years under color of title. But the chancellor erred as to the west one-half of lot two. Appellee had no color of title to that, and his only right depends upon whether or not he held for seven years actual, hostile, open, exclusive and continuous possession. The burden of proof of adverse possession is upon him who asserts it. 1 Cyc. 1143; 57 Ark. 97; 65 Ark. 422; 61 Ark. 464; 1 Rice on Ev. § 92; 15 Ore. 385; 1 Best on Ev. § 269, p. 500; 1 Jones on Ev. § 77. And

such possession must be actual, hostile, open, exclusive and continuous for the period prescribed. 65 Ark. 422; 1 Johns. 156; 2 Head (Tenn.), 695; Tiedeman, Real Prop. § 697; 24 Pick. 106; 5 Mich. 256.

WOOD, J. This is a suit to quiet title to a fractional quarter section of land in Logan County, Arkansas. The land is described in the complaint as the west half of lot two, north-east quarter and the south half of north-east quarter of section six, township eight north, range twenty-three west.

The appellee claimed title to the south half by virtue of a a deed from the Commissioner of State Lands executed April 19, 1888, and possession thereunder for more than seven years, and he claims title to the south half by virtue of the seven years statute of limitations. The south half contained eighty acres, and the west half of lot two north-east quarter contained 54.88 acres. To the latter tract appellee set up title only by virtue of the seven years statute of limitations, but he did not claim to hold the west half under any color of title.

The appellant answered, denying appellee's claim of title to the lands in controversy by the statute of limitations, and setting up title in himself by virtue of a deed from the Little Rock & Ft. Smith Railway Company, of date July 7, 1882. It was not disputed that the title to the lands in controversy was in the Little Rock & Ft. Smith Railway Company prior to their forfeiture and sale for taxes. And appellee does not contend that the tax sale was valid. His only contention in the court below and here is that the commissioner's deed gave him color of title to the lands described therein, and that he took possession of the south half of the north-east quarter under said deed, and has held them openly and adversely for a period of more than seven years. As to this tract appellant concedes here that the decree of the chancellor was correct, and should be affirmed, and it is so affirmed.

So the only controversy here is as to the west half lot two of north-east quarter. Appellant concedes that appellee had "possession of a residence thereon and one or two acres around same, but contends that the possession was obtained through its tenant, and that such possession was not adverse to appellant. Appellant also contends that, even if appellee had adverse possession of the residence and the few acres surrounding it, such

possession could only give him title to that which he actually occupied, and not to the whole tract. There is evidence to warrant the finding of the chancellor that the possession of the house and the few acres around it on the west half which appellee held through his tenants was adverse. The evidence shows that he took possession of this, regardless of any claims of appellant, and held it openly, adversely and continuously for more than the statutory period. But the proof shows that only the house and three or four acres around it was in the pedal possession of appellee. The evidence does not show that he had adverse possession to the residue of this tract. True, the evidence shows that the tenant of appellee cut rail, post, building and board timber, and got their fire wood from both the tracts. But this alone was not sufficient to constitute title by adverse possession. *Chatfield* v. *Earle Improvement Co.,* 81 Ark. 296; *Dickinson* v. *Connerly,* 81 Ark. 258.

One witness testified that he fenced about twenty acres of the woodland "on these lands" the year he cultivated them, but he does not show that any of the fencing was on the west half, or if so how much was inclosed and where. There is no evidence in the record, except what we have mentioned, tending to show that appellee held pedal possession of any of the west half of lot two, except the house and about four acres around it. The land was inclosed under a district fence in 1899, but this suit was begun in November, 1905. So appellee did not hold the lands under this enclosure for a sufficient time to give him title under the seven years statute of limitations.

The appellee, having no color of title to this tract, could only acquire title by adverse possession to such of it as he actually held *possessione pedis. Dickinson* v. *Connerly, supra.*

The evidence is not sufficient to show title by adverse possession to any of the west half of lot two north-east quarter, except about four acres on which the houses were situated, and appellee does not designate the portion of the tract where this four acres is situated. As the court decreed appellee title to the whole tract, he was not called upon, under the decree, to demand any lesser portion. But, as the court erred in decreeing title to the whole of the west half in appellee, he may, when the cause is remanded, if he so elects, define the three or four acres

upon which the houses are situated, and which he occupied for the statutory period, and have a decree accordingly. As to this, the cause has not been fully developed. *Long* v. *Charles T. Abeles & Co.*, 77 Ark. 156.

Appellee is also entitled to have the taxes prorated on the west half of lot two north-east quarter, and to have a decree for taxes he paid on the portion of the tract to which he has no title.

For the error indicated, the judgment is reversed and cause remanded for further proceedings, not inconsistent with this opinion.

ON REHEARING.

Opinion delivered December 21, 1908.

WOOD, J. When this cause was first decided, there was no brief for appellee. This court on application for rehearing, upon sufficient showing, set aside the judgment, the term being about to expire and permitted counsel for appellee to file brief as upon original consideration of the cause. On the record as presented, our first conclusion was correct. Counsel for appellee contends that the decree shows that the cause was heard upon "the depositions and oral testimony," and that, as there is no bill of exceptions preserving and presenting the oral testimony, the judgment must be affirmed. True, the first judgment that was rendered at the September, 1906, term recites that "the cause was submitted on the complaint, answer, reply, exhibits, depositions and oral testimony." But the record also of that term, after the entry of the decree, contains the following: "On this day the plaintiff filed his motion for new hearing in this cause, motion granted by the court, and cause by consent continued." At the February, 1907, term of the court recites: "Now comes on for hearing before the court the motion for a new trial heretofore filed in this court. * * * The court, being well and sufficiently advised in the premises, doth grant the said motion for new trial and vacate the decree heretofore rendered herein. The cause is resubmitted upon the pleadings and depositions of the witnesses," etc.

We are of the opinion that the granting of the motion for new hearing at the September, 1906, term of the court *ipso facto*

vacated the decree that was rendered at that term, opened up the cause for rehearing and prevented the decree from becoming final, on the adjournment for that term.

Such was the inevitable effect of the order, and the court at the subsequent term correctly so treated it by rehearing the cause at the February, 1907, term. At this final hearing the record shows that "the cause was resubmitted upon the pleadings and depositions of witnesses." Counsel says "it seems that it was inadvertently written that the cause was resubmitted upon the depositions." But we are bound by the record. If the record does not speak the truth in this respect, counsel should have had the record corrected. We can only consider the cause as having been heard upon the "pleadings and the depositions of witnesses," as set forth in the record.

On the question of taxes, the appellant in his answer and cross-bill offered to repay to appellee "all amounts paid out by him for taxes," and appellant in his cross-bill asked to have judgment for the "possession of all said lands on the payment of all the taxes, etc., that may be found due to W. S. Rodgers." It was upon these allegations of appellant's pleading that we awarded appellee a decree for taxes. The motions by appellee and appellant for reconsideration are therefore overruled.

WARREN v. STATE.

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Opinion delivered December 7, 1908.

ASSAULT—CONVICTION OF EXCESSIVE DEGREE—REDUCTION OF PUNISHMENT.—Where a conviction of an aggravated assault is not sustained because no assault with a deadly weapon, instrument or other thing is shown, but the evidence sustains a conviction of a simple assault, the case will be reversed with directions to sentence for the latter offense, unless the Attorney General asks that the case be remanded for a new trial.

Appeal from Nevada Circuit Court; *Jacob M. Carter,* Judge; reversed.

Hamby & Haynie, for appellant.

There is no proof to sustain a conviction of aggravated assault. Kirby's Digest, § 1587.

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

The evidence clearly shows an abandoned and malignant disposition on the part of the assailants, and is sufficient to sustain the verdict, under the statute. Kirby's Digest, § 1587. It is immaterial whether Warren actually kicked Tardy or not; it is manifest that he aided, participated in and assented to the commission of the crime. 45 Ark. 361.

BATTLE, J. John P. Warren was indicted by grand jury of Nevada County for an assault with an intent to kill one A. H. Tardy, and was convicted of an aggravated assault, and his punishment was assessed at a fine of $500, and imprisonment for one hour in jail; and he appealed.

The evidence adduced in the trial tended to prove the following facts: Appellant and A. H. Tardy met at a hotel in the town of Prescott, in this State, and after conversation for a few minutes took a drink of whisky, and then started out for a walk through a park. While walking, they were overtaken by one Joseph Brown, and Tardy was assaulted and unmercifully bruised and beaten by Brown, while Warren stood by and, despite of the cries of Tardy for help, failed and refused to interfere to aid or relieve him in any way. After a most cruel beating, he was allowed to get up, and had not proceeded far on his way when he was again assaulted, knocked down and beaten.

One witness testified that Warren kicked him in the head while down; and a physician who examined the wounds testified that one or two of the wounds could have been caused by a man's shoe. Other evidence tendered to exonerate the defendant. But there was no evidence to show that Warren assaulted Tardy "with a deadly weapon, instrument or other thing," and he therefore could not have been legally convicted of an aggravated assault (Kirby's Digest, § 1587). The evidence, however, was sufficient to convict Warren of an assault.

In view of the fact that the evidence does not sustain a conviction of an aggravated assault, but is sufficient to convict the appellant of an assault, a degree of the offense charged and in-

cluded in that of which he was convicted, a majority of us (of which the writer is not one) are of the opinion that so much of the judgment of the circuit court as includes the assault and one hundred dollars of the punishment, and the costs, be affirmed, and reversed as to the remainder (*Simpson* v. *State,* 56 Ark. 19; *Vance* v. *State,* 70 Ark. 272, 286; *Darden* v. *State,* 73 Ark. 315, 320), unless the Attorney General shall within fifteen days ask that the judgment of the circuit court be reversed, and the cause remanded for a new trial; and it is so ordered.

HAMPTON v. HICKEY.

Opinion delivered December 7, 1908.

1. STATUTES—REPEAL—GENERAL AND SPECIAL ACTS.—While the general rule is that a general act does not repeal a prior special act, the question is always one of intention, and the purpose to abrogate the particular enactment by a later general act is sufficiently manifested when the provisions of both can not stand together. (Page 327.)
2. SAME—REPEAL BY ENLARGING ACT.—A later statute which extends and enlarges a right before existing implied.y repeals the law by which the former was created or given. (Page 327.)
3. SAME—REPEAL BY EXCLUSIVE ACT.—When a later statute is exclusive, that is, where it covers the whole subject-matter to which it relates, it will be held to repeal by implication all prior statutes on that subject, whether they are general or special. (Page 328.)
4. SAME.—The special act of April 26, 1905, authorizing the special school district of Fordyce to borrow money to build a school building, to mortgage the real estate of the district, and to issue bonds, notes or other evidences of indebtedness not to exceed $15,000, was impliedly repealed by the general act of May 6, 1905, authorizing "all special school districts in Arkansas" to borrow money, without restriction as to amount. (Page 328.)
5. APPEAL AND ERROR—TEMPORARY INJUNCTION.—Where application is made to a court of equity for a writ of injunction, which is denied, and an appeal is prayed, the court may make an order to protect the rights of the appellant for a reasonable time until he can apply to the Supreme Court or one of the judges thereof for a temporary injunction in aid of the appellate jurisdiction of the court; but, after the Supreme Court acquires jurisdiction, its authority is exclusive. (Page 329.)

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

STATEMENT BY THE COURT.

The complaint alleges that G. M. Hampton, the plaintiff, is a citizen and taxpayer of the city of Fordyce, which was organized into a special school district under the laws of the State of Arkansas providing for the organization of special school districts co-extensive with the territory of any incorporated city or town; that the Legislature, by an act approved April 26, 1905, authorized said special school district to borrow $15,000, but that it has undertaken to borrow $25,000, and, unless restrained, will issue bonds for that sum, secured by a mortgage upon the property of the district, and such bonds may get into the hands of an innocent holder. He therefore prays for an injunction.

The defendants answered, admitting the allegations of the bill and alleging that on April 2, 1908, all members of the board being present, it was found that it needed money to erect new school buildings, and that buildings adequate to the needs of the district would cost $25,000, and the board thereupon resolved to issue bonds for that amount, secured by a mortgage on the real property of the district and a pledge of its revenues, and adopted resolutions providing the form of the bonds, the rate of interest thereon, and the form of the mortgage, and directed the defendants to execute it. They deny that the school district is authorized to borrow only $15,000, but say that at the time the special act described in the complaint was passed the school board could borrow money and mortgage the property of the district only after the submission of the question to the electors of the district at an annual school election, and the object of the special act was to enable the school directors of this district to issue bonds and execute a mortgage without such election; but after said special act was passed the Legislature passed an act applicable to all special school districts, authorizing the board of directors of such special school districts to borrow money and mortgage the real property of the district, without submitting the question to the electors and leaving the amount to be borrowed to the discretion of the board.

Evidence was adduced to show that the board of school

directors passed the resolution referred to in the answer, and that it will require $25,000 to construct the buildings needed in the district. That two buildings are needed, one for white and the other for colored children.

The chancellor found that the special school district of Fordyce had the power to borrow the $25,000 under the general act of May 6, 1905, and that the special act was repealed by it.

Therefore a decree was entered denying the prayer for injunction and dismissing the complaint for want of equity.

Plaintiff has duly prosecuted an appeal to this court.

T. B. Morton, for appellant.

A general act does not repeal a special act upon the same subject unless there is an invincible repugnancy between them. 50 Ark. 132; 51 Ark. 567; 52 Ark. 449; 53 Ark. 339; *Id.* 417; 54 Ark. 237; 72 Ark. 125; 80 Ark. 413; 81 Ark. 464; 63 Ark. 403. Here there is no inconsistency between the limitation as to the amount the special school district could borrow conferred by the special act and the general authority to borrow given to any school district by the general act. Repeals by implication are not favored. They will be declared only where there is an irreconcilable conflict between the two statutes. 28 Ark. 325; 29 Ark. 237; 34 Ark. 499; 48 Ark. 159; 56 Ark. 47; 41 Ark. 149; 45 Ark. 92.

Rose, Hemingway, Cantrell & Loughborough, for appellees.

The rule that ordinarily a general act does not repeal a prior particular act is not disputed; but that principle has no application here. The general act applies to *all* special school districts. Acts 1905, p. 652. Its manifest object was to place all special school districts in the State on an equal, uniform basis, and to permit all of them to borrow money and mortgage their property upon appropriate resolutions by their boards of directors. The general act only extends and widens the power of the special school district over the limited power conferred by the special act, and is applicable to any and all special school districts. The general act repeals the special act in this case by implication. 19 Ohio St. 320; 152 Pa. St. 244; 25 Atl. 556; 166 Pa. St. 152; 30 Atl. 831; 114 Ill. 138; 44 Mo. 159; 75 Minn. 456; 106 Ky. 628; 167 Pa. St. 628; Endlich, Int. Stat. § § 230, 231.

HART, J., (after stating the facts.) On the 26th day of April, 1905, the Legislature passed an act authorizing the special school district of Fordyce, in Dallas County, Arkansas, to borrow money to build and equip a suitable school building for said district, to mortgage any part or all of the real property of said district, and to issue bonds, notes or other evidences of indebtedness, not to exceed the sum of $15,000, under such conditions as to time and manner of payments as the school directors of said district may prescribe. Acts 1905, p. 508.

On the 6th day of May, 1905, at the same session the Legislature passed an act which provided "that all special school districts in Arkansas are hereby authorized and impowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and to mortgage the real property of the district as security therefor, under such conditions and regulations as to time, amount, rate of interest and manner of payment as the board of school directors of said school district shall prescribe, and to renew and extend from time to time any evidences of indebtedness or mortgages, or both, issued or made by virtue hereof."

The sole issue raised by the appeal is whether the first is repealed by the passage of the second act. The general act does not expressly repeal the special act. The general rule on the subject of repeal by implication is that a general act was not intended to repeal a prior special act. *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 119; *Chamberlain* v. *State,* 50 Ark. 132.

But, as stated by the author in Lewis' Sutherland, Statutory Construction, vol. 1, § 276: "There is no rule of law which prohibits the repeal of a special act by a general one, nor is there any principle forbidding such repeal without the use of words declarative of that intent. The question is always one of intention, and the purpose to abrogate the particular enactment by a later general statute is sufficiently manifested when the provisions of both can not stand together."

In his illustrations many of the cases relied upon by appellees are cited and reviewed as sustaining the text.

The same author at § 254 says that a new act which extends and enlarges a right before existing impliedly repeals the law by which the former was created or given.

In *State* v. *West Duluth Land Co.,* 75 Minn. 467, it appeared that St. Louis County was prohibited by a special act passed in 1877 to issue bonds, except to refund its existing indebtedness. A general act was passed in 1895 which authorized any county in the State to issue bonds for the purpose of building roads and bridges. It was held that the general enabling act removed the limitations in the special act. In discussing the question the court said: "This law, which expressly authorized any county in the State (making no exceptions) to issue bonds to build roads and bridges, was clearly hostile to the special law, previously enacted, which prohibited the further issuance of any bonds by the county therein named. These laws can not be harmonized, and, as a consequence, the special law stands repealed."

This rule has been recognized and applied in the following cases: *Dutton* v. *Aurora,* 114 Ill. 138; *State* v. *Pearcy,* 44 Mo. 159; *Hartford* v. *Hartford Theological Seminary,* 66 Conn. 485; *Acquackanonk Water Co.* v. *Passaic,* 65 N. J. L. 476; *Bruce* v. *Pittsburg,* 166 Pa. St. 152; *Cooper* v. *Wait,* 106 Ky. 628; *Garrison* v. *Richards,* 107 S. W. (Tex.), 861; *Mayor of Jersey City* v. *Jersey City & Bergen Rd. Co.,* 20 N. J. E. 360; *Commissioners of Knox Co.* v. *McComb,* 19 Ohio St. 320.

So, too, "it is a familiar rule that when a later statute is exclusive, that is, where it covers the whole subject-matter to which it relates, it will be held to repeal by implication all prior statutes on that matter, whether they are general or special." *United States* v. *Claflin,* 97 U. S. 546. This rule has been recently applied by this court in the case of *Western Union Telegraph Co.* v. *State,* 82 Ark. 302.

Applying these canons of construction to the facts in the present case, we are of the opinion that the general act repeals by implication the special act. The general statute by its title is "An act to permit any special school district in the State of Arkansas to borrow money for building purposes, etc."

Section 1 provides "that all special school districts in Arkansas are hereby authorized and impowered, etc."

The words used, 'any and all,' evidence the intention of the Legislature to create a uniform system to operate on all special school districts alike. At former sessions of the Legislature special acts had been passed enabling the special school district

named in the act to borrow money to build a school house. A great number of these special acts were introduced and some passed at the 1905 session. Then the general act was passed. It is broader in its scope than any of the special acts. It covers the whole subject-matter embraced by them, and the objects designed to be effected are the same. Then, too, the two statutes in question are inconsistent, and can not both stand. The special act provides that, "for the purpose of borrowing money to build and equip a suitable school building for said district," the board of directors are impowered to issue evidences of indebtedness, "not to exceed the sum of $15,000." Under this act, if the building was destroyed, or if the needs of the district required a building that cost more than $15,000, the board would be powerless to act. In the general act, no restrictions as to amounts are imposed by the terms of the act, and it thus enlarges the power given by the special act. Hence the two acts can not be harmonized, and are repugnant to each other.

In this case at the same term after the decree denying the injunction prayed for and dismissing the complaint for want of equity had been entered, the court added the following order: "And, it appearing that the case is one involving public interest and that the cause will be advanced by the Supreme Court, it is therefore ordered that the defendants be restrained from executing the bonds and mortgages described in the complaint herein, or any similar bonds and mortgage, until this cause has been heard in the Supreme Court. The matters involved in this litigation are to remain *in statu quo* until the hearing in the Supreme Court."

Courts of equity have the power to make orders to protect the rights of parties for a reasonable time after the determination of the suit in that court. But after this court acquires jurisdiction it has full power over the whole cause with regard to all things appearing on record. The language above used is that of Mr. Justice EAKIN as appears from the opinion in the case of *Payne* v. *McCabe,* 37 Ark. 318.

The orders of the chancellor in such cases are determinable, and should not be made to extend beyond a reasonable time in which the party desiring to preserve the *status quo* of the parties or of the subject-matter of the litigation may apply to this court

or one of the judges thereof for a temporary injunction in aid of the appellate jurisdiction of the court. See Kirby's Digest, § 1186. This is the proper rule of practice in such cases, as approved by the court in the case of *Little Rock Railway & Electric Co.* v. *North Little Rock,* 76 Ark. 48, where the precise question was involved in determining the rights of the parties under a temporary injunction granted by the Chief Justice during the pendency of an appeal in the case of *Little Rock* v. *North Little Rock,* 72 Ark. 195.

Therefore it is ordered that the temporary injunction be dissolved, and that the decree of the chancellor be affirmed.

HILL, C. J., disqualified and not participating.

SHEMWELL *v.* FINLEY.

Opinion delivered December 7, 1908.

FERRIES—TRANSPORTATION BY ONE NOT LICENSED.—Kirby's Digest, § 3582, making one not licensed to keep a ferry liable to a penalty if he shall charge any person any money or other valuable thing for transporting him, is violated where a non-licensed ferryman transported persons in consideration of their assisting in repairing his ferry boat.

Appeal from Clay Circuit Court, Western District; *Frank Smith,* Judge; reversed.

G. B. Oliver, for appellant.

Not only was the fourth instruction given by the court erroneous, but the instruction requested by the plaintiff is the law and should have been given. Labor is a "valuable thing," and afforded a sufficient consideration to support the promise of defendant to give ferriage to the parties who performed labor on the boat. Kirby's Digest, § 3582; 9 Cyc. 308, 311; Bishop on Contracts, § 38.

F. G. Taylor, for appellee.

The questions in this case are settled in 44 Ark. 184. The fourth instruction is correct. *Id.*; 19 Cyc. 501.

BATTLE, J. On the 26th of June, 1906, C. R. Shemwell brought an action against William Finley and J. E. Talley for

penalties for violation of section 3582 of Kirby's Digest, which is as follows:

"If any person shall keep any ferry over any navigable stream, for which he shall charge any person any money or any other valuable thing, without complying with the provisions of law in relation to obtaining license, he shall forfeit and pay to every other person having a licensed ferry on the same stream or lake, in the same county, five dollars for every person so ferried, and the same sum for every wagon or other article so transported, which may be the subject of a separate charge, to be sued for and recovered by civil action, founded in this statute, with costs of prosecution."

He alleges that he is licensed to operate, and is operating, a ferry across Current River in the Western District of Clay County, in this State, for the purpose of transporting passengers and freight. That the defendants are now, and for ten months last past have been, unlawfully and wrongfully operating a ferry across the same stream, and in the same district and county, and within one mile of plaintiff's ferry, and have wrongfully and unlawfully transported certain persons named across the river for hire, and have thereby become liable to plaintiff in the sum of $750, as a penalty for the violation of the statute. And he asked for judgment for that amount.

The defendants answered and denied the allegations of the complaint.

Defendants recovered judgment, and plaintiff appealed.

In the trial of the issues in the action before a jury evidence was adduced which tended to prove that plaintiff was licensed to operate a ferry, owned by him, across Current River, in the western District of Clay County, for the year 1906, and in pursuance of his license operated the same; that Finley owned a place on that river about a mile or less from plaintiff's ferry, and Talley rented it in the year 1906; that about the first of February, 1906, there was an old ferry boat there, part of it being in water and part on land; that Finley agreed to repair the boat and put it into the river, and defendants were to operate it; that many persons, in consideration of the promise of Finley that they should be transported arcoss the river at such place free of charge, whenever they desired to cross, until the first day of

January, 1907, assisted in repairing and launching the boat, and in pursuance of such provision many or all of them were transported in such boat across the river, free of additional charge, Talley propelling the boat. Many were transported across the river in the boat under a tacit agreement that the ferryman should receive compensation by money dropped as donations, but really as compensation, on the bottom of the boat, when they crossed.

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

"You are instructed that the defendant and all citizens have the right to cross the river and their properties and families and the members thereof at all times in their own craft without being liable therefor, and that, as to such persons as were ferried across the river in consideration of their assisting in the repairing and putting in shape of the boat to operate, there can be no recovery for such persons so ferried."

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

"If you find from the evidence that defendant Finley, either by himself or by some one so directed by him, procured the service of certain persons in repairing and launching this ferry boat by the agreement that thereafter they should have free ferriage, and that said persons thereafter were crossed on the ferry without paying anything for their transportation other than the labor as aforesaid, you will find for the plaintiff."

The persons assisting in repairing and launching the boat acquired no interest in the boat. They were to be compensated by transportation in the ferry boat across the river for the stipulated time, and their services were valuable things charged in advance by the defendants for such transportation which they or some of them afterwards received. This was a violation of section 3582 of Kirby's Digest; and appellant is entitled to recover the penalties provided by the statute.

In *Hunter* v. *Moore,* 44 Ark. 184, cited by appellee, no compensation was charged or received as in this case; and that case decides no question in this.

The trial court erred to the prejudice of appellant in instructing the jury in the manner stated.

Reversed and remanded for a new trial.

TATE v. LOGAN.

Opinion delivered December 7, 1908.

1. LACHES—UNREASONABLE DELAY.—Equity will not set aside a chancery sale upon the ground that the decree upon which it was based had been satisfied before the sale if the parties interested waited for seventeen years after the vendee acquired his deed and took possession of the land, and until the vendee has died and the land passed into the hands of innocent purchasers. (Page 334.)
2. SAME—NECESSITY OF PLEA.—Equity will deny relief to a party who is guilty of laches, though the defense is not specially pleaded. (Page 335.)

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

Harris & Ivie, for appellants.

1. The sale of the lands under the judgment was never approved and confirmed. The report of sale does not describe any lands, nor show that plaintiffs ever had any notice of the proceedings, and without notice could be no confirmation, and without confirmation there could be no sale. 69 Ark. 539. An order of confirmation of a sale is a final judgment. 73 Ark. 110. Judgments and orders without notice are void. Kirby's Digest, § 4424.

2. A void judgment is no judgment in legal effect. No rights are divested, and none can be obtained. It binds no one. 58 Ark. 186; Freeman on Void Judicial Sales, § 23 and notes; 12 Am. & Eng. Enc. Law (1 Ed.), 150-1 and notes; 23 L. R. A. 120 and notes.

3. The order of confirmation should describe the lands. 12 Am. & Eng. Enc. (1 Ed.), 75; Rorer on Jud. Sales, § § 109, 500.

4. Defendants having gone into possession under a void sale, their rights are those of a mortgagee in possession. 55 Ark. 326. They must apply the rents and profits to the payment of the debt. 54 Ark. 81; 30 *Id.* 520; 36 *Id.* 17; 49 *Id.* 508; 52 *Id.* 381; 2 Jones on Mort. § 1118.

5. The transfer of the certificate of purchase was a redemption, and not an assignment, and the certificate became void. 2 Jones on Mortgages, § 1051; Mansf. Digest, § § 3054, 3067, 3072. Adkins had the right to redeem as junior mortgagee. 2 Jones on Mort. § 1064, 1069, 1086.

Appellee, pro se.

1. The chancellor's finding of facts are conclusive unless against the clear preponderance of the testimony. 68 Ark. 314; 81 *Id.* 68.

2. The order of confirmation did not have to describe the lands, since the order refers to the lands heretofore ordered to be sold.

3. When the right of J. D. Atkins to redeem expired, the right of appellants also expired.

4. J. D. Tate did not pay off the judgment, and had no right to redeem. The money was from A. G. Atkins, and J. M. Williams assigned the certificate to him, and the deed was properly made to him and properly approved; hence none of the authorities cited by appellant are applicable.

McCULLOCH, J. Appellee, Logan, holds possession of the land in controversy, and claims title thereto under a sale pursuant to decree of the chancery court of Madison County, rendered in 1887 in a cause wherein J. M. Williams, administrator of Bayles Moore, deceased, was plaintiff and J. D. Tate was defendant. The land was sold to the plaintiff in that cause, who assigned a certificate of his purchase to one Atkins, to whom the commissioner's deed was executed. Atkins received his deed in November, 1890, and obtained possession of the land. Atkins's heirs conveyed the land to Powell, who in turn conveyed it to Sisemore, and the latter conveyed it to appellee in 1896 by warranty deed.

On January 11, 1888, J. D. Tate, the defendant in said decree, conveyed his interest in the land to appellees, Mary E. Tate, Lillie Tate and Ida E. Tate, who, in January, 1907, instituted the present suit to redeem from the chancery sale made in 1887 and to recover the land. They allege in their complaint that the decree was paid off after the sale had been made, but before the deed was executed, and that the sale was never confirmed by the court. The deed contains a recital that the sale was confirmed by the court and an approval of the deed, and the allegation of the complaint concerning the matter is not sustained.

We are of the opinion that the preponderance of the evidence sustains the contention that the decree was paid off after

the sale of the land thereunder, but appellants are barred, on other grounds, from recovering the lands. The evidence shows that a payment of two hundred dollars was first made on the decree by J. D. Tate himself. Afterwards one of the appellants intrusted enough funds to pay the balance of the decree to Shaw and Davis, who were attorneys for Atkins. They paid the money over to Williams, administrator of the Moore estate, who was the plaintiff in the decree, and who was also the purchaser of the land at the sale, and he, at the request of Shaw and Davis, assigned the certificate of purchase to Atkins. Atkins then procured a confirmation of the sale and a deed for the land, and then sold it after he got possession. The lands passed through the hands of several purchasers for value, and there is nothing, either in the pleadings or proof, charging them with actual notice of any frailty in the conveyance from the commissioner of the court to Atkins. Atkins is dead, and appellees have waited seventeen years after he procured his deed and took possession of the land before they made any movement to question the validity of the conveyance to him under the decree. Meanwhile, the lands have passed, for valuable consideration, from purchaser to purchaser, who, as far as this record discloses, are innocent of any actual knowledge of a defect in the title. No reason is shown why appellees did not commence their action to recover the land earlier, as it does not appear that they rest under any legal disability. Neither does it appear that there are any facts affecting the title which they were not apprised of many years ago. They are therefore barred, on account of their own laches, from asking a court of equity for relief. *Turner* v. *Burke,* 81 Ark. 352; *Sturdivant* v. *Cook,* 81 Ark. 284; *Dickson* v. *Sentell,* 83 Ark. 385; *Jackson* v. *Becktold Printing Co.,* 86 Ark. 591.

Laches was not specially pleaded in the answer, but this was not necessary. *Wilson* v. *Anthony,* 19 Ark. 16; *Dickson* v. *Sentell, supra.*

We are therefore of the opinion that the decree is correct.

Affirmed.

GRIFFIN v. WELCH.

Opinion delivered December 7, 1908.

MORTGAGES—DEED ABSOLUTE IN FORM—SUFFICIENCY OF EVIDENCE.—A deed absolute in form will be construed to be intended as a mortgage in effect if the proof of such intent is clear, unequivocal and convincing.

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

R. G. Harper, for appellant.

1. In the absence of fraud or imposition, it requires clear and decisive testimony to prove that a deed absolute in form was intended as a mortgage, and a conveyance absolute in form is not converted into a mortgage by a contemporaneous agreement for a re-sale and purchase. 75 Ark. 551.

2. The tender was insufficient under the proof, for it is shown by uncontradicted testimony that the actual amount due was $872, instead of $725.

W. D. Chew and *J. H. Green,* for appellee.

1. The case of *Hays* v. *Emerson,* 75 Ark. 551, is not a similar case. There was fraud and imposition in this case, and the great preponderance of the testimony shows clearly the deed was intended as a mortgage. 68 Ark. 314; 73 *Id.* 489; 67 *Id.* 200.

2. Counting the $100 called *rent,* there was due $672; the tender was $725, leaving $53 for appellant's loss of time, which was ample.

McCULLOCH, J. Appellee, G. T. Welch, owned a tract of land in Union County subject to the purchase money lien of Anderson, his vendor, and conveyed it to appellant, G. B. Griffin, by deed absolute in form. He instituted this action to have the deed declared to be a mortgage and to be allowed to redeem from it. He alleges in his complaint that the deed, though absolute in form, was in fact executed as security for debt, and was agreed by the parties thereto to be a mortgage; that he had tendered to appellant the amount of the secured debt, with interest, but that appellant had refused to allow the redemption and claimed the land absolutely.

Appellant answered, denying all the allegations of the com-

plaint as to the deed being intended as a mortgage, and asserting that the deed was intended as an absolute conveyance according to its import. The chancellor granted the relief prayed for, declaring the deed to be a mortgage and allowing redemption therefrom. The rule is firmly established by repeated decisions of this court that in order to change, by parol testimony, the purport of a deed absolute on its face by showing that it was executed as a mortgage, the proof must be "clear, unequivocal and convincing." *Rushton* v. *McIllvene, ante* p. 299, and authorities cited.

There is a decided conflict in the direct testimony as to the agreement between the parties when the deed was executed. Welsh testifies positively and definitely that Griffin agreed to furnish the money with which to pay off the debt to Anderson and to accept the conveyance as security therefor. Griffin testifies as positively that no such agreement was made, and that the conveyance was intended to be absolute. He admits, however, that about a month after the execution of the deed he agreed to re-sell the land to Welch for the amount which he (Griffin) had paid out, with interest, and "pay for the time he had been out."

There is also a good deal of corroborative testimony on both sides. There are, however, two undisputed circumstances which weigh very heavily in favor of the contention of appellees and convince us beyond reasonable question that appellees are correct in their contention that the conveyance was executed and accepted as security for debt.

Griffin says that Welch came to his house and stated that he could not borrow the money to pay the land out, and that he (Griffin) could take it. Welch had also mortgaged the land to a Mr. Goodwin for $100, and on the day the conveyance was executed, before it was executed, the Goodwin mortgage was satisfied by a note for the debt executed by Welch and signed as security by Griffin. Welch afterwards paid this note. Now, as Welch was a very poor man, and could not raise the money to pay off the Anderson debt, why, if he had to give the land up entirely, did he undertake to pay the Goodwin debt in order to remove that incumbrance? If, as Griffin claims, the execution of the conveyance was in effect an abandonment of the land because he could not pay the debt against it, why did he not aban-

don it with the Goodwin incumbrance on it too? If that was true, it seems to us that he would not have shown so much concern about the Goodwin debt as to renew it and afterward pay it off. The land, according to the preponderance of the testimony, was worth considerably more than the Anderson debt, and Griffin was anxious to get it because it was near his lands. Therefore it seems more reasonable that, if Welch intended to abandon the land altogether, he would have done so with the Goodwin incumbrance on it.

The other undisputed controlling fact is this: In January, 1904, Welch gave Griffin a note for $100 for rent of the land; being still in possession. When he paid the amount of the note to Griffin in November, 1904, he required the latter to give him a receipt, reciting that he agreed "to let this $100 go as a part payment on the place or land if they pay for the land on or by January 1, 1905."

Welch tendered the balance of amount due on November 28, 1904, which was withn the terms stipulated in the receipt.

We think the evidence is sufficient to sustain the finding of the chancellor, and the decree is affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* STATE *use* BOONE COUNTY.

Opinion delivered December 7, 1908.

RAILROADS—DUTY TO CONSTRUCT CROSSING.—Under Kirby's Digest, § 6681 *et seq.*, requiring railroad companies to construct highway crossings whenever their roads cross a public highway, it is contemplated that a crossing shall be constructed whenever a railroad track is laid at the crossing and ready for trains to pass over.

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

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

The statute under which this action is prosecuted is highly penal, and should therefore be strictly construed. Kirby's Digest,

§ § 6681 to 6684 incl.; 40 Ark. 97; 1 Conn. 502; 38 Ark. 519; 43 Ark. 413; 53 Ark. 336; 56 Ark. 45-47; 59 Ark. 344. Statutes *in pari materia* are to be construed together as one statute, each a part of the other. 40 Ark. 452; 4 Ark. 410. Section 2941, Kirby's Digest, therefore should be read and construed with these sections. It gives the railroad company the right to build across a public road, and provides that *after* it has done so it shall restore the road or highway to its former state, as nearly as may be. If it can not be restored to its former state, then by section 6681 the company must make a crossing, or, if necessary, a bridge or overhead crossing—the other sections providing the procedure on the part of the public and the remedy. Where statutes declare the rights of parties and prescribe the remedy, the remedy thus provided is exclusive, and must be strictly pursued. 59 Ark. 356; 71 Ark. 235 and authorities cited. The notice required by section 6682 is the foundation of the action. There is no such person or corporation as the "St. Louis, Iron Mountain & Southern Railway," and a notice addressed in that form is a fatal variance. 69 Ark. 363; 68 Ark. 241; 66 Ark. 120; 58 Ark. 248. In any case the alleged notice was premature, having been given at a time when appellant was in good faith prosecuting its work, and had not completed same at the place in controversy; and the notice is further insufficient as a basis of action because not filed with the county clerk at the expiration of the time allowed by statute. Kirby's Digest, § 6683.

Wm. F. Kirby, Attorney General, *Crump, Mitchell & Trimble* and *Frank Pace,* for appellee.

The act relied on by appellant, Kirby's Digest, § 2941, to sustain its contention that it could not "be compelled to restore the highway to a state of usefulness until after it had built its railroad across the same," nowhere gives power to a railroad corporation to take charge of and destroy the public's right of passage over a public highway until after it had built across the same. On the contrary, it is the law that when a railroad company crosses a public highway, it must restore the highway as nearly as may be to its original state of usefulness, and that without unreasonable and unnecessary delay. 20 L. R. A. 165; 37 W. Va. 97; 58 N. Y. 165; Elliott on Roads & Streets, § 779; 75

Am. Dec. 778; Redfield on Railways, 515-518. The notice was sufficient under the statute. Kirby's Digest, § 6622. It was served on an agent of the appellant near the place where the crossing was to be constructed; described a highway that is crossed by appellant's railroad, and there is no other railroad in that country. It is immaterial that the word "company" was omitted from the address in the notice. The object of filing the notice in the county clerk's office is to call attention of the prosecuting attorney to the matter, and not as constructive notice to the company, because it has previously had actual notice. Here the notice was filed September 28, 1907—a sufficient compliance with the statute. Kirby's Digest, § 6683.

BATTLE, J. The State of Arkansas for the use of Boone County brought an action against the St. Louis, Iron Mountain & Southern Railway Company. After alleging that the defendant owned a line of railroad through Boone County, in this State, it alleged in its complaint as follows: "That the defendant, in constructing its said line through Boone County, constructed the same across that certain public road leading from Harrison to Lead Hill and known as the old Harrison and Lead Hill road on what is known as Oregon Flat, in road district No. 7, Boone County, Arkansas, the point where the said railroad crosses the said public road being on the southwest quarter of the northeast quarter of section eight in township nineteen, range nineteen. That the said defendant has failed and refused to construct a public crossing at said point where the said defendant built its line of railroad across said public road leading from Harrison to Lead Hill and known as the Old Harrison and Lead Hill road on Oregon Flat in Road District No. 7, in Boone County, Arkansas, as required by law. That, by the making of a cut at said point about 150 feet wide and about sixty feet deep, the defendant has obstructed said public road, thereby making it impossible to cross said road at said point. That on February 26, 1906, I. W. Miller, road overseer of said road district No. 7, notified the said defendant as required by law that the said railroad crossing at said point was not constructed as the law required, and notified the said defendant so to construct said crossing within sixty days from the service of said notice. And plaintiff further says that,

notwithstanding said notice, the defendant still fails and refuses to construct a crossing at said point.

"Prayed judgment for $2,000 and $5 per day from the 26th day of April, 1906, until the trial, etc."

The defendant answered and denied the allegations in the complaint.

In the trial of the issues in the action evidence was adduced tending to prove the allegations of the complaint. On the 26th day of February, 1906, when the notice to the defendant was served, defendant's railway where it crosses the public road was not completed, but its trains were running over its railway at that place, and had been in 1905. The cut across the public road made for the railroad was made four feet deeper after the notice was served. The company has constructed a bridge over the cut since the 26th of February, 1906, and the construction of the road is more expensive on account of it, but it can be done.

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

"2. The court further instructs the jury that you would not be warranted in finding for the plaintiff in any sum unless you find that the defendant railway company failed for sixty days after it had had a reasonable time to complete the construction of its road across the public road after it obstructed said public road for a reasonable time to have had the construction of said road advanced to a state where the said defendant could have constructed a crossing over said public highway with a reasonable expense to said defendant and without unreasonably interfering with the work of constructing said road."

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

"If you find from the evidence that I. W. Miller was overseer of the road district in which the crossing in controversy was situated, and that on the 26th day of February, 1906, the time when he is alleged to have served the notice mentioned in the complaint, the defendant was in good faith prosecuting its work of making its railroad at the place mentioned in plaintiff's complaint, and that it had not, at said time, finished its work of construction at said place, you will find for defendant."

The jury returned a verdict for plaintiff for $1,500, and the defendant appealed.

Appellant insists that it had not completed its road at the public crossing at the time the notice was served upon it, but was prosecuting its construction at that place in good faith, and therefore was not subject to the penalties of the statute for failing to comply with it.

The statute provides as follows: "Whenever any railroad company or corporation has constructed, or shall hereafter construct, a railroad across any public road or highway of this State, now established or hereafter to be established, or where any public road or highway hereafter established shall cross any railroad now established or to hereafter be established, such railroad company or corporation shall be required to so construct such railroad crossing, or so alter or construct roadbed of such public road or highway that the approaches to the railroad bed, on either side, shall be made and kept at no greater elevation or depression than one perpendicular foot for every five feet of horizontal distance, such elevation or depression being caused by the construction of said railroad. Provided, at any crossing of any public highway such railroad may be crossed by a good and safe bridge, to be built and maintained in good repair by the railroad company or corporation owning or operating such railroad." Kirby's Digest, § 6681.

Upon the failure of the railroad company to comply with this statute, the road overseer is required to give the company notice of such failure and to require it "to so construct or change the construction of said crossing within the next sixty days that it will conform to the terms of the law." If it fails to do so within the time specified, it is subject to a certain penalty prescribed by the statute. Kirby's Digest, § § 6682-6684.

It is only after the railroad has been constructed across the public road that the statute requires the railroad company to construct its crossing or build a bridge in the manner prescribed. But when is it constructed? The statute does not require the railway to be completed. It seems to us that it is constructed when its track is laid at the crossing and ready for trains to pass over. It is then a railroad. There is no reason why public travel should be obstructed after that time in cases like this. The

bridge can not any more interfere with the further work upon the railroad than its own track or trains. Why should the building of the bridge be postponed when the track is laid and trains were operated over it? The company then enjoys the use and benefits of its road and trains. Should the public under such circumstances suffer delays and inconvenience, and the railroad company be relieved of them? It seems reasonable and just that the building of the bridge by the railroad company over the crossing should not longer be postponed when the track is laid and trains are running at that place. To do so would place it in the power of the railroad company to obstruct travel unnecessarily.

The instruction given over the objection of the defendant was not prejudicial to it, but was more favorable to it than it was entitled to.

Judgment affirmed.

COCHRAN *v.* CHETOPA MILL & ELEVATOR COMPANY.

Opinion delivered December 7, 1908.

SALE OF CHATTELS—RESCISSION.—Where, after ordering goods to be paid for on delivery, the vendee refused to receive them until he had inspected them and found them satisfactory, his demand amounted to a refusal to abide by the contract, and relieved the vendor from its obligation.

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

STATEMENT BY THE COURT.

H. K. Cochran brought an action against the Chetopa Mill & Elevator Company, before a justice of the peace of Pulaski County, to recover damages amounting to $32, which he claimed to have sustained by reason of defendant's failure to deliver to him 400 sacks of corn chops which he had purchased from it. In a trial the defendant recovered judgment, and the plaintiff appealed to the Pulaski Circuit Court; and a trial before a jury in

the circuit court was attended with the same result; and plaintiff again appealed.

In the trial in the circuit court appellant testified that he received a postal card from appellee, stating that it had some corn chops, and asked him to make a bid for them, and that he sent it the following telegram:

"May 11, 1907.

"Chetopa Mill & Elevator Co., Chetopa, Kan.,

"Your letter of the 8th, offer $1.08 delivered 500 100 pure corn chops, delivered immediately, inspection privileges, answer by telegraph immediately.

"H. K. Cochran."

This telegram was followed by letter.

"Little Rock, Ark., May 11, 1907.

"Chetopa Mill Co., Chetopa, Kansas:

"Gentlemen: We have your postal offering us 400 sacks chops at $1.10 delivered here, and we have wired you making you a counter offer of $1.08 delivered for immediate shipment and for inspection privileges on arrival of car. We now beg to confirm and wait your acceptance.

"Yours truly,

"H. K. Cochran."

On the same day the appellant received the following translated telegram:

"Chetopa, Kan., May 11, 1907.

"H. K. Cochran, Little Rock, Arkansas:

"Can sell one car load 400 sacks at $1.10 per sack now in Little Rock, inspection privileges subject our wire confirmation. Answer by telegram immediately.

"Chetopa Mill & Elevator Co."

And on the same day appellant wired as follows:

"Little Rock, Ark., May 11, 1907.

"Chetopa Mill & Elevator Co., Chetopa, Kan.:

"Accept 400 $1.10 delivered our track subject Monday's inpection satisfactory.

"H. K. Cochran."

After which appellant wrote appellee as follows:

"Little Rock, Ark., May 11, 1907.

"Chetopa Mill & Elevator Co., Chetopa, Kansas:

"Dear Sirs:—Your wire just to us 8 P. M., offering car corn chops 1.10 for immediate delivery, and we are writing you our acceptance of 400 sacks subject to chops proving satisfactory when inspection is made Monday. If the chops are good, and the weight is satisfactory, we will wire you Monday, and confirm the purchase, whereupon we will ask that you arrange for an immediate delivery.

"Yours very truly,

"H. K. Cochran.

"Quote lowest for car of mix corn."

At 12:52 the following day, May 12, 1907, the following telegram was received from the appellee:

"Chetopa, Kansas, May 12, 1907.

"H. K. Cochran, Little Rock, Ark.:

"Examine twenty-six seven eight Rock Island; wire acceptance or refusal early morning at a dollar ten per sack.

"Chetopa Mill & Elevator Co."

And in due course of mail the appellant received the following letter from the appellee:

"Chetopa, Kansas, May 12, 1907.

"H. K. Cochran, Little Rock, Arkansas:

"Dear Sir—An exchange of telegram has resulted in our selling to you 410 sacks of pure corn chops in second-hand bags at $1.10 per sack, f. o. b. Little Rock, with your privilege to examine the car 26780 R. I., and wire us Monday morning your acceptance or refusal. As this is a splendid car of chop, we have no doubt that you will take it. The freight on this car is paid, and you will find a draft for $393.60, at, we think, the Exchange Bank, which you will please pay and get B. Lading, and send us the balance when you unload the car. Three of us can make affidavit to the count of 410 sacks, and our count will govern unless you have them checked out by the railroad company and any shortage from our count noted on the expense bill. When we hear from you Monday, we will wire Mr. C. E. Jones, agent, to deliver you the car. The way the market is flirting and soaring, we are almost afraid to price stuff. For next day it is two or

three cents higher. We only have about 5,000 bushels more corn, and it is hard to buy. However, when you want any corn or chops, we will be pleased to hear from you.

"Yours truly,
"Chetopa Mill & Elevator Co."

On the following day, the 13th of May, 1907, the appellant and appellee wrote the two following letters:

"Chetopa, Kansas, May 13, 1907.

"H. K. Cochran, Little Rock, Ark.:

"Dear Sir—We got a letter from the Darrough Warehouse Company, saying they had paid the draft against car of chops, and were holding for our disposition. We wired them that we had sold the car to you, subject to your inspection, and if you wanted the car to deliver you the bill of lading. We have another bid of $1.10 on the car, and corn chops is still higher today, and we feel quite certain you will take the car. If not, wire us at once, and we will sell it to another dealer.

"Yours truly,
"Chetopa Mill & Elevator Co."

"Little Rock, Ark., May 13, 1907.

"Messrs. Chetopa Mill & Elevator Co., Chetopa, Kansas:

"Gentlemen: We have your wire dated Sunday, asking us to examine car 26780 R. I. and wire acceptance or refusal Monday morning at $1.10. We called the Rock Island early this forenoon, and asked them for an examination of the car, whereupon they stated that the car had been transferred from the north yards, which are across the river, and it is impossible for us to make an examination. We are therefore wiring you this forenoon that the car can not be examined, but as soon as the railroad transfers it to this side of the river we will make an examination and wire you our conclusion. In the mean time you can consider the car sold if the chops prove satisfactory. It may be two or three days, however, before we get an examination of the car, as everybody is having trouble getting cars pulled from the north side.

"Yours truly,
"H. K. Cochran."

Appellant wired appellee as follows:

"May 14, 1907.

"Darrough unloaded car chops on eleventh. Ship our car at once please, or order this car delivered to us.

"H. K. Cochran."

On the same day the appellant wrote appellee as follows:

"Little Rock, Arkansas, May 14, 1907.

"Chetopa Mill & Elevator Co., Chetopa, Kansas:

"Gentlemen—Referring to your telegram of the 11th and 12th, and our telegram and letter to you of the 11th and 13th, we beg to say our information from the railroad company on the 13th, when we wrote you and wired you, was that car 26780 R. I. was in North Little Rock, and that same would be placed so that we could examine it. Since then up to this very minute we have been struggling with the railroad company to get them to place the car where we could examine it, and are now informed that the car was unloaded on the 11th by Darrough Warehouse Company, who surrendered the bill of lading for this car. We beg by this means to ask that you ship us immediately 400 100 pound pure corn chops, for which we are to pay you $1.10 and this for immediate shipment. We have relied upon this car of chops to fill our orders, and do not understand how it is possible that you have permitted the Darrough Warehouse Company to have the chops. Please let the car come forward at once and thereby greatly oblige us.

"Yours truly,

"H. K. Cochran."

On the following day appellee wired:

"Chetopa, Kansas, May 15, 1907.

"H. K. Cochran, Little Rock.

"Will ship another car chops as soon as can get another set.

"Chetopa Mill & Elevator Co."

And on the same day the appellee wrote:

"Chetopa, Kansas, May 15, 1907.

"H. K. Cochran, Little Rock, Arkansas:

"Dear Sir: We received your wire this morning, advising that Darrough Warehouse Company had unloaded the car of chops we intended for you to examine. This is the first advice

we have had that the car was unloaded. We asked the Darrough Brothers to wire us a bid on the car when it arrived, which they did, but we did not accept and wired them to deliver car to you if you wished it. Since they have unloaded the car, we thought best to let them have it and ship you another car, and we are wiring you that we will ship you a car just as soon as we can get a car set. Will try to get the car out tomorrow.

"Yours truly,

"Chetopa Mill & Elevator Co.

"We have an order at $1.15 to a point taking the same rate as Little Rock."

The appellant wrote appellee some three letters, urging it to ship the car of chops as per contract. On May 27, 1907, appellee wrote that it had been trying to get a car on Katy. That it could have shipped sooner on the Missouri Pacific, but supposed appellant wanted the shipment on the M. K. & T.

On May 28, 1907, appellant wrote acknowledging the receipt of the letter of May 27, 1907, stating that he did not say that he preferred any particular routing, and as the chops were sold delivered the appellee had the liberty to route as he pleased.

On the seventh of June, 1907, appellant sent the following telegram to appellee:

"Chetopa Mill & Elevator Co., Chetopa, Kansas:

"Will pay original draft upon favorable inspection. Car arrived today.

"H. K. Cochran."

On June 9, 1907, appellee wrote to appellant that it was surprised to receive notice that draft for 440 with bill of lading attached for car of chops was protested. Did not agree to give privilege of examining car before paying draft. "If we hear from you to the effect that you will pay draft and protest fees, will return draft; otherwise will take for granted that you do not want the car on these terms, and we will sell to another dealer who will pay drafts when presented."

On June 10, 1907, appellee wrote to appellant that "the draft against car 16383 M. K. & T. was returned today with $4.15 protest fees on it. We are returning it to you today with protest fees added and have sent a letter to the bank there that if you

refuse to pay the draft, to deliver the draft and bill of lading tc another dealer there."

Appellant refused to pay the draft, and did not get the chops. Appellant "went into the open market and obtained quotations from all the dealers and finally bought from Bunch 400 sacks at $1.18 per sack and charged appellee with the difference between contract price, which was $1.10," and the $1.18, and brought this action for the same.

James A. Comer, for appellant.

It appears clear from the letters and telegrams between the parties that the shipment was to be made with privilege of inspection; yet, if there was any question as to what the parties meant, then it was a question for the jury, and not for the court. 35 Ark. 156. Where there is a conflict in the evidence, or where there is any evidence tending to establish an issue, it is error to take the case from the jury. 70 Ark. 74; 63 Ark. 94. See, also, 76 Ark. 520.

BATTLE, J., (after stating the facts.) After appellant failed to get the car load of chops in Little Rock, he, on the 14th day of May, 1907, ordered appellee to ship him 400 sacks of corn chops, agreeing to pay $1.10 a sack for the same. On the day following appellee, by telegram, agreed to do so. No condition was annexed to the order or acceptance. But, upon appellee drawing a draft upon him for the purchase price of the chops, appellant refused to pay it until he had inspected the chops and found them satisfactory, and appellee refused to deliver the chops until its draft for the purchase money was paid, and no sale was made. As the goods were sold by the manufacturer without inspection, the law implied a warranty that the chops were merchantable, and reasonably fit for the purpose for which they were intended. (*Main* v. *Dearing,* 73 Ark. 470, and cases cited; *Main* v. *El Dorado Dry Goods Co.,* 83 Ark. 15.) This was, in part, the legal effect of the contract as made. But appellant sought to interpolate into it the right to inspect the chops and the right to reject them if the inspection was not satisfactory to himself. As he sought to amend the contract, there was to be no sale until such inspection was made and proved satisfactory to him. His demand and contention amounted to a refusal to abide by his con-

tract as made, the effect of which was to relieve appellee of its obligation to appellant, if it elected to so treat the contract.

Judgment affirmed.

WOOD, J., dissenting.

COX v. COOLEY.

88 350
188 506

Opinion delivered December 14, 1908.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—AMENDMENT.—Where a bill of exceptions shows that the trial court gave oral instructions, but fails to show any request that they be reduced to writing or any exceptions to the instructions, the bill cannot be amended by motion for new trial, or affidavits attached thereto, stating that a request for written instructions was made or that the oral instructions were excepted to. (Page 351.)
2. SAME—BILL OF EXCEPTIONS—AFFIDAVIT OF BYSTANDERS.—It is only when the circuit judge refuses to certify a bill of exceptions as presented to him by a party that the latter is permitted to present his contention through the affidavits of bystanders. (Page 352.)
3. SAME—HOW MATTERS BROUGHT INTO RECORD.—Alleged errors of the trial court in refusing instructions asked by appellant and in permitting improper arguments to be made by appellee's counsel, will not be considered on appeal if they are not shown by the bill of exceptions, even though they are set out in the motion for new trial. (Page 352.)

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

J. N. Rachels, for appellant.

HILL, C. J. This is one of those unfortunate cases where a bitter controversy has arisen between neighbors over the ownership of a trivial amount of personal property. It is a replevin suit for the recovery of five pigs. There have been two trials in the circuit court, with opposite verdicts. The plaintiff recovered in the first instance, and his verdict was set aside by the trial judge, and this is an appeal from a verdict in favor of the defendant. The costs as taxed on the transcript amount to $331.40. The record is full of irreconcilable conflicts in the testimony, of impeachment of witnesses by attacks of their character, and of

contradictory statements. It is difficult to find a sadder chapter in the annals of the people.

There is ample evidence to sustain a verdict for either side, and it was just a question which side of the controversy would be believed by the jury. The appeal must be fruitless, for there is nothing properly brought before the court for review.

Appellant questions two instructions given orally by the court, both as to their correctness and as to their being given orally; and the refusal of the court to give three instructions which he alleges were requested; and also alleges that unwarranted and prejudicial arguments were made by the counsel for appellee.

The record shows that the court gave oral instructions, which were set out, but fails to show any request that they be reduced to writing, or exceptions to the instructions. This defect is attempted to be supplied by allegations in the motion for new trial. It is uncertain, even from these allegations, whether exception was taken to the court giving instructions orally, or whether to the correctness of the instructions, or both. The omission to have the exceptions noted in the record is sought to be supplied by an affidavit of the plaintiff and his attorneys verifying the motion for new trial, in which affidavit they state that the "counsel for plaintiff excepted to the giving of such oral instructions, and asked that his exceptions be noted of record with the statement that he believed that said instructions were prejudicial and erroneous;" and this was supported by the affidavit of a juror, who states that the counsel for plaintiff entered objections to the court giving its oral instructions by the court, and asked that his exceptions be noted upon the record.

It is not the office of a motion for new trial to present such matters. Section 6225, Kirby's Digest, provides that where a decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing and present it to the judge for his allowance and signature. If true, it shall be the duty of the judge to allow and sign it. If the writing is not true, the judge shall correct it or suggest the correction to be made, and when corrected sign it. Section 6226 provides that if the party excepting is not satisfied with the correction, upon his procuring the signa-

tures of two bystanders attesting the truth of his exception as by him prepared, the same shall be filed as a part of the record. But the truth of the exception thus made may be controverted.

If the other inadequacies of this attempt to correct the record be passed by, yet an indispensable requisite is absent. The matter sought to be made a part of the bill of exceptions by the affidavits of bystanders must be presented to the judge and disallowed by him. It is only where the judge refuses to certify a bill of exceptions as contended by the party that he may be permitted to present his contention through bystanders. *Fordyce* v. *Jackson,* 56 Ark. 594; *Vaughan* v. *State,* 57 Ark. 1; *Boone* v. *Goodlett,* 71 Ark. 577; *Ayer-Lord Tie Co.* v. *Greer,* 87 Ark. 543.

The refused instructions do not appear in the record, other than what is alleged to be such refused instructions are set forth in the motion for new trial; and the argument of counsel complained of does not appear in the record, other than as it is set forth in the motion for new trial. The motion for new trial can not be used, and has never been used, to incorporate anything into the record, or any exceptions to anything done by the court. Its sole use is to assign errors already committed by the court, except for newly discovered evidence as provided in the 6th paragraph of section 6215, Kirby's Digest. Its office is confined to presenting to the trial judge the questions which it is permitted to raise as provided in said section. Its purpose is to call the attention of the trial court to matters occurring in the trial which are alleged to be erroneous, and ask the trial court to correct the alleged errors; and, upon his failure to do so, to bring the errors thus complained of before this court for review. The reasons upon which this practice is based have been given by Mr. Chief Justice Taney in *Phelps* v. *Mayer,* 15 Howard, 160, whose language was adopted by this court in *Dunnington* v. *Frick Co.,* 60 Ark. 250, as follows: "It has been repeatedly decided by this court that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. * * * Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For, if it is brought to the attention of the court that one of the parties excepts to his opinion, he has

an opportunity of reconsidering or explaining it more fully to the jury. And if the exception is to evidence, the opposite party might be able to remove it by further testimony, if apprised of it in time." And the court in that case (*Dunnington* v. *Frick Co.*) approved this rule upon the subject: "If errors, or supposed errors, of any kind are committed by a court in its ruling during the trial of a case by a jury, the appellate court can not review these rulings of the court unless two conditions concur: First, these rulings must have been objected to when made, and a bill of exceptions taken, or the point then saved, and the bill of exceptions taken during the term; and, secondly, a new trial must also have been asked and overruled, and objected to, and this noted on the record." The same principle in regard to objections to argument of counsel have been announced in *Kansas City So. Ry. Co.* v. *Murphy,* 74 Ark. 156.

An application of these principles shows that the refused instructions, incorporated into the motion for new trial, which are not in the record, and the alleged prejudicial argument of counsel, which is incorporated into the motion for new trial, and which is not in the record, are not presented for the consideration of this court.

The judgment is affirmed.

DREYFUS v. BOONE.

Opinion delivered December 7, 1908.

1. INJUNCTION—ILLEGAL EXACTIONS BY MUNICIPAL CORPORATIONS.—While equity will not enjoin anticipated criminal prosecutions, either State or municipal, it will give relief from illegal exactions attempted by municipal corporations. (Page 358.)

2. SAME—PRAYER FOR RELIEF—CONSTRUCTION.—Though one suing for relief against an illegal exaction under an invalid municipal ordinance does not expressly sue for the benefit of all other citizens, still, if the relief sought would inure to their benefit, the prayer of the complaint will be so construed. (Page 358.)

3. MUNICIPAL CORPORATIONS—MONOPOLY.—A municipal ordinance granting to a person the exclusive privilege of removing the deposits from unsewered privies within the city limits for a fixed period, and to

charge a certain sum therefor, to be paid by the owner of the premises, is a valid exercise of police power if the ordinance is reasonable in its terms and designed solely for the protection of the public health. (Page 359.)

4. MUNICIPAL ORDINANCES—INVASION OF PRIVATE RIGHTS.—An ordinance providing for the removal of deposits from unsewered privies is not void for preventing the owner of premises from removing such deposits himself. (Page 360.)

5. SAME—PRESUMPTION AS TO VALIDITY.—Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the court, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of the health and welfare of the community. (Page 360.)

6. SAME—ILLEGAL EXACTION.—A municipal ordinance which arbitrarily fixed the price to be charged for cleansing unsewered privies and removing the contents therefrom, and then let an exclusive contract to the person who was willing to pay to the city the largest share of his profits, thus realizing a substantial sum to the city, imposed an unlawful exaction on the inhabitants of the city, and its enforcement will be restrained. (Page 361.)

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; affirmed.

Morris M. Cohn, for appellants.

1. If the penal provisions of the ordinances are to be tested, Dreyfus is not a proper party to the action; the city or its proper officials being the parties in interest. As to the penal provisions, Boone has a complete and adequate remedy at law, and chancery would have no jurisdiction.

2. There can be no question of the general authority of municipal corporations to prevent as well as suppress nuisances. 70 Ark. 12; 76 Ark. 250; Kirby's Digest, § § 5438, 5461, 5458, 5593. Certainly, night soil or excrement is of itself a nuisance. It has been decided that residents of a city or town are entitled to protection against offensive odors and noxious smells, whether emanating from things that are nuisances *per se* or things that may become such. 85 Ark. 553. As to unsewered privies, not only are cities invested with a large discretion in regulating them and in providing for their being kept in a sanitary condition, but if, in the judgment of the city authorities, the business of removing the offensive matter should be confined to one re-

sponsible person or company, and this is done, it is a legitimate exercise of power with which the courts will not interfere. And the right is not inherent in any inhabitant of a city to remove and dispose of the matter accumulated in his unsewered privy. 199 U. S. 306; *Id.* 325; 115 U. S. 683; 48 Fed. 458; 32 Fed. 403; 16 Wall. 57; 1 S. W. 606; 52 Mo. 177; 28 L. R. A. 679; 60 S. W. 355; 62 N. W. 41; 17 Am. Dec. 351; 126 Fed. 29, 39; 27 L. R. A. 540, note; 28 Cyc. 717; 60 Atl. 874; 123 Mich. 570; 47 La. Ann. 1029; 5 Sawyer (U. S.), 502; 140 Ala. 527; 103 Tenn. 500. No express grant of power to a city to confer an exclusive franchise for such time as may be reasonable is necessary in matters of this kind. The ordinances are therefore not invalid for want of power in the city council to enact them, nor because they grant an exclusive privilege, nor obnoxious to constitutional rights of citizens. 115 U. S. 650; 22 Am. Dec. 421; 96 Am. Dec. 650; 7 Cowen (N. Y.), 585; 42 Hun, 317; 130 Mo. 600; 83 Wis. 222; 33 N. W. 610.

J. H. Carmichael and *R. C. Powers,* for appellee.

1. Where an ordinance is void, a court of chancery has power by injunction to prevent a multiplicity of prosecutions under it. 175 Ill. 145; 93 Ky. 43; 74 Ky. 435; 90 Ky. 193; 11 Md. 186.

2. The ordinance and the pretended franchise thereunder are void, being in violation of the State Constitution, art. 2, § § 18 and 19. No municipal corporation in the State has authority to grant exclusive franchises, except for water, gas and street railroads. In order to grant an exclusive franchise, a municipal corporation must have express legislative authority for so doing. Art. 12, § 4, Const.; 27 Ark. 469; 3 Ark. 114; 45 Ark. 455; *Id.* 338; 71 Ark. 8; 2 Dillon Mun. Corp. (4 Ed.), 283; McQuillin on Mun. Ord. 900; Tiedeman, Police Power, 638; 102 Fed. 663; 47 Ohio 52; 146 U. S. 258; 13 Col. App. 80; 76 Fed. 271; 6 Mont. 502; 180 U. S. 587; 28 Cyc. 641, (1); 13 L. R. A. 383; 18 Ohio, 262; 27 L. R. A. 545; Kirby's Digest, § 5448. When the Legislature authorized municipal corporations to grant exclusive franchises in the three specified instances, that authority was, under the maxim *"expressio unius est exclusio alterius,"* to which this court is committed, withheld in all other in-

stances and for all other purposes. Broom's Legal Maxims, 480-489; 9 Cyc. 584; 19 Cyc. 23-27; 1 Ark. 203; *Id.* 513; 20 Ark. 410; 29 Ark. 479; 34 Ark. 676; 35 Ark. 457; 49 Ark. 231; 60 Ark. 95.

3. The ordinance is void because it attempts to condemn every unsewered privy in the city as a nuisance once every thirty days during the term of the franchise. A thing cannot be declared by a city counsel to be a nuisance which has not been made so by law or pronounced by judicial determination to be such. 41 Ark. 527; 45 Ark. 338; 7 Col. 345; 49 Ark. 165; 52 Ark. 23; 40 N. Y. 273.

4. It is void in that it deprives the owner of a valuable commercial commodity, without process of law. Art. 2, § 21, Const.; 13 Ark. 199; 15 Ark. 43.

5. The purpose and effect of the ordinance and franchise thereunder was not to regulate and care for the sanitary condition of the city, but to produce revenue. The city has no authority to grant a license as a matter of revenue. 34 Ark. 603; 70 Ark. 221; 43 Ark. 82; 41 Ark. 485; 70 Ark. 28.

6. The ordinance is also void because it prohibits the owner of the premises from removing the accumulations in the privies. 50 L. R. A. 473.

McCULLOCH, J. This case brings in question the validity of two ordinances of the city of Little Rock relating to the removal of deposits from unsewered privies. The two ordinances were both passed at the same meeting of the city council, they relate to the same subject, and are so interdependent that they must be read together as composing a scheme to accomplish the desired end. One of them is entitled, "An ordinance to prescribe the manner of constructing and cleaning the unsewered privies of the city of Little Rock and fixing penalties for violation thereof." It provides, among other things, that "the occupant, or occupants, or owner of said premises shall have the accumulation and deposits removed from said privies by the person or persons authorized by and under contract with the city to clean the unsewered privies at least once every thirty days, and oftener if it shall be ordered by the board of health, police, health commissioner," etc., and that if any such occupants or owners shall fail or refuse to have such accumulation and deposits removed every thirty days or oftener when ordered as aforesaid, they shall

be guilty of a misdemeanor and be fined in any sum not less than one nor more than five dollars. It further provides that "it shall be unlawful for any one, other than the person or persons with whom the city has contracted, or his or their agents or employees, to remove or convey through any of the streets or alleys of the city such accumulation and deposits of privies."

It also provides that such accumulation and deposits shall be removed during certain hours of the night-time, that it shall be conveyed away in air-tight metallic box vehicles and shall be deposited or burned at such places as the board of health may from time to time designate.

The other ordinance grants to appellant Dreyfus an exclusive right for a term of ten years, on the terms stipulated in the ordinance, "of cleaning the unsewered privies now located within the incorporated limits of the city of Little Rock, or that may hereafter be constructed within said limits, and of conveying the contents of said unsewered privies through the streets and alleys of the city," and impowers him to "charge the occupant, occupants or owners of premises upon which is located an unsewered privy or privies not exceeding fifty cents for each cleaning of such privy, or privies, including the conveyance of the contents thereof out of the city."

Appellee Boone instituted this suit in chancery against appellants to restrain the enforcement of these ordinances on the ground that they are void. He alleges in his complaint that he is a resident of the city, and has an unsewered privy on his premises, which is not kept in unsanitary condition, but that he has been arrested and fined and threatened with further punishment for refusing to permit said Dreyfus to remove the deposit from the privy; that said ordinances create a monopoly in favor of said Dreyfus, and inflict an unjust exaction on himself and the other citizens of Little Rock.

Appellants in the answer seek to uphold the ordinances, and allege, in support of the vested rights therein, that the contract for exclusive right of cleaning unsewered privies and removing deposits therefrom was submitted by the city to competitive bidding, and that he was the highest bidder, and that he paid to the city annually the sum of $3,160 for said privilege.

The court sustained a demurrer to the answer and, appel-

lants declining to amend or plead further, rendered a decree in accordance with the prayer of the complaint.

The facts being undisputed, we have the question presented by the pleadings, whether the ordinances in question constituted a valid exercise of the police power, and whether or not appellee can invoke the aid of a chancery court for redress.

The rule has been repeatedly announced by this court, and it is undoubtedly in accordance with the great weight of authority, that equity will not enjoin anticipated criminal prosecutions, either by officers of the State or by municipal ordinances. *Portis* v. *Fall,* 34 Ark. 375; *Medical & Surgical Institute* v. *Hot Springs,* 34 Ark. 559; *Taylor* v. *Pine Bluff,* 34 Ark. 603; *New Home Sewing Machine Co.* v. *Fletcher,* 44 Ark. 139; *Waters-Pierce Oil Co.* v. *Little Rock,* 39 Ark. 412; *Thompson* v. *Van Lear,* 77 Ark. 506.

But courts of equity will give relief from illegal exactions attempted by municipal corporations, for the Constitution of this State expressly provides that "any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exaction whatever." Section 13, art. 16.

The distinction was pointed out by Judge EAKIN in delivering the opinion of the court in the case of *Taylor* v. *Pine Bluff, supra,* when he said, with reference to the above quoted constitutional provision, that "this widens the range of equity jurisdiction, and will sustain this bill, to the extent of giving the court power to inquire into the validity of the exactions, and, if found void, so to declare it and restrain the city authorities from its collection." In that case the ordinance under consideration was one providing for a city weigher of cotton and other products requiring payment of a certain fee therefor, and requiring that all products brought into the city of Pine Bluff for sale should be weighed by the city weigher. The court held that the fee charged under the ordinance was unreasonable and rendered the ordinance void, and its enforcement was enjoined. The same principle controls and permits appellee to sue in equity to prevent the alleged illegal exactions imposed by these ordinances. Appellee did not, in his complaint, pretend to sue for the benefit of all other citizens, but the relief sought will, if obtained, inure to

the benefit of all others, and it is the duty of the court to construe the prayer to be for the relief of others.

The validity of the ordinances is challenged on the ground that they create a monopoly in a private business—that of cleaning unsewered privies and removing deposits therefrom.

Nearly all of the cases cited by counsel for appellee in support of their attack relate to the creation of private monopolies, and have no application to the question whether or not a municipality can, as a method of carrying out a police regulation which is otherwise valid, create incidentally a monopoly in a business involved in its enforcement. *Slaughter House Cases,* 83 U. S. 36; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746; *Combs* v. *McDonald,* 43 Neb. 632; *Dickinson* v. *Cunningham,* 140 Ala. 527; *Leeper* v. *State,* 103 Tenn. 500. Even the case of In re *Lowe,* 54 Kansas, 757, which is so confidently relied on by counsel for appellee, recognizes this principle, though it refuses to apply it to the facts of that case. The court there said: "While monopolies of any ordinary legitimate business are odious, we have seen that monopolies are upheld when deemed necessary in executing a duty incumbent on the city authorities or the Legislature for the preservation of public health. It is sometimes a matter of great nicety and difficulty to determine whether a particular business or calling is in its nature so directly connected with the public welfare that the performance can only be safely entrusted to some one acting under public authority."

The primary question, then, is whether the regulation attempted is a valid exercise of the police power, and, if so, whether the business which is necessarily an incident to its enforcement could not safely be entrusted to one or a limited number of persons acting under public authority, for if it is a valid regulation, reasonably exercised, and its enforcement should properly be intrusted to one or more persons, then it does not amount to the creation of a monopoly in any obnoxious or technical sense so as to become illegal as an improper restraint of trade. We think that the weight of authority sustains the power of a municpality to enforce a regulation of this character if the ordinance is reasonable in its terms, and is designed solely for that purpose. *California Reduction Co.* v. *Sanitary Works,* 126 Fed. 29, *California Reduction Co.* v. *Sanitary Reduction Works,* 199

U. S. 306; *Gardner* v. *Michigan,* 199 U. S. 325; *People* v. *Gardner* (Mich.), 100 N. W. 126; *Grand Rapids* v. *De Vries,* 123 Mich. 570; *Smiley* v. *McDonald,* 42 Neb. 5; *Coombs* v. *McDonald,* 27 L. R. A. 540, 43 Neb. 632; *Vandine, Petitioner,* 6 Pick. (Mass.), 187; *Walker* v. *Jameson,* 140 Ind. 591; *State* v. *Fisher,* 52 Mo. 174; *State* v. *Payssan,* 47 La. Ann. 1029; *Louisville* v. *Wible,* 84 Ky. 290.

The only authority to the contrary which has been brought to our attention is In re *Lowe,* 54 Kansas 757, already referred to, which seems to stand alone.

It is argued that the provision of the ordinances which prevent appellee from cleaning his own privies and removing the deposits himself is an invasion of his private rights, and therefore void.

The Supreme Court of the United States in *Crowley* v. *Christensen,* 137 U. S. 86, truly said that "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the county essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one's own will."

The same court said in another case that "every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." *Dobbins* v. *Los Angeles,* 195 U. S. 223.

The Nebraska courts, in one of the cases cited above, with reference to a smilar ordinance and contract; said:

"The removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare, and is, therefore, a proper exercise of the police power. Nor is the fact that in this instance the city has by contract conferred an exclusive privilege material. From the power thus conferred upon the city is implied the duty to determine the means and agencies best adapted to the end in view. The means adopted appear to be not only a reasonable and neces-

sary regulation, but a judicious exercise of the discretion conferred upon the city. That the subject of all such regulations can be best attained by intrusting the work in hand to a responsible contractor who possesses the facilities for carrying it on with dispatch and with the least possible inconvenience to the public is apparent to all." *Smiley* v. *McDonald, supra.*

We entertain no doubt that a city has the power to provide by proper ordinance regulations requiring the removal at suitable intervals of the deposits from unsewered privies and to grant the exclusive right to one or any limited number of persons to do the work for a rate of compensation to be fixed by the city and to be paid by the owner or occupant of the premises. The statutes of the State confer upon municipal corporations the power thus to provide for the safety, health and welfare of the inhabitants thereof. Kirby's Digest, § § 5438, 5461, 5458, 5593.

Though an unsewered privy may not be a nuisance unless allowed to get in an unsanitary condition, yet it is a matter of common knowledge that unless they are cleaned at reasonably frequent intervals and the deposits removed therefrom they become unsanitary and dangerous to health. Therefore it is within the power of a municipality to require this to be done.

What we have said, however, applies to the general power of a municipality to pass such an ordinance, but the question remains to be determined whether the power has been validly exercised in the passage of these particular ordinances. The right to pass ordinances such as these imposing regulations and burdens of this kind rests solely upon the police power vested in municipal corporations to legislate for protection of the health, safety and convenience of the inhabitants thereof.

Ordinances of this kind must be reasonable, and must be directed solely to legitimate regulation of the subject-matter undertaken. They can not be passed, under the guise of police regulations, in order to raise revenue. *Taylor* v. *Pine Bluff,* 34 Ark. 603; *Stamps* v. *Burk,* 83 Ark. 351; *Dobbins* v. *Los Angeles,* 195 U. S. 223.

In *Taylor* v. *Pine Bluff, supra,* the court said:

"The court did not err in holding that the city had power to pass, and enforce by proper penalties, an ordinance of this nature. But, being a police regulation, it must not be unreasonable

nor directed to the end of raising a revenue. Of course, the city council must first judge of what may be reasonable, and what fees will fairly compensate for the costs and expenses of the system, without regard to revenue. The courts will respect any fair exercise of this discretion, and will not be nice to take new accounts of expenses and correct small abuses. But the police power is too vague, indeterminate and dangerous to be left without control, and the courts have even interfered to correct an unreasonable exercise or mistaken application of it."

Applying the doctrine thus established, we can not escape the conclusion that the ordinances and contract in question were put in force partly, if not solely, for the distinct purpose of raising revenue. If not so, why should the city attempt to make money out of the regulation by letting to the highest bidder the contract and by receiving the sum of $3,160 annually for the privilege granted? This shows that the system is wrong, in that it is designed, not to procure the work to be done as cheaply as possible for the benefit of those who have to pay for it, but to obtain as much money as possible for the city out of the earnings of the business. The city can not, for the purpose of raising revenue, become the sharer of the profits arising from an exclusive privilege granted to enforce a police regulation. Of course, the higher the price is fixed for the work, the greater is the profit, and the more a bidder can offer to pay for the contract. If the scavenger can, by charging the price fixed in the ordinance for cleaning privies and removing the deposits, afford to pay the city a substantial sum annually out of his profits, he can and would do the work cheaper if not required to share his profits with the city. Instead of letting the contract to a bidder who was willing to do the work for the lowest price, the city has arbitrarily fixed a maximum price to be charged the property owners or occupants for doing the work and then let the contract to the bidder who was willing to pay to the city the greatest part of his profits. In other words, if the scheme was intended as a reasonable police regulation for the safety and convenience of the inhabitants, the contract should have been let to the lowest bidder for the work, instead of the highest bidder for the privilege of doing the work at the prices fixed. Every dollar which is paid to the city under the present system represents that much of

an excessive charge against those who have to pay for the work, for it is that much more than the contractor is actually getting for his work.

The city in this way is exacting a profit out of the business which has to be paid by those who are compelled to pay for the work. That, we think, the city has no right to do, and the fact that the regulation is based upon this plan stamps it as a scheme to raise revenue. Whether or not such was the actual intent of its framers we can not inquire, but such undoubtedly is its effect.

We cannot say what would be a reasonable price for doing the work if the profits were not shared with the city. Nor can we say that the city fixed a reasonable price for the work, as the submission of the contract to competitive bidding and the acceptance of a substantial sum annually for granting the exclusive privilege show that it was intended to raise revenue.

We do not overlook the fact that in the California case decided by the Supreme Court of the United States in *California Reduction Company* v. *Sanitary Works, supra,* the court passed upon and upheld an exclusive privilege of a similar kind for which the grantee paid a substantial sum to the city which granted it. That fact appears only incidentally in the statement, and that feature of the case was not passed upon by the court. The ordinance granting the privilege was not attacked on that ground, and the court was not called upon to decide, and did not undertake to decide, whether the provision was designed for raising revenue or for police regulation. We can not, therefore, regard that case as an authority on this particular question.

We are of the opinion that the chancellor was right in holding that the ordinance imposed an illegal exaction upon inhabitants of the city, and his decree restraining the enforcement thereof is affirmed.

KAHN *v.* METZ.

Opinion delivered December 7, 1908.

1. MORTGAGES—DEED ABSOLUTE IN FORM—SUFFICIENCY OF EVIDENCE.—A deed absolute upon its face will be construed to be a mortgage in

effect only when it is shown to be such by evidence that is clear, unequivocal and convincing. (Page 369.)

2. CONTRACT—CONSTRUCTION—CONDUCT OF PARTIES.—What the parties have done under a contract is potent to explain what its terms mean, where they are ambiguous. (Page 369.)

3. COMPROMISE AND SETTLEMENT—CONCLUSIVENESS.—When parties have mutually agreed upon a settlement of their dealings with each other and have adjusted balances on the basis of such settlement, nothing short of clear and satisfactory evidence of fraud or mistake will justify the falsifying or surcharging of such settlement. (Page 370.)

4. PLEADINGS—AMENDMENT TO CONFORM TO PROOF.—The rule that on appeal pleadings will be considered amended to conform to testimony adduced without objection applies to answers as well as to complaints. (Page 372.)

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; reversed.

STATEMENT BY THE COURT.

William Metz brought suit in equity against Herman Kahn, alleging that on the 6th of October, 1899, he conveyed to Kahn a tract of land in Pulaski County as security for $600 loaned by Kahn to him; that on December 27, 1889, he conveyed to Kahn lots 4, 5 and 6 of block 6, in the city of Argenta, as security for $450 loaned plaintiff by defendant; that on the blank date he conveyed to defendant a tract of land in Lonoke County. That afterwards Kahn reconveyed to him the land in Pulaski County, and that Kahn sold the land in Lonoke County for $750 and never accounted to plaintiff therefor. That in April, 1906, Kahn sold to Dr. F. L. French, the Argenta lots for $6,200, and paid plaintiff therefrom $733.18. That the defendant is entitled to a credit of $1,848.45, which he paid to the Herman Kahn Company; and that the defendant is also entitled to credit for taxes paid on plaintiff's property, the amount of which was unknown to plaintiff; and he prayed that an account be stated between them, and the defendant charged with all moneys received by him for the plaintiff's property, and credited with all sums to which he is entitled, and that plaintiff be given a decree for the balance.

Kahn answered the complaint, and admitted that Metz executed to him a deed to the property in Pulaski County, but denies that it was security for a loan of $600. He admits that he deeded to him the lots in Argenta, but denies that the deed was

executed as security for $450. He denies that he executed to him a deed for the Lonoke County property, and that he afterwards sold it for $750, and that he had failed to account to plaintiff therefor. He says that he made more payments than are set forth in the complaint, for the account of the plaintiff, and that since the acquisition of the property from the plaintiff he has expended amounts upon the said property not set forth in the complaint; and he alleged that said conveyances were absolute, and were not intended as security for debt, and that the pretended claim of the plaintiff, if it ever existed, is stale and barred by limitation.

The evidence developed these facts: Herman Kahn was in the wholesale liquor business, being president of the Herman Kahn Company, a corporation, which was in December, 1906, succeeded by the Bloch-Lyons Company. That Metz was a customer of said company, being engaged in the saloon business in Argenta. The court found that there was nothing due Metz on account of the Lonoke County land. As there is no cross appeal, the controversy over it is eliminated.

There was a mortgage on the Argenta lots, and Coy, the holder of the mortgage, was threatening foreclosure. Metz applied to Kahn for the money necessary to satisfy the mortgage, which Kahn advanced. There is a dispute as to whether the amount was $450 or whether it was $750. Metz says that the conveyance of said lots to Kahn was for the purpose of saving it for him, and that Kahn settled with Coy, and was to wait on him until he was able to redeem the property. He gives a similar version of the transaction inducing his deed to Kahn for the farm in Pulaski County, which was situated near McAlmont.

The Argenta lots were sold to Dr. French for $6200 in 1906, and at that time Kahn paid Metz $733.18 and deeded back to him the McAlmont farm. Metz says that the amount due him at that time from the proceeds of the sale of the Argenta lots was as follows: That he should have been charged with the amounts which Kahn had paid on the Coy mortgages, with the $733.18, and with something like $2,000 which he owed the Herman Kahn Company, and taxes on the places for several years paid by Kahn; and should have been credited with the

difference between that and the $6200 received by Kahn for the sale of the Argenta lots, which he claimed was about $2300.

Kahn testifies that Metz came to him and told him that he was about to lose all of his property, and asked him to advance money to him to save it, which he finally agreed to do on this understanding: He was to pay $750 to Coy on the Argenta lots and stand good for an account to Herman Kahn Company, and Metz was to deed to him the property, and he would give Metz the privilege of rebuying the same within two years, with eight per cent. interest and taxes, and Metz was to give him a thousand dollars profit on the transaction. At the time of the conveyance of the Argenta lots, Metz was needing about $700 for his liquor license for the ensuing year, and wanted the Herman Kahn Company to advance it to him, and Herman Kahn personally guaranteed its repayment to the company, in addition to the $750 paid him, which went to relieve the Coy mortgage. As to the farm, it had been previously deeded to him in consideration of $600, a part of which was used to pay Coy for the mortgage upon it, and the balance to pay for forty acres of land which was included in the deed from Metz to him. He paid taxes on both pieces of property, and paid for improvements on the Argenta lots. These lots he sold to Dr. French for $6200, and at that time, at the direction of Metz, he paid to the Bloch-Lyons Company, the successor to the Herman Kahn Company, an account which Metz owed it, amounting to $1,848.45. The following questions were asked, and answers given, with reference to the sale of the Argenta lots: "Q. Who sold them? A. I did. Q. How did you come to deal with Mr. Metz in regard to it? A. Well, he came in, and the firm wanted their money, and he was all the time trying to pay this back account—this particular account—and finally I sold them to Mr. French myself, F. L. French."

He then charged Metz with $600 and interest from October 9, 1899, the date of the deed to the McAlmont farm; charged him with $750 and interest thereon from December 28, 1899, the date of the deed to the Argenta lots; charged him with the taxes on all the property, with the cost of a concrete walk on the Argenta lots, and one thousand dollars to pay for his services; and gave him a check for $733.18, which he claimed bal-

anced his account with him; and gave him a deed to the McAlmont farm.

In regard to this settlement, Metz testified: "After what Mr. Kahn called a settlement, after he gave me that seven hundred dollars and whatever it was, and made me sign a receipt payment in full up to date, I had to give him that receipt when he handed me that money." He then proceeds to state wherein he afterwards concluded that the settlement was wrong. He was asked this question: "Q. At the time Mr. Kahn gave you a check for $733.18, did you know how much he owed you at that time? A. I didn't know; he never gave me a statement." He denied that Kahn had ever furnished him a statement at the time of the settlement or prior thereto, or that he ever gave him any receipt for taxes or other memoranda relating to the property. On the other hand, Kahn says that at the time he gave him the check for $733.18 he furnished him a statement of these items; that he seemed pleased at the settlement then made, and executed to him the following receipt:

"Little Rock, Ark., April 7, 1906.

"Received of Herman Kahn seven hundred and thirty-three dollars and eighteen cents ($733.18) in full of all demands for any equity or claim of any kind I may have in lots 4, 5 and 6, in block 6, Argenta, Arkansas.

(Signed) "William Metz."

That he gave him tax receipts and memoranda at that time.

Metz admitted that Kahn paid him $733.18. He was asked if he remembered what date it was, and answered: "Well, I couldn't say exactly. It was shortly (after) Mr. Kahn made up my account, and told me that was my balance; I don't know exactly the date." He admitted that he made no complaint to Mr. Kahn after that. The first time that he raised the question of the correctness of the settlement was by bringing this suit, which was filed about a year after the settlement.

Jos. Lyons testified that he was connected with the Herman Kahn Company, which has since become the Bloch-Lyons Company; and that he was present when the understanding was reached between Metz and Kahn. That Kahn several times refused to advance Metz money which he desired, and he finally made Kahn this proposition: "Mr. Kahn, if you will let me

have this $750, I will make you a deed to this property, and I will give you $1,000 additional profit on it, and I will take it up in two years, if you will permit me to take the property up in two years' time." That Metz needed about $700 shortly for his license, and Mr. Kahn guarantied this amount to the Herman Kahn Company.

The chancellor held that Metz's deeds to Kahn of the farm and of the Argenta lots were in effect mortgages, and stated an account between them on that theory, finding that Kahn was due Metz, on the 10th of April, 1906, the sum of $999.06, and gave judgment thereon, with interest from date. Kahn has appealed.

Morris M. Cohn, for appellant.

Metz is bound by his receipt, and ought not to be heard to question the settlement. There is no fraud, overreaching, mistake or false representation as an inducement to the settlement, either alleged or proved. The burden of proof was on him. The law favors settlements, and one will not be disturbed except upon clear and satisfactory evidence of fraud or mistake. 85 Ark. 592; 72 Ark. 234, 240; 80 Ark. 438; 80 Ark. 469; 53 Ark. 155; 47 Ark. 541; 41 Ark. 502; 13 Ark. 609; 24 Ark. 459; 34 Ark. 63; *Id.* 291; 20 Ark. 216; *Id.* 526; 23 Ark. 444; 14 Ark. 360; 12 Ark. 401.

J. H. Harrod and *W. R. F. Paine,* for appellee.

1. That the conveyances were mortgages is conclusively shown by Kahn's own act in paying Metz the $733.18 after he sold the Argenta lots.

2. A receipt is only *prima facie* evidence, and may be avoided by satisfactory proof that it was given under mistake. 21 Ark. 357.

HILL, C. J. (after stating the facts). Metz made deeds to Kahn for two pieces of property, one city lots of Argenta, and the other a farm in Pulaski County. Over six years afterwards Kahn sold the city lots for $6200, paid the indebtedness of Metz to his (Kahn's) business corporation, and repaid himself amounts which he had advanced to Metz on this property and upon a farm, together with interest thereon, taxes paid and improvements placed on the property, and charged Metz $1,000, as he claimed, pursuant to an agreement, for his undertakings and

gave Metz the residue, $733.18, and deeded him the farm. Metz has brought suit for an accounting, on the theory that the conveyances were mortgages, Kahn claiming that they were absolute sales. The chancellor found that there were mortgages, and decreed accordingly, from which decree Kahn has appealed. The pleadings and material facts are summarized in the statement by the court. Two questions arise: First, were the deeds mortgages; and second, was there a settlement between the parties.

1. In the case of *Rushton* v. *McIllvene, ante* p. 299, the court considered the quantum of evidence necessary to establish a deed, absolute on its face, to be a mortgage in effect, and approved this rule, which has oftentimes been applied by this court: "The evidence must be clear, unequivocal and convincing, for otherwise the natural presumption will prevail."

If the evidence upon this point rested on the testimony of Metz, it would utterly fail to meet the requirement; but it did not rest there, and the testimony of Kahn and his actions convince the court that the conveyances under consideration were in fact mortgages, though absolute in terms. This conclusion is reached from the action of Kahn under the deeds. He paid money to Metz and assumed other sums due his (Kahn's) business corporation; and finally, because Metz was insisting upon paying this particular debt, he sold the property, and from the proceeds repaid all of his indebtedness, which would have been secured by these deeds if in the form of mortgages, and exacted of Metz a receipt reciting that the payment then made was "in full of all demands for any equity or claim of any kind I may have in lots 4, 5 and 6, in block 6, Argenta, Arkansas."

Lord Chancellor Sudgen said, "Tell me what you have done under a deed, and I will tell you what that deed means." This statement was quoted with approval in *Gauss* v. *Orr,* 46 Ark. 129. No explanation is made by Kahn of his accounting to Metz for the residue after paying the sums secured by the deeds and the additional sum of $1,000, which he and Lyons said were to be paid him for assuming these undertakings, and the deeding over to Metz the farm. If it had been done as gratuity, made to him on account of friendly relations or long dealings with him as a customer, or any other explainable cause, it might have re-

butted the force of his conduct under the deeds. But no explanation was offered, and the court is met with this conduct under the deeds, which is the conduct required if they were mortgages. It is more potent than testimony of witnesses in fixing their character as mortgages.

2. Treating the conveyances as mortgages, there remains to be decided whether there was a settlement of the accounts growing out of these transactions. Metz, at one place in his testimony, refers to a statement that Kahn made him showing the residue due him from the French sale after paying various sums; but when he was directly asked whether Kahn furnished him a statement, he denied that he ever had any statement of these transactions, and declared that the only statement furnished him was the statement of his account with the liquor company of his dealings with it. Kahn testifies that he gave him a detailed statement, showing in full the transactions between them, and turned over to him tax receipts and receipts for money paid out on improvements on the property, and other memoranda relating to the property.

In view of this conflict on the point of an account being rendered and the decision in favor of Metz, it cannot be said that the doctrine invoked of the stated account is applicable.

There were transactions running over six years to be settled in an accounting between Kahn and Metz. Kahn says that the original agreement was that he was to have one thousand dollars for undertaking the various matters that he did undertake in the event of repurchase by Metz; and in this he is supported by a witness. On the other hand, Metz says that Kahn was to allow him to redeem at any time upon the repayment of the sums advanced to him. Had the settlement been made within the two years during which Kahn admits Metz had the right to repurchase the property, there would have existed between them a dispute as to this matter, and the dispute was not eliminated by the prolongation of the time of repurchase, or redemption. The conveyances were in the forms of absolute deeds, and, as contended on the side of Kahn, they were such, with a mere right to repurchase on the conditions named by him. On the other side, it was contended by Metz that they were in effect mortgages, although in form they were absolute deeds. There was also a

contention on the part of Kahn that he was entitled to eight per cent. interest on the sums advanced by him, and this was denied by Metz.

These various differences were matters of adjustment between men of full age and sound mind, and the law favors amicable settlement of differences. "The law favors settlements, and courts will not open or disturb them but for cogent reasons. When parties have mutually agreed upon a settlement of their dealings with each other, and have adjusted balances on the basis of such settlement, nothing short of clear and satisfactory evidence of fraud or mistake will justify the falsifying or surcharging of such settlement." *Fletcher* v. *Whitlow,* 72 Ark. 234.

In *Burton* v. *Merrick,* 21 Ark. 357, the court said: "A receipt expressed to be in full of all demands is only *prima facie* evidence of what it purports to be, and, upon satisfactory proof being made that it was obtained by fraud or given under a mistake, it may be inquired into and corrected in a court of law as well as in equity. But where the receipt is introduced by the party relying on it, and there is no attempt from the other side to prove that it was obtained by fraud or given by mistake, it must necessarily operate in the particular case as conclusive evidence of what it purports to be upon its face."

The application of these principles to the receipt in evidence forces the conclusion that it must be given effect as written. There is no evidence of imposition, fraud or mistake. There is no evidence of weak-mindedness, overreaching or inability to care for himself on the part of Metz. The amount paid for which the receipt was given represented the amount which Kahn contended was due to Metz upon the settlement of their accounts. Metz admits that this was stated to him by Kahn; and whether he received a detailed statement at that time is immaterial. It was his right to have it; and, if he omitted to demand it, that was his misfortune. He knew what the sum then paid him purported to be; and he was required to sign a receipt in full of all demands growing out of his equity in the property which had been sold. He then received a deed for the other property in addition to the cash paid him evidenced by the receipt; and the only outstanding matter that could have been between them was over pro-

ceeds of the Argenta property and the amount due him from the sale of it to Dr. French. Instead of demanding a detailed statement at that time and questioning it then, he accepted the money and land tendered him and waited a year before bringing suit, and never, until this suit was brought, questioned the correctness of the sum paid him in full settlement of these transactions. As heretofore shown, there were matters of fair controversy between them, and when he accepted from Kahn the conveyance of the land and the payment of the $733.18 in full settlement of them, and executed a receipt evidencing the same, it was binding upon him unless he showed that his acceptance of the deed and the money and execution of the receipt were made under mistake of fact or induced by fraud. There is neither evidence nor allegation of fraud or mistake in the settlement. There is evidence of Kahn's contentions and of Metz's contentions, which radically differ; but these were subjects for mutual adjustment, and if adjusted according to Kahn's contention, and the consideration paid and accepted, it is too late to reopen the matter merely to establish that Metz's contentions as the juster basis of settlement.

It is objected that the settlement was not pleaded in the answer. But the evidence of the settlement and the written receipt evidentiary of it were received without objection. It is an undisputed fact of the case, only its effect being a matter of controversy. It is permissible under the Code to amend pleadings to conform to the proof; and on appeal, where the pleadings have not been so amended, they are considered amended to conform to the testimony which has been adduced without objection. *Railway Co.* v. *Triplett,* 54 Ark. 289; *Davis* v. *Goodman,* 62 Ark. 262; *Waterman* v. *Irby,* 76 Ark. 551; *Young* v. *Stevenson,* 75 Ark. 181. This principle has been applied to answers as well as complaints. *Shattuck* v. *Byford,* 62 Ark. 431; *Trippe* v. *DuVal,* 33 Ark. 811.

This is an equity case, where the trial here is *de novo* on the record as made in the chancery court, and the pleadings will be considered amended here to conform to defenses made out by evidence introduced without objection.

Decree reversed and complaint dismissed.

BOQUA v. MARSHALL.

Opinion delivered December 7, 1908.

1. APPEAL AND ERROR—PARTIES.—An intervener in a case who was treated as such in the court below did not become an appellant by virtue of an appeal taken by one of the defendants on behalf of the defendants. (Page 376.)

2. SAME—PARTIES.—An appeal prayed by one of the defendants on behalf of the defendants generally will be held to inure to the benefit of a defendant not specially mentioned in the prayer for appeal, though he did not sign the application for appeal. (Page 376.)

3. SAME—RIGHT OF ASSIGNEE TO APPEAL.—Where the right of a party to a suit to share in a certain fund in litigation depended upon a verbal contract, the assignment of his interest in the fund by him to another authorized the latter to control the litigation and if necessary to prosecute an appeal from the court's decree. (Page 377.)

4. PARTNERSHIP—BROKERAGE COMMISSION.—Where a partnership was formed by three brokers for the purpose of selling certain property and dividing the brokers' commission, and a sale was effected by two of them while the partnership existed, the other broker was entitled to share in the commission. (Page 378.)

5. FACTORS AND BROKERS—WHEN COMMISSION EARNED.—A broker is entitled to his commission for procuring a sale if he is the procuring cause of the sale, even though the owner of the property sold it himself. (Page 379.)

6. PARTNERSHIP—ACCOUNTING—EXPENSES.—A member of a firm of brokers is entitled to share in a commission earned by the firm for procuring a sale only after deducting the legitimate expenses of perfecting the sale. (Page 380.)

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

Robert L. Rogers, for appellants.

1. Under the evidence, it was error to give judgment in favor of Marshall for any amount; but if his contention is correct, then he would be entitled only to one-half of the commission of $10,000.00 (the amount named in the contract) after the firm expenses in negotiating and finally concluding the sale were deducted.

2. But the offer to sell made by Latham to the firm was for a limited time and to certain prospective purchasers, Mordoff and Hammond, and that offer was revoked when Latham sold an option to Boqua, Jr., and R. S. Willie, on October 27. Lath-

am's offer to the firm was not an option, because there was no consideration to support it; hence it was only a continuing offer, revocable at any time, and was revoked by the sale of the option on October 27th. 21 Am. & Eng. Enc. of L. 929 and cases cited; 2 Chancery D. 463.

Youmans & Youmans, for appellee.

1. As to Boqua, Sr., the decree of the lower court is conclusive, he not having appealed.

The prayer for appeal indorsed on the transcript amounts to an appeal as to A. E. Boqua, Jr., only, and is not sufficient to bring in Willie as an appellant here.

2. The findings of law and fact by the court will stand, if not opposed to a clear preponderance of the evidence. 68 Ark. 314; 75 Ark. 52; 68 Ark. 134. Marshall's right to a share in the commission was not dependent on a sale to Mordoff and Hammond. On the contrary, the right of the firm to sell the property was a partnership asset, and it was immaterial to whom the sale was made. 101 Fed. 322; 22 Am. & Eng. Enc. of L., 114, 115, authorities cited; 53 Ark. 152. There is no contention that dissolution of the firm occurred before November 1, 1905. The contract and option procured by Boqua, Jr., and Willie were both obtained before that date, and the clear preponderance is that the option was obtained for the purpose of sale. It was, therefore, a partnership asset at the time of dissolution, and appellee had an interest in whatever was made out of it. 101 Fed. 322.

Robert L. Rogers, for appellant in reply.

1. The contention that only A. E. Boqua, Jr., has appealed is idle. All of the defendants, as is conclusively shown by the prayer for appeal, have asked for an appeal through the agency of A. E. Boqua, Jr., as they had the right to do.

2. Trials in chancery are *de novo,* and the findings of the chancellor persuasive only; and where they are against the clear preponderance of testimony, his decree will be reversed. 55 Ark. 112; 50 Ark. 185; 75 Ark. 72; 31 Ark. 85; 41 Ark. 292; 42 Ark. 521; 83 Ark. 340.

McCULLOCH, J. This is an action to recover an interest in broker's commissions on the sale of the capital stock of the

Pan Telephone Company of Fort Smith, Arkansas, appellee (the plaintiff below) claiming to have been a member of a firm of brokers who, it is alleged, made the sale and earned the commission. During the summer of 1905 appellee Marshall and appellant A. E. Boqua, Jr., formed a co-partnership under the firm name of Marshall-Boqua Realty Company, and on October 12, 1905, Mr. Latham, the owner of 597 out of the 600 shares of the telephone stock, entered into a contract with the firm whereby he agreed, if they brought about a sale of the stock for $110,000, to pay them for their services all over $100,000 of the purchase price. Appellee, acting for his firm, was then in negotiation with C. W. Mordoff, of Toledo, Ohio, and his associates, for sale of the stock. A sale to Mordoff and associates was never consummated, but the stock was subsequently sold to A. E. Boqua, Sr., father of A. E. Boqua, Jr., and certain associates under a new agreement, and a gross commission of $15,000 was paid by Latham. Appellee claimed half of this commission ($7,500), and it was paid into the American National Bank of Fort Smith to await the result of the threatened litigation over it.

This action was then instituted in the chancery court by appellee Marshall against A. E. Boqua, Jr., R. S. Willie, who also claimed an interest in the commission, and the American National Bank. He alleged in his complaint that, under the original agreement concerning the sale of the stock, Willie agreed to assist in making the sale by procuring a loan of money for the purchaser for a commission to be paid by the latter, and that his commission should be shared with the Marshall-Boqua Realty Company; that Boqua, Jr., representing the firm, made a new deal with Latham for a commission of $15,000, and then made the sale, and that Boqua, Jr., and Willie conspired together to defraud him of his share of the commission. Boqua, Jr., and Willie filed separate answers, admitting the formation of the alleged partnership and the execution of the original contract with Latham for sale of the telephone stock, but alleged that Boqua, Sr., assisted in finding purchasers, and was, by agreement with the firm, to have half of the commission; that Willie was also to assist and receive one-fourth of the commission; that the firm failed to make a sale of the property, and after the dissolution of

the firm Boqua, Jr., and Willie procured from Latham an option for the purchase of the stock, and made a sale to Boqua, Sr., and associates, earning thereby a gross profit of $15,000 which was greatly reduced by necessary expenditures in making the sale. They denied that appellee assisted in negotiating the sale, and was entitled to any commission, but prayed that, if that issue should be decided against them, the expenditures in making the sale should be deducted from the commission or profit before deciding it.

A. E. Boqua, Sr., appeared, and by leave of court filed his interplea, containing substantially the same denials and allegations set forth in the answer of Boqua, Jr., and Willie, and asserting his claim to the fund in controversy. The chancellor, at the final hearing of the case, found that appellee was entitled to the fund in controversy, dismissed the interplea of Boqua, Sr., and rendered a decree in appellee's favor.

The defendants, Boqua, Jr., and Willie, prayed and obtained an appeal from the clerk of this court. Boqua, Sr., contends that he also joined in the prayer for appeal, and that he is now before the court as an appellant. Appellee contends that Boqua, Sr., did not appeal, and cannot now do so, as the time for the appeal has expired.

The prayer for appeal indorsed on the transcript is as fol-

"The defendants pray an appeal to the Supreme Court from the decree upon this transcript, and their exceptions to said decree.

(Signed) "A. E. Boqua, Jr., *et al.*, defendants in the court below, by A. E. Boqua, Jr."

A. E. Boqua, Sr., was not a defendant below. He styled himself "interpleader" in the pleadings, and was so designated in the orders of court, including the final decree. The summons issued by the clerk of this court pursuant to the prayer for appeal also omits the name of A. E. Boqua, Sr., and includes only the names of those who were defendants below—A. E. Boqua, Jr., R. S. Willie, and American National Bank. He therefore does not fall within the designation of parties who prayed an appeal.

Willie was a defendant, and the prayer for appeal included him, though he is not mentioned therein by name, and he did not

sign the application. *Little Rock Traction & El. Co.* v. *Hicks,* 78 Ark. 597. The application could be made and signed by attorney or agent.

Willie has since filed a disclaimer, and asks that the appeal granted on his behalf be dismissed. This is met by a response from A. E. Boqua, Jr., showing that Willie assigned to W. R. Abbott all his interest in the subject-matter of the litigation, and that Abbott has assigned that interest to him. The assignment to Abbott was made before the commencement of the suit, but the assignment from Abbott to Boqua, Jr., was made during the pendency of the suit and before the appeal was taken. This, then, presents the question whether Willie has the right to dismiss the appeal or to decline to prosecute an appeal from the decree of the chancery court. At common law the assignment of a chose in action conferred upon the assignee the right to enforce remedies in the name of the assignor, and the right to control any action instituted to enforce the chose. The assignor was not permitted to interfere with the action so as to hinder or defeat the rights of the assignee. 4 Cyclopedia of Law, p. 93 and cases cited. This rule is modified by the statute, which provides that any action, with certain named exceptions, must be prosecuted in the name of the real party in interest. Kirby's Digest, § 5999.

Another section of the Code provides that "agreements and contracts in writing for the payment of money or property or for both money and property shall be assignable (Kirby's Digest, § 509); and still another that "where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant" (Kirby's Digest, § 600). These statutory provisions leave the common-law rule in force as to the cause of action not assignable under the statute, and as to these the rule still prevails that the assignment gives the assignee the right to control the action in the name of the assignor. Though the assignor may, under the statute, be brought in as a defendant, this provision does not abrogate the common-law right of the assignee to use the name of his assignor in an action to enforce the assigned right, for in law the assignor is deemed to be the owner where the right is not assignable. *St. Louis,*

I. M. & S. Ry. Co. v. *Camden Bank,* 47 Ark. 541; *Lanigan* v. *North,* 69 Ark. 62.

The right of Willie to share in the fund in bank, which represented a portion of the commissions on the sale of the telephone stock, if the right existed at all, depended upon a verbal contract between the parties, and was not assignable under the statute. Therefore, it was not necessary for Boqua, Jr., as assignee of the right, to plead it in the court below. He could litigate the right in Willie's name with appellee Marshall, and can control the litigation in this court by showing, as he has done, that he has, as assignee, acquired all of Willie's rights in the fund in controversy.

Thus we reach the point that Boqua, Sr., is eliminated from the controversy by his failure to take an appeal from the adverse decree, and it is narrowed to one between Boqua, Jr., on the one side as a claimant of his own original interest in the fund as well as that of Willie under the assignment, and appellee Marshall on the other side.

Has appellee shown himself to be entitled to any commission on the sale of the telephone stock?

As we have already stated, Latham, the owner of the telephone stock, entered into a written contract with the Marshall-Boqua Realty Company, authorizing them to sell the stock for $110,000, and agreeing to pay that firm a commission of $10,000 for making the sale. The contract contained no limitation as to time, but of course Latham had the right to withdraw the stock from sale at any time before a sale was made, or at least at any time before the brokers earned a commission by producing a purchaser "ready, able and willing to purchase" at the authorized price. Appellee participated in the negotiations with Mordoff and his associates, but no sale to those parties resulted. Latham threatened to declare the deal off, but met some of the parties in St. Louis on October 27, 1905, and entered into a new contract in writing with Boqua, Jr., and Willie, whereby, in consideration of the sum of $1,000 paid to him, he gave them (Boqua, Jr., and Willie) an option to purchase on or before November 14, 1905, the property for the sum of $106,000, subject to a mortgage of $14,000, which made the total price $120,000. It was further stipulated in this contract that if Boqua, Jr., and

Willie should on or before November 14 pay Latham $4,000 more, their option should be extended to December 1, 1905. Nothing was said in this contract about paying any commission to any one on the sale, but Latham testified that he understood it to be an extension or continuance of the previous arrangement whereby a commission of all over $100,00 of the price should be paid as commission. When this contract was entered into, no steps had been taken to dissolve the firm of Marshall-Boqua Realty Co., and an agreement had been reached between Boqua, Sr., Willie, Marshall, and Boqua, Jr., concerning commissions on the sale of the telephone stock, to the effect that Boqua, Sr., should have one-third, Willie one-third, and the remainder to the firm of Marshall-Boqua Realty Co., which would give each member of that firm one-sixth. Boqua, Jr., and Willie, with the assistance of other parties, made the additional payment of $4,000 on November 14, 1905, so as to preserve the option, and finally consummated a sale of the stock to Boqua, Sr., and associates, Sutter and Zellekin. The price was to be $120,000, thus leaving a commission of $20,000, but an arrangement was finally made for Latham to keep one-fourth of the stock and reduce the commission to $15,000.

We think that appellee is entitled to share in the commission. He was still a member of the firm when the new deal or arrangement was made with Latham on October 27, which was clearly but a continuation of the previous arrangement, and there was then existing between the parties a distinct agreement as to the division of any commission that should be realized from a sale of the stock. Good faith and fair dealing between those associated in the enterprise imperatively demanded that his rights as one of the participants should be preserved. No sort of change in the form of the deal could operate as an elimination of his right to share in the fruits of the contract. The fact that Boqua, Sr., who was to be a sharer of the commission, finally became one of the purchasers did not prevent appellee from claiming a share. His associates were none the less the procurers of the sale, and the commission became due to them all. This results from the application of elemental principles too obvious to need citation of authority in support of them.

It is not essential that appellee's firm should have actually

made the sale. It was sufficient to entitle them to commission if they were the procuring cause of the sale, even though the owner of the property sold it himself. *Scott* v. *Patterson,* 53 Ark. 49; *Hunton* v. *Marshall,* 76 Ark. 375; *Branch* v. *Moore,* 84 Ark. 462.

But appellee can not claim the fruits of the contract shorn of its burdens. In other words, he is entitled only to share in the net commissions after deducting the legitimate expenses of perfecting the sale, for it is certain that a sale to Mordoff and associates could not have been consummated, and it therefore became necessary, if any commission was to be earned at all, for other purchasers to be found or some other way devised to make a sale.

What were these expenses?

On December 2, 1905, Edward Zellekin, who was either a capitalist or promoter residing at Joplin, Missouri, loaned $4,000 to Boqua, Sr., for payment to Latham in order to prevent the option from lapsing. In February, 1906, as the time approached for consummating the sale, the two Boquas, father and son, became doubtful whether Sutter, their associate, who was to take three-fifths of the telephone stock, would be able to carry out his part of the contract of purchase, and they, too, being financially unable to carry out their own part, applied to Zellekin to finance the deal. Zellekin proposed to assist them in consummating the deal and to furnish the necessary funds if they would pay him a fee or bonus of $5,000. They agreed to do so. On March 13, 1896, when the time came to close up the matter finally with Latham, Boqua, Sr., was in St. Louis for that purpose, and telegraphed Zellekin to come. It was still uncertain whether or not Sutter would be able to pay his part of the money, and Zellekin arranged with his banker to get enough money to finance the entire deal and to keep the bank open after business hours, so that the cash could be gotten to close the deal. Late in the evening Sutter came forward with his part of the funds, and Zellekin only had to furnish $9,820.40, which was the part necessary for Boqua to pay at that time. This $5,000 paid to Zellekin is claimed to be a legitimate expense of the sale, but appellee contends that it was merely a fee or bonus paid by the Boquas as purchasers of the property for borrowed money to

enable them to purchase the property. We think that it was an expense of sale which should be deducted from the gross commission. It appears that no sale could have been made without the assistance of Zellekin, and this agreement with him made it possible for a commission to be earned. The fee agreed to be paid by Zellekin seems large and unreasonable at first glance, but, when it is remembered that a well-nigh earned commission of $15,000 was hanging in the balances and was about to be forfeited unless such help as Zellekin could give could be obtained, we can not say it was unreasonable for the Boquas to pay such an exorbitant fee in order to rescue the commission. It may have been an unreasonable and exorbitant fee for Zellekin to charge, without being unreasonable for the Boquas to pay, when we come to consider whether or not they can, in a settlement with appellee, deduct it from the gross commission. It cannot be seriously doubted that they did in fact pay this fee or bonus to Zellekin, for the testimony as to this is undisputed. Moreover, appellee is in no position to complain of the payment of this amount to Zellekin, for the basis of his contention is that his associates fraudulently changed the form of the deal in an attempt to deprive him of a commission which, while he was recognized as a participant in the deal, was understood to be $10,000, and, after the amount paid to Zellekin is deducted from the gross commission, it still leaves the amount of commission which appellee thought he and his associates were to earn.

On October 27, 1905, when the negotiations with Mordoff had practically failed, and Latham was about to revoke the authority to sell the telephone stock, the Boquas and Willie employed one L. B. Pierce, a real estate and investment broker, to assist them in obtaining from Latham an extension of time for negotiating a sale, agreeing to pay him (Pierce) $2,500 for his services, and $250 to his attorneys for preparing the necessary papers. Pierce procured from Latham the new option contract of that date which has already been referred to, and the agreed amounts were paid to Pierce and his attorneys. These were necessary expenses of continuing the option and making the sale, and should be deducted from the gross commission. They paid out $234.50 to a consulting engineer to examine and report on the telephone plant and $500 to Mr. Mechem as attorney's fee for

services rendered throughout the negotiations. These were, we think, legitimate expenses to be deducted from the gross commission.

Mordoff and his associates paid Boqua, Jr., $1,000, which was forfeited when they failed to consummate their negotiated purchase. Boqua used this money as a payment to Latham when he secured the October option. He claims that this was earned in services rendered for Mordoff in an effort to obtain a loan of money. The chancellor concluded correctly, we think, that this sum was earned in and about the attempted sale of the property, and that it should be added to the commission on the sale.

After adding the last-named sums to the gross commission of $15,000 and deducting the other sums hereinbefore named, there is left a net commission of $7,515.50 in which appellee is entitled to share. We think that the fact is established by a clear preponderance of the testimony that Willie was, in the verbal agrement between all the parties, to have one-third of the commission when earned. This, of course, must be construed to mean the net commission. Counsel for appellee earnestly insist that Willie's compensation was to be for assisting purchasers, Mordoff or others, in borrowing money, that his employment was a collateral matter, and that he should be paid nothing out of the earned commission. We cannot agree with counsel in this contention. With A. E. Boqua, Sr., eliminated from the controversy by the adverse decree below, appellee is entitled to one-third of the net commission, which is one-half of Marshall-Boqua Realty Company portion.

There is another item of travelling expenses incurred by Boqua and others in negotiating the sale which should be deducted from the gross commission. Boqua, Jr., testified that the amount expended was $840, but the master, to whom reference was made of the accounts, found only the sum of $390.30 (exclusive of Mr. Mechem's fee) to have been expended in and about the sale. Appellants have not pointed out in the abstract and brief wherein the evidence fails to sustain the master's findings in this respect. One-third of the amount so found by the master should be deducted from appellee's share of the commission.

The master also charges appellee with the sum of the operating expenses of the firm of Marshall-Boqua Realty Company,

which are found in the report to have been the sum of $776.78. One-half of this, or $388.38, should also be deducted from appellee's share of the commission.

The master also found that appellee had drawn from the firm $30 more than Boqua, Jr., his co-partner, and one-half of this amount should be deducted from his share of the commission, so as to equalize the two accounts.

The evidence does not, in our opinion, warrant the charge made by the master against Boqua, Jr., of $46.25 for one-half rental value of the furniture after the dissolution. Appellee, according to the terms of the partnership agreement, is entitled to one-half of the office furniture and fixtures on dissolution of the firm, or one-half of the net proceeds of the sale thereof.

According to the above findings, the decree in favor of appellee is excessive, and should have been for the sum of one thousand, nine hundred and seventy-one and 68-100 ($1,971.68) dollars. The decree is therefore reversed, and the cause remanded with directions to enter a decree in his favor for that sum, and also for one half of the net proceeds of sale of the office furniture now in the hands of the receiver.

Appellee is also entitled to decree for his costs in the court below, but costs of the appeal will be adjudged against him. It is so ordered.

MAIN v. OLIVER.

Opinion delivered December 14, 1908.

EVIDENCE—WRITTEN CONTRACT—PROOF OF PAROL CONDITION.—Parol evidence is admissible to prove that a written contract was executed upon condition that certain changes were to be made in the writing before it should become the real agreement of the parties.

Appeal from Washington Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

Appellant *pro se.*

One who signs a contract must stand by the words of that contract. If he will not read what he signs, he alone is responsible for his omission. 32 Ark. 327; 70 Ark. 515; 71 Ark. 188;

91 U. S. 50; 35 Ark. 559. Not only so, but he must show that he was guilty of no laches in signing before he can be relieved from this contract. 56 N. Y. 137; 66 Me. 109. Where the company does not know of the representations by the agent until after delivery, there can be no fraud. 98 N. W. 697. See, also, 63 Pac. (Cal.) 1067; 89 S. W. 648; 75 Ark. 206; 81 N. W. 551. The terms of a written contract, expressing the whole agreement of the parties, cannot be varied or contradicted by parol evidence. 65 Ark. 333; 67 Ark. 62; 71 Ark. 185; *Id.* 289; 73 Ark. 451; 75 Ark. 206; 66 Ark. 393; *id.* 445; 64 Ark. 650; 85 Mich. 464.

R. J. Wilson, for appellee.

There is no contention here that one may vary the terms of a written contract by parol evidence, but it is contended that the writing sued on is not the contract between the parties, and that may be established by parol evidence. Fraud of an agent in procuring a contract may be shown by parol. 17 Ark. 498; 19 Ark. 103; 20 Ark. 216. Fraudulent statements by which one is induced to sign a written contract may be proved by parol, as also that the written instrument was procured by fraud. Kerr on Fraud and Mistake, 388; Underhill on Evidence, 394; 6 Neb. 401; 97 Ill. 539; 14 Wis. 106; 16 S. E. 749; 29 Atl. 338. Where because of fraud or mistake the actual agreement of the parties is not expressed in the written contract, that fact may be shown by parol evidence, especially in a chancery proceeding to cancel the instrument. 86 Ala. 495; 40 Ia. 70; 89 Ga. 793; 15 S. E. 670; 43 Mo. App. 625; 73 N. Y. 315; 1 Ala. 160; 113 Ill. App. 537.

McCULLOCH, J. Appellant sued appellee at law to recover the price of a lot of jewelry shipped to the latter by the former under a written contract of sale. Appellee answered, stating in substance that appellant's agent had agreed with him to ship the jewelry for sale on commission, that he signed the written contract of sale at his place of business in Fayetteville, Arkansas, upon an express agreement with appellant's agent that the latter would change the form and substance of the writing before it was mailed to appellant at his place of business in Chicago, Illinois, so as to make it conform to their verbal agreement for a shipment for sale on commission, but that said agent had wrongfully and fraudulently sent the written contract to appellant with-

out changing it. He also alleged that as soon as he discovered that fact he repudiated the written contract and returned the goods to appellant without opening the packages containing same.

The case was, by agreement of parties, transferred to the chancery court, where it was heard on the evidence, and a decree was rendered dismssing the complaint for want of equity. The statements of the answer are fully sustained by the evidence, and the only question for our determination is whether or not these facts will defeat a recovery on the written contract of sale.

The effort of appellee is not to vary or contradict the terms of a written contract by parol evidence, but it is to show by such evidence that no written contract was entered into of the kind set forth by appellant as the basis of his action. The distinction is pointed out by the court in the following cases: *Graham* v. *Remmel,* 76 Ark. 140; *Barton-Parker Mfg. Co.* v. *Taylor,* 78 Ark. 586; *Barr Cash & Package Co.* v. *Brooks-Ozan Merc. Co.,* 82 Ark. 219.

The design of appellee's testimony was not to establish a contemporaneous or antecedent verbal contract, but to show that certain changes were to be made in the writing in order for it to evidence the real agreement of the parties, before it should be delivered as his contract. He did not deny that he signed the paper, nor that he was aware of its contents, but he claimed it was to be altered before its delivery to appellant, the other contracting party.

In *Barton-Parker Mfg. Co.* v. *Taylor, supra,* we said: "The purpose of the evidence was not to vary or contradict the terms of the contract, but to identify the particular contract which defendant in fact executed. The paper signed by the defendant did not in fact become his contract until the salesman attached the slip containing the clause as agreed upon between them, and it was competent for him to prove this by parol testimony."

So in the present case the paper signed by appellee was not to become his contract until the changes should be made which were agreed to be made before delivery.

Decree affirmed.

KEELING v. SEARCY COUNTY.

Opinion delivered December 14, 1908.

CLERKS—FIXED SALARY—RIGHT TO WITHHOLD FEES.—The act of April 19, 1905, providing that the clerk of the circuit court of Searcy County shall receive a salary of $1,500, which "shall be full compensation for all work and services of said clerk that he is now or may hereafter be required by law to perform, * * * * and for all other official work," embraces every fee or emolument accruing to the clerk by reason of his official capacity, including fees for services rendered by him in his official capacity under the act of Congress of March 11, 1902.

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

Bratton & Bratton, for appellant.

The fees sought to be retained by the clerk in this case are authorized under an act of Congress, but he is not *required by law* to perform these services, as is specified in the act of the Legislature fixing his fees. On the contrary, while he may, under the act of Congress, perform the services, yet he may lawfully decline it, and is not required to do so. If he performs the services, the fees derived therefrom are not payable into the county treasury, but are his own, in addition to the salary provided by the State statute. 15 Fed. 341; 44 Pac. 659; 32 Ark. 120; 36 Pac. 64; 64 L. R. A. 131; 110 U. S. 688; 21 Ct. Cl. 120.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

See Acts 1905, p. 477. Therein, by section 1, it is provided that $1,500 shall be "full compensation for all work and services of said clerk that he is now or may hereafter be required by law to perform as clerk of the circuit court, etc., and *for all other official work.*" The amendatory act, Acts 1907, p. 845, section 1, simply increases his salary to $1,800. The act must be taken to mean what it says, *i. e.,* that the salary allowed shall be full compensation for all work and services required by law to be performed by the clerk, but for all other work performed by him in his official capacity. 61 Ark. 21; 66 Ark. 30; *Id.* 39; 87 Pac. 628; 88 Pac. 89; 37 Pac. 627; 79 Cal. 89, 21 Pac. 554; 71 N. W. 785; 71 N. W. 717; 30 Neb. 574; 17 Neb. 73; 41

Neb. 257; 67 N. W. 311; 73 Pac. 273; 165 U. S. 504. See, also, 32 Ark. 45; 40 Ark. 100.

BATTLE, J. Section one of an act entitled "An act to fix the salaries of the clerk, sheriff, and assessor of Searcy County," approved April 19, 1905, provides as follows:

"That the fees and salary of the clerk of the circuit court of Searcy County, Arkansas, shall not exceed the sum of fifteen hundred dollars ($1,500) per annum, and out of this sum he shall pay all necessary deputies and assistants, and the said sum of fifteen hundred dollars ($1,500) shall be full compensation for all work and services of said clerk that he is now and may hereafter be required by law to perform as clerk of the circuit court, ex-officio clerk of the county and probate courts, and recorder of said county, *and for all other official work.*"

This act was afterwards amended by an act approved May 22, 1907, by increasing the clerk's salary to eighteen hundred dollars. Acts of 1907, page 845.

An act of Congress approved March 11, 1902, provided, in part, as follows: "That hereafter all proof, affidavits, and oaths of any kind whatsoever, required to be made by applicants and entrymen under the homestead, pre-emption, timber-culture, desert-land, and timber and stone acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner, or commissioner of the court exercising Federal jurisdiction in the territory, or before the judge or *clerk* of any court of record in the land district in which the lands are situated. * * * * * * * * That the fees for entries and final proofs, when made before any other officer than the register and receiver, shall be as follows:

"For each affidavit, twenty-five cents.

"For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

"For each deposition of claimant or witness prepared by the officer, one dollar," etc.

Under this act of Congress, Hosea Keeling, in his capacity of clerk of the circuit court and ex-officio clerk of the county and probate courts of Searcy County, in the State of Arkansas, took 66 affidavits at 25 cents each----------$ 16.50

and 447 depositions of claimants and witnesses prepared by himself at $1.00 each 447.00

Total $463.50

Is he entitled to this sum in addition to the salary allowed him by the acts of the General Assembly of the State of Arkansas? After providing that the salary specified "shall be full compensation for all work and services of said clerk that he is now or may hereafter be required to perform as clerk of the circuit court, ex-officio clerk of the county and probate courts, and recorder of said county," to prevent any other official services being left out, it adds, "and for all other official work." This language embraces every fee or emolument accruing to the clerk by reason of his official capacity, and allows the withholding of none. It includes every fee that was earned by him in his official capacity. *Finley* v. *Territory,* 73 Pac.. 273; *Rhea* v. *Board of County Commissioners,* 88 Pac. 89; *Hazzlet* v. *Holt Co.,* 71 N. W. Rep. 717.

The $463.50 was collected by Keeling as clerk for "official work" done by him, and he is not entitled to hold it in addition to the salary fixed by law, and should account for the sum in the manner prescribed by the statute.

Judgment affirmed.

Ex parte BOLES.

Opinion delivered December 14, 1908.

1. CERTIORARI—PARTIES.—One who was not a party to a habeas corpus proceeding before a chancellor is not entitled to apply for a writ of certiorari to review the chancellor's finding. (Page 390.)
2. HABEAS CORPUS—PARTIES.—Upon habeas corpus to procure petitioner's release from imprisonment for contempt of court, the only parties entitled to be heard are the applicant for the writ and the officer having him in custody, unless it be the State. (Page 391.)

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

Frank A. Youmans, for petitioner.

Oscar L. Miles, for respondent.

BATTLE, J. Thomas Boles petitions to this court for a writ of certiorari directing the Honorable J. V. Bourland, Chancellor of the Tenth Chancery District, to cause certain proceedings had before him to be certified to this court for review. He alleges as follows: Robert A. Young, James N. Kelley and Jesse A. Jones were appointed commissioners of election for Sebastian County before the last general election. He (Boles) and John H. Holland were candidates for the office of State Senator for Sebastian County, it being the Twenty-eighth Senatorial District of Arkansas, at the general election held in September, 1908. According to the returns of such election, Holland received for senator a majority of twenty-seven votes. Commissioners met on Monday, the 21st day of September, 1908, after the election, to ascertain and declare the result. They counted the ballots in only three precincts, and Boles gained by the count seventeen votes and reduced Holland's majority to ten. They refused to count the ballots cast at the other precincts, although requested to do so by Boles by a proper petition, and immediately issued a certificate of election to Holland as senator. Afterwards, on the ——— day of September, 1908, petitioner, within the time and in the manner required by law, "served notice of contest of said election upon Holland," and named therein Ezra J. Morgan and L. F. Fishback, two justices of the peace of Sebastian County, as the justices before whom, at a day therein named and within the time required by law, he would take the depositions of witnesses in behalf of himself. In the taking of depositions it appeared that many illegal votes were cast at the election, 265 being polled in the First Ward in Fort Smith. The returns from that ward showed that Holland received a majority in that precinct of 180. In order to ascertain how such illegal votes, as well as other illegal votes, cast at other precincts in the county, were cast and counted, it became necessary to inspect the ballots. For that purpose James N. Kelley, one of the commissioners who had custody of all the ballots cast at the election in Sebastian County, was summoned to appear before the justices and bring with him the ballots. He appeared before the justices and refused to produce the ballots. An attachment for contempt was issued against

him, and, he still persisting in his refusal, the justices adjudged that he was in contempt, and ordered that he be committed to jail for five days, and issued a warrant of commitment, and under it he was taken into custody. He thereupon applied for and obtained a writ of habeas corpus from Honorable J. V. Bourland, Chancellor, then sitting in chambers, and upon hearing the chancellor held that the justices had no right to compel the production of the ballots, and for that reason declared the warrant of commitment to be void, and discharged Kelley.

Petitioner asked that a writ of certiorari be issued by this court, directing the chancellor to cause the proceedings mentioned herein to be certified to this court, to the end that his decision may be reviewed and held for naught.

James N. Kelley moves to dismiss the petition, because, among other reasons, the petitioner, Thomas Boles, was not a party to the habeas corpus proceedings. That being true, can he maintain this proceeding?

In *Sumerow* v. *Johnson,* 56 Ark. 85, this court held that a petitioner for a writ of certiorari is not entitled to the writ if he was not a party to the proceeding he seeks to quash. *Black* v. *Brinkley,* 54 Ark. 372. But in *Burgett* v. *Apperson,* 52 Ark. 213, the daughter and sole heir of Isaac Burgett, deceased, presented her petition to the circuit court for a writ of certiorari to quash an order of the probate court confirming a sale of her father's lands made by the administrator of his estate to pay debts, and the court held that she was entitled to the writ, notwithstanding she was not a party to the proceeding in which the order was made, she having shown a valid excuse for not becoming a party to the proceeding and prosecuting an appeal.

"The test of the right to certiorari is, was the person seeking the writ a party in form or in substance to the proceedings sought to be reviewed, so as to be concluded by the determination thereon?" *Starkweather* v. *Seeley,* 45 Barb. 164, 168; 6 Cyc. 766; 4 Enc. of Pl. & Pr. 167. Under some circumstances and in some jurisdictions the writ may be granted on the application of one whose interest in the proceedings sought to be quashed is direct and immediate, who was not a party. *Bath Bridge & Turnpike Company* v. *Magoun,* 8 Greenleaf (Me.) 292; *Campau* v. *Button,* 33 Mich. 525; *Wilson* v. *Bartholomew,* 45 Mich. 41;

4 Enc. of Pl. & Pr., 167; 6 Cyc. 767, and cases cited. Such an interest would entitle such a person to be made a party in this State (Kirby's Digest, § § 6005, 6006), but would not be sufficient to entitle him to the writ, according to *Burgett* v. *Apperson,* 52 Ark. 213, unless he had lost the opportunity of becoming a party through no fault of his own.

In this case the proceedings sought to be quashed were instituted for the purpose of relieving Kelly of imprisonment imposed upon him as a punishment for contempt, the term of which was fixed at five days. The attachment and commitment of Kelly were a criminal proceeding. The penalty assessed was imprisonment for five days. There was no condition that he should be relieved on production of the ballots. There was nothing in the proceeding of a civil nature which formed any basis for Boles to claim the right to be heard. The habeas corpus proceeding involved the liberty of Kelly, and in that Boles had no interest which made it admissible to make him a party. In habeas corpus proceedings like that in question herein the only parties entitled to be heard are the applicant for the writ and the officer in custody of the party restrained of his liberty, unless it be the State.

The petition for writ of certiorari is denied.

CLAIBORNE v. LEONARD.

Opinion delivered December 14, 1908. 88 391; 90 308

1. APPEAL AND ERROR—WHEN COMPLETE.—When an appeal is granted, and an authenticated copy of the record is filed in the appellate court, the suit is thereby removed, though no summons was issued. (Page 392.)
2. SAME—DISMISSAL FOR WANT OF SUMMONS.—Where a transcript on appeal was lodged in the Supreme Court three days before expiration of one year from rendition of the judgment appealed from, and a summons was immediately issued but was never served, and six months later an *alias* summons was issued and served, in the absence of explanation why the summons was not served earlier, the appeal will be dismissed. (Page 392.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; appeal dismissed.

Hogue & Cotham, for appellant.

A. J. Murphy, for appellee.

PER CURIAM. Judgment was rendered in the Garland Circuit Court on the 25th day of May, 1907, against M. A. Claiborne. The transcript was filed in this court on the 22d of May, 1908. An appeal was prayed and granted, and summons was issued and forwarded to the attorneys for appellant. That summons was never returned to the clerk's office, and was never served on the appellee or delivered to an officer to be served. An *alias* summons was issued on November 25, 1908, and was served on appellee on November 28, 1908. Appellee moves to dismiss the appeal.

In *Robinson* v. *Ark. Loan & Trust Co.,* 72 Ark. 475, it was held that when an appeal is granted, and an authenticated copy of the record is filed in the appellate tribunal, the suit is thereby removed to the appellate court. That when it is filed the appellate court's jurisdiction of the subject-matter is complete, and no other act is required to be done which can aid in the accomplishment of this object. The notice or summons does not aid in the removal, but calls the attention of the appellee to the fact that it has been removed. "The appeal is complete, and the appellate court can dismiss it if the appellant neglects to cause the notice to answer it to be given in a reasonable time, or fails to prosecute it in any other way."

In this case the appellant's appeal was not lodged in this court until three days before the year expired in which he was authorized to take an appeal. The summons was immediately issued, but never served; and six months thereafter an *alias* summons was issued and served. The court does not think that this is a reasonable time to delay the service of summons. No explanation is offered as to why the summons was not earlier served.

The appeal is dismissed.

APPLING v. STATE.

Opinion delivered September 14, 1908.

LIQUORS—UNLAWFUL SALE—GOVERNMENT LICENSE AS EVIDENCE.—In a prosecution under the statute prohibiting the clandestine sale of intoxicating liquors, evidence that a United States license authorizing defendant to sell liquors was found elsewhere than upon the premises where the liquor is alleged to have been sold is competent to show that defendant kept liquor for sale, but raises no presumption to that effect.

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

C. T. Wetherby, for appellant.

The defendant having previously been convicted of running a "Blind Tiger" at a certain pool hall in Hartford, at which time at request of the prosecuting attorney he deposited his government license in the bank where the evidence shows it remained, it was error to admit his license as evidence in this case, and espccially erroneous to charge the jury that such license was *prima facie* evidence of guilt. Kirby's Digest, § 5144; 102 S. W. 7.

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

The internal revenue license was properly admitted in evidence, there being no evidence that it had ever been cancelled, the same to go to the jury for what it was worth. True, the license itself was not *prima facie* evidence of the unlawful sale by defendant of intoxicating liquors without license and by means of a blind tiger, but the appellant, not having requested in instruction that it was not *prima facie* evidence of guilt, will not now be heard to complain of the court's instruction to that effect. 77 Ark. 143.

HILL, C. J. Lem Appling was proceeded against for the clandestine sale of liquor under sections 5140 *et seq.,* Kirby's Digest; and there was also a proceeding under section 5137 *et seq.* to search for liquors, and, if found, to destroy them. After trials in the justice's court, the cases were appealed to the circuit court. Appling was convicted by the jury, and the court ordered the liquors which had been found in his house destroyed.

The State introduced a United States internal revenue liquor license issued to Appling for the sale of liquors at Hartford, but it designated a different place for the sale than where the search was made. Defendant proved that in the preceding October he had been arrested and convicted for an illegal sale of liquor, and under an agreement with the prosecuting attorney, made in open court, he deposited the Government license in the Bank of Hartford, and that it was retained in said bank from that time until the time of the trial of this case. These proceedings were instituted in February following his former conviction in October.

The judgment of conviction of Appling will have to be reversed on acount of an instruction given by the court that the issuing of an United States internal revenue liquor license is *prima facie* evidence that defendant has sold liquor. Section 5144, Kirby's Digest, makes the finding of such a license on the premises occupied or controlled by the defendant *prima facie* evidence of a violation of the laws against the clandestine sale of liquors. This license was not found upon his premises, but was in the bank, and therefore the statute does not apply. It was held in *Liles* v. *State,* 43 Ark. 95, a case arising prior to the passage of the act making the possession of a license *prima facie* evidence of guilt, that the possession of it was not sufficient to sustain a conviction. And in *Peyton* v. *State,* 83 Ark. 102, it was said: "The mere issuance of internal revenue license, even if that fact had been established by competent evidence, was not sufficient to make out a *prima facie* case of unlawful sale of liquor."

The liquor was found upon the premises, and the court correctly instructed the jury that the finding of it there was *prima facie* evidence of guilt, under section 5141. But this is a presumption which can be rebutted by showing that the liquor was for private purposes, and not for sale, as provided under section 5146. The defendant adduced evidence which, if believed, would have been sufficient to have overcome this *prima facie* presumption of his guilt by reason of his having possession of the liquor; but there was no evidence to rebut the statement of the instruction by the court that the issuance of the license to him was *prima facie* evidence that he had sold liquor, and therefore

the conviction might well have been obtained upon that instruction, and if it is erroneous it was necessarily prejudicial. Evidence of the issuance of these licenses does not raise a presumption of guilt, unless made so by statute; but it is competent evidence for the purpose of showing what business the defendant is engaged in, or that he keeps liquors for sale, and generally on the question of intent. See 23 Cyc. 255. It was therefore competent evidence for the consideration of the jury, but, not being on the premises, was not made *prima facie* evidence by section 5144.

Other questions are raised, but it is not necessary to consider them, as the whole case goes back for new trial, and none of them which may arise again are fatal to the State's cause, and hence it is not necessary to discuss them.

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

CHATFIELD v. IOWA & ARKANSAS LAND COMPANY.

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Opinion delivered November 16, 1908.

1. TAXATION—REFORMATION OF TAX DEED.—Under Kirby's Digest, § 7116, providing that where a tax deed shows two or more tracts of land were sold at delinquent tax sale for a lump sum when in fact they were sold separately, the county clerk, "upon the presentation to him of such deed and being satisfied from the records of his office that said tracts of land were sold separately, shall file said deed in his office and cancel the same, and shall thereupon execute in lieu thereof a deed for said land, reciting * * * * that each tract was sold separately," etc., *held,* that the clerk can reform a tax deed only when he is satisfied from the records in his office that the several tracts of land were sold separately. (Page 401.)

2. SAME—SALE OF SEVERAL TRACTS FOR LUMP SUM.—A tax sale of several tracts of land for a lump sum is void. (Page 402.)

3. SAME—WHEN PAYMENTS OF TAXES NOT ADVERSE.—Kirby's Digest, § 5057, providing that one who pays taxes on unimproved lands shall be deemed in possession, does not apply to payments made by the agent of one claimant by consent of the agent of an adverse claimant during the pendency of negotiations looking to a compromise between the parties. (Page 402.)

4. EQUITY—LACHES.—As the holder of the record title to unimproved and uninclosed land is presumed to be in possession thereof, mere delay upon his part in suing to quiet his title does not constitute laches, as there is no duty or necessity for resorting to legal or equitable remedies until some one threatens to destroy or impair his possession or right to the land. (Page 404.)

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

STATEMENT BY THE COURT.

On the sixth of November, 1905, A. H. Chatfield, trustee, brought this suit, in the Cross Chancery Court, against the Iowa & Arkansas Land Company to quiet title to certain lands, all of which are wild and uninclosed. He states that these lands were sold by the collector of taxes of Cross County on the 11th day of March, 1867, for taxes, penalty and costs due on the same for the year 1866, to E. H. Porter, and the same, not being redeemed, were conveyed to him; and he (Porter) and his wife conveyed them to the Memphis & St. Louis Railway Company on the 11th day of June, 1873; and it conveyed them to William H. Chatfield, trustee, on the 31st day of May, 1883; and he (Chatfield) died on the 13th day of May, 1889, leaving plaintiff, A. H. Chatfield, and Mary Chatfield Gilbert, his only heirs; and Mrs. Gilbert conveyed all her interest in the lands to A. H. Chatfield on the 11th day of July, 1889, and since that time plaintiff has paid all the taxes on the lands, except for the year 1888, which were paid by the defendant. He further alleges that since Porter purchased at the tax sale he and those under whom he claims have been in absolute control of these lands; and the defendant is seeking to annoy and disturb him by claiming title and attempting to sell the same.

Defendant answered and denied that any part of the lands were sold on the 11th day of March, 1867, for the taxes of 1866; that plaintiff is now or ever has been in the possession of these lands; that plaintiff paid taxes thereon for seven successive years; and alleged that it, the defendant, paid taxes from the 9th of January, 1900, to thirteenth of July, 1905, under a special arrangement with plaintiff's agent, under which the taxes were to be repaid according to interest of parties. It alleged as follows: that the lands were swamp and overflowed, and were granted

by Congress to the State of Arkansas. They were conveyed by the State to Barnett Graham on the first day of December, 1860. On the 27th day of May, 1883, the widow and heirs of Graham, he being dead, conveyed to George W. Miller. On the 6th day of August, 1883, Miller conveyed to Charles Paxton, trustee; and he and the beneficiaries of the trust in which he held conveyed to the defendant on the 4th day of January, 1889; and by virtue of these conveyances it claims to be the owner of the lands. It asked that the allegations of its complaint be taken as a cross-complaint against the plaintiff, and that its title to the lands in controversy be quieted.

Plaintiff answered the cross-complaint, and alleged that he paid taxes on the lands for seven sucessive years, three of which were prior to the act of March 18, 1899, and four subsequent, and pleaded this in bar of defendant's right to recover.

Plaintiff and defendant entered into the following agreement, which was read as evidence in the hearing of this cause:

"It is agreed between plaintiff and defendant in this cause to be used as evidence that the lands in the complaint are what is known as swamp and overflow lands, and as such were granted to the State of Arkansas by act of Congress.

"That the lands were by the State sold to Barnett Graham, then a resident of the city of Memphis, in the State of Tennessee, and said lands were patented to said Graham.

"That said Barnett Graham departed this life intestate, and his heirs at law, all residents of said city of Memphis, conveyed said lands by deed duly executed, acknowledged and recorded May 27, 1883, to one George W. Miller.

"That said George W. Miller, by deed duly executed, acknowledged and recorded, conveyed said lands to Charles Paxton, trustee, August 8, 1883.

"That said Charles Paxton, trustee, by deed duly acknowledged and recorded, conveyed said lands to the defendant, Iowa & Arkansas Land Company, January 4, 1889.

"It is further agreed that E. H. Porter, to whom the tax deed in question was made under which plaintiff claims, died August 17, 1881."

Herbert Tonney testified as follows: He was the secretary of the defendant. M. M. Arnold was State agent, and L. C. Balch was agent of plaintiff.

"In the spring or summer of 1900, Mr. L. C. Balch, Mr. M. M. Arnold and myself met at the Capital Hotel, in Little Rock, Arkansas, and there were suggestions made as to clearing up the title to these lands (lands in controversy). The substance was that we ought to settle the matter of title in dispute, and I suggested that as both had paid taxes we ought to have three-fifths interest. Balch suggested one-half interest, saying that he would advise a settlement on that basis; and we left with the understanding that it was settled, as far as that was concerned, and that he would report later. Balch was to submit the proposition to Chatfield. In a second conversation with L. C. Balch in the first part of December, 1900, Balch, Mr. Arnold, and I met again at the Capital Hotel in Little Rock, and talked the matter over again. Balch said he had been sick, and had not been able to take the matter up with Mr. Chatfield, but said he would advise the settlement as heretofore agreed upon between us. The question then arose about taxes. We had been trying to pay the taxes prior to that time. We found there was going to be trouble in paying taxes, and Mr. Balch said they would pay the taxes, and later on we could settle; that there was no use squabbling about the matter."

M. M. Arnold testified: "I was present with Mr. L. C. Balch and Mr. Herbert Tonney at the Capital Hotel. My recollection is that it was in the spring of 1900—sometime in March, I think. We all talked and made suggestions as to what kind of settlement ought to be arrived at. Balch said he was anxious to have a settlement, and get the matter disposed of. The result of it was, at that time, that we would settle it on the one-half basis, which we all agreed was fair. Mr. Balch said he understood the history of both titles. Mr. Tonney and I thought under the circumstances that the Iowa & Arkansas Land Company should have three-fifths. Mr. Balch said something about the sale to be made, and he wanted three-fifths of what it brought and the taxes, which were to be paid, were to be taken out of the returns from such sale. He did not agree to the three-fifths to the Iowa & Arkansas Land Company. Spoke of them not

accepting it. But all were busy talking about the tax matters, and we did not discuss the matter after that. Said he would advise a settlement on the one-half basis. We finally agreed to it. We were to get up the tax matters. In the meantime he was to correspond with Mr. Chatfield, and ascertain what we were to get out of it in the event of a sale, and we were to settle upon in the meantime, whether we were to have one-half or one-third, but he didn't seem to think he, Mr. Chatfield, would give us over one-half * * * * We were to deduct first the amount of taxes which he had paid out. We had two conversations at the Capital Hotel that I remember. In the last one we got down to the proposition that we would divide even. I was present in the early part of December, 1900, at a talk between Mr. Balch and Mr. Tonney concerning the payment of future taxes on these lands. Mr. Tonney and Mr. Balch did most of the talking at that time. Mr. Tonney asked what about the taxes. He said, 'I have paid part of the time, too.' Mr. Balch said, 'I think, Mr. Tonney, you had better let things run along the same. You can pay the levee taxes, and we can pay the other taxes. We can do this until we settle up.' And they agreed upon that. I understand in all conversations up to the last one in December, 1900, that Mr. Balch would have to submit the matter to Mr. Chatfield."

From this testimony we infer that the proposition that the agents of both parties agreed to submit to Chatfield for approval or ratification was: "That each should proceed to try to find a purchaser for the lands; and if sold each should be refunded the taxes" he or it had paid, "and the balance should be equally divided."

A. H. Chatfield testified: L. C. Balch or R. W. Balch had no authority to "settle" a claim of any party to the lands mentioned in his complaint in this action; and that he never ratified or approved any agreement between L. C. Balch and the defendant, or any one in its behalf, whereby the defendant was recognized as having any interest in the property mentioned in the complaint; and no such agreement was submitted to him for approval; and no such agreement was made by him.

Plaintiff offered by letters and telegrams to purchase defendant's interest in the lands in controversy by payment of certain

sums, all of which it declined, and offered to sell for $10,000, which plaintiff refused to give. Propositions were pending until the fourth of March, 1905, when plaintiff withdrew all propositions, and ended negotiations.

The plaintiff paid county and State taxes on the lands in controversy from the year 1883 until the commencement of this suit, except the taxes of 1888 and 1890, which were paid by the defendant.

Both parties, plaintiff and defendant, concede and insist that there was no agreement as to division of lands or proceeds.

The court dismissed plaintiff's complaint for want of equity, and decreed that defendant's title to the lands in controversy be quieted as against plaintiff; and that defendant within six months pay to plaintiff the sum of $1,929, the amount of taxes paid by him on the lands, and made it a lien on the lands. Plaintiff appealed.

Joseph W. O'Hara, T. E. Hare and *R. W. Balch,* for appellant.

1. The act of March 18, 1899, is constitutional, and has become a rule of property. Kirby's Digest, § 5057; 74 Ark. 302; 78 *Id.* 95.

2. Levee assessments are not *taxes.* 158 Fed. 250; 86 Ark. 109; 65 Ark. 498, 503; 59 *Id.* 513, 531; 43 *Id.* 82; 38 *Id.* 514; 34 *Id.* 166; 26 *Id.* 523; 21 *Id.* 40.

3. Appellant has color of title, though the tax deeds be void. 47 Ark. 528; 67 *Id.* 102 U. S. 461; 18 How. 56; 2 Words & Phrases Jud. Def. 1264-1272; 71 Md. 283; 24 C. C. A. 397; 10 Fed. 531-6; 37 W. Va. 215; 61 Wis. 615; 72 Ala. 77-8; 77 Cal. 485; 16 Ill. 424; 102 Ind. 330. A tax deed regular on its face is *prima facie* evidence of the regularity of the tax forfeiture and sale. 59 Ark. 195; 35 *Id.* 505; 32 *Id.* 131; 22 *Id.* 556.

4. Records not required by law but kept for convenience are not competent as public records. 135 U. S. 109; 131 Ala. 286; 143 Mass. 77; 90 Minn. 239; 64 Neb. 39; 173 N. Y. 374; 57 N. Y. Supp. 794; 10 Enc. Ev. 722. All presumptions are in favor of the acts of a public officer on collateral attack. 22 Ark. 556; 43 *Id.* 243; 35 *Id.* 81.

5. Appellee and its predecessors are barred by *laches.* 81 Ark. 352; 139 U. S. 380; 81 Ark. 432; 3 Brown, Ch. 638.

O. N. Killough and *John B. Jones,* for appellee.

1. Where a clerk's tax deed recites that the tracts of land therein named were sold altogether and for a lump sum, and the fact is that they were sold separately, the clerk is, nevertheless, authorized to cancel that deed and execute another in lieu thereof, making the proper recitals, *only when he is satisfied from the records in his office* that the tracts of land were sold separately. And when no such record exists, the subsequent deed is void. Kirby's Digest, § 7116. The first deed was also void. A tax deed that shows on its face that two or more tracts of land were sold for a lump sum, is void. 83 Ark. 174; 29 Ark. 476; 31 Ark. 491. Where, as in this case, the clerk has failed to make a record of tax sales separate from the delinquent list, the tax sale is void. 84 Ark. 316; Gould's Digest, § 123, c. 148.

2. The claim of title under the seven years' payment of taxes act cannot be sustained under the evidence in this case. As, under the statute giving title by seven years' adverse possession, there must be open, continuous, hostile possession for the required time with intent to hold adversely to the original owner, so under this statute the payment of taxes must have been hostile to the other claimant of title, and must have been continuous for seven years in succession under color of title. The principle underlying the two acts is the same. 68 Ark. 553; 29 Conn. 391; 97 Iowa 247; 150 U. S. 597; 11 Pa. St. 212; 4 Wend. 508; 5 T. B. Mon. (Ky.) 531; 17 Am. Dec. 109; 43 Fed. 31; 74 Ark. 314.

3. There is no merit in the claim of laches. The same evidence that defeats the claim of limitation by payment of taxes also defeats the claim that appellee is barred by laches.

BATTLE, J., (after stating the facts.) Appellant claims under a deed executed by the clerk of the county court of Cross County on the 17th day of March, 1903. That deed recites that "on the 11th day of August, 1883, there was executed and issued by the clerk of the county court of the county of Cross, in the State of Arkansas, a clerk's tax deed for the following described lands: All of section 3, three, all of section 4, four, and all of section 5, five, all in township six, 6, north range five, 5, east, in Cross County, Arkansas, to one E. H. Porter of the county of Shelby, State of Tennessee;" and it is stated in that deed "that the said tracts of land were sold altogether and for a lump sum, when

the fact is they were sold separately;" and the clerk of the county court of Cross County proceeded to correct the error by the execution of the deed on the 17th day of March, 1903. But that deed was made without authority. The statute in such cases provides that "the clerk of the county court of the county in which said lands were sold, upon the presentation to him of such deed, and being satisfied from the *records of his office* that said tracts of land were sold separately, shall file said deed in his office and cancel the same, and shall thereupon execute in lieu thereof a deed for said land, reciting the execution of the former deed and the date thereof, the error therein, that each tract was sold separately, and the amount for which the same was sold, and in all other respects conform to the requirements of law." Kirby's Digest, § 7116. According to this statute, it is only when the clerk is satisfied *from the record in his office* that the tracts of land were sold separately that he is authorized to execute a deed in lieu of the first, making proper recitals. In this case there was no such record as to how the lands were sold, and no authority to execute the deed of March 17, 1903, and it is void. In many other respects the records of the county clerk's office of Cross County fail to show a valid sale of the lands in controversy for taxes of 1866.

The deed of March 17, 1903, having been executed without authority of law, the deed of the 11th day of August, 1883, remains in force, and it shows that the lands in controversy were sold together for the taxes of 1866; and, such being the case, the sale is void. *LaCotts* v. *Quertermous,* 83 Ark. 174, and cases cited.

It is evident, therefore, that appellant acquired no title by conveyances, the tax deed which is the basis of his title being void.

Appellant contends that he is entitled to hold the lands in controversy under an act entitled "An act for the protection of those who pay taxes on land," approved March 18, 1899. That act provides: "Unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays taxes thereon if he have color of title thereto; but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall have paid such taxes for at least seven years in

succession, and not less than three of such payments must be made subsequent to the passage of this act." Kirby's Digest, § 5057. Is he so entitled to hold?

Appellant and appellee claimed title to the lands in controversy. In the spring or summer of 1900, L. C. Balch, Tonney and Arnold met at the Capital Hotel, in Little Rock, for the purpose of adjusting their differences, and it was proposed to divide the lands equally, and that this proposition should be submitted to Chatfield for approval; Balch not having the authority to make the agreement. In December, 1900, they met again at the Capital Hotel, and it was agreed that a proposition to sell the land, and that each claimant should receive out of the proceeds the taxes paid by it or him, and that the balance be equally divided between them, should be submitted to Chatfield for ratification. Tonney, then agent of appellee, wanted to know what should be done in the meantime about taxes. He said: "I have paid a part of the time, too." Mr. Balch said: "I think, Mr. Tonney, you had better let things run along the same. You can pay the levee taxes, and we can pay the other taxes. We can do this until we settle up." And they agreed upon that. This agreement as to taxes was entered into after it was agreed that the proposition as to lands should be submitted to Chatfield. The effect of this was that Balch, who was the agent of Chatfield to pay taxes on his lands in Arkansas, should pay the State and county taxes on the lands in controversy until they should adjust their differences, or until it should be finally decided that they would not do so. Until that time Balch was the agent of both parties to pay the taxes, and the true owner of the land became liable for the taxes when there was a final failure to compromise. Negotiations by letter and telegram to compromise were thereafter entered into, appellant proposing to purchase appellee's interest in the lands and appellee to sell, and each one rejected the offer of the other until the fourth of March, 1905, when Chatfield withdrew all propositions, and ended negotiations. Until that time Balch was to pay State and county taxes for both parties, and continued to do so until he died in 1904, and the true owner became liable for the full amount of the same. There is no evidence that Chatfield ever accepted or approved the proposition Balch, Tonney and Arnold agreed to submit, but there is evidence that he did not.

The negotiations and failure to agree and withdrawal of them corroborate such evidence.

The payment of taxes, (we mean State and county taxes, and not levee assessments) under the agreement of the agents of the parties was not hostile to appellee, and was not a payment of the taxes by appellant within the meaning of the act of March 18, 1899; and the taxes on the lands were not paid for at least seven years in succession, three of which not being subsequent to the passage of the act, so he did not acquire title under that act.

Appellee is the true owner of the lands in controversy. He traces his title through an unbroken chain to the government of the United States.

But appellant says appellee has lost its right to the land by laches. Laches is an equitable defense, and the theory upon which it is sustained in equity is that "nothing can call a court of equity into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing." In this case the appellant has brought a suit to quiet title, and is indirectly seeking to use it for the purpose of establishing title. See *McFarlane* v. *Grober,* 70 Ark. 371; *Rowland* v. *McGuire,* 67 Ark. 320. It could not avail him as a defense to the cross complaint; for if it was dismissed he would have to sustain his complaint by proof of its allegations before he could prevail in this suit. Appellee is the owner of the lands. The lands are wild and unoccupied. They are in the constructive possession of the appellee. Appellant has acquired no title to them. There is no duty or necessity for resorting to legal or equitable remedies to establish its right until some one threatens to destroy or impair it; and that he has done in this case. See *Penrose* v. *Doherty,* 70 Ark. 256.

The decree is affirmed as to all the lands in controversy, except so far as appellee confesses error, and as to the land excepted it is reversed, and the cause is remanded with directions to the court to quiet appellant's title to it as against appellee.

HILL, C. J. and MCCULLOCH, J. (dissenting.) As stated by Mr. Justice BATTLE, the respective agents of the parties agreed "that each should proceed to try to find a purchaser for the lands; and if sold each should be refunded the taxes he or it had paid, and the balance should be equally divided."

The land company's agent seemed possessed of full authority; there is no question on that score, and the case turns on Chatfield's ratification. If he did not ratify it, then the whole agreement should go for naught. It was not a separable agreement, but an entirety. Its two subject-matters, tax paying and a division of the proceeds from sale of the land, were interdependent. It is true that a division of the land was first agreed upon by the agents, but, owing to Mr. Balch's illness, the agreement was not submitted to Chatfield when Balch met Tonney and Arnold at the second conference at the Capital Hotel and the whole matter gone over again and the tax payment agreement also reached. It was added to the former agreement, as the taxes were to be refunded from the proceeds of the lands when sold and the balance equally divided and the whole to be submitted to Chatfield for approval. There was no agreement for their payment otherwise than through the sale of the land.

If the agreement was not ratified by Chatfield, no more effect should be given to one part of it than the other. It did not purport to have life of itself. It had to be approved by Chatfield before it was brought into being. Without Chatfield's approval, it was mere amicable conversation between gentlemen desirous of avoiding a lawsuit.

But we think the evidence shows ratification by Chatfield, even in the face of his denial. Mr. Balch evidently put the whole matter fully before him. Norton, the president of the land company, put it fully before him in a letter of July 13, 1903. The evidence shows it was repeatedly put before him, and no dissent is found from him. He subsequently recognized the interest of the land company in efforts to purchase their half interest.

This conduct is inconsistent with any other fact than that L. C. Balch's agreement as to tax paying and division of the lands was approved. It cannot be explained as a compromise of disputed titles, for Chatfield and R. W. Balch refer in these negotiations to their half interest; language entirely inconsistent with a compromise of disputed titles and entirely consistent with a ratification of Balch's agreement. This would in equity be an enforceable agreement. Each party should have a half interest.

Holding these views, we cannot concur in the opinion.

KENNEY v. STREETER.

Opinion delivered December 14, 1908.

1. PLEADINGS—ALLEGATIONS NOT DENIED.—Allegations of the complaint, not denied by the answer, need not be proved. (Page 409.)
2. MORTGAGES—LIMITATION ON ACTION TO FORECLOSE.—One who assumed the payment of a mortgage is not a "third party," within Kirby's Digest, § 5399, fixing the period within which suits may be brought to foreclose mortgages, and providing that payments on the mortgage debt shall not, so far as affects the rights of third parties, revive the debt unless indorsed on the mortgage record. (Page 411.)

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

STATEMENT BY THE COURT.

On the first day of April, 1890, appellant, D. S. Kenney and his wife, Abbie L. Kenney, executed to the Topeka Investment & Loan Company their promissory note due and payable five years after date to said company for the sum of $700, together with interest thereon at the rate of eight per cent. per annum until paid, interest payable semi-annually on the first days of October and April each year thereafter according to the tenor of ten interest notes of twenty dollars each. This note was indorsed in blank without recourse by said Loan Company to appellees.

On the first day of April, 1890, to secure the payment of this note, appellant D. S. Kenney, and his wife, Abbie L. Kenney, executed their mortgage and deed of trust on the following lands lying in Crawford County, to wit: The N. W. ¼ of the N. E. ¼ and the N. E. ¼ of the N. W. ¼, section 5, township 9, range 31, to secure the payment of said note.

This mortgage was duly recorded in the office of the recorder of deeds and mortgages in Crawford County on said first day of April, 1890.

There was a default in the payment of this note and some of the interest coupons, whereupon appellees filed their complaint in the Crawford Chancery Court to foreclose this mortgage, making D. S. Kenney, Abbie L. Kenney, S. F. Kenney and J. H. Durham defendants. The first, second, third and fourth paragraphs of the complaint allege execution of the notes and the mortgages to secure them, the recording of the mortgage, and

the transfer before maturity and for value of the note for the principal and the interest coupon notes, together with the deed of trust securing same, to the plaintiff, appellee A. W. Streeter. The payments made and indorsed on the note are set forth, and it is averred that the principal debt, together with the interest at the rate of ten per cent. per annum, less the payments mentioned, is due and unpaid.

The sixth paragraph of the complaint is as follows: "The plaintiffs further state that on the 13th day of January, 1902, the said defendants Daniel S. Kenney and Abbie L. Kenney, his wife, sold and conveyed to defendant S. F. Kenney, who is a son of the said Daniel S. and Abbie L. Kenney, the said described lands set forth in the said deed of trust for an expressed consideration of one dollar, giving their quitclaim to the same; that the defendant S. F. Kenney purchased said lands of Daniel S. and Abbie L. Kenney with full knowledge of the said deed of trust, and that the same was a valid subsisting lien on the said land; that the assumption of the payment of said indebtedness by him was the real consideration for the conveyance of said land by the said Daniel S. and Abbie L. Kenney, and that the said S. F. Kenney in writing assumed the payment of said notes and interest, and that he, the said S. F. Kenney, made all payments that were made thereon subsequent to the 13th day of April, 1897, as hereinbefore particularly set forth."

The prayer was for judgment for the amount of the notes and the interest, and for a short time to be given for its payment, and unless same were paid within the time specified that the mortgage be foreclosed to satisfy the judgment, and for all other relief to which plaintiffs were entitled.

The answer of appellant S. F. Kenney set up that he was in possession of the land by virtue of a quitclaim deed from D. S. Kenney and Abbie L. Kenney, his wife, executed on the 13th day of January, 1902, that, prior to the execution of said deed, plaintiffs were barred of their right of action to foreclose the mortgage executed on the 1st of April, 1890, by Daniel S. and Abbie L. Kenney to C. S. Gleed, trustee, etc., because no one for plaintiffs' appellees, or either of them, had entered on the margin of the record of the mortgage any credits paid on the mortgage within five years, and appellant pleaded the five years

statute of limitation of March 29, 1899. The cause was submitted to the chancellor upon the pleadings and exhibits, the note and mortgage, and upon an agreed statement of facts containing certain letters of D. S. Kenney and S. F. Kenney written to A. W. Streeter, appellee, between February 14, 1898, and January 21, 1906, and including those dates. In addition to the letters, the agreed statement showed that "S. F. Kenney purchased the lands mentioned in the mortgage of Daniel S. Kenney and his wife, Abbie, with actual and full knowledge of the existence of said mortgage, and took deed from them for same; that there is no provision to pay the mortgage debt mentioned in the deed from Daniel S. Kenney and his wife to appellant S. F. Kenney; that no indorsements of any payments with date thereof had been made on the margin of the record where the mortgage complained of is recorded."

The chancellor rendered a decree in favor of the appellee, Streeter, for the sum of $1186.15, with interest thereon at ten per cent. from the date of the decree, and ordered and decreed that the mortgage be foreclosed, and the land sold to satisfy the judgment. A commissioner was appointed to make the sale.

From this decree this appeal has been duly prosecuted.

Sam R. Chew, for appellant.

1. There is nothing in the record to justify a personal judgment against S. F. Kenney. It nowhere appears that he was connected with the original undertaking. True, the bill alleges that the real consideration for the conveyance to him was the assumption of the debt, and that he had in writing assumed the payment of the note, but the proof does not sustain these allegations. The agreed statement of facts affirmatively shows to the contrary; and nowhere in the letters written did he *expressly* agree to pay the debt of his father. Therefore they are not sufficient to take the agreement out of the statute of frauds. Kirby's Digest, § 3654; 61 Ark. 613; 45 Ark. 67; 52 Ark. 174; 76 Ark. 292; 12 Ark. 174; 18 Am. Dec. (Ala.) 36; 23 Ala. 591; 33 Ala. 106.

2. The action on the debt and mortgage is barred, no indorsement of payments having been entered on the margin of the record where the mortgage was recorded within the time

allowed by law. Kirby's Dig., § 5399; 64 Ark. 317. Appellant being an interested third party, the mortgage as to him is void, and it is not material that he had knowledge of the existence of the mortgage. The statute makes no exceptions, and the court cannot interpolate terms into a statute not there in express words or by necessary implication. 44 Ark. 301; 57 Ark. 611.

Jesse Turner and *L. H. Southmayd*, for appellees.

1. The answer does not deny nor controvert the material allegations of the complaint, specifically pleaded, that the expressed consideration in the deed was one dollar, that appellant purchased with full knowledge of the deed of trust, that it was a valid subsisting lien on the lands, and that the assumption by appellant of the payment of the debt was the real consideration for the conveyance; and that appellant in writing assumed the payment of the note and interest, making all payments thereon subsequent to April 15, 1897. These allegations, therefore, must be taken as true. Kirby's Digest, § 6137; 73 Ark. 344; 85 Ark. 561; 80 Ark. 65. The agreed statement of facts shows conclusively that the court properly rendered personal judgment against appellant, and his letters are proof that he in writing assumed the payment of the debt.

2. Appellant is not a third party within the purview of the statute relied on. The object of the statute is that third parties be not misled. If a party who knows the actual status of a loan purchases with the stipulation that as part of the consideration he will assume the payment of the loan, and in writing promises the mortgagee so to do, and in recognition of the binding force of the mortgage makes various subsequent payments on the debt, he is estopped to claim the benefit of the statute. 68 Ark. 256; 63 Ark. 268; 48 Ark. 258; 70 Ark. 348; *Id.* 49; 64 Ark. 317-321.

WOOD, J. (after stating the facts.) 1. The most material allegation of the complaint, as it affects appellant, is that he purchased with full knowledge of the deed of trust, and "that the assumption of the payment of said indebtedness by him was the real consideration for the deed from Daniel S. and Abbie L. Kenney, and that the said S. F. Kenney in writing assumed the payment of said notes." The appellant's

answer does not deny this specific and well-pleaded allegation. Therefore, under the statute, and many and some recent decisions of this court, it must be taken as true and confessed. It was not necessary for appellee to prove it. Sec. 6137, Kirby's Digest; *Haggart* v. *Ranney,* 73 Ark. 344; *Simon* v. *Calfee,* 80 Ark. 65; *St. Louis, I. M. & S. Ry. Co.* v. *State,* 85 Ark. 561.

The agreed statement of facts shows that there is no provision to pay the mortgage debt mentioned in the deed from Daniel S. to S. F. Kenney. But that does not disprove the allegation of the complaint. It only shows that the deed did not mention any assumption of the mortgage debt. But that is far from disproving that appellant assumed the payment of said notes in writing, as the complaint alleged. We must take it from the undenied allegation that there was some other writing than the deed by which appellant assumed to pay the notes in suit as a consideration for the purchase by him of the land from his father. But, in addition to this, we are of the opinion that the various letters of D. S. and S. F. Kenney to appellee contain sufficient evidence of an express promise on the part of appellant to pay the debt of his father to appellee as a part of consideration for the deed. We have not set forth these letters in the statement of facts, but we have carefully read and considered them. A letter of D. S. Kenney's to appellee of July 18th, 1899, shows that he had let his two sons, appellant being one of them, "have the farm, they to stand in his place and meet the obligations of the mortgage." The letters of appellant, subsequent to this one, and the other letters of D. S. Kenney, show that appellant had assumed the debt of his father to appellee, for he sends in these at various times small payments, amounting in the aggregate to $132. In the first letter he says, *inter alia,* "I will do the very best I can, and as soon as I can, for you in the way of settlement," referring, as the whole letter shows, to the land in suit. Promises of similar purport are contained in sundry other letters in which small remittances are made, with excuses and apologies for not sending more. The whole correspondence, fairly construed, contains evidence of an express promise to pay the debt to appellee as the consideration for the deed. The very small sum of one dollar mentioned in the deed as the consideration therefor shows that appellant was to pay D. S. Kenney and wife only a nom-

inal sum. But he took possession of the land in controversy, and, as his letters show, occupied and used the income therefrom for his own purposes. This deed and the possession of the eighty acres of land was a sufficient consideration for his promise to pay the debt of his father to appellee. The court did not err, therefore, in rendering personal judgment against appellant.

2. We are also of the opinion that the proof shows, and it follows from what we have said, that appellant was not a "third party," in contemplation of section 5399, Kirby's Digest. That section has no application to cases like this, and the action was not barred. The decree was correct.

TULLY v. STATE.

88 411
90 599

Opinion Delivered December 14, 1908.

1. GAMING—EXHIBITING GAMBLING DEVICE—CONSTRUCTION OF STATUTE.—A conviction of exhibiting a gambling device contrary to Kirby's Digest, § 1732, is not sustained by proof merely of playing a game of poker for money, which constitutes an offense under Kirby's Digest, § 1739. (Page 412.)

2. SAME—CONSTRUCTION OF STATUTE.—The fact that the owner of a table at which a game of poker is played plays in the game and furnishes the chips to the other players does not make him a "keeper or exhibitor" of a gaming table, within Kirby's Digest, § 1732. (Page 413.)

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

Appellant *pro se.*

Poker does not come within the statute prohibiting the exhibition of gambling devices. *Stith* v. *State,* 13 Ark. 680, is conclusive of this case.

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

The laws against gambling "shall be so construed as to have effect, and to include all such games and devices as are not specially named, and in all cases when construction is necessary, it shall be in favor of the prohibition and against the offender." Kirby's Dig. § 1745. The table described might have been used

for many purposes, but was in fact being used for the playing of poker. The facts justify the lower court in holding that it was a device used in that game. 84 Ala. 13; 61 Ala. 1; 70 Ala. 1; 83 Ala. 84; 12 Wis. 434; 86 Ark. 353.

McCULLOCH, J. Appellant was tried before the circuit court, sitting as a jury, and convicted of the charge of exhibiting a gambling device contrary to the provisions of the statute on that subject. Kirby's Digest, § 1732. The following is an agreed statement of the facts:

"On the 6th day of May, 1908, William Tully rented two rooms in the Hotel Henry for one month. In one room there was a bed and such other furniture as is usually found in a bed room. In the other room there was no furniture except a round table covered with a sheet and some chairs. On or about the 1st day of June, 1908, officers raided these two rooms and found therein the defendant, William Tully, and several men. These men were seated around this table, playing for money a game of poker. When arrested, the defendant Tully asked permission of the officers to cash the chips of the other players in the game, the game being played with chips representing money, and, this request being granted, said Tully cashed or redeemed the chips held by the other players."

It further appeared in the record that appellant had been previously arrested on the charge of gambling, based on the same game of poker referred to in the present case, and pleaded guilty. Do the facts agreed upon constitute guilt of the offense charged?

The statute under which the charge against appellant is lodged was discussed at some length and construed by Chief Justice WATKINS in the case of *Stith* v. *State*, 13 Ark. 680, where he said: "The first section of the statute is aimed at those who set up, keep, or exhibit what are known as banking games, or gaming tables, against which persons bet, such as roulette, *rouge et noir*, faro and the like; and the exhibition of which is commonly understood to be a challenge to all persons to bet against them. * * *

"An attentive perusal of the statute makes the conclusion almost inevitable that the first seven sections are intended to re-

late exclusively to the banking games, whether called by names specified, or by any new name or device."

In that case the defendant was charged with violating the fourth section of the gambling statute (Kirby's Digest, § 1735) which made it unlawful for the owner or occupant of any house, outhouse, etc., to suffer any of the devices or games mentioned in the first section to be exhibited or carried on in their houses. With reference to this, the court said: "Our opinion is that the offense designed to be punished by the fourth section is the suffering or permitting to be carried on or exhibited in any house, etc., by the owner or occupant thereof, any banking games, gambling tables or devices prohibited in the first section, and not the playing or betting at any of the games mentioned in the eighth section. * * * So much of the opinion in *State* v. *Mathis* (3 Ark. 84) as extends the offense intended to be punished to the fourth section to the sufferance, by the owner or occupant of any house, of the playing of the smaller games mentioned in the eighth section, is not in accordance with what seems to be the object and policies of the statute, but rather calculated to defeat it."

That decision undoubtedly establishes a construction of the statute that the section under which the charge in the present case is based refers only to banking games and gaming tables or devices at which banking games are played, and not merely to the games of chance specified in the latter section (1739).

The court in that case seems also to have construed the term "banking games" to mean only those which involved the idea of the banker or exhibitor betting against the players, but this construction has been modified by the recent case of *State* v. *Sanders,* 86 Ark. 353, where we held that the statute applied to the exhibition of a pool table designed for play where the losing participants in the game paid to such owner the price for the use of the table. No reference is made to *Stith* v. *State* in the last-named case, but the undoubted effect of the decision is to modify to some extent the doctrine announced in the former. We have no hesitancy, however, in saying that the doctrine of *Stith* v. *State* is correct, so far as it holds that the first section of the statute applies only to banking games and devices, and that a banking game of chance is one in which the banker or exhibitor is interested in the result of the play. The fact merely that the

owner of the table or other device plays in the game with the other gamblers does not make him interested in the game as banker or exhibitor, so as to render him liable under the statute for exhibiting a gambling table or device.

It is not shown here that appellant was interested in the game as banker or exhibitor. The most that is shown is that he, with others, gambled at a table and with chips which he furnished. The fact that he cashed the chips does not show that he was interested further than as a player. In furnishing the chips and in cashing them at the close of the game he may have been acting merely as stake-holder in a game in which he was a participant. It devolved upon the State to show that he was interested as banker or exhibitor in the result of the game, and not merely as a participant in the game of poker.

Reversed and remanded for new trial.

Hill, C. J., (dissenting). If *Stith* v. *State,* 13 Ark. 680, is correctly interpreted by the majority of the court, then in my opinion it should be overruled, as such construction is not consistent with the plain terms of the statute. But I do not agree with their construction of that opinion. The charge in that case was that the defendant knowingly permitted divers persons to play the game of poker in his house. The question was whether such charge fell within the fourth section of the statute against gambling. (Kirby's Digest, § 1735.)

The difference between banking games and what were denominated small games was the point of discussion of the learned Chief Justice. He was not going into the other provisions of the statute relating to maintenance of gaming tables, gambling devices, etc., but was considering only the case in hand. This is evidenced by the language used in his conclusion of the subject: "Our opinion is, that the offense, designed to be punished by the fourth section (which is section 1735) is the suffering or permitting to be carried on or exhibited in any house, etc., by the owner or occupant thereof, any of the banking games, *gaming tables* or *devices prohibited in the first section,* and not the playing or betting at any of the games mentioned in the eighth section" (italics mine).

The first section (Kirby's Dig. § 1732) prohibits the setting up, keeping or exhibiting "any gaming table or gambling de-

vice * * * * or any faro bank, or any other gambling table or device, or bank of the like or similar kind * * * adopted, devised or designed for the purpose of playing any game of chance, etc."

To restrict this to banking games when they are only one—albeit the chief one aimed at—is contrary, in my opinion, to the plain terms of this statute. I do not so understand the Stith case. If it so rules, it ought to be quickly overruled.

DODSON v. BASKIN.

Opinion delivered December 14, 1908.

PARTNERSHIP—LIABILITY OF PARTNER.—Although a bank had notice that one of two partners was to furnish all the money needed by the partnership, this will not discharge the other partner from liability to it on a partnership note given to cover an overdraft for money used in the partnership business; in order to discharge himself, the latter should have notified the bank that he would not be liable for the acts of his partner in obtaining money for the use of the partnership in violation of the private agreement of the partners.

Appeal from Union Circuit Court; *George W. Hays,* Judge; reversed.

STATEMENT BY THE COURT.

In the spring of 1903, a partnership was formed between H. W. Baskin and J. H. Garrison, under the firm name of H. W. Baskin & Company, for the purpose of dealing in cattle, cotton seed and fertilizers. Baskin was to look after the trading end of the partnership, and Garrison was to furnish the money necessary to run it. Baskin told E. H. Smith, cashier of the Bank of El Dorado, of the arrangement, and asked if there was any possibility of the checks of the firm being turned down, saying if there was he would not check on it, for it would injure his credit. Smith told Baskin to go ahead, and it would be all right.

Thereafter, in making purchases for the firm, Baskin drew checks on the Bank of El Dorado in their firm name of H. W. Baskin & Company. To cover an overdraft caused by these

checks, Garrison executed the note here sued on to the bank in the firm name. The note was for $549. Baskin did not at the time know of the execution of the note. The affairs of the partnership have never been settled. Subsequently to the execution of the note, the bank became insolvent, and E. H. Smith was appointed its receiver. W. J. Miles succeeded Smith as receiver, and instituted the present suit. Before the trial, the assets of the bank were sold to C. W. Dodson by order of the chancery court, and Dodson was substituted as plaintiff in the place of Miles, the receiver. Other testimony was adduced at the trial, but the above statement sufficiently sets forth the issue raised by the appeal, and a further abstract will not, therefore, be necessary. There was a jury trial, and a verdict for the defendant. The plaintiff has duly prosecuted an appeal to this court.

W. E. Patterson for appellants.

1. Persons who are aware of the terms upon which partners have agreed among themselves to carry on business are not deemed to contract with them upon the basis of the agreement made between themselves, unless there is distinct notice that the firm will not be answerable to strangers for acts which without such notice would clearly impose liability. 30 U. S. (5 Pet.) 529; 8 L. Ed. 216; 30 Fed. Rep. 412; 74 Ala. 64; 61 Miss. 354.

2. Notice of non-liability must be shown, and the burden is on the party claiming exemption. 22 A. & E. Enc. Law, p. 143.

R. G. Harper, for appellee.

1. When one partner borrows the money and executes a note without authority, and the lender knows that by the terms of the partnership the borrowing partner was to furnish all the money, the payee of the note cannot recover of the other partner. 22 A. & E. Enc. L. (2 Ed.) p. 164.

2. Partners may by agreement restrict the authority of one or more of them to bind the firm, and no act done in contravention thereof is binding on the firm with respect to persons having notice. 22 *Id.* 142; 50 Miss. 344. The notice in this case was ample.

HART, J. (after stating the facts). The sole question raised by the appeal is as to the correctness of the following instructions:

"If you believe from the evidence in the case that, acting within the scope of this partnership, Mr. Garrison was to furnish the money for this business to be carried on, and that Mr. Smith, who was the agent of the Bank of El Dorado, where those checks were drawn, had notice of the agreement and had notice of the terms of this contract as to the part he was to perform, and that Mr. Baskin had nothing to do with the furnishing of the money for this firm to operate on, then you will find for the defendant. To enable the plaintiff to recover, he must show this by a preponderance of the evidence."

And again:

"Before you can find for the defendant, you must find that Mr. Smith, as agent of the Bank of El Dorado, knew of the terms of the contract as to Mr. Garrison furnishing the money, and knew that was Mr. Garrison's part of the contract, and that Mr. Baskin had nothing to do with the furnishing of the money for the operation of the firm. If Mr. Baskin, as a partner of Mr. Garrison, was doing a partnership business, and there was no understanding, so far as the bank knew of, then the acts of Mr. Garrison would be binding on Mr. Baskin, and he would be bound by it."

Baskin admits that he and Garrison were equal partners, each to receive one-half of the profits of the business, and that the partnership affairs have not been settled. His contention now is that notice to the cashier of the bank that Garrison was to furnish all the money needed by the partnership restricted his liability to the bank, and that therefore he is not liable upon the note, although it was given to cover an overdraft for money that was used in the partnership business. In order to avoid liability, Baskin should have gone further and have given notice to the bank that he would not be answerable for the acts of his partner in obtaining money for the use of the partnership in violation of the private agreement of the partners.

Mr. Lindley in his work on Partnership, vol. 1, p. 176, states the rule as follows: "The writer is not acquainted with any case in which it has been decided that persons who are aware of the terms upon which partners have agreed together to carry on business are deemed to contract with them upon the basis of the agreement come to amongst the partners themselves. In all cases of this description, the real question to be determined seems to be

whether there was distinct notice that the firm would not be answerable to strangers for acts which, without such notice, would clearly impose liability upon it; and whenever there is any doubt upon this point, the firm ought clearly to be liable, the *onus* being on it to show sufficient reason why liability should not attach to it."

Tested by this rule, it will be plainly seen that the instructions are erroneous.

For the error contained in them as indicated in this opinion, the judgment must be reversed and the cause remanded for a new trial.

DENNIS v. STATE.

Opinion delivered December 14, 1908.

1. LARCENY—EVIDENCE.—In a prosecution for larceny where there was evidence tending to prove that defendant stole the property and sold it, receiving a bank check in payment, it was competent to introduce the check, properly identified, to fix the date of the sale. (Page 421.)
2. WITNESS—IMPEACHMENT.—Where defendant was asked on cross examination whether he did not come to see a certain person, and whether when the latter said to him, "I can help you out if you will turn State's evidence," he replied, "I'll see you later," and defendant denied that such conversation took place, it was admissible to prove by the person mentioned that such a conversation took place between himself and defendant. (Page 421.)

Appeal from Jackson Circuit Court; *Joseph W. Phillips*, Special Judge; affirmed.

Stuckey & Stuckey, for appellants.

1. There is no proof that the hogs were stolen, nor that they were Harris's hogs—just a suspicion *that they might have been stolen.* A suspicion is not enough to sustain a conviction. 85 Ark. 360. Nor did Harris say that these were his hogs, nor that they were stolen.

2. An *alibi* was clearly shown. The verdict is inconsistent with the evidence—the result of passion or prejudice. 51 Ark. 467; 56 *Id.* 314; 46 *Id.* 149.

3. The check was inadmissible, as no one identified defendant as being connected with it.

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

1. There was evidence to support the verdict. 85 Ark. 360, 39 *Id.* 491, and 68 *Id.* 52 are entirely different cases on the proof.

2. The question of *alibi* was for the jury.

3. There was no prejudice in admitting the check; it made definite the time and place.

4. Finley's testimony was admissible to impeach defendant on cross-examination as to the statements made by him. Kirby's Dig. § 3138.

HART, J. Bud Dennis was convicted of the crime of grand larceny, and has duly prosecuted an appeal to this court. The indictment charged him with stealing one red, white and black spotted gilt, two white and black spotted pigs, and nine spotted hogs, all marked with a crop off of the right ear and a hole in the left ear, the property of A. P. Harris.

Harris testified that he owned hogs of the mark and description mentioned in this indictment. That they ran in the Bayou Bottoms in Poinsett County, near the Jackson line. That the hogs disappeared from their range in March, 1907, and that he does not know what became of them. The place where Dennis lived is not far from where the hogs ranged.

J. G. Handel testified that on Saturday about the last day of March, 1907, he bought some hogs, answering the description of those set out in the indictment. That he did not know Bud Dennis then. That W. B. Chastain informed him that there was a man in town with hogs hunting for him. That he afterwards found the man, bought the hogs, and paid him $80.75 for them, being 4½ cents per pound. That the man said C. W. Sears owned the hogs, but that he wanted the check made to him, R. W. Sears. That he saw the man indorse the check, and identified the check presented to him as being the one. That the signature on the back is R. W. Sears, and that it was made by the man who sold him the hogs. Signatures proved to have been written by Bud Dennis were introduced in evidence before the jury for the purpose of comparison with this signature. That the defend-

ant was a man of much about the same description, but that he can not positively identify him as the man who sold the hogs to him. That the hogs were in a wagon, to which four mules were hitched. The hogs were sold in the town of Newport, Jackson County, Arkansas.

W. B. Chastain testified substantially as follows: I know Bud Dennis. He drove up to my place of business in Newport during the latter part of March, 1907, and inquired for Mr. Handel, a hog buyer. Handel was not there, but came in later, and I told him Dennis was looking for him. Dennis was driving a wagon with four mules hitched to it, which was loaded with hogs when I first saw him. Later in the day, I had occasion to ride down to the stock pen, and saw Dennis drive away from there.

Marcellus Balch testified that he lived about fifteen miles from Newport, and that on the night of the 29th day of March, 1907, he met a wagon going towards Newport with four mules hitched to it. There were two men in the wagon, but he did not recognize them. He did not see any hogs in the wagon, but heard them in it making a noise. Bud Dennis lives in his neighborhood.

Lee Balch testified that the next night, about 11 o'clock, he heard the racket of a wagon and got up. He thinks he recognized the mules as belonging to Frank Curtis and Bud Dennis. There was only one man in the wagon, and he was driving four mules. The driver of the wagon suited Bud Dennis's description, but he could not say whether or not it was he. The moon was shining dimly, and his house was about fifty or sixty feet from the road. The wagon was coming from the direction of Newport, and going towards the Dennis neighborhood.

C. W. Sears, W. R. Sears and W. H. Sears all testified that they lived in the same neighborhood with Bud Dennis. That they did not authorize any one to bring hogs to Newport for them in March, 1907, and they did not know any one by the name of R. W. Sears.

Bud Dennis took the stand in his own behalf. He denied that he was ever in possession of the hogs described in the indictment, and denied that he sold any hogs to Handel in March, 1907. Other evidence was adduced in his behalf which if believed by the jury established an *alibi*.

The principal question raised by appellant is that the evidence is not sufficient to sustain the verdict. His counsel cites the case of *Jones* v. *State,* 85 Ark. 360, to sustain that contention.

There is no similarity between the facts in the Jones case and the present one. In the former Jones had purchased from one Ellison cattle which belonged to Dr. Neice. The court held that there was sufficient testimony to justify a finding, from the conflicting evidence, that Ellison was not authorized by Dr. Neice to trade the cattle to Jones, but not enough to warrant the conclusion that Jones did not receive the cattle in good faith. The court said: "In order to justify appellant's conviction, it is necessary to prove, not only that Ellison had no authority to dispose of the cattle, but also that appellant knew that he had no such authority, and that he received the cattle from Ellison, with the felonious intent to deprive the owner of his property."

In the present case Chastain positively identifies appellant as the person who sold the hogs to Handel, and if the hogs were those of Harris they were stolen; for it is not either claimed or shown by the proof that any one had authority to sell his hogs. Harris's hogs had disappeared from their usual range in the bottoms on the line between Poinsett and Jackson counties. The earmarks, the flesh markings and other parts of the description of the hogs sold tallied with those of Harris. Some one was seen hauling hogs towards Newport, from the direction of the Dennis neighborhood, which was not far from where Harris's hogs ranged on the night before the hogs were sold. The signatures of Dennis and of the man who sold the hogs were before the jury for comparison. The defendant, in addition to denying his guilt, introduced evidence strongly tending to establish an alibi, but the weight of the evidence was a question for the jury.

A careful consideration of the evidence leads us to believe that it is sufficient to sustain the verdct.

Handel identified the check as the one given by him to the person who sold the hogs to him, in payment for them. It was introduced by the State to fix the date of sale, and was competent for that purpose.

Appellant was asked, on cross-examination, if he did not come to see Buck Finley in response to word sent him by Finley, and when Finley said to him, "I can help you out if you will turn

State's evidence," replied, "I'll see you later." Having denied this, Finley was introduced as a witness to show that the conversation had occurred between Dennis and Finley as indicated by the question asked appellant on cross-examination. This was competent to go to the jury for what they might consider it worth as impeaching appellant's testimony.

Finding no prejudicial error in the record, the judgment must be affirmed.

JOHN A. GAUGER & COMPANY v. SAWYER & AUSTIN LUMBER COMPANY.

Opinion delivered December 14, 1908.

1. EVIDENCE—BURDEN OF PROOF.—Where, in an action for the breach of a contract, the defendant alleges in defense a breach of the contract by plaintiff, the burden is on plaintiff to show that he complied with the terms of the contract in the particulars alleged, and that defendant broke the contract. (Page 429.)
2. SALES OF CHATTELS—RESCISSION—WAIVER.—Where, in a suit for breach of a contract of sale of chattels, defendant set up a counterclaim alleging certain breaches of the contract by the plaintiff, all breaches committed by the plaintiff which are not set up in such counterclaim will be considered as waived. (Page 430.)
3. SAME—CONSTRUCTION OF CONTRACT.—Where a manufacturer of doors and windows in the month of February, 1904, accepted an order for from 7,500 to 10,000 doors and as many windows as might be required by the vendee from time to time during the year 1904, and, after making some orders during the year which were filled, the vendee sent in additional orders during the month of December, 1904, for 7,862 doors and 46,300 windows, the manufacture of which would have required five months, the manufacturer was not in default in failing to fill the latter orders. (Page 431.)
4. SAME—RESCISSION.—A refusal by one party to a contract to perform his part of it justifies the other in treating is as rescinded. (Page 431.)
5. SAME—BREACH.—Where a vendee refused to pay sums due to the vendor, who was not in default, unless he would give assurance that he would perform the contract in certain respects, such refusal justified the vendor in treating the contract as rescinded, and in suing to recover the amount past due. (Page 433.)

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

STATEMENT BY THE COURT.

The appellant, John A. Gauger & Company, of Chicago, is a general sash and door dealer and distributor; and the appellee, the Sawyer & Austin Lumber Company, of Pine Bluff, Arkansas, is a manufacturer of lumber, sash and doors.

Appellant wrote to appellee, asking for prices on doors and sash. Appellee in reply wrote appellant, January 30th, 1904, giving prices and saying: "We will agree to furnish you from 7,500 to 10,000 doors at the above quotation, minimum amount to be 7,500, and would agree to furnish all the open sash you wish at prices named." In reply to this appellant wrote to appellee February 3, 1904: "We have your letter of January 30, and you may book our order contract for yellow pine doors and open windows covering our requirements during the present year of 1904, as we need the stock from time to time. We to take from 7,500 to 10,000 doors, and as many open windows as we may require during the year." In answer to this appellee wrote to appellant, February 5, 1904, as follows: "Your favor of 3d inst. at hand, and we entered your order for 7,500 to 10,000 doors and what open sash you may need during the life of this agreement at the following prices," etc. The terms named were sixty days net, or 2 per cent. off for cash in ten days from date of invoice after deducting freight.

The parties entered upon the performance of the contract, and the correspondence that followed showed that appellant made numerous and large orders of sash, and that appellee did not ship same as promptly as appellant claimed the contract required. Appellant complained of this to appellee, and claimed that it was being damaged on account of appellee's failure to ship the sash as promptly as it should. Appellee, on the other hand, sent in its statement of past-due indebtedness of appellant on orders that had been filled, and urged appellant to pay this indebtedness, and complained because it did not do so. Appellee also urged appellant to send in more orders for doors, and complained that appellant was not making orders for doors as it should, and that

if it had received larger orders for doors it would have been enabled to fill the orders for sash more promptly. Notwithstanding these reciprocal complaints, appellant continued to send in its orders (the orders for sash largely predominating), and appellee continued to bill same and to ship same, it claims, as rapidly as it could under the circumstances, fire having occurred which destroyed a part of the machinery, and which necessitated a cessation in the operation of appellee's plant from about the 22d of September, 1904, till about the 15th of October, 1904. On October 10th appellee notified appellant that in three or four days it would be in shape "to handle orders as heretofore." On October 17th appellee wrote appellant "that there is rather a large amount past due on account; we are needing all the money we can collect at the present time, and will appreciate an early remittance." October 31st appellant asked appellee "to advise by return mail how soon we may expect shipment of our orders with you, and just what we may depend upon." November 2 appellee replied: "We have enough windows now for a car, and have ordered in an empty for it, which will be loaded as soon as set in on our track. Will advise further what to expect in the way of future shipment in a day or two." In a letter to appellee November 14th, appellant asked appellee "to advise promptly by return mail whether you will protect us on say ten thousand doors on the basis of your present contract with us to be specified between this time and April 1st next." To this appellee replied Nov. 17th: "We find that you have ordered on your contract 1,851 doors, and we are ready to ship the balance at any time that you will send us specifications. We have been urging you at different times to send us an order for these doors. We wish to fill the entire contract order by January 1, 1905. When the first contract is filled, we will be glad to take up the matter of one for 1905." To this appellant replied Nov. 21, 1904: "You have not fully replied to our letter of the 14th. We tried to make it clear to you that we wanted to take all the doors that we thought we could specify this season when we contracted with you, and explained that while we can sell, we think, several car loads of yellow pine doors, it may be that we cannot get specifications so that we can send them in to you until after January 1st. Possibly some of the doors we can specify, but there will be a good many we cannot specify until

during January and February next. Would it not be satisfactory to you to send our specifications between this time and March 1st for yellow pine doors with you? We do not expect that you contemplate advancing your prices to us on yellow pine doors for 1905, as we have already been solicited by several Y. P. door manufacturers, and we think we would have no trouble in contracting for 1905 at exactly as low prices as we are now paying you. We want to continue doing business with you, and wish you would again read our letter of the 14th and write us more fully on the subject, and oblige."

To this appellee replied: "We have your favor of the 21st inst., and we think we replied to your letter of the 14th in full. We simply expect you to take the doors according to your contract, and expect you to send us specifications by January 1st. When the first contract is filled, we will be glad to take up the matter of one for 1905. You have been holding us to the sash part of the contract, and we shall expect you to live up to it on the door proposition as well." On December 5 appellant wrote appellee "inclosing an order for 26,800 sash, and promising to "send memorandum of the balance of doors due to make up the 7,000 very shortly," and saying, "We fully intended to carry out our part of the contract some time ago, but were in a position where we had to buy considerable goods elsewhere closer. We will surely give you specifications for our entire contract during the year." The appellee, on December 9, returned the order for 26,800 sash, saying: "Your orders now on file will take all the sash we can furnish between now and the time of our annual shut-down for repairs, and, as we are not prepared to accept order for 1905 delivery, we return the order forthwith," and the letter asked appellant to send in specifications for doors due it promptly, so that appellee might make as large shipment of these as possible before it "shut down." To this appellant replied, returning the order for the sash and insisting on appellee's booking and filling the order, saying the contract showed they were entitled to this, and promising to "send specifications for doors shortly." Appellee, December 14, again replied by returning the order for sash, and reminding appellant that it had promised to take 7500 doors during the year 1904, and urging it to "send in specifications for these doors at once." From December 14th till the 31st appellant

almost daily sent in to appellee orders for doors, amounting in the aggregate to 7,862 doors, and on the 26th of December it also sent in an order for 18,500 sash. The amount of sash orders from December 6 to December 26, inclusive, amounted to 46,300. Appellee made no further reply to appellant's order for sash on December 5 than that stated in its letter of December 9, and made no reply to the letters containing orders for doors and sash after December 14th. On December 28 appellee wrote appellant as follows: "Our books show a balance due us of $1641.57, all of which is past due except the last car shipped you, amounting to $642.07. This leaves a balance past due of $999.50, and we have this day placed draft in bank against you for this amount. Trusting you will honor on presentation, we remain," etc. On December 31, appellant wired and wrote appellee asking for acknowledgment of the receipt of its orders for doors sent appellee within the last two weeks, also for sash and for full assurance of shipment "according to the terms of the contract." These were followed by letter of January 4, 1905, referring to and reciting these orders, and urging shipment of same, and adding: "Your draft on us for collection covering a portion of your account which is now due we have requested the bank to hold until we receive acknowledgments from you covering all the orders we have mailed you since December 1, with the assurance from you that all orders will be shipped with reasonable promptness based on our recent contract. We are prepared to pay your account as it matures just as soon as we receive your acknowledgments of our orders and positive assurance that the goods will be shipped." And on the 12th, another letter urging shipment of certain orders, designating them.

On January 16 appellee sent appellant this telegram: "We hereby cancel all your orders on file with us on account of your violation of contract as regards settlements;" also letter confirming telegram, and adding: "We will dispose elsewhere of what stock we have made for you."

This was all the correspondence directly between appellant and appellee, but on February 6, 1905, W. T. Young, attorney for appellant wrote Mr. Danaher, attorney for appellee, to the effect that appellee was due appellant for 7,862 doors as per orders from December 14 to 30, 1904, and for 46,300 sash as per orders

of December 6 and 26, 1904. And, after declaring that appellee had repudiated the contract, and that appellant had not refused to make payments for past shipments, but had only delayed same till appellee could acknowledge receipt of appellant's orders, the letter expressed a willingness on the part of appellant to make payments of appellee's accounts promptly, provided it could get a fulfillment of the whole contract on the part of appellee. The letter then tendered the sum of $1560.07 in full payment of the account with appellee, upon the condition that, if appellee accepted same, it should fill the orders for sash and doors as per statement of the orders for same as set forth in the letter. In answer to this Mr. Danaher, as attorney for appellee, in letter of February 14, 1905, replied that appellee was then and had been at all times ready and willing to comply fully with the terms of its contract with appellant, provided appellant complied with its part of the contract. He then demands of appellant the sum of $1710, as the amount long past due appellee. In answer to this, Mr. W. T. Young, attorney for appellant, handed Mr. Danaher, attorney for appellee, a letter in which appellant made a tender of $1710.69 to appellee, saying: "While we do not contend that we owe this amount, yet, for the purpose of showing our absolute willingness to comply with every part of the contract, we have concluded to grant your request," and concluding: "Your acceptance of the money herewith tendered will bind you to carry out all the terms, conditions and stipulations of the contract, and a prompt shipment of the orders heretofore placed with you upon the terms and conditions above mentioned." This letter was indorsed by Mr. Danaher as follows: "This letter was handed to us by W. T. Young, on March 3, 1905, and we agreed to accept said sum of $1710.69 under the terms mentioned in the letter. Young then refused to pay us the money unless we would deliver to him bill of lading for two cars of sash and doors." There was evidence to the effect that when sash and doors were ordered in such large quantities as those given by appellant to appellee in the month of December, it would take five months to fill same, in the natural course of trade, and there was no evidence to the contrary.

On March 3, 1905, appellee sued appellant in the Jefferson Circuit Court, alleging that appellant was indebted to it in the

sum of $1710.69 for lumber and lumber products sold and delivered to appellant. Appellant answered, denying that it owed appellee $1710.69, but admitting that it was due appellee the sum of $1500.07 for lumber and timber products purchased of appellee under contract dated February 3, 1904. Appellant then set up the contract with appellee, and averred that appellee and appellant "operated under said contract in accordance with the terms thereof until the latter part of 1904, when the plaintiff ceased to acknowledge receipt of orders and specifications sent it by defendant or to manifest a disposition of carrying out its contract by manufacturing and shipping the orders so received by it." Appellant by way of counterclaim set up that appellee had failed to fill orders for 46,300 windows and 7,862 doors under the contract, and that it was damaged thereby in the sum of $2778.54, for which amount, less the sum of $1,560, admitted to be due appellee, appellant asked for judgment. Appellee denied all material allegations of the cross complaint, and set up the contract from its viewpoint.

The above were substantially the issues and the facts except on the question of appellant's damage, which, in the view we have taken, it is unnecessary to state. The cause was tried by the court sitting as a jury, and its judgment on the facts and law was in favor of appellee in the sum of $1,936.67, to reverse which this appeal is prosecuted.

Young & Rowell, for appellant.

1. Appellee was not in law justified in cancelling the contract by reason of appellant's failure to pay its draft of $999.50. 51 L. R. A. 791. Defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other payments or deliveries stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. 47 N. J. L. 290; 9 C. P. 208; L. R. 9 Q. B. Div. 648, L. R. 9 App. Cas. 434; 115 U. S. 188, 29 L. Ed. 366; 2 Allen (Mass.), 492; 40 N. J. Eq. 612; 65 Ia. 390; 38 Mo. App. 201; 25 Am. Rep. (N. Y.), 203. Covenant of payment was not a condition precedent in this case. 17 Geo. III, 1 H. B. 1, 273, note a; 4 Ad. & El. 599. In rescinding as in making con-

tracts, the rule is that both parties must concur. 2 Barn. & Ad. 882; L. R. 9 C. P. 208. See also 49 N. W. 529; 2 Benjamin on Sales § 909; 69 N. Y. 348; 26 Ark. 309; 56 Ill. App. 165; 30 L. R. A. 33; Benjamin on Sales, 7 Ed. (Bennett's), § 593 pp. 579, 582; *Id.* p. 604, tit. "Successive Payments."

2. In this case special damages would lie, and the true rule in estimating same would be the difference between the contract price and the price appellant had to pay for similar goods to fulfill its contracts with other parties, even though it exceeds the market value at the time of the purchase by appellant. 71 Ark. 408. See also 23 Ill. App. 17; 57 L. R. A. 203.

Austin & Danaher, for appellee.

1. It is in proof, undisputed, that an order the size of those given by appellant after December 1, 1904, could not in the ordinary course of business have been filled in less than five months. It can not be questioned, therefore, that appellee had the right to refuse such orders. Sash that appellant "may require during the year" has reference to sash to be delivered during that year, whereas the construction of the contract to mean that appellants could, as they contend, order up until the end of the year would mean an extension far into the year 1905, and beyond the intention of the parties.

2. If a buyer not only refuses to pay for one installment, but puts his refusal on such ground as justifies the inference that he repudiates the entire contract, or insists upon new terms differing from the original agreement, the vendor may be released from any subsequent delivery. Am. note to Part 1, Book IV., Benjamin on Sales, 1888 Ed., 558, 559; 59 Md. 131; 2 B. & Ad. 882; 15 C. B. N. S. 711; 6 Wall. 561; 15 Fed. Cas. 222; 100 Cal. 504; 119 Cal. 275; 28 Fla. 89; 59 Md. 155; Rose's Notes, 891; 77 Md. 331. The purchaser can not withhold payments that are due for goods delivered in order to see that the seller will deliver other consignments. 110 Pa. St. 236; 21 N. Y. 399; 4 Seld. (N. Y.), 512; 44 Ill. 339; 30 Me. 258; 5 N. H. 307; 12 R. I. 82. See also 30 N. Y. St. Rep. 315; 114 N. Y. 640; 123 N. Y. 382; 16 Wend. (N. Y.), 638; 24 *Id.* 60-62; 4 N. Y. 411; 134 N. Y. 92.

WOOD, J., (after stating the facts.) First. The burden of proof is upon the appellee to show that it is entitled to recover.

Therefore it must show that it had complied with the terms of the contract on its part in the particulars in which appellant alleges that it violated the terms thereof, and it must further show that appellant breached the contract on its part, giving the appellee the right to treat the contract as rescinded, and to sue for the damages resultant. It will be observed that appellee seeks to recover only for amount alleged to be due for doors and sash furnished. It does not ask to recover for loss of profits. Appellant says in its brief "that it had ample excuse in fact and in law for not paying the draft, and it avers that in hardly any respect did the appellee comply with and fulfill its obligations to appellant under the terms of the contract." But if there were any breaches of the contract on the part of appellee other than those mentioned in appellant's cross complaint, it has failed to set them up, and has therefore waived same. Then the first question is, did appellee violate the terms of its contract in failing to fill the orders for the 46,300 windows and 7,862 doors? The uncontroverted proof shows that these could not have been manufactured by appellee after they were ordered, in the usual course of trade, before the year 1904 had expired. It would have taken some five months to manufacture same, and these orders were sent and received after the first of December, 1904. The contract expired with the year 1904. The contract contemplated the manufacture of the sash and doors by appellee during the year 1904. Appellee manufactured the lumber products it sold. Appellant fully understood this, and must be held to have contracted with appellees accordingly. Therefore appellant could not insist on appellee's filling orders that appellant delayed in sending until it was too late for same to be manufactured by appellee in the usual course of its business. Any other construction of the contract would be unreasonable. For if appellant could have delayed till the last day of December, 1904, in sending in its orders for the doors and windows, it was possible for it to have kept appellee manufacturing same during the year 1905, as well as "during the year 1904." The language of the letters evidencing the contract does not warrant such construction, and certain letters of appellant in the record, practically asking an extension of the contract of 1904 into the year 1905 on the same terms as to the doors, show that appellant itself understood that the contract for filing its orders ex-

pired with the year 1904. So we are of the opinion that the evidence warranted the finding of the court that "the plaintiff (appellee) fully performed all things required of it by the contract."

On the other hand, appellant, while urging with zeal that appellee fill its orders for sash, treated with apparent indifference the provision which bound it to take at least 7,500 doors during the year 1904. The contract called for the manufacture of both sash and doors. Appellant could not insist on the one and reject the other, yet the proof shows that as late as November 17, 1904, appellant had only ordered 1851 doors, and there was no acceleration of appellant's movements in this particular until its request to be allowed to send in specifications for doors to be delivered in 1905 had been refused. The delay of appellant to send in the orders and specifications for doors until it was too late for them to be manufactured and delivered during the life of the contract was tantamount to a failure or refusal to take the number of doors appellant was bound to take. Although repeatedly urged to do so, appellant took no heed of the requirements of the contract on its part to order the doors in time, and this conduct on its part, it seems to us, was in violation of both the letter and spirit of the contract. It was very unequal and unfair to appellee. When we consider this fact in connection also with the fact that appellant, although urgently requested, neglected to meet its payments as the contract required, and allowed large amounts to become past due, we must conclude that appellant is not without fault. Certainly, appellant was in no attitude to be insisting on the other party to the contract "giving bond for its good behavior," so to speak, before appellant would do what the contract required on its part. But appellee agreed to waive these breaches and to fill appellant's orders, notwithstanding the contract had expired, if appellant would pay the amount past due.

Second. The appellant refused payment of this amount, or indeed of any amount which it admitted to be due under the contract, unless appellee would give assurances that it would do what it promised, delivering to appellant bill of lading for two cars of sash and doors. Did this constitute such a breach or abandonment of the contract on the part of appellant as would justify appellee in treating the contract as rescinded except for the pur-

pose of declaring on it for amount that was past due?" The precise question was ruled in the affirmative in *Harris Lumber Co.* v. *Wheeler Lumber Company, post* p. 491, and authorities are there cited to sustain the doctrine announced. We are aware that a different rule obtains in other jurisdictions, and we are cited by the learned counsel for appellant to the exhaustive and well-considered opinion of the Supreme Court of Michigan in *West* v. *Bechtel,* 51 L. R. A. 791, where the authorities, English and American, are reviewed, and just the opposite conclusion is reached to the one we have announced. We have carefully considered this case and other cases cited in appellant's brief, among them the case of *Lake Shore & Michigan Southern Ry. Co.* v. *Richards,* 30 L. R. A. 1, where there is a very extended and valuable note on the "right to rescind and abandon contract because of other party's default." In the latter case, although upon a different state of facts, the court announced this principle, quoting syllabus: "A breach of contract which will justify the party not in default in abandoning performance and suing for damages on account of a breach by the other need not be of such a character as to render the further execution of the contract by him impossible; but if the other party refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he had renounced it, and no longer considers himself bound by it, there is in legal effect a prevention of performance by the other party." This principle is sound, and, as we view the facts of the case at bar, is applicable here. In *King* v. *Faist,* 161 Mass. 449, the facts were that "by the terms of a contract for the sale and delivery of a quantity of flour, the vendor was to ship the flour specified as the vendee might direct, drawing upon him demand drafts for the flour shipped, and the vendee was to take out the flour by a certain date and to honor the drafts. A month before the time limited for withdrawing the flour the vendee wrote to the vendor, "Before we pay any more drafts we want some assurance from you that you will make good any claims on acount of quality," and stated orally to the agent of the vendor that he would pay no future drafts without some guaranty to protect him in case flour should on arrival prove deficient in quality and he returned draft of the vendor unpaid. The vendor thereupon wrote: "We are not going to send any more flour." It was

held "that the vendor had a right to rescind the contract, the vendee having, without justification, declared his intention not to perform it, and that the letter of the vendor was an effectual rescission, and relieved him thereafter from all obligation under the contract to deliver the flour." As to whether or not there has been a breach of contract by one of the parties to it that will warrant the other in treating it as abandoned will depend upon the facts of each particular case as they may arise. But we are of the opinion that the doctrine we have announced in this and the case of *Harris Lumber Co.* v. *Wheeler Lumber Co., supra,* is sound and based on better reason that a contrary rule grounded on similar facts. The doctrine, too, is but in line with *Miller* v. *Thompson,* 22 Ark. 258, where we held that "a refusal by one party to perform his part of a contract justifies the other in treating it as rescinded, and authorizes him to sue in general *indebitatus assumpsit;*" and with *Ward* v. *Kadel,* 38 Ark. 174, where we said: "Where there is a mutual contract for the performance of successive acts, the refusal upon one side to perform will justify the other party in treating the contract as rescinded." See also the recent case of *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336. In that case Judge McCULLOCH quoted the language of Coleridge J., in *Franklin* v. *Miller,* 4 A. & E. 599 as follows: "Each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure, and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract." See also *Wiegel* v. *Boone,* 64 Ark. 228; *Missouri Pacific Ry. Co.* v. *Yarnell,* 65 Ark. 320.

Third. Upon the whole record the judgment of the court is clearly right, and it is therefore affirmed.

BURKE *v.* SHARP.

Opinion delivered December 14, 1908.

1. ATTACHMENT—INTERVENTION—VERIFICATION OF PLEADING.—Kirby's Digest, § 6152, providing that "no objection shall be taken after judgment to any pleading for want of, or defect in, the verification," applies to the petition of an intervener claiming attached property. (Page 442.)

2. CONFLICT OF LAWS—LEX FORI.—In determining the effect of the continued possession of personal property situated in this State by a vendor under a lease executed in this State, the laws of this State govern. (Page 443.)

3. FRAUDULENT CONVEYANCES—CONTINUANCE OF VENDOR IN POSSESSION.—The continuance of a vendor of personal property in possession of the goods sold is *prima facie* but not conclusively fraudulent. (Page 443.)

4. INSTRUCTIONS—COMPLETENESS.—Instructions which correctly deal with a particular phase of a case are not objectionable because they omit other phases of the case if these are covered by other instructions given. (Page 444.)

5. FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—REASONABLE TIME.—Where it was a question under the Missouri law whether personal property sold in Missouri but situated elsewhere was taken possession of within a reasonable time as required by a statute of that State, it was proper to charge the jury that it was sufficient if the vendee took possession within such time as was required "to travel to the place where said property was located by the usual mode of travel." (Page 444.)

6. SALE OF CHATTELS—PRESUMPTION OF GOOD FAITH.—A bill of sale regular on its face is *prima facie* evidence of a contract of sale in good faith. (Page 446.)

7. ATTACHMENT—INTERVENTION—PARTIES.—Under Kirby's Digest, § 6002, authorizing a trustee of an express trust to sue without joining his beneficiary, a stockholder in a corporation who with corporate funds bought certain property, which was attached as belonging to a third person, could intervene therefor without making the corporation a party. (Page 446.)

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

STATEMENT BY THE COURT.

Burke & Joseph, a contracting firm, filed suit in the White Circuit Court against D. P. Cullen, U. B. McCurdy and the Cullen-McCurdy Construction Company, alleging that the defendants were indebted to them in the sum of $11,000, and filed an affidavit for attachment, on the ground that the defendants were nonresidents of the State and had removed a material part of their property out of the State, not leaving enough to satisfy the claims of their creditors. The attachment was issued and levied on a contractor's outfit, consisting of plows, wagons, scrapers, tents, steam drills, horses, mules and other personal property.

C. H. Sharp filed an interplea, claiming the attached property and giving an intervener's bond. The plaintiffs answered said interplea, denying all the material allegations thereof, and there was a trial upon those issues, which is brought here for review.

The following is the substance of the intervener's testimony: Sharp and Cullen lived in Kansas City, and were railroad contractors. On the 23d of February, 1907, Sharp purchased at Kansas City, Missouri, the contractor's outfit in controversy from D. P. Cullen and D. P. Cullen Company, Limited, which purchase was evidenced by the following bill of sale:

"In consideration of the sum of twelve thousand ($12,000) dollars in hand paid, the receipt of which is hereby acknowledged, do hereby sell, assign, transfer and set over to C. H. Sharp, of Kansas City, all of our right, title and interest in and to the following described personal property, towit: 56 mules, 2 grading machines, 50 drag scrapers, 10 farm wagons, 38 sets of double harness, 2 blacksmith outfits, 45 tents, 1 office car, 29 horses, 50 wheelers, 12 dump wagons, 8 plows, 2 buggies, 2 cook outfits, 4 sections stable tents, 1 stump machine, 2 sets buggy harness, and all machinery, appliances, equipments and commissary supplies now being used in connection with grading outfits and property above described, a portion of which is now situated on the line of the Colorado Southern, New Orleans & Pacific Railway, at DeQuincy, La., and between DeQuincy, La., and Kinder, La., and a portion which is now located along the Beaumont, Sour Lake & Western Railway, in the State of Texas, free and clear from any and all liens, or other incumbrances, and do hereby declare to be the owner of all of the said property, and to have full power to sell the same.

"In witness whereof we hereunto set our hands this, the 23d day of February, 1907.

"D. P. Cullen and
"D. P. Cullen Co., Ltd.
"By D. P. Cullen, Pres. and Mgr."

That on the date of said purchase Sharp sent U. B. McCurdy to take possession of the outfit. Part of it was at Beaumont, Texas, and part of it at Liberty, Texas, and part at DeQuincy, Lousiana. McCurdy left on the first train, and went to Beau-

mont and took possession of the outfit, and placed part of it at work on a canal near Beaumont. While he was there, Cullen came to him and told him that Burke & Joseph had some work in Arkansas upon which he desired to place the outfit, and that Sharp had consented to its removal to Arkansas. McCurdy brought the outfit to White County, Arkansas, the last of it being shipped from Beaumont on the 12th of May, 1907, and it was placed upon railroad construction there. On the 12th of July, 1907, the property was leased by Sharp to the Cullen-McCurdy Construction Company for $800 per month. The lease provided that on the failure to pay the rental Sharp could take immediate possession of the property. The lease also contained an option for the purchase of the outfit at a given price by the construction company. There had been a verbal lease between the parties on the same terms prior to the written lease.

The company failed to pay the rent, and there was due upon the lease between $1600 and $2,000. The Cullen-McCurdy Construction Company was formed for the purpose of taking this lease and to purchase the outfit, and was capitalized at $25,000, divided into 250 shares, of which Cullen owned 125, McCurdy 124 and Sharp one. Its only capital was its rights under the lease. The construction company was a Missouri corporation.

McCurdy represented in Texas, when he had the outfit there, that it belonged to Sharp, and that he was Sharp's agent. It cost $60 a day to keep the outfit while it was in Texas. The consideration of the purchase of the outfit by Sharp was $12,000, which was paid by check of the C. H. Sharp Contracting Company. The C. H. Sharp Contracting Company is a Kansas corporation. Its stock is divided into three thousand shares, and C. H. Sharp owns 2,996 shares, the remaining four being held in trust for him.

The plaintiff adduced testimony tending to prove that Sharp was not the owner of the property, and that the bill of sale and lease were not *bona fide* transactions.

The court gave in behalf of the intervener instructions 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, all of which, except the 9th, are attacked on this appeal, and are as follows:

"2. You are instructed that if you find from a fair preponderance of the evidence in this case that on the 23d day of Febru-

ary, 1907, the intervener C. H. Sharp, purchased the property described in the bill of sale introduced in the evidence from the D. P. Cullen Company, Limited, or from D. P. Cullen, or from either of them, and paid therefor the sum of $12,000 by paying to the American National Bank, of Kansas City, Missouri, said sum of $12,000 in surrender of a note held by said bank against D. P. Cullen, and you further find from a fair preponderance of the evidence that the said C. H. Sharp sent one U. B. McCurdy to the place where the said property was situated to take possession of the said property for him, the said C. H. Sharp, and that the said U. B. McCurdy did go to the place where the said property was located and did take possession of said property for the said C. H. Sharp, and you further find that said purchase and taking possession of said property was in good faith on the part of the said C. H. Sharp, then I instruct that such possession was paramount to the rights of these plaintiffs as creditors of the said D. P. Cullen or the said Cullen-McCurdy Construction Company.

"3. The jury is further instructed that, as the owner of the property described in the bill of sale introduced in evidence herein, the said C. H. Sharp had the right to lease, rent or hire said property or any part thereof to the said Cullen-McCurdy Construction Company, and that if, at the time he so leased, rented or hired said property to the said Cullen-McCurdy Construction Company, he was the owner thereof, such leasing, renting or hiring said property did not divest him of the constructive possession thereof, and the fact that the Cullen-McCurdy Construction Company had the physical possession of said property at the time it was attached herein gave the plaintiffs no rights to said property against the right of the said C. H. Sharp.

"4. You are further instructed that the bill of sale introduced in evidence was executed and delivered in the State of Missouri, and that the transaction relating to the purchase of the property described herein was had in the State of Missouri, and is governed by the laws of that State, and under the laws of the State of Missouri the taking possession of said property at the time or within a reasonable time after the purchase of said property was all that was necessary for the said C. H. Sharp to do in order to complete said purchase and give him a right thereto as

against subsequent purchasers or creditors of the seller of said property.

"5. The court further instructs the jury that if you find from the evidence that plaintiffs extended credit to the Cullen-McCurdy Construction Company upon the representation of said company, or a duly authorized agent thereof, that the property in controversy herein was the property of the Cullen-McCurdy Construction Company, yet such representation did not give the plaintiffs the right to attach, and their attachments does not constitute a lien on, said property paramount to or against the rights of the said C. H. Sharp, unless you further find that the said C. H. Sharp had actual knowledge and notice that said Cullen-McCurdy Construction Company had made such representations.

"6. If you find from the evidence herein that the sale of said property and the payment therefor took place in Kansas City, Missouri, on February 23, 1907, and that at that time a part of said property was located in the State of Louisiana and a part in the State of Texas, and you further find that one U. B. McCurdy went to the place where said property was located at the request of the said C. H. Sharp and took possession thereof for him within such time as was required by law to travel to the place where said property was located by the usual mode of travel, then I instruct you that the taking possession of said property was within a reasonable time as contemplated by law.

"7. You are further instructed that the validity of a bill of sale, regular on its face, can not be overcome by oral testimony unless it is shown to have been for fraudulent purpose; and unless you find from a fair preponderance of the evidence that the bill of sale introduced in evidence was made for the purpose and with the intent to defraud the creditors of C. P. Cullen, Limited, then you should find that the bill of sale is valid and entitled to full faith and credit.

"8. You are instructed that if you believe from the evidence that at time C. H. Sharp purchased the property in controversy from D. P. Cullen Company, Limited, he took precaution as a reasonably prudent man would in order to determine whether or not said property was free from incumbrances, and that he was assured by Kenefick, Hammond and Quigley that they would or had released any claim they might have to said property, then

I instruct you that such precaution may be considered by you as an evidence of good faith in the purchase of said property.

"9. You are further instructed that the burden of proving the allegation of fraud as set forth in the answer of the plaintiffs filed to the interplea of C. H. Sharp rests upon the plaintiffs, and that, unless such fraud exists and is proved to the satisfaction of the jury by a fair preponderance of the evidence, then it is your duty to find for the intervener therein, provided you find as hereinbefore instructed that the said intervener purchased and took possession of said property and was the owner thereof at the time it was attached.

"10. If you find from the evidence in this case that C. H. Sharp, the intervener herein, by written lease, rented or hired the property in controversy herein to the Cullen-McCurdy Construction Company by the terms of which lease the Cullen-McCurdy Construction Company had the option to purchase said property upon the payment of the sum stipulated therein, and wherein it was stipulated that the said C. H. Sharp had the option to declare said lease at an end upon the condition thereof being broken, then I instruct you that in the law the title to the said property remained in the said C. H. Sharp until the conditions of said lease, and a creditor of the lessee (The Cullen-McCurdy Construction Company) acquired no right to said property, paramount to the rights of the said C. H. Sharp, by the furnishing of goods or extending of credits to the lessees upon the strength of the statement by the lessees that they were the owners of the said property.

"11. If you find from a fair preponderance of the evidence that in the organization of the Cullen-McCurdy Construction Company the capital stock of said company consisted in the equity which Cullen and McCurdy had or thought they had in the lease in question, then I instruct you that such a fact in no manner affected the rights of the said C. H. Sharp with respect to the property in question herein.

"12. A bill of sale regular on its face is *prima facie* evidence of a contract of sale in good faith; and unless you find from the evidence that there was a contemplated fraud on the part of the grantor and known by the grantee at the time the bill

of sale in question was executed and purchase price paid, then your verdict should be for the intervener herein.

"13. Fraud is never to be presumed, but must be proved by good and sufficient evidence in the cases; therefore, before you can find for the plaintiff on the ground of fraud, you will have to find that the intervener C. H. Sharp at the time of the purchase knew of grantor's intent to defraud the plaintiffs.

"14. Circumstantial evidence relied upon to make a case of fraud must be established by proof of facts which on the whole make out a clear case, and the evidence must not only connect the grantor but the grantee in the participation of the intended fraud; and unless you find from the evidence that C. H. Sharp, the intervener, knew of the fraud at the time, and then and there assisted in a disposition of the grantor's property for the sole purpose of defrauding the plaintiffs or any other creditor, your verdict should be for the intervener.

"15. You are instructed that D. P. Cullen and D. P. Cullen Company, Limited, are two separate and distinct parties, and the fact that D. P. Cullen may have had the subsequent possession of the property purchased from D. P. Cullen Company, Limited, can not be construed to be the possession of the grantor, D. P. Cullen Company, Limited."

On behalf of the plaintiffs the court gave eight instructions. Their consideration is not important on this appeal. The jury rendered a verdict for the intervener, and the plaintiffs have appealed.

Crump, Mitchell & Trimble, for appellants.

1. The intervention was not sworn to, as required by statute. Where the Legislature points out specifically how an act is to be performed, its requirements in that respect are mandatory—must be strictly pursued. Here the Legislature has pointed out what the intervener must do, "present his complaint *verified by oath,*" etc. Failure to verify the complaint is fatal. Kirby's Digest, § 391; 11 Enc. Pl. & Pr. 446; 28 Ark. 362.

2. The court's modification of the second instruction requested by appellant is erroneous. The instruction must be considered in the light of the Missouri law. Kirby's Digest, § 7823. There it is well settled that if the vendor remains in possession

and exercises acts of ownership over the property then the sale is as a matter of law fraudulent. 131 Mo. 631; 55 Ark. 116; 50 Ark. 290.

3. The second instruction does not go far enough, in that it leaves out of consideration the question of the lease, the later incorporation and all acts after the execution of the bill of sale and the taking of possession. And the tenth instruction is fatally defective in that it leaves out the question whether or not the lease is properly of record. 44 Mo. 323; Mo. R. S. 1899; § § 3412, 3404; 130 Mo. 558.

4. The sixth instruction erroneously declares as a matter of law what was a reasonable time in which to take possession of the property. 131 Mo. 680.

5. The third instruction is misleading, and also erroneous in stating as a fact a certain matter that had been submitted to the jury in another instruction, and in stating as a fact a thing that was a disputed point in the evidence. 15 Ark. 491; 74 Ark. 437; 37 Ark. 598; 71 Ark. 38; 65 Ark. 64; 77 Ark. 200.

6. An intervention is governed by the same rules as are ordinary suits. 58 Ark. 564. Here the title to the property is to be tried; and unless the intervener shows by a preponderance of the evidence that he is the owner of the property, his intervention must fail. Evidence that title to the property was in the C. H. Sharp Contracting Company, a corporation, does not warrant a finding of title in C. H. Sharp. Kirby's Digest, § § 5999, 6002, 6011; 49 Ark. 100; 94 Ky. 83; Cook on Corp. (4 Ed.), § 664; *Id.* p. 1329 note 2; 45 Fed. 812; 69 Ark. 85; 30 Ark. 66; Gen. Stat. Kan., 1897, c. 66; 21 Kan. 365; 37 Kan. 183; 29 Kan. 311; 64 Ark. 155; 10 Cyc. 1337; 116 N. Y. 41; 84 Ark. 453; 4 Thompson on Corp. § 4632; 46 N. J. L. 237; 5 N. Y. 320; 2 Cook on Corp. § 716, note; 62 Ark. 33.

J. N. Rachels, for appellee.

1. The statute disposes of appellant's objection to want of verification of the interplea. They should have objected before judgment. Kirby's Digest, § 5087; *Id.* § 6152; 83 S. W. (Ark.), 1047; 71 Ark. 611.

2. The part of the second instruction eliminated by the court's modification had no application to the facts disclosed by

the evidence. Moreover, the instructions given in a case are to be considered as a whole; and where they, taken together, fairly present the law, one instruction can not be singled out and error predicated thereon.

3. Intervener's second request given by the court could hardly have "gone further" and correctly stated the principles of law involved. The question of the lease was fully covered by the tenth, and "it is generally impossible to present all the law of a case in one instruction; and, if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others." 83 Ark. 61; 75 Ark. 325; 76 Ark. 222; 77 Ark. 458.

4. There is no merit in the objection that the sixth instruction declared as a matter of law what was a reasonable time in which to take possession of the property, and that the court should have defined reasonable time. That is sufficiently defined by the statement that if possession was taken, etc, "within such time as was required to travel to the place where said property was located by the usual mode of travel." The title to the property was in Sharp, and since the right of possession follows the title, he had at all times either actual or constructive possession. A purchaser from the bailee could obtain no title, neither could an attaching creditor. 68 Ark. 230; 47 Ark. 363; 49 Ark. 63; 60 Ark. 133. It was not subject to the provisions of the Missouri statute. 114 Mo. App. 332.

5. There is ample evidence, legally sufficient, to sustain the verdict. The issues in the case were submitted to the jury upon conflicting evidence and proper instructions of the court. Their verdict on the facts is final. 89 S. W. (Ark.), 471, and cases cited; 111 S. W. (Ark.), 469; 37 S. W. (Ark.), 1052; 74 S. W. (Ark.), 300.

HILL, C. J., (after stating the facts.) 1. The first point made by appellants is that the interplea was not verified, and this was made a ground in the motion for a new trial, wherein the lack of verification was pointed out to the trial court. Section 391, Kirby's Digest, requires that any person, before the sale of attached property or before the payment of the proceeds thereof to the plaintiff, may present his complaint, verified, to the court,

disputing the validity of the attachment, or stating a claim to the property or an interest therein, and his claim shall be investigated. It is argued that the statute is mandatory, and that the failure to verify is fatal. But this section of the statute is taken from the Civil Code, and must be read in connection with another section of the Code which says: "No objection shall be taken after judgment to any pleading for want of, or defect in, the verification." Section 6152, Kirby's Digest. Counsel say that section 6152 was passed many years before the intervener's statute (section 391), and was therefore not applicable to it; but in this counsel are in error, for both are taken from the Civil Code. Section 391, Kirby's Digest, is section 257 of the Code, and section 6152, Kirby's Digest, is section 159 of the Code.

II. The next assignment is that the court erred in modifying appellant's second instruction. This modification was by striking out the following words: "A continued possession of personal property by the vendor as the ostensible owner and exercising acts of control and ownership over the same under such sale is fraudulent and void against creditors of the vendor."

It is contended that the laws of Missouri should govern as to the possession of this property, and that under the laws of Missouri the eliminated clause would be correct. It is unnecessary to go into the laws of that State upon the subject, because the laws of Missouri do not govern under the facts of this case. This was a question between Burke & Joseph, and D. P. Cullen and U. B. McCurdy and the Cullen-McCurdy Construction Company. The property was situated in White County, Arkansas, and the suit was there brought for money advanced by the plaintiffs to the defendants for railroad construction in this State. The property had been brought from Texas and Louisiana into Arkansas, and there controlled ostensibly by the Cullen-McCurdy Construction Company under a lease made to it while in Arkansas; and whether it was really the property of this corporation or its corporators, or of Sharp, was the issue. The laws of this State, and of no other State, should determine the effect of the possession by the debtors of the property in this State at the suit of their creditors brought here. *Garner* v. *Wright,* 52 Ark. 385. This part of the instruction would be in conflict with *Valley Dis-*

tilling Co. v. *Atkins,* 50 Ark. 289, *Stix* v. *Chaytor,* 55 Ark. 116, and *Shaul* v. *Harrington,* 54 Ark. 305.

In Missouri there is a statute on the change of possession of personal property. As to its construction, see *Lesem* v. *Herriford,* 44 Mo. 323; *State* v. *Goetz,* 131 Mo. 675. For the reasons indicated above, the Missouri statute could not apply to the effect of possession of personal property in Arkansas held here under a lease made here upon it. The parties were residents of Missouri, and the bill of sale was executed there. The bill of sale would be governed by the laws of Missouri, so far as given effect in that State. But the possession of the property was taken in Texas and Louisiana, and the question of the continued possession was of the property in Arkansas, and therefore the statute of Missouri could not reach to it.

III. The next objection is to instructions two and ten. The first point made is that the instructions omit a consideration of the subsequent conduct of the parties, it being said that they leave out the entire question of the lease, the later incorporation and all acts after the execution of the bill of sale and taking possession. It was not improper to leave out these considerations, because these instructions were stating the law which would make the written contract valid; and other instructions, given at the request of the plaintiffs, presented the law as contended for by them as to the effect of the continued possession and the various circumstances indicative that the transactions were fraudulent. As has often been said, all the law of the case can not be presented in one instruction; and these instructions deal with one phase of the case, and correctly deal with it, and are not erroneous because they do not incorporate the theories under which plaintiffs attempted to defeat the intervener's action upon the bill of sale.

It is also objected that instruction ten leaves out the question whether the lease was properly of record. The Missouri statute upon this subject is quoted; but, as shown in the discussion of the previous question, this Missouri statute could have no bearing upon the lease made in Arkansas upon property situated here.

IV. Instruction six is criticised for declaring as a matter of law what was a reasonable time for taking possession under

the bill of sale; but it does not so declare. It states the evidence which was adduced on behalf of the appellee, and told the jury that if they found that the facts there assumed were the truth of the case, the possession was taken within a reasonable time, as contemplated by law. This bill of sale, as indicated, would be governed by the Missouri law. The Supreme Court of Missouri, in *State* v. *Goetz,* 131 Mo. 675, stated: "What is 'reasonable time' is a question of fact when the evidence is conflicting as to the character and condition of the property, and the length of time necessary for its delivery, and it is only where the facts are undisputed, and the evidence substantially all one way, that it becomes a question of law."

The court very properly in this case assumed that if the facts testified to by the intervener were true, then as a matter of law the possession was taken within a reasonable time; and left it to the jury to determine the truth of the matter testified to in relation to it.

V. The same objection is made to instruction twelve as the first objection that was made to instructions two and ten; and it is argued that "it left out any intent of fraud that might have been formed after the bill of sale was executed." This instruction stated correctly that a bill of sale, regular on its face, is *prima facie* evidence of a contract of sale in good faith, and instructed the jury that, unless they found from the evidence that there was a contemplated fraud on the part of the grantor at the time of the execution of the bill of sale in question, and which was known to the grantee, their verdict must be for the intervener. This goes to the intervener's title, and correctly states the law. If the plaintiffs relied upon fraud after that time, as they did, they should present instructions, as they did, asking that the law governing such subsequent conduct be given to the jury for their consideration, which was done. Each went to different phases of the case, and it was proper to be given in separate instructions. There is no inconsistency between them, and they must all stand together and be read as a harmonious whole.

VI. It is said that the third instruction is misleading, in that the instruction assumes as a matter of fact that Sharp was the owner of the property. The first part of the instruction,

taken alone, is subject to that criticism; but, when read as a whole, it is found that it is left to the jury to determine that question. The first part is qualified by the latter part, wherein it is said that "if at the time he so leased, rented or hired said property to the said Cullen-McCurdy Construction Company, he was the owner thereof," etc. Therefore it is not thought to have been susceptible of misleading the jury in any way whatsoever.

VII. Criticisms are made of instructions 4, 5, 7 and 11. The argument against them is practically the same argument that has heretofore been discussed in dealing with the other instructions. The cases of *Valley Distilling Co.* v. *Atkins,* 50 Ark. 289, *Stix* v. *Chaytor,* 55 Ark. 116, and *Shaul* v. *Harrington,* 54 Ark. 305, state the principle governing the retention of personal property by the vendor; and it is not found that any of the instructions in the case are in conflict therewith.

VIII. Finally, it is insisted that the verdict is contrary to the evidence, in that the evidence shows that the title, if it shows any at all, is in the C. H. Sharp Contracting Company, a Kansas corporation, and not in C. H. Sharp, the intervener. The evidence shows that Sharp conducted his contracting business in the name of the C. H. Sharp Contracting Company, of Kansas, of which he was the owner of all the shares except four, which were held in trust for him. The bill of sale upon which the interplea is predicated is made to C. H. Sharp, individually. It is true that the money advanced for the purchase of the property was paid by a check of the contracting company. But it is not open to these plaintiffs to question the relations between Sharp and the corporation which furnished money to him to buy this property. The bill of sale shows that he took title to it in his own name. Whether the Sharp Contracting Company could hold him as trustee for it would be a question between him and that corporation.

Section 5999, Kirby's Digest, requires that every action must be prosecuted in the name of the real party in interest, with certain exceptions therein mentioned—one of which is that the trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, may bring an action without joining with him the person for whose benefit it is prosecuted. Section 6002, Kirby's Digest.

And, even if it were open to these plaintiffs to question the title, yet, under these provisions of the statute, Sharp would be entitled to bring this action, if it be conceded that the property in equity belonged to the Sharp Contracting Company.

IX. Appellants argued fully the facts of the case, seeking to obtain a reversal on the ground that there is not evidence legally sufficient to sustain the verdict. It would serve no useful purpose to review the facts of the case. Suffice it to say that the court is of the opinion that the evidence is legally sufficient to sustain the verdict.

X. Appellants have filed a motion, since the submission of the cause, to set aside the submission and permit the transcript to be amended so as to show that proper objection was made to the instructions given and modifications made; and to the refusal of the court to give instructions as requested, and that the exceptions were properly noted to the rulings of the court upon these objections. As the court is satisfied, after an examination of the case, that no errors were committed, it would be useless to give time for the record to be corrected. The court has disposed of the case upon the merits, without determining whether, if the court had found error, and proper objections and exceptions were not shown to have been made, the appellants were entitled at this late hour to have the cause continued in order for the record to be amended.

The judgment is affirmed.

THOMPSON v. STATE.

Opinion delivered December 21, 1908.

1. HOMICIDE—THREATS BY DECEASED.—Where the defendant in a murder case testified that he, with deliberation and premeditation, killed deceased at night while he lay upon his bed, because deceased had threatened to kill him, and there was no evidence that deceased made any effort to kill defendant, it was not error to refuse to instruct the jury that threats made by deceased and communicated to defendant were admissible to show defendant's motive. (Page 448.)

2. SAME—INSTRUCTING AS TO DEGREES OF HOMICIDE.—Where there was no evidence tending to prove that appellant was guilty of a degree of offense lower than murder in the first degree, it was not error for the court to refuse to instruct the jury as to what is necessary to constitute murder in the second degree. (Page 448.)

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

William F. Kirby, Attorney General, *Daniel Taylor*, Assistant, for appellee; *C. A. Cumingham*, of counsel.

1. Evidence of threats were not admissible, as defendant was the sole aggressor, by his own testimony. 29 Ark. 248; 79 *Id.* 594; 72 *Id.* 427; 76 *Id.* 495; 55 *Id.* 604; 55 *Id.* 593.

2. There was no testimony upon which to base an instruction as to murder in the second degree. 21 Ark. 69; 23 *Id.* 730; 29 *Id.* 17; 52 *Id.* 120; 77 *Id.* 234.

3. The judgment should be affirmed, there being no error on the record as a whole. 10 Ark. 9.

BATTLE, J. Joe Thompson was indicted for murder in the first degree, committed by killing Miller Brown, and was convicted of that offense; and he appealed.

The defendant testified in his own behalf. He testified, in effect, that at night, while Miller Brown lay upon his bed, after deliberation and premeditation, he shot and killed him. He did so with the intent to kill because Brown threatened to kill him and wanted his wife. There was no evidence that Brown made any effort to kill him.

Appellant complains that the court refused to instruct the jury as follows:

"If in a trial for murder it has been proved that threats have been made by deceased against the defendant, and that they have been communicated to the defendant, they may be considered by the jury in making up their verdict to show defendant's motive."

Threats could not have mitigated, extenuated or palliated the conduct of the defendant. They could not have reduced the grade of the offense or reduced the punishment; and the court committed no prejudicial error in refusing it.

The appellant asked and the court refused to instruct the jury as to what is necessary to constitute murder in the second degree. There was no evidence tending to prove that appellant

was guilty of a decree of offense lower than murder in the first degree; and the court committed no error in so refusing. *Jones* v. *State*, 52 Ark. 345; *Fagg* v. *State*, 50 Ark. 506; *Curtis* v. *State*, 36 Ark. 284.

The evidence was sufficient to sustain the conviction.

Judgment affirmed.

FILES v. LAW.

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Opinion delivered December 21, 1908.

1. EXECUTIONS—TITLE OF INNOCENT PURCHASER—UNRECORDED DEED.—A *bona fide* purchaser at execution sale takes title as against the holder of an unrecorded deed. (Page 450.)

2. APPEAL AND ERROR—ABSTRACT—EXPLORING TRANSCRIPT.—Where appellant neglects to set out in his abstract such matters as are relied upon to secure a reversal, the court will not explore the record to discover errors of the trial court, except for the purpose of settling conflicting statements of counsel as to what the record contains. (Page 450.)

Appeal from Ashley Circuit Court; *Henry W. Wells*, Judge; affirmed.

A. W. Files, pro se.

George W. Norman, for appellee.

McCULLOCH, J. Appellant instituted this action in the circuit court of Ashley County against appellee to recover possession of a tract of land containing about thirty-three acres, and a trial thereof resulted in a judgment in appellee's favor. Appellant owned the land originally, and appellee claims title under an execution sale to A. H. Norman in the year 1877, on a judgment for debt rendered by the circuit court of the United States in favor of J. M. Robinson & Company against appellant. Both parties claim to have had adverse possession of the land for more than seven years continuously next before the commencement of the action. The testimony is not very satisfactorily abstracted, but there appears to have been enough to have sustained a verdict either way on this issue.

Appellant insists that the judgment of J. M. Robinson & Company against him in the Federal court, on which the auction sale to Norman was based, was invalid, but the record does not sustain him, for the certified copy of the judgment in this record shows it to be valid on its face, and appellant proves no grounds for avoiding it. He claims also to have redeemed the land from the execution sale, but the record fails in this particular, too, to sustain him. He contends that about a month before the execution sale he conveyed the land to his son, E. W. Files, and that upon the death of his son without issue in 1881 he inherited the land. The deed to his son, exhibited in the record, is void for uncertainty in the description of the land. Besides, the deed was never recorded until about five years after its execution and after the death of his son, and the testimony tends to show that his son never took possession of the land. The conveyance to his son was therefore of no avail against a purchaser without notice at the execution sale.

So the testimony is sufficient to sustain the verdict of the jury either on the ground that appellee had title under the execution sale or by adverse possession.

Appellant complains of error of the court in giving and refusing to give instructions, but he fails to set forth the instructions so that we can see what the court gave. The only two instructions which are copied in the abstract and brief we do not find to be erroneous, nor does appellant argue that they are incorrect statements of the law. He says they are not applicable; but, as he fails to abstract any of the other instructions, we are unable to ascertain the precise bearing of these on the case, so as to determine whether or not they could have had any prejudicial effect. Appellant argues that many other errors were committed by the court in giving and refusing other instructions, but we can not pass upon the question, because the instructions are not set out. It has been pointed out many times by this court that the judges will not explore the record to discover errors of the trial court except for the purpose of settling conflicting statements of counsel as to what the record contains. It is impossible for us to do so. If the record is to be read at all (except to verify conflicting statements of counsel concerning same), it would have to be done by all of the judges; otherwise the decision would be that of one

judge. The amount of business constantly before the court does not admit of that, and it can be readily seen by any one that, unless attorneys print a fairly complete abstract of the record, it is impossible for the judges to comprehend the issues included so as to form an opinion as to the merits of the controversy. We have repeatedly attempted to point out the necessity for doing this, and have steadily adhered to the rule requiring attorneys to comply with the rules of the court in this respect. *Shorter University* v. *Franklin,* 75 Ark. 471; *O'Neal* v. *Parker,* 83 Ark. 133; *Carpenter* v. *Hammer,* 75 Ark. 349; *Emerson* v. *McNeil,* 84 Ark. 552; *Mine LaMotte L. & S. Co.* v. *Coal Co.,* 85 Ark. 123.

Careful study of appellant's abstract and brief discovers to us no error of the court, and the judgment is therefore affirmed.

ROGERS v. STATE.

Opinion delivered December 21, 1908.

EVIDENCE—RES GESTAE.—In a prosecution for robbery the prosecuting witness cannot be corroborated by proof that two hours after the robbery he stated to a police officer that defendant committed the robbery, nor is such testimony admissible as part of *res gestae.*

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

J. F. Gautney, for appellant.

The testimony of Arrington was incompetent, hearsay, contradictory of defendant, and hence prejudicial. It was no part of the *res gestae.* 67 Ark. 594, 604; 56 *Id.* 326.

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

The statement detailed by Arrington were clearly part of the *res gestae.* 66 Ark. 494. A reversal is never ordered for the erroneous admission of incompetent testimony which is but cumulative and corroborative of competent testimony properly admitted. 77 Ark. 74; 76 *Id.* 276; 74 *Id.* 417; 68 *Id.* 607; 58 *Id.* 125; *Ib.* 446; 56 *Id.* 37; 32 *Id.* 337; 22 *Id.* 79; 15 *Id.* 372.

HILL, C. J. Ben Rogers was indicted by the grand jury of Craighead County for robbery, was convicted, and has appealed. Fielder testified that on the night of May 31, 1908, in the city of Jonesboro, he left a restaurant, and was accompanied by one Tomlinson, and the defendant Rogers followed them. That Tomlinson offered him a drink of whisky, which he refused, and the defendant stepped up and said he would take a drink, and Tomlinson handed him the bottle, and he took a drink and dropped behind them, with the bottle. He and Tomlinson walked under the shadow of some trees, and some one hit him from behind with a bottle on the side of the head and face, and he was knocked senseless. After he fell some one beat him on the head and face with his fists; and either Tomlinson or the defendant ran his hands in his pockets and got his money. "After I was hit, I do not remember anything until I was being talked to by Arrington, chief of police, in a plumbing shop on South Main Street." He was then permitted, over the objection of defendant, to state that "Mr. Arrington asked me who robbed me, and I told him a white man whose name I did not know and a negro whom they called Ben." The next morning he went to the jail to see if he could identify the defendant, who had been arrested. His eyes were so swollen that he could not see distinctly, and he asked that the defendant talk. The defendant did so, and he recognized him by his voice. The witness does not appear to have been cross-examined—at least the bill of exceptions does not show what part of his examination is in chief and what is cross-examination; and there is no inconsistent or contradictory statement in his testimony indicative that any part of it was brought out by cross-examination.

Arrington, the chief of police, was permitted to testify, over the objections of defendant, that he had arrested defendant the night that Fielder was robbed, and that he found Fielder in a plumbing shop on South Main Street. "I asked Fielder who robbed him; he said a white man and a negro; that he did not know who the white man was, but they called the negro Ben Rogers." No money or other property was found on the defendant, after his arrest, that belonged to Fielder.

It appears that from one to two hours elapsed from the time that Fielder was robbed until he made the statement to the chief

of police in the plumbing shop. The defendant testified, denying that he had robbed Fielder, and stated that he was at another place at the time of the occurrence. Several other witnesses testified, tending to sustain his alibi.

The subject of prior consistent statements was recently considered by this court in *Burks* v. *State,* 78 Ark. 271, where one phase of it was discussed and the authorities reviewed. The court said: "After all, the effect of proof of previous consistent statements could only be to corroborate the statement of the witness under oath by his own words uttered on another occasion. It would add nothing to his statement upon the witness stand, either as to his testimony on the main issue, or as to his denial of the contradiction. We are of the opinion that the admission of the testimony by the court was improper and prejudicial, and should not have been allowed."

This subject is exhaustively reviewed in 2 Wigmore on Evidence, § 1122 *et seq.,* and the occasion and time when such statements may be admitted fully explained. In section 1124 Mr. Wigmore says: "When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless." In some classes of crime statements of a complaint being made are admissible, notably rape. 2 Wigmore, Evidence, 1134. Likewise, statements made by the owner or possessor of goods after an alleged robbery or larceny of them may, under some circumstances, be admitted. Upon principle, however, only the fact of the complaint, and not the details of the statement, will be admissible. 2 Wigmore, Evidence, § 1142.

Applying the principles here, it is plain to be seen that the prior consistent statements were inadmissible; and, as their tendency was naturally to reinforce the testimony of the witness prior to an attack upon it, by incompetent testimony, it would ordinarily be prejudicial. It is necessarily so in this case, as the conviction depends solely upon the testimony of Fielder, as against the testimony tending to prove that the defendant was at another place, and could not and did not commit the robbery.

The Attorney General seeks to sustain the admission of these statements as a part of the *res gestae.* Mr. Wharton's definition and explantation of *res gestae,* quoted in *Little Rock Traction &*

Electric Co. v. *Nelson,* 66 Ark. 494, has often been approved by this court. He says: "Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of, such act, and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act." In this case the evidence is what the person said when talking about the act, and was not the voluntary emanation of the act itself. See further applications of the principle in *Williams* v. *State,* 66 Ark. 264; *Blair* v. *State,* 69 Ark. 558; *Kansas City S. Ry. Co.* v. *Morris,* 80 Ark. 528; *Beal & Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479.

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

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

Opinion delivered December 21, 1908.

INSTRUCTIONS—RELEVANCY TO EVIDENCE.—It is error to submit a question to the jury upon which there was no evidence.

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

Huddleston & Taylor, and *Johnson & Burr,* for appellant.

1. The acts of negligence charged in the complaint are, the failure to give the statutory signals of the trains approach, and running the train at an excessively high rate of speed over the highway and through the town. (1) Failure to give the signals required by statute, under Kirby's Digest, § 6595, was actionable negligence. 76 Ark. 227; 80 Ark. 19; 69 Ark. 134; 53 Ark. 201; 78 Ark. 251. (2) Running the train at excessive speed through the town without keeping a lookout was negligence. 197 Mo. 15; 93 S. W. 1120; 76 Ark. 100. (3) Proof of the killing by the operation of the train made a *prima facie* case of

negligence against the railway company. 80 Ark. 19; 73 Ark. 548; 70 Ark. 481. (4) Deceased being, at the time he was killed, on the highway, he was no trespasser, and the company owed him the duty to employ reasonable means and exercise reasonable care to avoid injuring him. 74 Ark. 610; 63 Ark. 636.

2. Under the circumstances shown in evidence, and considering the youth, etc., of deceased, he was not guilty of contributory negligence. 29 Cyc. 535 and cases cited; 7 S. E. 912; 81 Ark. 187; 72 Ark. 117; 37 Ark. 261; 59 Ark. 215; 32 Am. Rep. 413; 34 S. E. 75; 41 So. 146; 3 So. 555; 3 Atl. 871; 43 La. Ann. 43; 88 Mo. 293; 58 N. J. L. 682; 82 Ill. 198; 5 Dill. (U. S.), 96; 88 Ill. 441; 28 Ind. 287; 25 Kan. 738; 47 La. Ann. 1218; 45 Mo. 70; 47 N. Y. 317; 114 N. C. 699; 74 Pa. St. 421.

3. The jury having found all the issues in favor of appellant, the strongest probative force of which the evidence is susceptible must be given to it in support of that verdict. 76 Ark. 115; 67 Ark. 399; 74 Ark. 478; *Id.* 16; 82 Ark. 214.

T. M. Mehaffy, for appellee.

McCULLOCH, J. Appellant, as administrator of the estate of Willie Welch, deceased, instituted this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damage alleged to have been sustained by the next of kin on account of the death of said decedent, which is alleged to have been caused by the negligence of servants of the railway company in the operation of its train. A trial before jury resulted in a verdict in favor of appellant for damages, and the company filed its motion for new trial, which was granted by the court. Appellant took an appeal to this court from the order granting a new trial, giving notice as required by statute, containing an assent on his part that if the order be affirmed judgment absolute shall be rendered against him.

Willie Welch, appellant's intestate, a boy thirteen years of age, was struck and instantly killed by a southbound passenger train at Peach Orchard, a village of about 200 inhabitants in Clay County, Arkansas. It occurred at night. The railroad track at that place runs about due north and south, and is perfectly straight for several miles. There is a switch track or passing track running parallel with the main track on the east side for

a distance of about one-half of a mile, and at the point where the accident occurred there is a space of eight feet between the two tracks. A public highway intersects both tracks at right angle about twenty yards north of the station, and it was at this point that deceased was struck by the train as he crossed the main track. The village lies on both sides of the track, and the highway just connects the two sections of the town, being the principal crossing place for the public.

The following succinct statement of facts, which the jury were warranted by the testimony to find, is taken from appellant's brief: "On the night of the accident a northbound freight train pulled very slowly over the passing track past the depot. As it ran slowly along, Morris Welch, a young man, climbed upon one of the box cars; then Roy Baker, a sixteen-year old boy, got upon the train; Willie Welch then got upon the second or third car from the caboose, and Howard Baker, a thirteen-year old boy, stepped upon the rear platform of the caboose. The freight train practically came to a stop when the caboose cleared the highway. Thereupon Morris Welch jumped to the ground, and ran across to the west side of the main track; Roy Baker followed Morris Welch across the main track; Howard Baker then ran across the main track after his brother; and Willie Welch, following close behind Howard Baker, crossed the main track on the highway, and just as he reached the west end of the ties of the main track west of the west rail, and while on the north end of the crossing planks in the highway, he was struck across his shoulders by the projecting end of the pilot beam of the engine pulling the passenger train, and instantly killed. Howard Baker was about three feet west of deceased when he was struck. The passenger train was twelve minutes late, and was running sixty to sixty-five miles an hour, which was much faster than usual. Its regular schedule was about fifty miles an hour through Peach Orchard. It neither sounded the whistle nor rang the bell as it approached the crossing, neither did it give any warning of its excessively high rate of speed."

To this should be added the further undisputed facts that the passenger train was a fast through train not scheduled to stop at Peach Orchard; that the engine was equipped with an electric headlight, which burned steadily and could be seen as far

as Knobel, the next station northward; that the whistle of the engine was sounded just as the boy was struck, and that the passenger train was in sight when the boys boarded the freight train. There was nothing to obstruct the view of the approaching passenger train, and Willie Welch was seen to run across the track so close in front of the engine that he passed under the headlight. He was a bright, intelligent boy, and could see and hear well.

The court gave the following instruction, the part of italics being over the objection of appellee:

"No. 5. The plaintiff says that the deceased had the right to be upon the track at the time of his injury; although he may have been at one time a trespasser, he had ceased to be such and had become a licensee. *If so, the defendant owed to the deceased the obligation to look out for him from the time he ceased to be a trespasser and became a licensee; and, in determining whether or not the defendant was guilty of any act of negligence proximately contributing to the death of the deceased, you are to find from the evidence whether or not the defendant was guilty of any act of omission after deceased ceased to be a trespasser which proximately contributed to the injury;* and unless you do find from the evidence that the defendant was negligent in this respect, then there can be no recovery here, unless you further find that defendant's servants were aware of the deceased's presence and danger in time to have averted the accident after such discovery."

This instruction was erroneous, as there was no evidence to warrant it. There was not a particle of evidence that appellee's servants were guilty of any negligent act or omission after deceased started to go upon the track, which contributed in any degree to the injury. On the contrary, it is certain that, after deceased started to go upon and across the track, it was too late for the employees in charge of the engine to do anything to avoid the injury. He was only eight feet from the main track when he alighted from the freight train and started to run across the track. The train was then coming at a rapid speed, and was so close to him that nothing could have been done during the short space of time to avert the disaster unless he stayed off the track. No warning that might have been given by bell or whistle at that time could possibly have added to his knowledge of the immediate approach of the train, for the undisputed evidence is

that the engine was so close to him that in crossing the track he passed beneath the rays from the headlight.

It was erroneous and prejudicial to submit a question to the jury upon which there was no evidence. *St. Louis, I. M. & S. Ry. Co.* v. *Denty,* 63 Ark. 177; *St. Louis, I. M. & S. Ry. Co.* v. *Woodward,* 70 Ark. 441; *Fordyce* v. *Key.* 74 Ark. 19; *Pratt* v. *Metzger,* 78 Ark. 177; *Harris Lumber Co.* v. *Morris,* 80 Ark. 260.

It is unnecessary to determine whether there was any negligence at any time on the part of appellee's servants which contributed to the injury of appellant's intestate, as, on account of the giving of the erroneous instruction mentioned above, the court was correct in granting a new trial, and his order must be affirmed.

In accordance with the terms of the statute, judgment absolute will be rendered against appellant.

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

Opinion delivered December 21, 1908.

1. TRIAL—SINGLING OUT INSTRUCTION.—Where the jury returned into court and asked to have the instructions read to them, it was error for the court to single out one of the instructions, which was correct in itself but contained only part of the law, and read it alone, and then say, "That ought to be plain enough for anybody; there is no reason for misunderstanding that by any one." (Page 465.)
2. APPEAL—BILL OF EXCEPTIONS—MARGINAL NOTE.—A marginal note appended to a bill of exceptions, as copied in the transcript reciting that something appearing therein is erroneous will not be considered by the court where there is nothing to show that the trial judge made the annotation or intended to reject the matter referred to. (Page 466.)

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

STATEMENT BY THE COURT.

Reed was a section hand, in the employ of the St. Louis, Iron Mountain & Southern Railway Company on its White River

branch, near Yellville, in Marion County. Several of the section crew were returning from work on a hand-car furnished by the railroad company, and Reed and three of his companions were pumping when the lever bar, or upright iron supporting the handle, broke, and he was thrown from the car and injured. He sued the railroad company, and his complaint alleged that the railroad company disregarded its duty to use ordinary care and prudence in furnishing him with a reasonably safe and secure hand-car for the purpose of conveying him to and from his work, and to use ordinary care and diligence in keeping the same in a reasonably safe and secure condition, in that the lever was defective, and was known to the defendant to be defective, or could have been known by the defendant to have been defective by the use of ordinary care; and that it was unknown to the plaintiff.

The answer denied these allegations, and stated that if there was a defect in the lever bar the same was as patent to the plaintiff as to the defendant. The plaintiff's evidence in regard to the cause of the accident was in substance as follows: He testified that he saw no flaw or crack in the iron, and that he thought it was safe.

Robert Richardson testified that he examined the lever bar after it was broken; that the break occurred about half-way between the handle and where the lever bar was fastened to the car. That at the point of this break there was a sand-hole on the top side of the broken bar, just a little way from the edge. The sand-hole had a little shell or scale over it. That the sand-hole was about the size and shape of a pencil. The upper part of the broken handle bar appeared to have in it an old crack. Between the sand-hole and the surface it seemed to look a little rusty. That the crack could not be seen from the outside. He does not think the crack was deep enough to be discovered on observation, and the sand-hole was out of sight. That the rusty streak appeared to reach from the sand-hole to the surface. That this could not have been detected by looking ever so close to it. He does not know whether a mechanic or inspector could have seen it or not.

Keeter testified that the lever bar was broken square in two, and on the inside there was a vacancy about like a lead pencil. The bar was about two and a half inches through, and this hole

was on the inside. It ran lengthways of the bar. The hole was right where the bar was broken. It was about the size of a lead pencil, and some two inches in length. The hole appeared not to be in the center of the bar, but a little to one side, and there was a place that looked like it had been cracked before. That was close to the thin side. This crack was about half an inch long. If the two broken pieces are put back together, no one could see the crack there, leading to the hole inside. He does not think an ordinary examination would discover it. This crack reached to the surface, but the hole was in the heart of the iron. He says: "I do not think any one could have seen the sand-hole or the crack. Q. Was that a hollow on the inside of the iron, and this crack reaching out to the outer edge? A. Yes, sir, it was all on the inside of the iron." He thinks the rusted streak came to the surface at one little point, but it could not have been easily seen.

Willard testified as an expert, and said: "If there was a crack an eighth of an inch long, you could see it with the eye; but if there is a sand-hole on the inside you have to detect that by hammering. Q. A sand-hole could be detected by hammering? A. Yes, sir." He says that with the hammer test a flaw of a half-inch could be detected. That in a piece like the one exhibited a sand-hole an inch or an inch and a half long could be detected. Then the court asked this question: "Could you find a flaw in it the size of this pencil? A. No, sir."

On behalf of the defendant, it was testified by Issa Ensley, the section foreman, who examined the lever, that the crack did not show on the surface, and it was not rusty, but that it was all freshly broken. The roadmaster testified that no kind of inspection could have detected this flaw. It was also shown that this car had been in use about a year, and that it was of the Buda make, one of the best hand-cars in use. Following is the testimony of an expert, S. C. Collins, introduced by the defendant: "My name is S. C. Collins. I am a mechanical engineer; have had twenty years' observation and study. There is no known test by which this flaw could have been discovered, that is ordinary test. It might be done in a terrial machine. To test or discover it by a hammer test it would require a much larger hole than this in the other piece of the bar; it would have to be two

or three inches long. The torsion test is a test made by twisting, but is seldom used. Hand-car levers are sometimes made of malleable iron; usually they are made of cast iron. I see nothing wrong with this piece of iron. It is a very close grained piece of cast iron. The flaw in this piece of iron is what is commonly called a cold shot. This cavity, by being smooth on the inside, was probably full of some substance, and when it broke the substance likely dropped out. This defect could have been discovered by making a hammer test, and possibly could have been detected by a mechanical eye if the old break came to the surface. I am working for the defendant. This defect is what we call a structural defect."

The court gave instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, which are as follows:

"Gentlemen of the jury: This is an action by Thos. C. Reed against the St. Louis, Iron Mountain & Southern Railway Company, defendant, to recover damages for alleged injuries claimed to have resulted to him on account of being thrown from a hand-car on or about the 23d day of November, 1907, while said plaintiff was in the employment of the defendant. The plaintiff alleges in his complaint that there was a lever bar on said hand-car, and that it was defective, which caused it to break, resulting in the alleged injuries complained of, and that the defendant neglected to use ordinary care and prudence in furnishing him with a reasonably safe and sound hand-car and appliance thereunto belonging, and neglected to properly inspect the same at reasonable intervals of time in order to ascertain its condition. The defendant denies any negligence on its part with reference to said hand-car and appliances, and denies the injuries as claimed by the plaintiff, and these are the issues which you are called upon to try. The burden of proof is upon the plaintiff to establish by a preponderance of the evidence negligence on the part of the defendant and the injuries, if any, resulting to him by reason thereof.

"2. You are instructed that it was not the duty of an employee to inspect the appliances of the business in which he is engaged, to see whether or not there are any latent defects that render their use more than ordinarily dangerous, but is only required to take notice of such defects or hazards as are patent or

obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not prevent him from a recovery unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them. It is the duty of the employer to exercise ordinary care and prudence in making reasonably careful examinations, searches or inspections at reasonable times by a competent inspector for hidden defects in appliances furnished to employees which can be discovered by a proper inspection by a competent inspector.

"3. You are instructed that an employee has the right to assume, in the absence of knowledge to the contrary, that the appliances which he is called upon to use in the performance of his work are reasonably safe; and if there are latent or hidden defects, or other defects of which said employee has no knowledge, or which are not obvious to him while using ordinary care and prudence, then he does not assume the risk attendant thereon.

"4. You are instructed that if you find from the evidence that the plaintiff was in the employment of the defendant as a section hand at the time and place of the alleged injuries complained of, and that in the course of his employment he was furnished a hand-car by defendant to be used in his work for it, and that while he was lawfully on said car in the course of his employment the lever bar was defective and broke by reason thereof, and that such defective condition was neither known or could have been known to plaintiff by the use of ordinary care and prudence, and if you further find that such defective condition, if any, of said lever bar could have been discovered by defendant by the use of ordinary care and diligence, and by a proper inspection, search or examination of said hand-car, and that the defendant failed and neglected to use such care and diligence, and if you further find that the injuries complained of resulted from such failure on the part of the defendant, you will find for plaintiff."

The 5th was as to the measure of damages.

"6. I charge you that there is no presumption that the company has been guilty of any negligence, arising from the fact that an accident has occurred and that an employee has been injured or killed.

"7. I instruct you that a master is required to use ordinary care to furnish his servants a safe place to work and to discover defects in his tools or appliances and repair them; the burden is upon the injured servant to show negligence in this regard, which will not be inferred merely from the occurrence of the injury; therefore, before you would be authorized to find for the plaintiff in this case, you must find from a preponderance of the evidence that the railway company failed to use ordinary care in selecting the hand-car, and that it could, by the exercise of ordinary care, have discovered the defect in that part of said car which broke and thus caused plaintiff's injury. I further instruct you that, before you would be authorized to find for the plaintiff in any sum, you must find from a preponderance of the evidence that the defect in the iron was known to the railway company, or that it might have been known by the exercise of reasonable care.

"8. I charge you that the burden of proving negligence in this case is upon the plaintiff; and, before you would be authorized to find for the plaintiff in any sum whatever, you must find from a preponderance of the evidence that the defendant railway company was guilty of some negligent act.

"9. I instruct you that the railway company owed to the plaintiff only the duty to search for any hidden defect that might have been in that part of the hand-car that broke and caused the injury to the plaintiff; and, before you would be authorized to find for the plaintiff in any sum, you must find from a preponderance of the evidence that defendant or its employees failed to use ordinary care to search for or discover any defect that might have existed.

"10. I instruct you that by reasonable care to discover defects as mentioned in these instructions, the law means such care as a man of ordinary prudence and judgment would give to the hand-car lever in question.

"11. I instruct you that a railway company fulfills its duty to its servants in regard to the inspection of its machinery if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances."

The plaintiff recovered judgment, and the railway company has appealed.

T. M. Mehaffy and *E. B. Kinsworthy,* for appellant.

1. The duty of railroads in regard to latent or structural defects is defined in 83 Ark. 323; 166 U. S. 617. The burden of proving that defendant had not discharged its duty in this respect was on plaintiff. 4 Thompson on Negligence, § § 3803 and c.; 79 Ark. 437; 51 *Id.* 468; 46 *Id.* 555; 83 *Id.* 323.

2. It was error to single out instruction 2 and read it to the jury and add remarks thereto, without reading all the instructions. 1 Heisk. (Tenn.), 202; 2 Baxter (Tenn.), 326; 11 Enc. Pl. & Pr. 283-5; 1 Blashfield on Instructions, sections 111, 177; 60 Ill. 32; 73 Ark. 148; 31 Kans. 58; 8 Col. App. 110; 71 Ark. 38; 76 *Id.* 232.

3. Instruction No. 2 does not state the law correctly. 77 Ark. 200; 65 *Id.* 64; 74 *Id.* 585; 79 *Id.* 428; 76 *Id.* 227; 74 *Id.* 437; 83 *Id.* 202; 65 *Id.* 98.

Seawel, Jones & Seawel, for appellee.

1. The evidence is sufficient to support the verdict. The appearance of a crack or flaw in a bar at the time it broke as well as its condition are matters for the jury in deciding whether or not the defect could have been detected or discovered by proper inspection. 82 Ark. 372; 78 Tex. 486; 146 Mass. 586; 138 *Id.* 426; 26 Cyc. 1142.

2. The inspection must be proper and by a competent inspector. 48 Ark. 347; 51 *Id.* 479; 67 *Id.* 305; 87 Ark. 217; 82 Ark. 372; 26 Cyc. 1142. Instruction No. 2 is the law, and the remarks of the judge had no reference to the evidence or merits of the case. 75 Ark. 380.

3. No request was made to read the other instructions—they had been read *twice.* 47 Ark. 407. The verdict was responsive to the evidence, and not to extraneous matters. 83 Ark. 384; 84 *Id.* 87-8.

HILL, C. J., (after stating the facts.) This is a suit by a section hand to recover for injuries received upon a hand-car, due to the breaking of the lever bar; and the case turns upon whether a proper inspection would have disclosed the defect. The substance of the testimony on both sides will be found in the preceding statement, and the instructions are also therein set out. It is doubtful whether the court would permit the verdict to

stand upon this evidence, weighed by the principles announced in *St. Louis & S. F. Rd. Co.* v. *Wells,* 82 Ark. 372, and *Ultima Thule, A. & M. Ry. Co.* v. *Calhoun,* 83 Ark. 318. But, as the judgment will have to be reversed upon another matter, and the evidence may be more fully developed upon a new trial, the court will not pass upon the sufficiency of it as found in this record.

The bill of exceptions shows the following: "Be it further remembered that at the trial of said cause, after the evidence had been closed and the instructions of the court read to the jury and the argument of counsel, the jury retired to consider of their verdict and returned into court and asked to have the instructions read to them by the court, which was accordingly done. That later the jury returned into court a second time, whereupon the court read to the jury instruction No. 2 aforesaid, and added thereto the following words 'By a competent inspector,' being the last four words of said instruction as above set forth. And thereupon the court made the following statement to the jury: 'That ought to be plain enough for anybody; there is no reason for misunderstanding that by any one.' And to the action and ruling of the court in reading only instruction No. 2 as aforesaid, and adding said words to the same, and in making said statement to the jury, the defendant at the time excepted and caused its exceptions to be noted of record."

This action of the court was equivalent to submitting the whole case upon instruction No. 2. Unless the jury had specifically asked for instruction No. 2, it should not have been read without reading all of the instructions. Instructions must be taken as an entirety. It is only when the jury fails to understand a certain one, and do understand the others, that one should be read over to them without reading the others; and even then the judge should caution them that all of the law of the case is not given in that one, but that it is only covering that particular phase of the case with which it deals. The court only read this one instruction when there was no request for it alone, and this over the objection of the defendant to giving it alone, and the court emphasized it by adding a few words thereto, and then telling the jury that it "ought to be plain enough for anybody," and that there was no reason for misunderstanding that by any one. The jury would naturally and properly infer from the court's

singling out this instruction and making additions to it, and making these remarks in regard to it, that the whole case was determinable by it. The instruction is of itself correct. But there are many matters proper for the jury to have considered that are not therein mentioned, but which are mentioned in other instructions. For instance, the statement that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence negligence on the part of the defendant, and that there was no presumption that the company has been guilty of negligence from the fact that an accident has occurred through which an employee has been injured, were all matters proper for the jury to consider which are not mentioned in this instruction. Nos. 9 and 11 were also correct and useful instructions that are not covered by No. 2. These are but illustrations of the necessity of giving all of the instructions, instead of singling out one. The court had thought it was necessary to give eleven instructions in order to cover the whole law of the case. While there is a good deal of repetition in them, and they might have been condensed, yet they are not all condensed in this instruction No. 2.

On the margin of the record that has heretofore been copied is marked, "This is error." The transcript is made up in typewriting, and this marginal note is written with a pen. Other notes in the same handwriting such as "Instructions of the court" the names of the witnesses, etc., appear upon the margins of the transcript.

Appellee moves to strike out this part of the record, and contends that this marginal note was intended by the judge as a nullification of the statement in the bill of exceptions; but the court can not so consider it. If the judge had intended to reject this part of the bill of exceptions, he would have cut it out, and not indicated its error by such marginal references; and it is not shown that this note is made by the judge, and its appearance clearly indicates that it was not.

For the error indicated, the judgment is reversed and the cause remanded.

LONDON v. HUTCHENS.

Opinion delivered December 7, 1908.

APPEAL AND ERROR—PRESUMPTION WHERE EVIDENCE IS NOT BROUGHT UP.—Where a proceeding to vacate a judgment after term was dismissed for want of prosecution, and a motion to set aside this dismissal was made, which, after hearing evidence, was overruled, the presumption on appeal will be that the motion was properly overruled if the evidence heard by the trial court is not brought up in the transcript.

Appeal from Washington Circuit Court; *J. S. Maples,* Judge; affirmed.

J. E. London, pro se.

HILL, C. J. Hutchens sued London in a justice of the peace court in Washington County, and obtained a judgment by default. London appealed to the circuit court. He lived in Crawford County. He filed a motion in the Washington Circuit Court, praying a continuance of the cause on account of the illness of his wife, alleging that her condition was such as required his personal attention. The continuance was granted, and the cause set for a day certain of the next term of court. Subsequently, during the same term, it was shown to the court that London was at Brentwood, in Washington County, and not at his home, and the court set aside the continuance and rendered judgment against him. London filed a petition to vacate this judgment, which was denied, and he appealed to this court. His record failed to show any final judgment, other than what purported to be such in the bill of exceptions, which was filed out of time. The court held that the bill of exceptions could not be considered, and that the final judgment should appear, not in it, but in the record entries in the transcript; and, none being there, his appeal was dismissed, on November 5, 1906. *London* v. *Hutchens,* 80 Ark. 410.

Subsequently, London filed an amended petition to vacate the judgment. A summons was issued upon it, and Hutchens was summoned to answer to the April term, 1907. This was a proceeding predicated upon sections 4431, 4433 and 4434, Kirby's Digest, which prescribe that the trial court shall have power to vacate a judgment after the expiration of the term at which it

was rendered for the causes which are therein made grounds for vacation.

This petition was dismissed for want of prosecution. London filed a motion to set aside this dismissal, setting forth that he had caused summons to issue to the April term, but that, owing to a misapprehension of the date of the convening of that term of court, he had failed to attend the first week of its session; and alleged other matters tending to show merit in his motion. The record recites that this motion came on to be heard, and the court, "being well and sufficiently advised in the premises, doth overrule said motion, and doth refuse to set aside the order heretofore made, dismissing said cause." From this order London has appealed.

There is no bill of exceptions, and therefore the evidence upon which the hearing was had is not preserved. The court has nothing to review. The appeal is one from the order refusing to set aside the dismissal of his proceeding for vacation of the judgment for want of prosecution. The judgment rendered against him after the cause was continued is not the subject-matter of this review. London had proceeded under the statute to have it set aside, that proceeding was dismissed for want of prosecution, and the only matter here is the order refusing to set aside that order of dismissal. The record entry indicates that the court had evidence before it, and the presumption is always indulged, in the absence of evidence being brought here, that the evidence would sustain the action of the court.

The judgment is affirmed.

OWENS v. JABINE.

Opinion delivered December 21, 1908.

1. CURTESY—REQUISITES.—To entitle a husband to an estate by the curtesy, it is necessary that the wife be seized during coverture of an estate of inheritance in land. (Page 472.)

2. SAME—NECESSITY OF SEIZIN.—Where a wife, as sole heir of her father, was entitled to an estate of inheritance in his homestead upon her mother's death, but died before the mother, who also had an estate of

homestead therein, she was never seized of an estate of inheritance in such homestead, and her husband never became entitled to curtesy therein. (Page 473.)

3. HOMESTEAD—ACT OF 1852 CONSTRUED.—The act of December 8, 1852, providing for a homestead right in "one town or city lot," intended the lot or piece of ground on which the head of a family has a house, with the appurtenances which he uses as a home, no matter whether it contains more or less than one lot, according to the plat and survey of the town or city. *Wassell* v. *Tunnah,* 35 Ark. 101, followed. (Page 473.)

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

J. W. Blackwood, for appellant.

1. To constitute curtesy, there must be a lawful marriage, seizin in fact or in law, in the wife, birth of issue and death of wife. All the facts are clearly proved. 47 Ark. 175; 21 *Id.* 601; 15 *Id.* 585; 63 *Id.* 254; 64 *Id.* 356; Tiedeman on Real Property, pp. 106-7; 2 Minor's Inst. 121; 8 Cyc. 510; Wash. on Real Prop., pp. 174-5; 49 Kans. 49; 55 Iowa 256; 3 Oh. St. 377; 1 Pet. (U. S.) 507. In this State title is substituted for seizin. 15 Ark. 585; 120 Ill. 638-9; Williams on Real Prop. (4 Ed.), Appendix "E," 491, 502.

2. Dower is not an estate until assigned. A widow's quarantine is not hostile to the heir. 44 Ark. 492; 87 Ill. 80; 100 *id.* 356; 101 *Id.* 628; 25 Mo. 349; 2 N. H. 31; 34 *Id.* 31; 76 Fed. 925.

3. The homestead of Edmund O' Connor was confined to one lot. Gould's Dig. § § 29, 30, ch. 68.

4. If there was a homestead, it was abandoned. 55 Ark. 139. Besides, there were two houses or homes on the lots, and 25 Ark. 101 does not apply. 33 Ark. 404; 31 *Id.* 145.

S. R. Allen and *E. W. Kimball,* for appellees.

1. The *three* lots were the homestead of Edmund O'Connor, and after his death that of the widow until *she died,* long after the death of plaintiff's wife. There never was seizin in fact or law in plaintiff's wife. 25 Ark. 101; 15 Ark. 466; 63 *Id.* 254. There must be seizin in the wife. I How. (U. S.) 38; 21 Ark. 600; 47 *Id.* 175; 64 *Id.* 356.

2. The homestead right is a fixed definite estate in the widow, and there could be no seizin in the heir until the death of the widow. 43 N. C. 177; 3 Baxter (Tenn.), 420; 3 Head.

(Tenn.) 491; 23 Pa. State, 305; 12 Cyc. 1011-12; 58 Conn. 174; 147 Mass. 602; 1 Barb. Ch. 598; 43 N. Y. 549; 63 Ark. 254.

BATTLE, J. This action was brought by E. J. Owens against Mary E. and Lucian Jabine in the Pulaski Circuit Court to recover possession of a certain part of lot 7 in block 117 in the city of Little Rock, Arkansas. He alleges in his complaint that he owns an estate by the curtesy in lots 7, 8 and 9 in block 117 in the city of Little Rock, that these lots were owned by Edmund O'Connor in his lifetime, and were occupied by him and his family when he died in 1862, leaving surviving him Mary O'Connor, his widow, and Margarett O'Connor, his daughter, then an infant two years old. That Mrs. O'Connor and her daughter, Margarett, continued to occupy these lots until the year 1878, when plaintiff and Margarett married. That plaintiff and his wife took immediate possession of the lots, and Mrs. O'Connor lived with them, and he supported her as a member of his family. That he fenced the lots and built houses thereon and otherwise improved the same. That there were born to him and his wife, in lawful wedlock, three children, all girls, the eldest, the defendant, Mary E., who married the defendant, Lucian Jabine. That plaintiff and his family lived upon the lots and occupied them until the year 1892, when his wife, Margarett, departed this life intestate, leaving the three daughters her sole and only heirs at law. That he and his family continued to occupy the lots for several years thereafter and until Mrs. O'Connor died, and he still has possession of the same, except the west portion of lot 7, it being a house numbered 508 West Fifth Street, with the ground inclosed therewith. That the defendants, without authority or right, took possession of the house on lot 7, and refuse to allow plaintiff to take possession or pay rents therefor, to his damage in the sum of $200. He asks for judgment against the defendants for the house and ground so held by them, and the $200 damages.

Defendants answered and denied that plaintiff is entitled to the possession and rents and profits of lots seven, eight and nine in block 117, and that they (defendants) are unlawfully in possession; and admitted that Edmund O'Connor lived with his wife, Mary O'Connor, and Margarett O'Connor, his only child, upon the lots as his homestead, until his death, which occurred in the year 1862; that Margarett was then two years old; and

that Edmund O'Connor was the owner of the lots. They alleged that Mrs. O'Connor held and occupied the lots, not until the marriage of Margarett in 1878, but until her death on the 9th day of September, 1893, Margarett having died on the 30th day of March, 1892, intestate; that it is not true that plaintiff upon his marriage took possession of the lots, and that Mrs. O'Connor lived with him and he supported her as a member of his family, but on the contrary he and his wife lived with Mrs. O'Connor, who continued to hold possession of the lots, and during her life "sedulously" guarded against plaintiff having any control of the same. That under her direction houses and buildings were erected upon the lots, the costs thereof were defrayed by her in her own name, without the assistance of the plaintiff, with money accruing from her own earnings and the rents of the premises. That three children were born unto plaintiff and his wife; that after the death of Mrs. O'Connor they resided with plaintiff upon the lots until the 26th of June, 1899, when they moved to a homestead elsewhere in the city of Little Rock. That Margarett, wife of plaintiff, never was at any time seized or possessed of the lots, and plaintiff has no estate by the curtesy in the same. That defendants are in possession of the house on the west end of lot seven and ground inclosed with it, in right of Mary E. Jabine, an heir of Margarett, her mother, and is entitled to hold the same. They, defendants, allege that they were married on the 30th day of March, 1903; that plaintiff has, ever since the death of Mrs. O'Connor on the 9th day of September, 1893, collected and held the rents and profits of all the lots, consisting of four houses, except the part held by the defendants, which they have held since the 15th day of November, 1904. That he has never accounted for any of the rents and profits, amounting in all to more than $4,000. They made their answer a cross-complaint, and asked that plaintiff be required to account to them for one-third of the rents and profits of the lots since the 9th of September, 1893, and that he be restrained from interfering with and setting up any claim to the one-third of the lots belonging to Mrs. Jabine, and asked that this action be transferred to the Pulaski Chancery Court.

Plaintiff answered defendant's cross-complaint, and denied

the foregoing allegations contained therein, except as admitted in his complaint.

The action was transferred to the Pulaski Chancery Court. Upon a hearing the court found as follows: "Edmund O'Connor in 1862 died seized of lots seven, eight and nine, in block 117, in the city of Little Rock, Pulaski County, Arkansas, and that the same, taken altogether, was his homestead; that he left surviving him his widow, Mary O'Connor, and one daughter, Margarett O'Connor, then about four years of age, his heir at law. That at his death Mary O'Connor, his widow, was rightfully in possession of said lots and remained in full possession of the same up to her death in September, 1893; that said child, Margarett O'Connor, intermarried with plaintiff, E. J. Owens, in 1878; that issue of said marriage living at the time of her death in 1892 was Mary E. Owens, now Jabine, the defendant, and Katherine Owens and Margarett Owens, her three heirs at law. At the time of the death of said Margarett Owens the said Mary O'Connor was in full, exclusive possession of said lots under her rights of homestead and dower, as widow of said deceased, dower never having been assigned to her, and remained in possession until her death, sixteen months after the death of her daughter, Margarett, the wife of plaintiff. The court thereupon finds that no estate by the curtesy accrued to the plaintiff by reason of the premises."

The court dismissed the complaint for want of equity, and rendered judgment in favor of defendants against the plaintiff for one-third of the lots of which she was not in possession. Plaintiff appealed.

We find that the preponderance of the evidence adduced at the hearing sustains the findings of facts by the court.

To entitle a husband to an estate by the curtesy, it is necessary that the wife be seized during coverture of an estate of inheritance in land. In this case the lots in controversy constituted the homestead of Edmund O'Connor at the time of his death. His widow, Mary O'Connor, and his daughter, Margarett, during her minority, were entitled to hold it as a homestead. Before the expiration of the homestead the daughter died. The daughter was the only heir of Edmund O'Connor, and inherited an estate in his lands. Her right to the enjoyment and possession of the

homestead and estate of inheritance did not exist at one and the same time; and neither merged in the other. *Kessinger* v. *Wilson,* 53 Ark. 400, 403. As the daughter died before the homestead expired, she never was seized in law or fact of the estate of inheritance, and her husband, the appellant, is not entitled to an estate by the curtesy in the lots. *Chew* v. *Commissioners of Southwark,* 5 Rawle, 160; *In the Matter of Cregier,* 45 Am. Dec. 416; *Malone* v. *McLaurin,* (Miss.), 90 Am. Dec. 320; *Reed* v. *Reed,* (Tenn.), 75 Am. Dec. 777; 12 Cyc. Law & Procedure, 1011, and cases cited; 8 Am. & Eng. Enc. of Law, 511, and cases cited.

But appellant contends that Mrs. O'Connor was entitled to a homestead under the act of December 8, 1852, and under that act she was entitled to only one town or city lot as a homestead. The words "one town or city lot," as used in that act, were construed in *Wassell* v. *Tunnah,* 25 Ark. 101, to mean "the lot or piece of ground on which the head of a family has a house, with the appurtenances which he uses as a home, no matter whether it contains more or less than one lot, according to the plat and survey of the town or city." According to this construction, the three lots in controversy constituted the homestead of Edmund O'Connor at the time of his death, and of his widow, Mrs. O'Connor and their infant daughter after his death.

Decree affirmed.

HART, J., disqualified and not participating.

NORTH STATE FIRE INSURANCE COMPANY *v.* DILLARD.

88 473
89 572

Opinion delivered December 21, 1908.

1. ACCORD AND SATISFACTION—EFFECT OF ACCORD.—Accord without satisfaction is no defense, even where the performance of satisfaction is prevented by the interposition of a third party, as where the debtor is prevented from making payment as agreed by reason of being served with a writ of garnishment in a suit of a third person against the creditor. (Page 476.)

2. INSURANCE—LIABILITY FOR PENALTY.—Under Acts 1905, p. 308, making insurance companies liable for 12 per cent. damages and reasonable attorneys' fees where they fail to pay losses within the time specified

in the policy after demand is made therefor, an insurance company is not liable for such penalty and attorneys' fees where it was prevented from making payment within the required time by writs of garnishment served upon it by creditors of the plaintiff. (Page 477.)

3. APPEAL IN ERROR—PRESUMPTION WHERE EVIDENCE NOT BROUGHT UP.—Although the bill of exceptions shows that it does not contain all of the evidence, yet if it shows that the omitted evidence went to one issue only, the presumption that the omitted evidence sustains the judgment below extends only to this particular issue. (Page 477.)

4. SAME—HOW DOCUMENTS BROUGHT UP.—Where certain documents were made exhibits to the complaint, and their execution was admitted by defendant, they need not be repeated in the bill of exceptions if they are sufficiently identified therein. (Page 477.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed.

O. H. Sumpter, S. W. Leslie and *W. G. Bouic,* for appellant.

1. When an insurance company and a policy holder agree upon a settlement of a fire loss at a definite sum to be paid on a day named, and the company under said settlement is ready to pay the sum, but is prevented by garnishment proceedings, it is only liable for the sum agreed upon, and no more. It is the duty of the garnishee to hold the funds. 3 Ark. 509; 6 *Id.* 391; 19 *Id.* 249; 40 *Id.* 531. A garnishment is a lien from the time served (39 Ark. 97), and transfers to the garnisher all rights and remedies of the judgment defendant. 76 Ark. 344; 72 *Id.* 350.

2. No penalty nor attorney's fees should have been allowed, as the company was restrained by law from paying the loss within the time under the act of 1905, p. 308, § 1.

C. V. Teague, for appellee.

1. This case should be affirmed for failure to abstract the record as required by rule nine. 82 Ark. 547; 81 *Id.* 327; 83 *Id.* 133-4; 80 *Id.* 259; 78 *Id.* 379; 84 *Id.* 552, 555; 85 *Id.* 123-6; 55 *Id.* 547-9.

2. The bill of exceptions shows on its face that it does *not* contain all the evidence. 12 Pac. 454; 8 Ark. 429; 48 *Id.* 138; 29 L. R. A. 757; 46 Ark. 67; 84 *Id.* 73; 3 Cyc. 166-7, note; 66 N. W. 1020-2; 42 Ark. 29, 35; 44 *Id.* 74; 80 *Id.* 74, 79; 81 *Id.* 327; 74 *Id.* 551, and many others. The presumption is that the rulings of the court below are correct, and the judgment should be affirmed.

HILL, C. J. Dillard sued the insurance company on two policies for loss by fire covered by said policies. The insurance company alleged two defenses: First, it denied that the plaintiff, within sixty days after the fire, furnished proof of loss as required by the policies; and, second, it alleged that there was an agreement reached between the plaintiff and defendant to settle the loss for $1,750; that by the terms of the agreement the defendant was given a reasonable time to make payment, and that within the time that payment was to be made the same was intercepted by various writs of garnishment sued out by creditors of the plaintiff; that the service of these writs prevented the defendant paying the amount, pending the litigation between plaintiff and the creditors; and that defendant had filed answer to said garnishments, and in its answer interpleaded the said creditors with the plaintiff, and asked that the litigation by them be determined, and that the court declare the rights of the parties to the funds in the hands of the defendant, and that, by the payment of said $1,750 as agreed upon to the parties rightfully entitled thereto, the defendant be discharged.

There was a trial upon these issues, and a verdict was rendered against the insurance company for $2,250; and it has appealed. The appellee contends that the judgment should be affirmed for two reasons: First, because the transcript is not abstracted as required by Rule IX, and, second, because the bill of exceptions affirmatively shows that it does not contain all of the evidence, and that therefore the presumption applies that there was evidence to sustain the judgment.

The abstract can not be commended as one which fully complies with the rule, but there are certain questions sufficiently presented in the abstract to require a determination of them.

The evidence of the agreement between Mr. Dillard and Mr. Nelson, the representative of the insurance company, is sufficiently abstracted to show that these were the facts in regard thereto: An agreement was made to settle the loss at $1,750, and Mr. Nelson was given until his return to Memphis, which he expected to be on the following day, or, at the furthest, the second day, in which to make the payment. The compromise was in consideration of this payment being made within two or three days at the outside. Mr. Nelson returned to Memphis, and had the drafts

prepared, intending to carry out the agreement in good faith, when he was informed that the company had been garnished. Before the compromise was made, there was an outstanding garnishment, but this was to be taken up with the amount paid in compromise; but these subsequent garnishments prevented the execution of the compromise.

It is contended that there was error in giving an instruction which stated: "You are instructed that if the plaintiff agreed with defendant to accept a less sum than that sued for in this case, and defendant agreed to pay him, but before it made payment it was garnished, and on that account failed to make payment, and that it has never paid anything to plaintiff, this would be no defense to this suit, and plaintiff would not be bound by such agreement;" and in refusing an instruction stating the law otherwise than as above given.

This instruction is correct. The general principle is "that accord without satisfaction is no bar to an action of debt—that is, that accord, being a promise to confer satisfaction, must be fully and actually executed and accepted in order to be a satisfaction." *Martin-Alexander Lumber Co.* v. *Johnson,* 70 Ark. 215. In *Grimmett* v. *Ousley,* 78 Ark. 304, this statement from Judge Thompson was approved: "To constitute a bar to an action on the original claim or demand, the accord must be fully executed unless the agreement or promise, instead of the performance thereof, is accepted in satisfaction."

In *Dreyfus* v. *Roberts,* 75 Ark. 354, the validity of an agreement to discharge a debt by the payment of a smaller sum, when it was fully executed, was considered, and the authorities upon that phase of the subject reviewed, and this conclusion was reached: "It is therefore held that when an agreement is fully executed to discharge a debt by the payment of a smaller sum, and such discharge is evidenced, as it usually is in practical business affairs, by a written receipt for the lesser sum in full satisfaction of the greater sum, it is 'a valid and irrevocable act.'" But where the agreement is not executed, and is not evidenced by any writing, then it is not a bar to an action on the original debt; and, not being a bar, it is immaterial why the agreement is not executed. It may be through the fault of either party, or it may be through the fault of neither, as was the case here, or through the interposi-

tion of a third party. Still, the promise is to satisfy, and until that promise is fulfilled the agreement has not become binding.

The court erred in assessing a penalty of twelve per cent. and attorney's fees. Under the act of March 29, 1905 (Acts of 1905, p. 308), an insurance company is liable for twelve per cent. damages and reasonable attorney's fees where it fails to pay a loss within the time specified in the policy after demand is made therefor. Testimony of the appellee as set forth in the abstract, which the court finds correct from an examination of the transcript, shows that the garnishments were not released up to the time of the trial. Therefore the company was not in fault in not paying the defendant within the time specified in the policy, because the processes of the law interfered and required it to pay the same to the creditors of the plaintiff; and plaintiff is not in a position to invoke this act for his own benefit. The undisputed evidence shows that the first garnishment was served within sixty days after proof of loss was furnished, and the company had, under the terms of the policy, that time within which to pay the sums due thereupon, and the second garnishment was served just after the compromise and prevented its consummation.

It is said that the judgment must be affirmed because the bill of exceptions shows affirmatively that it does not contain all of the evidence. This is true. But it also affirmatively shows that the omitted evidence consisted of an affidavit and letters in regard to the proof of loss. Upon that issue it must be held that the presumption is that there was evidence sufficient to sustain the judgment; but where it affirmatively appears that the omitted evidence only went to one issue, this presumption does not apply to the whole case. *Wadly* v. *Liggett,* 82 Ark. 262; *McKissack* v. *Witz, Biedler Co.,* 120 Ala. 412.

The only other matter which appears to be omitted was some parts of the policies which were read in evidence. But the policies were made exhibits to the complaint, and their execution admitted by the defendant in the answer; and therefore they were parts of the record, and when read in evidence they need not be repeated in the bill of exceptions when properly identified.

There are other questions discussed that are not properly presented for the consideration of the court because they are not abstracted so as to enable the court to determine them.

The judgment is in favor of Dillard against the insurance company, and no creditors of Dillard are made parties hereto, and the circuit court could not, and this court can not on appeal in this action, protect the insurance company from paying to Dillard, notwithstanding the garnishments, as it has not seen proper to interplead the garnishers in this suit. Probably its rights are preserved in another suit, as indicated in the answer; but with that the court can have no concern on this appeal.

There was error in adding a penalty of twelve per cent. and attorney's fees under the act of 1905, and so much of the judgment is reversed. The judgment for the amount found by the jury to be due on the policies is affirmed.

PARAGOULD v. LAWSON.

Opinion delivered December 21, 1908.

1. MUNICIPAL CORPORATIONS—DEDICATION OF STREETS.—Where the owner of land in a city laid off an addition, and filed a plat thereof, showing streets and alleys, and thereafter sold lots by reference to the plat, he will be held to have dedicated the streets and alleys to the public use irrevocably. (Page 480.)
2. LIMITATION OF ACTIONS—OPENING STREETS.—Under Kirby's Digest, § 5593, providing that cities of the second class may "alter or change the widths of streets, sidewalks, alleys,". etc., the statute of limitations cannot be pleaded against a city of the second class proceeding to remove obstructions or encroachments upon streets which have been dedicated to or acquired by the city for public use. (Page 480.)
3. SAME—REPEAL.—The Legislature may repeal the statute of limitations or suspend its operation before a cause of action is barred under it. (Page 481.)
4. LACHES—WHEN DOCTRINE NOT APPLIED.—The equitable doctrine of laches is applied only when the party guilty of laches is asking the court of equity for relief. (Page 481.)
5. MUNICIPAL CORPORATIONS—ESTOPPEL.—A city of the second class is not estopped from proceeding to open a street by reason of the inaction of its officers for a long period of time. (Page 481.)
6. ADVERSE POSSESSION—STREET.—The owners of lots abutting on a platted street of a city of the second class have notice of the dedication, and can build up no right by continued occupancy thereof on

account of delay of the city in opening the streets to public use. (Page 481.)

7. MUNICIPAL CORPORATIONS—SUFFICIENCY OF DEDICATION OF STREET.—A dedication of a street by filing a plat is not void because the plat fails to identify the land dedicated if such land is sufficiently identified by parol evidence. (Page 481.)

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

Johnson & Burr, for appellant.

1. The execution, acknowledgment and filing of the McDonald plat, and the subsequent sale by him of lots with reference thereto, constitute an irrevocable dedication to public use of all streets and alleys therein described. 109 S. W. (Ark.), 541; 80 Ark. 489; 77 Ark. 221; *Id.* 177; *Id.* 570. Formal acceptance of the dedication was not necessary on the part of the city, The court erred in holding the plat defective and void because no starting-point is shown thereon. If any doubt ever existed as to the proper location of Cumberland Street on the plat, that doubt was removed when the boundary lines of the existing and traveled Cumberland Street of the city were extended northward as required by the plat. Difficulties in locating tracts from the description in a deed are removed by putting the purchaser in possession. 76 Ark. 146. The same rule applies here. If the plat is defective, appellees are estopped to deny the dedication. 109 S. W. (Ark.) 541; 98 S. W. (Ky.) 317; 110 Mo. 618.

2. The city is not barred by the seven years' statute of limitations, Paragould having been raised to the grade of a city of the second class, January 10, 1894, and less than two year's time having elapsed from the time of the dedication to the time where Kirby's Digest, § 5593, was enacted.

J. D. Block and *M. P. Huddleston,* for appellees.

McCULLOCH, J. Appellees instituted this suit to enjoin the city of Paragould and its officers from opening up Cumberland Street through an addition to the city that is known as McDonald's Third Addition. They own property, which they purchased from W. J. McDonald by description of lots and blocks according to the plat of said addition, abutting on the east side of Cumberland Street as described on the plat, and they claim

title by adverse possession for more than seven years to that part of the platted street embraced within their respective inclosures.

The city asserted the right to open the street by virtue of an alleged dedication made by McDonald, and notified the owners of the abutting property to withdraw their fences so as to open the street to the full width.

The chancellor granted the relief sought by appellees, and the city appealed.

There is no substantial dispute about the facts, which are as follows: Paragould became a city of the second class on January 10, 1894. During the year 1895 W. J. McDonald, who owned the surrounding property, including that now owned by appellees, platted it into an addition, and filed it with the recorder of the county with an instrument of writing attached, dedicating to the city for public use all of the streets and alleys laid out and shown on the plat. From time to time thereafter McDonald sold and conveyed lots in this addition, including the lots now owned by appellees, describing them by reference to the plat.

Cumberland Street is named on the plat, and the figures indicate it to be sixty feet wide, corresponding in width with that street beyond the addition. It is one of the principal streets of the city, and is more than a mile in length, being opened to its full width up to this addition. It has been opened through this addition from the west line of the platted street to a width varying from twenty-five to thirty-five feet, leaving an irregular width of twenty-five to thirty-five feet embraced within the inclosure abutting on the east side of the street. The city is now attempting to require the owners of property on the east side of the street to withdraw the encroachments so as to widen the street to its full width as shown on the plat. The city has never before exercised any control over the street nor worked it. The dedication made by McDonald was complete and irrevocable. *Hope* v. *Shiver*, 77 Ark. 177; *Davies* v. *Epstein*, 77 Ark. 221; *Dickinson* v. *Arkansas Improvement Association*, 77 Ark. 570; *Brewer* v. *Pine Bluff*, 80 Ark. 489; *Stuttgart* v. *John*, 85 Ark. 520.

Appellee's claim of title to the strip of land in controversy can not be sustained. According to the terms of a statute enacted June 5, 1897 (Kirby's Digest, § 5593), the statute of limitations can not be pleaded against a city of the second class proceeding

to remove obstructions or encroachments upon streets which have been dedicated to or acquired by the city for public use. *Kansas City Sou. Ry. Co.* v. *Boles, post* p. 533.

Even if adverse possession began before the passage of the statute referred to above exempting cities of the second class from the operation of the statute of limitation on this subject, the possession had not continued for sufficient length of time for the statute bar to attach, and it was within the power of the Legislature to repeal the statute of limitations as to cities or to exempt cities from the operation thereof. There is no such thing as a vested right in a statute of limitation, and the Legislature can repeal the statute or suspend its operation before a cause of action is barred under it. *Dyer* v. *Gill,* 32 Ark. 410; *Pearsall* v. *Kenan,* 79 N. C. 472; *Hill* v. *Boyland,* 40 Miss. 620; *Smith* v. *Tucker,* 17 N. J. L. 82; 8 Cyc. 921; 25 *Id.* 988.

The equitable doctrine of laches can not be successfully invoked to defeat the right of the city to open the street which was dedicated to that use. The city is not asking any equitable relief, and appellees are therefore not in position to take advantage of a doctrine which is sometimes afforded by courts of equity purely as a matter of defense where the party guilty of laches is asking the court for relief. In such case the court simply remains passive and refuses to grant the relief. *Chatfield* v. *Iowa & Ark. Land Co., ante* p. 395.

Nor is the city estopped, on account of the inaction of its officers for a long period of time, to proceed to open the street. The city had no power to vacate the street (*Texarkana* v. *Leach,* 66 Ark. 40), and could not do indirectly through mere inaction on the part of its officers that which it was without power to do directly. *Beebe* v. *Little Rock,* 68 Ark. 39. The owners of lots abutting on the platted street had notice of the dedication, and are presumed to have had knowledge of the city's legal right to proceed in its own time to open the street. *Brewer* v. *Pine Bluff, supra.* They could, therefore, build up no right to continued occupancy of the dedicated strip on account of delay in opening the street to public use.

The principal contention of appellees in support of the decree in their favor is that the dedication was void for the reason that the plat of the addition did not sufficiently locate and identify

the land, but we think this contention is not well founded. The surveyor's certificate or note indorsed on the plat shows that the land platted lies within a certain quarter section, and the center of the quarter section is approximately indicated on the plat. Cumberland Street was one of the established streets running through the city, and the designation of the street on the plat by that name and of the same width is sufficient to identify it as a continuation of that street. We are only concerned in this case about the identification of the street; but when it thus identified as a continuation of the street of that name in the city, the uncertainty as to the location of other property on the plat disappears.

It is not essential that the description be so precise that the location and identity of the land embraced are apparent from the description alone, but extraneous circumstances may be considered to show the application of the description. *Dorr* v. *School District,* 40 Ark. 237; *Tippins* v. *Phillips,* 123 Ga. 415. According to this rule, it was competent, by parol testimony of extraneous circumstances, to fit the plat to the adjoining parts of the city, so that Cumberland Street would be what it was obviously intended, a continuation of the street of that name and width in the old part of the city.

Reversed and remanded with directions to enter a decree dismissing the complaint for want of equity.

DODSON *v.* ALPHIN.

Opinion delivered December 21, 1908.

PARTNERSHIP—LIABILITY.—As each partner is liable individually for all of the debts of a firm, a payment by one of two partners of one-half of the partnership note will not absolve him from liability for the remainder of the debt.

Appeal from Union Circuit Court; *George W. Hays,* Judge; reversed.

Gaughan & Sifford, for appellant.

HART, J. C. W. Dodson, as assignee of the Bank of El Dorado, brought suit against A. L. Alphin to recover an amount alleged to be due on a promissory note. The case is here on appeal from a verdict and judgment in favor of the defendant. The facts, briefly stated, are as follows:

E. H. Smith and A. L. Alphin formed a partnership for the purpose of buying and selling scrip. They carried their account in the Bank of El Dorado, of which Smith was the cashier, under the head of "scrip account." The partnership executed a note to the bank for the sum of $593.50. After the scrip account had run for three or four years, the bank became insolvent, and Smith was appointed its receiver in June, 1904. Some time in November following, J. S. Alphin, the husband and agent of A. L. Alphin, paid Smith $300 on said note, and the note was turned over to him. Smith was to pay his half of the note out of the fees claimed to be due him as receiver. The chancery court did not approve the settlement so made by the receiver. Smith executed a note to the bank for the balance due, $293.50 in the name of Smith & Alphin. After the settlement with A. L. Alphin, the scrip on hand was turned over to J. S. Alphin, her agent, to be sold, and the joint profits were about $1,000.

The last mentioned note for $293.50 is the one herein sued on. It is admitted that C. W. Dodson is the legal owner as assignee of the bank of the note. No exceptions were saved at the trial to the introduction of evidence or the instructions of the court. The sole question raised by the appeal is that there is not sufficient evidence to support the verdict. This point is well taken. Each partner was individually liable for all the debts of the firm. The payment by A. L. Alphin of $300 and her settlement at the time with Smith did not relieve her liability for the balance of the debt. In other words, the payment by A. L. Alphin of one-half the original note to E. H. Smith, the receiver of the bank and who was also her partner, and the agreement at the time of him to settle the other half of the debt out of the fees thought to be due him as receiver, did not amount to a payment of the debt.

Hence, because there was no evidence to support the verdict, the judgment is reversed, and the cause remanded for a new trial.

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

Opinion delivered December 21, 1908.

1. RAILROAD—INJURY TO INFANT—IMPUTED NEGLIGENCE.—In an action by a child of tender years to recover for injuries caused by the negligence of a railroad company in failing to keep a proper lookout for persons on its track, it is no defense that the child's parent was negligent in suffering the child to be exposed to danger. (Page 487.)
2. SAME—DUTY TO KEEP LOOKOUT.—Where a train crew consisted only of an engineer, fireman and conductor, an instruction to the effect that it was the duty of one of these three to keep a constant lookout for persons on the track was not erronoeus. (Page 488.)
3. APPEAL AND ERROR—EFFECT OF FAILURE TO OBJECT TO EVIDENCE.—Evidence received without objection in the trial court cannot be objected to on appeal. (Page 488.)
4. SAME—INVITED ERROR.—Where appellant introduced incompetent evidence, he cannot complain because the appellee was permitted to introduce evidence of the same character. (Page 489.)
5. SAME—SUFFICIENCY OF EVIDENCE.—Where there was some evidence that sustained a verdict finding defendant railroad company negligent in failing to exercise due care after discovering plaintiff's peril, the verdict will not be disturbed. (Page 489.)

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

STATEMENT BY THE COURT.

Viola May Noel, an infant twenty months of age, was struck by a locomotive upon defendant's railroad, and this action was brought to recover damages for her injury.

In September 1907, W. W. Noel, his wife, Polly Ann Noel, with the infant, Viola May, in her arms, and their fifteen-year old son, Johnnie, were walking across a trestle upon defendant's line of railway near Bergman in Boone County, Arkansas. The bridge or trestle was 365 feet long. They were going south, and when they got to the middle of the trestle, Johnnie was about thirty feet in advance because he could walk the ties better. At this point, he heard a rumbling noise, and thought it was a wagon. He went a little further, and the noise grew louder. Then he hallooed back to his parents that he thought a train was coming They commenced running as fast as they could in the direction

they were going. Johnnie ran also, and got off the bridge just as an engine and tender went by him. The engine knocked his father, mother and baby off the trestle. The trestle was about sixty feet from the ground in the highest place and about forty feet high at the point where his parents and the baby were knocked off. The injury was received at a point about fifty feet distant from the south end of the trestle.

The parents soon afterwards died as a result of their injuries. The baby received a fracture of the thigh bone at the juncture of one upper and middle third, and was otherwise severely injured and shocked, which caused her to suffer intense pain and to become very nervous. Evidence was adduced in behalf of the infant, tending to show that the injury caused by the shock to her nervous system was permanent, and on the part of the railroad company tending to show that she would entirely recover. The only ground of negligence alleged is that the train crew failed to keep a proper lookout, and there is a sharp conflict in the evidence on that point. As we are asked to hold that the facts in proof do not make out a case sufficient to go to the jury, the facts pertinent to that issue will not be abstracted here, but will be sufficiently stated in the discussion of that question in the opinion.

There was a jury trial and verdict for the plaintiff in the sum of $3,000. The defendant has duly prosecuted an appeal to this court.

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

1. We concede that negligence of a parent can not be imputed to a child of tender years and incapable of understanding and appreciating danger; but the lack of contributory negligence does not of itself make primary negligence, nor can it be presumed from the mere lack of contributory negligence. If the conduct of the custodian of the child has made the accident inevitable, and has prevented the exercise of ordinary care on the part of the defendant, so that, relieving the child of all question of negligence, the real cause of the injury has been the negligence of the custodian, the defendant can not be held responsible. 63 Ark. 177; 78 Ill. 88; 46 Ind. 25; 62 Me. 468.

2. The court erred in admitting evidence of the witnesses Paul, Milum and Seitz, which was purely opinion evidence, rel-

ative to a matter which was not the subject of expert testimony, but all the facts of which should have been submitted to the jury for their conclusions. If it was the subject of expert testimony, these witnesses, being ignorant of the things about which they testified, were manifestly not qualified to testify as experts. 56 Ark. 617 and cases cited; 76 Ark. 549; 78 Ark. 62; 85 Ark. 72; 85 Ark. 488; 82 Ark. 214; 139 Pa. 149; 157 Mo. 666; 101 Wis. 258; 73 N. E. 865.

3. The verdict of a jury will not be disturbed on appeal where there is evidence to support it. 70 Ark. 512; 66 Ark. 53; 76 Ark. 115; 74 Ark. 478; 70 Ark. 385; 67 Ark. 531; 57 Ark. 577.

Seawel, Jones & Seawel, Pace & Pace and *Frank Pace,* for appellee.

1. The court correctly instructed the jury that the negligence of the parents, if any, could not be imputed to the child, that it was the duty of the employees in charge of the engine to keep a constant lookout for persons on the track, that if such lookout had been kept and the child could have been seen by them in time to have avoided the injury by the use of ordinary care, and if by reason of such failure to keep a lookout the child was injured, their verdict should be for the plaintiff. 63 Ark. 253; 59 Ark. 180; 63 Ark. 184.

2. The fourth instruction requested by defendant was properly refused because in direct conflict with the instruction, and because it makes the parent's contributory negligence a bar to recovery, regardless of the negligence of the defendant.

3. Appellant's objection to the testimony of Paul, Milan and Seitz as being expressions of opinion is untenable. It was correctly admitted as a statement of fact. 17 Cyc. 62-3; 4 Mill's Logic, ch. 1, 2; 98 Ala. 336; 90 Ala. 45; 84 Mo. 122; 51 Mo. App. 276; 38 N. Y. Sup. 361; 170 U. S. 501; 81 Ark. 605; 87 Ark. 475; 79 Ark. 252; 59 Ark. 143; 52 Ark. 186; 62 Ark. 259. Appellant can not complain, even if the testimony was improperly admitted, having introduced the same kind of testimony itself. 17 Cyc. 61; 112 Mich. 307; 58 Mo. App. 68; 75 Ark. 257; 66 Ark. 600; 67 Ark. 47; 69 Ark. 14; 1 Thompson on Trials, 706-7; Elliott, App. Proc. 626; 27 Neb. 90; 2 Wyo. 94; 66 Ark. 292.

HART, J., (after stating the facts.) Counsel for appellant

first insist that the court erred in refusing to give the fourth instruction asked by it, which is as follows:

"If you find from the evidence that the plaintiff, Viola May Noel, was a child of tender years in arms, and was in the custody of her parents, and that her said parents negligently took her upon a trestle, a part of the defendant's railway, and negligently exposed her to danger, and in consequence of such negligence on the part of her said parents she was struck by the defendant's engine and injured, you will find for the defendant."

The instruction refused makes the contributory negligence of the parents a bar to a recovery by the infant, regardless of the negligence of the railroad company in failing to keep a proper lookout. In the case of *St. Louis S. W. Ry. Co.* v. *Cochran,* 77 Ark. 398, the court said: "It has been repeatedly held by this court that the act of April 8, 1891, known as the 'lookout statute,' is not applicable in suits for injury to persons upon a railroad track where the persons injured was guilty of contributory negligence." (Citing cases.)

"The statute is applicable to a suit by a child of such tender age as to lack sufficient discretion to be chargeable with negligence (*St. Louis, I. M. & S. Ry. Co.* v. *Denty,* 63 Ark. 177); but not to suits brought by parents for their own benefits on account of injury to children of tender years where their own negligence contributed to the injury." (Citing cases.)

In other words, where the suit is brought by the child, the rule is that the negligence of the parent in suffering the child to be exposed to danger is not negligence which can be said in any legal sense to contribute to the injury.

Mr. Beach says that the doctrine that a minor must lose his suit on account of the negligence of the persons in whose custody he may be "is an anomaly and in striking contrast with the case of a donkey exposed in the highway and negligently run down and injured (*Darius* v. *Mann,* 10 M. & W. 546), or with oysters in the bed of a river injured by the negligent operation of the vessel, in both of which cases actions have been maintained," and he adds: "If the child were an ass or an oyster, he would secure a protection denied him as a human being. He is not the chattel of his father, but has a right of action for his own benefit when the recovery is solely for his own use." Beach, Cont. Neg., § 127.

The present suit was brought by James Flinn, as next friend of Viola May Noel, an infant twenty months of age, against the railway company to recover for injuries received by her on account of the alleged negligence of the railroad company in failing to keep a proper lookout. Hence there was no error in refusing the instruction.

2. Counsel for appellant bases error upon instruction No. 2 as follows:

"2. The jury are instructed that it was the duty of the employees in charge of said engine to keep a constant lookout for persons on the track; and while it was not required that every employee upon said engine shall be constantly upon the lookout, it is sufficient that the lookout be kept by one person—unless by reason of a curving track or other obstruction a careful lookout can not be kept by one person only. And if you find from all the evidence that such constant lookout was not kept by either the fireman or conductor or engineer on said engine at the time and place of the injury complained of, and that, had such lookout been kept, said child could have been seen in time to have avoided the alleged injury by the use of ordinary care, and that by reason of such neglect to keep such lookout, if any, the said child, Viola May Noel, was injured, your verdict will be for the plaintiff."

The objection made by them to the instruction is that it confines the performance of the duty of keeping a lookout on the part of the railway company to the three persons named in the instructions. It must be remembered that the train only consisted of an engine and tender, and the undisputed evidence shows that the engineer, fireman and conductor were the only members of the train crew on the engine. Therefore there was no error in giving the instruction.

3. Counsel for appellant contend that the court erred in admitting certain portions of the testimony of the witnesses J. N. Paul, Roy Milum and James Sits. The witness Paul had made an examination of the scene of the accident. He testified that at a point fifteen rails distant on the railroad from the south end of the trestle he could see persons on the trestle at the place where the Noels were said to have been when knocked off. He was then asked, "If you had been raised about two or three feet there at the fifteen-rail point, could you have seen the entire bridge?"

and answered, "I think I could." No objection was made to the question and answer at the trial, and it can not be now raised here.

The witness Milum was asked the following question: "State whether or not for a distance of fifteen rails from where these parties were knocked off the engineer could have an unobstructed view?" and over the objection of appellant's counsel answered: "We could stand there flat-footed and see, and I do not see why he could not see from the cab, when he was higher." Again, after testifying about the height of a cab window, and about where the engineer would be in the cab window, he was asked: "Is there anything that would obstruct the vision of the engineer for fifteen rails south of the bridge?" he said: "I do not think there would be anything in the way from the cab window." This witness had made an examination of the scene of the accident, and had made observations from the points about which he testified. We think his testimony was but a statement of facts there as they appeared to the witness.

For another reason, appellant can not complain of the introduction of this evidence. Counsel for appellant adopted precisely the same kind of testimony to prove their version of how the accident occurred; and have therefore waived the error, if any was committed. *St. Louis & S. F. Rd. Co.* v. *Kilpatrick,* 67 Ark. 47; *German-American Ins. Co.* v. *Brown,* 75 Ark. 251.

The testimony of Sits was practically the same, and for like reason there was no error in admitting it before the jury.

4. Counsel for appellant contend that the judgment should be reversed for lack of evidence to support the verdict. The undisputed evidence shows that the child, an infant twenty months old, while being carried in its mother's arms, was knocked from the trestle about fifty-six feet from the south end of it to the ground about forty feet below. That the Noels were going south, and that the engine was coming north. That going south from the trestle there is an open track for some distance, then a small cut, with a high hill on the right and a bank ten or twelve feet high at the highest point on the left side. That the track curves to the left, and that it is only a short distance through the cut.

The testimony of the engineer and those in the cab with him was to the effect that they were keeping a lookout, and that after

discovering the peril of these people they did all in their power to prevent injury to them.

Appellant also adduced evidence tending to show that the engineer in charge of the engine at the time of the accident, with some persons who lived in that neighborhood, afterwards went to the scene of the accident, and made several tests and experiments in regard to stopping an engine under the circumstances similar to those existing at the time of the accident. They testified that the engine was run towards the trestle from the south, and that the instant the engine arrived at a point where persons could be seen on the trestle at the place where the accident occurred, the engine was reversed, and every effort made to stop it. Two of the tests showed that the engine ran past the point where the injury was received before it could be stopped, and in one it was stopped at the south end of the trestle before it reached the place where the accident happened.

On the other hand, evidence was adduced in behalf of appellee tending to show that there was an unobstructed view of the trestle and persons on it where the injury was received for fifteen rails or 495 feet distant from the south end of the trestle, and that an engine and tender could be stopped within 200 feet when going at the same speed and on the same grade as the engine and tender at the time of the accident.

Other evidence was adduced in behalf of the appellee to the effect that after the accident the engineer stated that he saw the Noels in plenty of time to have stopped, but that when he first saw them he did not know whether they were on the bridge or on the dump, and that when he saw them again he was too close to stop. The evidence on this point on both sides is very voluminous, but we have given the substance of it.

Upon the testimony before them in this case, we think the court properly left it to the jury to say whether they could deduce, from the evidence, the inference that the engineer discovered, or could by ordinary care have discovered, that the Noels were upon the trestle in time to have avoided the injury, or whether they thought a preponderance of the testimony was in favor of the inference that appellant's employees could not have averted the accident by exercising the diligence required by law.

Finding no prejudicial error in the record, the judgment is affirmed.

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HARRIS LUMBER COMPANY v. WHEELER LUMBER COMPANY.

Opinion delivered November 30, 1908.

1. SALE OF CHATTELS—SEVERABILITY.—When a contract for the sale of 11 car loads of lumber contemplated that each car load should be shipped as fast as the lumber accumulated in the vendor's yard, and that each car load should be billed separately, and the purchase price for the lumber contained therein should be due sixty days after delivery, the contract is severable. (Page 495.)
2. SAME—BREACH—WAIVER.—A breach of a contract of sale on account of the vendee's failure to make payments of purchase money when due is waived by the vendor when he accepts payments after they are due without insisting on prompt payments. (Page 496.)
3. SAME—RIGHT OF VENDOR TO RESCIND.—Where a vendee in a contract of sale wilfully refused to pay an installment of the purchase money when due, the vendor was authorized to rescind the contract. (Page 496.)
4. SAME—BREACH OF CONTRACT.—A vendee who is himself in default in failing to pay an installment of the purchase money cannot insist upon performance by the vendor as a condition precedent to his performance. (Page 497.)

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

STATEMENT BY THE COURT.

This suit was begun by appellant against appellee in a justice's court for a balance alleged to be due on lumber which appellant had sold appellee. The amount claimed was $100. Appellee denied orally that it was indebted to appellant in any sum, but claimed that appellant was indebted to it on account of a breach of the contract made between appellant and appellee in regard to sale of lumber, in the sum of $175.

In a written reply to this oral claim appellant denies that appellee has been damaged in any sum on account of appellant's failure to comply with its contract, denies that appellant failed to comply with its contract, and avers that "whatever delay, if any, in shipping said lumber was caused by the carelessness of the roads, the amount and kind of lumber ordered by appellee, and other conditions over which appellant had no control, and the fact that appellee refused to pay for the lumber when due."

It appears from the evidence that the contract originated in this way: Appellee sent to appellant for a list of lumber for

prices. Appellant in reply letter sent a list of lumber, giving kind, dimensions and price, and saying: "We hope that you will be able to favor us with a portion of your business. We can ship you dry stock and ship you promptly." In reply to this letter appellee wrote appellant under date of September 25, 1905, as follows:

"Enclosed find list of eleven cars. Each car numbered and prices attached as per your quotation of 22d inst. Cars No. 1 and 2 we would like you to ship promptly, and the balance one or two cars a week, or along as convenient. We would like to have the whole shipment within ninety days." To this letter was attached the order for the eleven cars. Each car numbered and the number and dimensions of the lumber for each car.

Appellant on same day wrote accepting the order as follows: "We note your letter of the 9-25; also orders. We will accept your orders with the understanding that we are to ship any and all as fast as we accumulate it on the yard. You will note that this is all No. 2, and that it is mostly all eighteen and twenty foot lengths, which makes it bad on us. If all right, we can load you up several cars soon, and we will check each of them off as we load it, and will not load any more than your order calls for. Please answer."

The appellee on the 26th of September, 1905, replied as follows: "You may let the stuff come. But check items as loaded, and do not ship more than the order calls for of any one item. Trusting that this will be satisfactory, we are, etc."

On the next day appellant answered as follows: "We note your letter of the 9-26. Will go to work on your order at once."

The above constituted the contract between the parties as to the sale of the lumber. It is not shown by the correspondence when the lumber was to be paid for, but the uncontradicted evidence was that the bill for a car load of lumber would be due sixty days after the car was shipped, that those were the regular terms for lumber sold on time, and that the lumber was sold to appellee on the regular terms. Appellant began the shipment of lumber on October 10, 1905, and continued to ship until February 6, 1906, when the last car was shipped. It shipped eight cars. Appellant testified and appellee admitted that the sum of $100 was due on the lumber that had been shipped under the con-

tract, but appellee contended that it was the duty of appellant to have shipped eleven cars under the contract, and that the lumber which it failed to ship was worth $175 more at the time it refused to ship same than the contract price at which appellee purchased same of appellant. There was no shipment of lumber from December 9, 1905, till February 6, 1906. In the mean time the correspondence shows that appellee was complaining of the delay and urging appellant to make more prompt shipments, and appellant in reply (February 12, 1906) made excuses for the delay and promised to send the balance of the order "as soon as possible." On March 3, 1906, appellant advised appellee by letter that the former had drawn on the latter for $722.59 the amount of its account past due. Appellee in answer sent a remittance for $250. Appellant in a letter of March 7th acknowledged receipt of remittance and said: "Hope you will not delay sending balance due." On March 21, 1906, appellee wrote appellant as follows: "We are still waiting patiently for balance of our order. If you only knew how badly we need stuff, you would appreciate our hurry. We will let you have another check in a few days." In answer to this appellant wrote: "We note your letter of 3-20" (evidently meaning 3-21.) "If this kind of weather continues, we will soon be able to get some lumber hauled in from the woods, but before we ship you any more we must know about this pay, as part of your account is past due, and we need this money to run our business, and we can sell our lumber to men who will pay promptly."

On April 4th appellee wrote appellant as follows: "Enclosed find check for $313.13, the amount of our account less $100, Expense bill for $50.13 also enclosed. We notice by your last letter that you can sell your lumber to people who pay promptly. We feel that we have been as prompt in our remittances as you have in your deliveries. You accepted our order September 25-05, which is more than six months ago. It will be just as convenient for us for you to ship with draft, invoice and bill of lading attached, as regular terms, provided that on the last car or our order you include the draft for the $100 which we are holding up. We would appreciate an early delivery of this order as by agreement, and, in order to satisfy you, to be paid for as before stated, *i. e.*, cash on delivery. If you had delivered

this stuff promptly, we have been in position constantly to comply with our letter of March 2, 1906."

Appellant's witness testified that appellee was constantly behind with its payments, and that the reason the two cars were not shipped was because he "felt like they would not pay us for it." On the other hand, appellee's witness testified that "he kept the bills paid promptly until he (appellant) quit shipping," that the money was held in order to force shipment. There was evidence on behalf of appellee tending to show that appellant failed to ship 42,342 feet of lumber contracted for, and that the difference between the contract price and market price when it should have been delivered was approximately five dollars per thousand. On the other hand, the evidence of appellant tended to show that the advance in the price of lumber, such as composed the order here, amounted to only fifty cents per thousand, and that it would not exceed the sum of $8.00 per car. The court among others gave the following instructions:

"1. If the jury believe that the plaintiff agreed to furnish to the defendant one entire lot of lumber, and has failed or refused to furnish a part of same, it is not entitled to recover in this action.

"2. If the plaintiff has failed to ship to defendant all the lumber it contracted to ship to it, defendant would be entitled to recover from plaintiff the difference between contract price of the lumber and the market value of same at the time it should have been shipped, if that be greater than the contract price."

The court refused to give, among others, the following prayers:

"1. If you find from the evidence that the Wheeler Lumber Company is indebted to the plaintiff, Harris Lumber Company, for lumber, then your verdict must be for the plaintiff for such sum as you believe from the evidence is still due on said lumber.

"2. If you believe from the evidence that the defendant, Wheeler Lumber Company, failed or refused to pay for said lumber, or any part thereof, when same fell due, then the plaintiff was not required to continue to furnish lumber to defendant while any part of the account was due and unpaid.

"A. If you believe from the evidence that plaintiff delivered

to this defendant the lumber as fast as it accumulated on its yards, then your verdict must be for the plaintiff."

To these rulings exceptions were properly saved. The verdict and judgment were for appellee in the sum of $25, and this appeal is duly prosecuted.

Brizzolara & Fitzhugh, for appellant.

It is clearly shown by the evidence that the lumber was to be shipped and paid for in installments as delivered. The contract was therefore severable, and there could be a breach for non-payment before complete delivery. 137 N. Y. 471; 148 N. Y. 81; 104 Mich. 242; 110 Pa. St. 236; 7 Words & Phrases, 6454. Where the contract calls for delivery of goods in installments, and payment therefor as delivered, the seller may refuse to deliver subsequent installments until prior installments have been paid for, and, if payment is refused, he may rescind the contract. 24 Am. & Eng. Enc. of Law (2 Ed.), 1096; 117 Mass. 6; 44 Ill. 339; 115 U. S. 188; 113 Fed. 256; Tiedeman on Sales, 210; 98 S. W. 34; 43 Am. Dec. (Century Ed.), c. 423; 81 N. E. 574; 149 Ill. 138; Bishop on Contracts, 613.

Appellees were not authorized to withhold the hundred dollars due on prior installments of lumber received and accepted. 110 Pa. St. 242; 51 Atl. 305; 78 N. E. 414.

Winchester & Martin, for appellee.

The contract was admitted as pleaded, and the proof is conclusive that appellant did not comply with it. The only contested issue, therefore, was whether or not appellee was damaged by reason of appellant's breach of contract. Testimony that is not responsive to the issues may properly be eliminated by the charge of the court to the jury. 67 Ark. 147; 41 Ark. 393; 77 Ark. 237; 74 Ark. 468; 63 Ark. 108. If appellant desired to rely on issues raised in its brief, not having raised them in its pleadings, it should have presented them in instructions to the jury. 67 Ark. 416; 69 Ark. 632; 75 Ark. 76; *Id.* 381.

WOOD, J., (after stating the facts.) The contract under consideration was severable, and the court erred in not so treating it. Although the contract called for the shipment of eleven car loads of lumber, yet the undisputed evidence is that it was to be shipped from time to time in car lots, and each car load was to

be billed separately and the amount of purchase price for the lumber contained in each car was due and to be paid sixty days after delivery. Where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the whole is in its nature single and entire, the contract is severable. 2 Parsons, Cont. 577; *Rugg* v. *Moore,* 100 Pa. St., 236; *Dowley* v. *Schiffer,* 13 N. Y. Supp. 552, 553. In *Williams* v. *Robb,* 104 Mich. 242, it is held (quoting syllabus): "a contract for the shipment of fifteen car loads of potatoes, while entire in the sense that either party has a right to full performance, is severable where it clearly appears that the shipments were to be made in car lots to be paid for as received." The contract in this case was entire in the sense that, if appellee had complied with its terms as to payment, it could then have compelled appellant to ship it the balance of the lumber, or else have responded in damages for its failure to do so. But here the uncontroverted proof shows that appellee was guilty of the first breach of the contract. For its letter of April 4th shows that it held back the sum of one hundred dollars that was due appellant, and appellee's own evidence shows that this amount "was held back in order to force appellant to make shipment." True, appellee contends that appellant, in its course of dealing, by allowing appellee to make payments and in receiving same after they were due, and in not insisting on prompt payment of the amounts as they became due, waived any breach, if any, of the contract on appellee's part in that respect. This would certainly be correct up to the time when appellant definitely notified appellee that it must comply with the contract in making payments, and that it was required to pay the past due indebtedness on shipments before appellant would ship any more lumber. Such notice appellant gave appellee March 20, 1906, in a letter of that date, and it was after this that appellee "held back" the one hundred dollars past due "to force appellant to make shipment." Appellee could not do that. Appellant claimed (and really there is no evidence to the contrary) that it had performed its contract and had shipped the lumber to appellee "as fast as it had been able to accumulate it on its yard." If appellant had not performed its contract in shipping the lumber as promptly as the contract required and refused to ship any more lumber under it, appellee could have

abandoned same and sued for damges for the breach, but appellee could not stand on the contract and insist on further shipments of lumber when it was in default in making payments that were past due under it, at least without tendering those payments. Mr. Tiedeman says: "If the breach of condition of part payment is the result of accident or oversight, or is attendant by other facts and circumstances which are inconsistent with an intention to abandon the contract, and which incline one to presume that the buyer intended to fully perform the contract, then the failure to pay an installment at the agreed time does not work a forfeiture of the whole contract, but by tender of the future installments of payments he may claim the benefits of the sale. But if the acts of the buyer in failing to make the payment of an installment indicate his intention to abandon the contract, as where the refusal to pay is willful, and not through a misunderstanding or accident, the entire contract is held to be forfeited, and the seller can not thereafter be compelled to perform the contract." Tiedeman on Sales, § 210.

Here the failure to pay the one hundred dollars, admitted by appellee to be past due, was not accidental but intentional, as shown by appellee's own evidence. There was no tender to appellant of the past due payment, but an intentional withholding of same to compel the other party to perform. A party, who is himself in default, without any offer to repair such default, can not insist on performance by the other party as a condition precedent to his performance. *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336; *Lee* v. *N. H. Ry. Co.,* 15 Fed. Cas. 214; *Porter* v. *Arrowhead Reservoir Co.,* 100 Cal. 504; *San Francisco Bridge Co.* v. *Dumbarton Co.,* 119 Cal. 275; *McGrath* v. *Gegner,* 77 Md. 331; *Dunham* v. *Mann,* 4 Seld. 512; *Curtis* v. *Gibney,* 59 Md. 131; *Haines* v. *Tucker,* 50 N. H. 307; *King Phillip Mills* v. *Slater,* 12 R. I. 82; *Guerdon* v. *Corbett,* 87 Ill. 273; *Wilson* v. *Bauman,* 80 Ill. 494; *Winchell* v. *Scott,* 114 N. Y. 640; *Flaherty* v. *Miner,* 123 N. Y. 382, 389; *Mead* v. *Degolyer,* 16 Wend. 638; *Ladue* v. *Seymour,* 24 Wend. 60, 62; *Jones* v. *Judd,* 4 N. Y. 411; *Kokomo Strawboard Co.* v. *Inman,* 134 N. Y. 92; *Pattridge* v. *Gildmeister,* 1 Keyes, 93; *Barnes* v. *Denslow,* 9 N. Y. Supp. 53.

In *Rugg* v. *Moore,* 110 Pa. St. 242, where the facts are similar, the court said: "He paid the first (draft) and refused to

pay the second, because he wanted to see whether the defendants had shipped or would ship all the corn. This was not a sufficient reason for refusing to pay after he had accepted and received the corn. If, then, the contract required payments on deliveries, and the plaintiff wilfully refused payment, according to the contract, he thereby authorized defendants to rescind at their option." See also *Nichols* v. *Scranton Steel Co.,* 137 N. Y. 471, and other authorities to this point cited in appellants briefs. *King* v. *Faist,* 161 Mass. 449.

The court erred in giving instructions numbered one and two and in refusing prayers numbered one and two asked by appellant.

We do not concur in the view expressed by counsel for appellee that the contention of counsel for appellant here is not responsive to the issues raised below. The appellant alleged a compliance with the contract on its part, and the sum of $100 due on the part of appellee in not making payment, and asks judgment for the amount of that payment, which appellee admits was due on the lumber that had been shipped.

The judgment is reversed, and judgment is entered here for appellant for the sum of $100.

ON REHEARING.

Opinion delivered January 11, 1909.

WOOD, J. It is true, as appellee contends, that the one hundred dollars which in its letter of April 4th, it stated it was "holding up" was not due until two days thereafter (April 6th). But the letter shows that appellee treated it as if it were due when it was writing the letter, and we so treated it. The letter is set out in the statement, and it clearly shows that appellee did not intend to send that one hundred dollars (which it then knew would be due in two days) until appellant had shipped the last car. For the letter expressly states: "It will be just as convenient for us for you to ship with draft, invoice and bill of lading attached as regular terms, provided *that on the last car of our order you include the draft for $100 which we are holding up.*" This letter was in answer to appellant's letter saying: "Before we ship any more lumber we must know about this pay." Appellant had the

right to make that inquiry and that demand, for at that time appellee owed appellant $313.13 past due. The answer to this inquiry and demand (letter of April 4th *supra*) shows, as we have endeavored to make clear, that appellee intended to withhold that amount, even after it was due under the contract, to "force appellant to make shipment." This appellee could not do without breaching the contract. Notifying appellant of that fact in advance absolved it from further effort to carry out the contract on its part.

We believe our first conclusion therefore is correct, and the motion for rehearing is overruled.

WESTERN UNION TELEGRAPH COMPANY *v.* ARANT.

Opinion delivered December 14, 1908.

1. TELEGRAPH COMPANY—NEGLIGENCE—MENTAL ANGUISH.—Under Kirby's Digest, § 7947, making telegraph companies "liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages," a telegraph company is liable for mental anguish caused by its negligence in delivering a message which would have notified a mother in this State that her son was dead and requested that she wire disposition of the body, in consequence of which negligence the body was interred in another State, and the mother suffered a week of anxiety until the body could be exhumed, removed to this State and reinterred. (Page 501.)
2. APPEAL—INVITED ERROR.—Appellant cannot complain of an error of the trial court which it invited by its own instruction. (Page 503.)

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; affirmed.

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

There is no sufficient showing here for recovery on the ground of mental anguish. Appellee was deprived of no privilege by reason of the delay, and a speedier transportation of the remains, and burial, would have made no material difference in her emotions. The claim that she was shocked when she saw

that the telegram was dated a day prior to its receipt by her is too intangible for remuneration in money. And her alleged suffering under the thought that he had been buried before she could see deceased is not sufficient; it was in fact without foundation, because she knew her messengers would bring the remains home. Worry because she did not know how or why her son had died, nor what he had gone through, would not have been relieved by prompt delivery of the message, and can not enter into the elements of mental anguish for which recovery can be had. 83 Ark. 476; 41 S. E. 881; 42 S. W. 549; 44 S. W. 538; 67 S. W. 515; 56 S. W. 1127; *Id.* 744; 47 S. E. 597; 85 S. W. 1171; 12 S. W. 534; 30 S. W. 1105; *Id.* 1107; 56 S. W. 568; 38 S. W. 635; 71 S. W. 584; 84 S. W. 296.

Jabez M. Smith, A. M. Duffie and *W. R. Duffie,* for appellee.

The jury were properly instructed in accordance with the law, as declared by this court, that no recovery can be had for mental anguish arising from purely imaginary causes, apprehensions or worries having no basis in fact; but, in order to recover for mental anguish, it is not necessary that the complainant minutely dissect and analyze each emotion of grief upon the witness stand. Each case must stand upon its own state of facts, and in arriving at the elements of damages they must be determined in the light of experience from a common sense construction and application of the facts and circumstances surrounding each particular case. 83 Ark. 43. With one exception the cases cited by appellant are from other States, and were decided prior to the passage of our mental anguish statute, Kirby's Digest, § 7947. This statute has been upheld in many cases. See particularly 78 Ark. 549; 85 Ark. 263. That a mother would suffer genuine pain and anguish on receipt of delayed telegram under circumstances such as these is a matter of common knowledge.

HILL, C. J. Harry Arant and Burt Coyne were roommates, living at Lissie, near Eagle Lake, Texas. Harry Arant was born and reared at Malvern, Arkansas, where his parents resided. He died on the 20th of February at 2:15 P. M. Burt Coyne went to Eagle Lake immediately after Harry's death to arrange for the body to be sent to the home of his parents, and

discussed the matter fully with the agent of the telegraph company, and sent this telegram to Harry's mother: "Harry died today. Wire disposition of body at once." This was sent at 4:48 P. M. on February 20, 1907. He was told by the operator that it would take about two hours to get an answer, and he called repeatedly thereafter for an answer. None being received, the body of Harry Arant was buried at five-thirty P. M. February 21st, at Lissie, Texas.

The message was received by Mrs. Arant at about the hour of his burial, 5:30 P. M. on February 21st. It was shown that a message from Eagle Lake to Malvern would be relayed three times; and if the message was given precedence, as was usual with death messages, from fifteen to thirty minutes would be good service, while if it took its turn with business messages two hours would be good service. Immediately upon receipt of this message, Mrs. Arant sent this message to Burt Coyne: "Bring body at once; expenses will be paid here." To this a reply was sent: "Message too late; body buried yesterday."

Another son of Mrs. Arant and a friend were sent to Texas to disinter the body and bring it to Malvern for burial. They had to expend $140 for a metallic coffin, which was made necessary by reason of the condition of the body. Had the body been shipped home immediately after death, a coffin suitable for the purpose could have been purchased for $35. The coffin in which he was first buried cost $25. The expenses of the trip for the body were shown in the evidence. The body was buried at Malvern, and a funeral held at this burial. The body was too decomposed to permit the casket to be opened after its arrival at Malvern.

This suit was instituted by Mrs. Arant against the telegraph company seeking to recover for mental anguish and the expenses incident to the interment and disinterment due to the negligent delay in the delivery of the telegram. She recovered a verdict for $400, and the telegram company has appealed.

It is insisted that there is no element of mental anguish shown. Mrs. Arant was questioned as to her feeling on the subject. Without going into a discussion of whether this real but intangible element, mental anguish, can be described in testimony or dissected on cross-examination, it is sufficient to say

that the court is of opinion that there is a substantial basis for mental anguish shown in the facts of this case.

In *Western Union Telegraph Company* v. *Blackmer,* 82 Ark. 526, a recovery was sustained under this statute where the negligence of the company prevented a daughter being with her mother at her death.

In *Western Union Telegraph Company* v. *Weniski,* 84 Ark. 457, there was an action against the company for mental anguish growing out of its negligence in the delivery of a message telling of the death of a brother, and the court said: "Her only deprivation on account of the failure to deliver the telegram was the melancholy pleasure of attending the funeral of her deceased brother and the satisfaction of having fully discharged her duty to the dead. It may be that such a bereavement produced mental injury, distinct from that resulting naturally from the death of a brother or other loved one, which would justify the assessment of some pecuniary compensation, but we feel sure that a far less sum than that assessed by the jury in this case would, under the circumstances shown by the evidence, be sufficient to afford full compensation to the plaintiff for her injury in this respect."

In *Western Union Telegraph Company* v. *Hollingsworth,* 83 Ark. 39, it was said: "The Legislature has put in force mental anguish as elements of damage, and the court must take the construction which common sense and experience teaches should be given to the terms describing such elements of damage. That any one would suffer as keen and real mental anguish for failing to hear from the sick bed of a dangerously ill member of the family is too apparent to need any explanation; and no refinement or distinction can take away the reality of such suffering."

There can be no distinction in principle between those cases and this. The mother was deprived of the privilege of seeing the body of her son before its burial, and of paying the usual and customary rites to the dead in the usual and customary way. She was not given an opportunity to attend the interment of his body in Texas. It was contrary to her wishes that he should be interred there, but her wish was that he should be buried in the community where he was reared. It is true that after a week of anxiety over the unfortunate situation produced by the failure

to deliver the telegram this object was finally accomplished. This is but another phase of the mental anguish, and is no less real than in the cases mentioned, and in other cases which may be found discussed in the opinions in those cases.

It may be questioned whether the telegram gave such notice to the company on its face of the additional expense incurred by the interment in Texas and sending the body to Arkansas for a second interment as would justify recovery for this expense. But evidence was adduced upon this point, and the telegraph company asked the court to give this instruction, which was done: "If you find for the plaintiff, you will assess her damages for pecuniary loss at the amount she expended for the burial of the remains at Eagle Lake, Texas, and the amount she expended for exhuming the remains for shipment to Malvern, less any items of expense that she would have had to pay if the telegram had been promptly delivered."

Under this instruction the jury were authorized to find a certain amount in her favor from the evidence; and the appellant can not complain of the recovery on this account, for it was invited by this instruction. The amount of pecuniary loss, deducted from the face of the verdict, leaves the recovery for the mental anguish element less than $300, and it can not be said that it is excessive.

Other questions have been presented and discussed by the appellant, but the court is unable to find wherein there has been error committed to the prejudice of the appellant. In fact, some of the instructions given are more favorable to it than the law authorizes; and there is evidence sufficient to support the verdict.

Judgment is affirmed.

ON REHEARING.

Opinion delivered January 11, 1909.

HILL, C. J. I. Attention is called to the fact that the court in the 8th instruction withdrew from the jury the consideration of the evidence showing that the mother was deprived of seeing her son's body on its arrival at Malvern, and it is insisted that this evidence could not be considered. It is true that it was not before the jury, and its verdict could not be tested by it; but this evidence was in the case, and the court considered it when weigh-

ing appellant's contention that there was no element of mental anguish shown. The court was of opinion that it, and the other matters mentioned in the opinion, were elements within the statute. It was pointed out in the opinion that some of the instructions given were more favorable to appellant than the law authorized.

II. Appellant says that the court does not mention in the opinion what appeared to it an important point, that there was no testimony introduced showing what Burt Coyne would have done had he been instructed by the plaintiff to ship the remains to Malvern. Coyne was the friend and roommate of Harry Arant, and wired his mother of his death; and in the telegram said, "Wire disposition of body at once." Coyne testified that when he sent this telegram, "I told the agent that we wanted to notify Mrs. Arant that her son Harry was dead, and that we desired to know what disposition she wanted to make of the body." Coyne waited the two hours he was told it would take for an answer to come, and then called at the office for it and, failing to get it, went back for it every half-hour until after midnight, and then arranged for the answer to be telephoned to him. The reply that was sent to his message when it was received, and before it was known that it had been delayed, was, "Bring body at once; expenses will be paid here." To this a reply was sent that it was too late, as the body was buried. The court, at the instance of the appellant, instructed the jury that the plaintiff must show that Coyne would have responded to this message and shipped the remains before she could recover.

Considering the close friendship the evidence showed existed between Coyne and Harry, and Coyne's prompt action in going to the nearest telegraph station and wiring news of Harry's death and asking disposition of his remains, and his explanation to the agent, his conduct in repeatedly endeavoring for twenty-four hours before he buried his friend to get a reply from his telegram, and the nature of the reply, the jury was not without evidence to sustain its finding on this issue. This matter was not overlooked, as thought by counsel, but was considered a question of fact submitted to the jury under instructions given at the instance of appellant, and, the evidence being considered sufficient, no profit was seen in a discussion of it. There was no error

to the prejudice of appellant in the trial, and the motion is overruled.

CAMMACK v. SOUTHWESTERN FIRE INSURANCE COMPANY.

Opinion delivered December 14, 1908.

1. APPEAL AND ERROR—INSTRUCTIONS—NECESSITY OF EXCEPTIONS.—Errors of the court in giving or refusing instructions are waived where no exceptions to the court's action in reference thereto were saved. (Page 506.)
2. SAME—WHEN EXCEPTIONS SAVED.—Exceptions to the action of the trial court in giving or refusing instructions must be saved during the trial and brought upon the record in bill of exceptions, and cannot be saved by merely assigning them as grounds of a motion for new trial. (Page 506.)

Appeal from Ashley Circuit Court; *Henry W. Wells,* Judge; affirmed.

Jas. C. Norman, for appellants.

Greaves & Martin, for appellee.

HART, J. This suit was brought to recover the sum of five hundred dollars upon a fire insurance policy issued by the Southwestern Fire Insurance Company to A. W. Cammack, and the case is here on appeal from a judgment for fifty dollars in favor of appellants.

The application for the policy describes the building as a one-story frame building, with shingle roof, situated on lot No. eight (rear), block No. five, in the town of Portland, Arkansas, and used as a butcher shop, barber shop and ice house. The policy describes it as a one-story frame building with shingle roof, occupied as a butcher shop, barber shop and ice house, situated on lot eight, block five, town of Portland in Ashley County, Arkansas.

Cammack testified that there were four buildings on this lot: one single-story frame building occupied as a general store; a shed room adjoining it on one side occupied as a barber shop; two box houses on the rear of the lot, occupied as a barber shop, butcher shop and ice house.

The general store and the barber shop adjoining were destroyed by fire, and the buildings on the rear part of the lot were slightly damaged by the same fire.

The point at issue between Cammack and the Insurance Company was that the former claimed that the building adjoining the general store on the side was the one covered by the policy, and the latter contended that the policy was issued on the building on the rear of the lot. Counsel for appellant contends that there was prejudicial error in the action of the court in giving instructions covering this point and in refusing those asked by him.

No exceptions were saved to the action of the court in giving or in refusing instructions. Hence by a familiar rule of practice, the errors of the court in that regard, if any occurred, were waived. *Mitchell* v. *State,* 86 Ark. 486; *Plumlee* v. *St. Louis S. W. Ry. Co.,* 85 Ark. 488; *Missouri & N. A. Rd. Co.* v. *Bratton,* 85 Ark. 326.

It was not sufficient to make the errors assigned grounds of a motion for a new trial, but the exceptions must have been saved during the trial and brought upon the record in the bill of exceptions, which the record shows was not done in this case. The rule is discussed, and our former decisions on it are cited, in the case of *Cox* v. *Cooley, ante* p. 350.

After due consideration of the evidence, we find it sufficient to sustain the verdict.

Finding no prejudicial error in the record, the judgment must be affirmed.

COMMERCIAL FIRE INSURANCE COMPANY *v.* BELK.

Opinion delivered December 21, 1908.

1. INSURANCE COMPANY—AUTHORITY OF AGENT.—An insurance agent, entrusted with blank policies signed by the defendant with power and authority to solicit insurance to fill out and issue policies, and to collect premiums, is impliedly authorized to waive conditions in the policy. (Page 509.)

2. AGENCY—ACTING FOR BOTH PARTIES—There is nothing to prevent an insurance agent from acting as agent of the insured in drafting a contract for the sale of the insured property. (Page 510.)

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

Charles P. Harnwell, for appellant.

Mrs. Belk was not the sole and unconditional owner in fee simple, but had sold it. The policy was void. 72 Ark. 47; 77 *Id.* 57; 62 *Id.* 348; 63 *Id.* 187; 67 *Id.* 584; 82 *Id.* 400.

2. There was no waiver by the company. The agent knew nothing of the policies until after the fire. Besides he was the attorney of the plaintiff. 3 Cooley's Briefs on Insurance, 2774; 26 So. 655; 66 Ia. 466; 122 N. Y. 578; 24 Oh. St. 67.

3. The burden was on plaintiff to prove the waiver. 3 Cooley's Briefs on Insurance, 2768, 2773; 23 Ind. App. 121; 53 67 *Id.* 584; 63 *Id.* 187.

A. L. Wilson and *Thornton & Thornton,* for appellee.

1. A waiver by a duly authorized agent of the company was clearly shown. 52 Ark. 11; 75 *Id.* 100; 24 S. W. 807; 67 Ark. 553; 53 *Id.* 499; 63 *Id.* 188; 62 *Id.* 34.

2. An agent who has authority to write policies may also act as an agent of the assured. 76 Ark. 180.

BATTLE, J. Adelia J. Belk brought this action against Commercial Fire Insurance Company on two policies of insurance executed by the defendant to plaintiff on the 9th day of October, 1906, insuring her hotel and dwelling house in the town of Thornton against fire for a period of one year. The policies contained the following conditions:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material facts or circumstances concerning this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated herein; * * * or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the property be or become incumbered by mortgage; * * * or if any change other than the death of an

insured take place in the interest, title, or possession of the subject of insurance.

"If fire occur, the insured shall give immediate notice of any loss therein in writing to this company, protect the property from further damage, * * * and, within thirty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to origin and time of fire, the interest of the insured and of all others in the property, all incumbrances thereon, and changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, etc.; * * * or this policy shall be null and void."

In its answer in the action defendants denied that "it was notified of the fire, or that she (plaintiff) ever furnished a proper proof of loss, or otherwise performed all conditions of the said policies on her part."

"It alleged that Adelia J. Belk was neither the owner of nor in the possession of either of said buildings so insured by her under said policies, at the time of the said fire, and alleged that both of said buildings had been sold by Adelia J. Belk to Isaac W. Kifer, that she had parted with the possession thereof before said fire without the knowledge or consent of the appellant, and that said properties belonged to the said Isaac W. Kifer.

"That Adelia J. Belk had not complied with the conditions of the said policies, and that she was not the sole owner of the properties as contemplated by and within the meaning of the express terms of the said policies, and that she had parted with the possession of said properties, and there had been a change in the occupancy, contrary to the terms of the said policy."

The issues in the case were tried by a jury. In the trial evidence was adduced tending to prove the following facts: The policies of insurance were executed by the defendant to the plaintiff as shown by the pleadings. On the 19th of August, 1907, while the policies were in force, the hotel was totally destroyed by fire, and the dwelling was damaged; one witness saying $50, and another from $150 to $200. Notice of the fire was given, and proof of loss was made within the time and in the manner prescribed by the policies.

On the first day of April, 1907, the plaintiff contracted with I. W. Keifer in writing to sell and convey to him the property insured when the price agreed upon was paid. A. J. Koenigstein drew the contract for them. He was at that time the agent of the defendant, and was furnished by it with blank applications and blank policies duly signed by the defendant, and was authorized to solicit insurance and take risks by filling blanks in policies and delivering them without advice from the defendant. In the course of or after the transaction with Kifer he assured the plaintiff that her policies were "all right." On the 27th day of August, 1907, the contract with Kifer was rescinded, and he conveyed by quitclaim deed all his interest in the insured property to the plaintiff.

The court instructed the jury as follows: "If you find from the evidence in this case, that it was a condition expressed in the policy sued on that if the interest of the insured was other than unconditional or sole ownership, and not owned by the plaintiff in fee simple, then you will find for the defendant unless you further find that these conditions were waived by the agent of the insurance company. If you find that this condition was waived by the agent of the insurance company, that would be a waiver by the company, and the company would be bound by it."

The defendant requested and the court refused instructions which ignored and excluded from consideration all evidence showing a waiver of the condition of the policies as to unconditional and sole ownership; and for that reason they were properly refused.

The jury returned a verdict in favor of plaintiff for $1150. Judgment was rendered in her favor for that amount, and the defendant appealed.

A. J. Koenigstein was the agent of the defendant, and was entrusted with blank policies signed by the defendant with power and authority to solicit insurance, and, when obtained, to fill the blanks in the policy, receive the premiums and issue the policies, and consequently had the implied authority to waive the conditions of the policy. (*State Mutual Ins. Co.* v. *Latourette,* 71 Ark. 242; *Phoenix Ins. Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187; *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348, and cases cited.) He knew that appellee had contracted to sell

and convey to Kifer the property insured, when the purchase price agreed upon was paid; he wrote the contract, and with full knowledge of the transaction assured appellee that her policies were "all right." The appellant, through its agent, thereby waived the condition in the policies as to sole and unconditional ownership of the insured property. With the assurance that the policies were all right, she rested in the belief her property was insured until it was destroyed or damaged by fire. Appellant can not now avoid the policies, on account of the condition waived. *German-American Ins. Co.* v. *Harper,* 75 Ark. 98, and cases cited; *Arkansas Mutual Fire Ins. Co.* v. *Claiborne,* 82 Ark. 150, 162.

The fact that Koenigstein drew the contract of appellee and Kifer did not affect the waiver. (Mechem on Agency, § 67; 1. Clark & Skyles on Law of Agency, § 414.) There was nothing in that act inconsistent or incompatible with his agency of appellant.

Judgment affirmed.

TORRANS *v.* TEXARKANA GAS & ELECTRIC COMPANY.

Opinion delivered November 16, 1908.

TRIAL—DIRECTING VERDICT.—It was not error to direct a verdict for the defendant, in an action against a gas company for causing an explosion, if, giving the evidence its strongest probative force, plaintiff failed, upon any reasonable view of the evidence, to establish a cause of action.

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

STATEMENT BY THE COURT.

Appellant was a milliner in the city of Texarkana, Arkansas. The store she occupied was eighty feet long, twenty-five feet wide, and sixteen feet from floor to ceiling. Appellee was a corporation engaged in the manufacture, distribution and sale of gas in Texarkana. Appellant employed appellee to install two arc lamps in her store. These depended from the ceiling. One was placed in the rear end, about twelve feet from the rear end wall, and midway between the side walls east and west. The other was placed in the front end. The lamps were supplied

with gas by a pipe which entered from the front and ran along the side of the front end wall to the ceiling, then along the center of the ceiling over the lamps. The lamps hung about six feet below the ceiling, and were connected with the gas pipe above by a pipe which made an elbow at the ceiling. Each lamp had three burners, which were supplied with gas by feeders. A pilot light which was designed to burn continuously was connected with each lamp. The pilot light burned with a flame about a half inch high. The lamps were lighted by pulling a chain which opened a valve to the gas pipe and were extinguished by also pulling a chain which closed the valve. A meter was connected with the gas pipe which measured the flow of gas, showing the amount consumed. On the fourteenth of September, 1907, the day the lamps were put up, parties in the store could not light the lamps, and the agent of the gas company came and lighted them with a taper. Again Monday night following (the 16th) the parties in the store could not light the lamps, and again the agent of the gas company came and lighted them with a taper. He said: "Your lights are all right." The lamps were not lighted any more until the succeeding Saturday night (21st). That night the lamps were lighted without any trouble. The trouble about lighting the lamps was on the previous nights. The lights burned Saturday night from about seven till nine o'clock, and had burned about the same time the previous nights when they were lighted. Sunday morning about 9:30 o'clock, September 22d, a fire occurred in appellant's store. Parties in proximity to the building at the time first discovered the fire by the smoke that came from the building. There was no noise of any explosion. Those first in the building, members of the fire department, discovered a little fire in the back part of the store, and near the west wall. A considerable hole in the ceiling had burned out there, and there were evidences of where the fire had burned up the west wall through the shelving. The policeman and the chief of the fire department and some of the firemen who were the first in the building testified that they first discovered the fire in the ceiling next to the west wall; one witness saying that he was one of the first to get there, that it seemed that the fire caught back on the floor and got up in the ceiling. Goods or merchandise was burning eight or ten feet from the

wall in the southwest corner. The chief of the fire department said they pulled down the ceiling "where the fire was, and cut another hole for the purpose of getting their heads up through there to see where the fire was spreading." "There was, of course, no fire where we cut the other hole. The second hole was cut right above this arc light." The firemen substantially corroborate the testimony of the chief as to the place where the fire was first discovered and the condition that obtained when they first reached the building, and as to what was done by them after they arrived there. One of them stated: "There was no fire at the place where we pulled the ceiling down in the centre. The ceiling, though, had been burned between that joint and the west wall."

Appellant testified that when she reached her store after the alarm of fire "she found it crowded with people, and as it seemed to her a foot deep in water, she found the firemen were playing water all up in the ceiling around the rear lamp. The fire was out. It was all black, smoking, charred and burning, and the ceiling all around the lamp in the back end of my store was burned. The lamp was pulled down from the ceiling. The ceiling was charred, and the lamp was pulled down on the floor, and the pipe lay against the work table. When asked what was the condition of the ceiling above the lamp, she replied, "It had dropped down on the table and floor and was simply a charred mass." She was asked: "Assuming that the fire started at the rear lamp, what direction did it take?" and answered: "It went towards the west wall. The fire burned to the wall between me and Nasons' (west wall). It burned from the lamp to the wall, that I know." She further testified that her work table was right under the lamp, that it was full of goods, and that these were destroyed, and that the goods were destroyed along the way to the west wall. Witnesses on behalf of appellant who examined the store after the fire, some of them on the day of the fire and others a day or two afterwards, testified substantially that the ceiling was burned from where the rear lamp was suspended clear over the west wall. One of the witnesses testified: "I did not see the fire. I do not know that the flame traveled toward the west wall; but I judge that it did. I found the ceiling pretty badly burned near the place where the split fitting had been on

the ceiling, then westward towards the wall of the building, and my recollection is that it burned more in that direction than it did right where the fitting was." Appellant testified that on Saturday night before she was burned out on Sunday morning, when she was in the act of closing the store for the night, she went back and tried the rear lamp, which had attracted her attention during the week by flaring up so high that she thought the lamp was lit. She had reference to the pilot light that was kept burning during the whole week. The pilot light burned up brighter when she noticed it. Witness detected the odor of escaping gas in the work room on Saturday afternoon before the fire. After the fire, the pipe that connected the rear lamp with the gas pipe on the ceiling was tested by plumbers, and they discovered a leak in the pipe at the elbow where it was joined on to the other pipe at the ceiling. It was a slit in one of the fittings, and when the gas was turned on and a match applied it burned a blaze about a quarter of an inch high, or, as one of the witnesses said: "The flame was about half that of an ordinary match." The employee of the appellee who put up the lamps testified: "I turned on the gas, burned off the mandrel and tested the pipe to see if there was any leak anywhere. I held a match all around the joints that I made in the line, and if there had been any leak anywhere it would have caught on fire. I did not find any leak, I put the L on that pipe in Mrs. Torrans' store. There was no crack or split in it then. I painted this pipe and did not see any split. If there was anything broken about it, I did not find it." The partition between the work room and store room lacked about five feet of reaching the ceiling. There were several broken panes of glass in the back window to the work room. There was an open flue on the west wall about opposite the arc lamp.

The testimony of experts who were familiar with the properties of water gas, the kind used in this building. was substantially as follows: That when water gas is emitted into air it will mix in a proportion which is less than nine per cent. volume, and when it comes in contact with a match or spark there is no action, but when the percentage of water gas mixed with air is more than 9 per cent. and less than 50 per cent. then it will explode very violently. When the percentage of water gas is more than 55 per cent. and it is ignited, it will simply burn throughout the

room. When it is less than 9 per cent. there will be no action at all. That is due to the fact that there is a great excess of air. When gas explodes, it always explodes very violently, and there is always a report from it as the gas expands. A gas explosion in a store room would cause the doors and windows to be blown out. A store room eighty feet long, twenty-five feet wide with ceiling sixteen feet high would contain 32,000 cubic feet, and before it would explode 9 per cent. of that would have to be gas or 2800 cubic feet. When you emit water gas into a room, it will go to the top of the ceiling; and if there are no openings in the ceiling, it will gradually diffuse in the room. It will spread itself through the entire room. It would not confine itself to any particular part of the room. It would first rise to the ceiling, and then if it could not get out it would begin to diffuse and mix with the air generally. If there is a window that is broken out, or there is a flue or holes in the door through which it can escape, it will go out in its natural course through those openings. It would diffuse out in the open air, just as well as in the room. Where there is a leak in a gas pipe a half inch or an inch long, which would light a flame a quarter of an inch high, there could be no danger from the quantity of gas that would escape. There would be no danger from the escaping gas from a pilot light, should it go out, as there would never be enough gas in a room the size of this store to equal 9 per cent. of the volume. You can readily smell gas where there is less than one per cent. in a room.

If any large quantity gets in a room, it will make one very sick. These arc burners would burn forty cubic feet of gas per hour or four hundred cubic feet in ten hours. The pilot light would not burn over a half cubic foot in twenty-four hours. It would not be dangerous if it went out. A flame a quarter of an inch high, such as is described by one of the witnesses who tested the pipe for gas, would not leak more than a half cubic foot in twenty-four hours. The gas meter showed that 500 cubic feet of gas had been consumed by appellant for the month of September.

The above are the facts as developed by the testimony. Appellant filed her complaint against appellee, alleging, after setting up the contract, that the work of putting in pipes for gas

in the store "was done in such careless, negligent and incompetent manner," and the material for piping and lighting the store was "so faulty, defective, insufficient and unsafe as to cause a leakage of gas in the store," which appellee "utterly failed and neglected, in violation of its promise and contract, to remedy, although promptly and repeatedly notified to do so. That, by reason of appellee's negligence in the work done and dangerous material furnished, the gas escaped and came in contact with the burning pilot light of the arc lamp suspended from the ceiling, and by explosion, combustion, or ignition set fire to the goods of appellant, causing their destruction, to appellant's damage in the sum of eight thousand five hundred dollars, for which she prayed judgment." The appellee answered, denying all the material allegations of the complaint. The court directed a verdict for the appellee, and this appeal is duly prosecuted.

W. H. Ward, for appellant.

1. A case should not be withdrawn from the jury unless it can be said as a matter of law that no recovery can be had upon any reasonable view of the facts which the evidence tends to establish. The trial court is prohibited from charging the jury with regard to matters of fact, and it is limited to declaring the law. Art. 7, § 23, Const.; 37 Ark. 193; 71 Ark. 447 and cases cited; 77 Ark. 556; 39 Ark. 419; 57 Ark. 468.

2. If there is any evidence, however slight, to sustain a verdict for the plaintiff, it will be sustained, and, on appeal, such evidence will be given its strongest probative force. 76 Ark. 520; 2 Thompson on Trials, 1598-9, § 2245. Where the facts are such that men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute, they should be submitted to the jury. 80 Ark. 194. See also 76 Ark. 522; 57 Ark. 461; 66 Ark. 363; 147 N. Y. 536-7.

Wm. H. Arnold, for appellee.

1. When the evidence introduced by the plaintiff is unreasonable and contrary to the physical facts, human experience and common knowledge, it is proper for the court to direct a verdict for the defendant. That is the case here. 79 Ark. 68.

2. Where an unimpeached witness testifies positively and distinctly to a fact, and nothing is shown from which an infer-

ence against the fact testified to can be drawn, that fact may be treated as established, and a verdict may be directed based on such evidence. 82 Ark. 86.

WOOD, J. (after stating the facts). It is not shown that appellee was negligent in the manner in which it constructed the arc lights. Its servant who installed them shows that he went over the joints of the pipes with a lighted match after the fittings and pipes had been placed, and that no leak was discernible; that if there had been a leak of any consequence anywhere at that time he would have discovered it with the lighted match. True, the testimony shows that the parties in the store were unable the first two nights the lamps were lighted to light same by the pilot, and sent for the agent of appellee and informed him they were having trouble with the lamps. He responded to the call, lighted the lamps and pronounced them all right. It is not pretended that the pilot light went out after that, or that it failed to light the arc lamp on the last night it was lighted before the fire. The proof shows that the arc lamp was lighted without any trouble on the Saturday night before the fire and burned until it was extinguished by appellant when she left the store. True, witnesses say they detected the smell of escaping gas on Saturday afternoon before the fire. But it is not shown that this fact was communicated to appellee between that time and the occurrence of the fire. Appellant shows that the pilot light had been flaring up during the week after the second night, but she does not prove that she communicated this fact to appellee. So it affirmatively appears from the evidence that appellee, when it installed the lamp and pipes and fittings, went over all and gave it a test that would have detected escaping gas, had there been any. Appellee had no reason to suspect, in the short time intervening between the last visit of its agent to fix the lamps and the fire, that the lamps or pipes had become defective, and it had no notice that such was the case if it really was. So, if it be conceded that the fire was caused by a defect in the pipe or pilot, we are of the opinion that the proof does not show that appellant was negligent in causing or permitting such defect to exist. There was no negligence therefore on the part of the appellee by which the fire was produced.

But we are still further of the opinion that there is no evi-

dence to warrant a conclusion that the fire was caused from escaping gas. The uncontradicted testimony of the experts as to the properties of water gas shows conclusively that the fire could not have been caused by its escaping and coming in contact with the pilot light as charged in the complaint. The meter showed that only five hundred cubic feet had escaped through the pipe in September. Of this some must have been consumed before the arc lamps were installed. Then these arc lamps, if they burned six or eight hours before the fire as the evidence shows they might have done, would have consumed two hundred and forty or three hundred cubic feet more. So there would have been left a very small quantity, if any, of gas not consumed by the lamps before they were extinguished to have produced the conflagration. There is nothing to show that the meter was defective; no evidence that it did not register accurately the amount of gas that escaped through the pipes. It is certain from the testimony that not enough gas escaped in this way to have produced the fire by explosion. For it would have taken 2,800 cubic feet in a room of that size to have exploded. The proof was conclusive that there was no explosion, none was heard, and the inevitable effects, had there been one, were absent. There was no general combustion over the whole store, as there must have been, had the gas escaped in sufficient quantity to have diffused throughout the store and to have ignited by contact, in this way, with the pilot. That would have required 17,600 cubic feet. The only other way for the fire to have been produced by escaping gas was for the gas to have escaped with such pressure in the direction of the pilot, or the pilot to have flared to such height in the direction of the gas escaping from the slit in the elbow at the ceiling, as to have come in contact. But there is no proof of this. On the contrary, the uncontroverted evidence shows that this would have been impossible. The gas only escaped from the slit with sufficient force to burn feebly, after repeated efforts to ignite it, in a flame, at most, of one-half the strength of an ordinary match, and the pilot only flared high enough to make appellant believe the lamp was lighted. So the pilot flame and the escaping gas, if any, were still some six feet apart. Gas is lighter than air. Its tendency was to rise and go out through openings, or if confined to diffuse with the

air surrounding, not in a stream or in waves, but generally until the whole space is pervaded. Such is the evidence of experts.

We are therefore of the opinion that, giving the evidence its strongest probative force for appellant (*Rodgers* v. *C. O. & G. Rd. Co.*, 76 Ark. 522), it shows no more than that the ceiling above the lamp and between the lamp and the west wall was charred. It certainly does not show (though that was the expressed opinion of appellant and some of her witnesses) that the fire orignated under the lamp, and that it burned from there toward the west wall. Such opinion is mere surmise or speculation. It has no basis of evidence to rest upon. The court therefore did not ignore constitutional limitations in directing a verdict for appellee, and thus declaring as matter of law that appellant had failed, upon any reasonable view of the evidence, to establish her alleged cause of action. The ruling is well sustained by decisions of this court. *Waters-Pierce Oil Co.* v. *Knisel*, 79 Ark. 608; *Neal* v. *St. Louis, I. M. & S. Ry. Co.*, 71 Ark. 447, citing *Catlett* v. *Railway Co.*, 57 Ark. 527; *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593.

Judgment affirmed.

HILL, C. J., (dissenting). There was a slit in one of the gas pipes which emitted enough gas to burn a flame a quarter of an inch in length. There were defects in the lighting arrangement of both the pilot and arc lamps, and the pilot lamp, instead of burning constantly, would sometimes go out, and there was a perceptible odor of gas in the store room at different times after these gas fixtures were installed, and as late as the afternoon of Saturday preceding the fire early Sunday morning. From these facts it may well have been found that there was negligence in the installation of the gas fixtures. The more doubtful question is whether there was sufficient evidence that the fire resulted from gas escaped from these defective fixtures.

There was evidence tending to prove that the fire originated over one of these lamps and extended from the ceiling above it to the west wall. Several witnesses early on the scene of the fire said the ceiling in close proximity to the gas lamp was more burned than any other part of the building, and the appearance to them was that fire had originated there and spread therefrom. This testimony would, standing alone, evidently be sufficient

to sustain a verdict. The defendant introduced testimony tending to prove that the fire originated on the west side of the building. This presented a square conflict, and, without the experts testifying to the properties of gas, seeking to negative the fire from that cause on scientific principles, doubtless this conflict would have been settled by the jury. The evidence shows that the ceiling of the store room was not air-tight, and there is no evidence of the extent of the openings in the room through which air and gas could escape.

There is no evidence of the force or violence of an explosion in such a room as this when the admixture of gas and air barely reached the explosive state, say 9 per cent. gas. Therefore much, if not all, of the scientific testimony, while quite interesting, is wholly inapplicable to the precise point. Moreover, the scientific theory against gas being the origin of the fire is largely based on the amount of gas in the room as shown by the meter, and no evidence to show the accuracy or good order of the meter. In fact, it is really based on a bill for the gas, and the bill is presumed to be based on the meter. This is too unreliable a witness to be the basis for a scientific demonstration.

The case should have gone to the jury.

HICKMAN v. PARLIN-ORENDORFF COMPANY.

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Opinion delivered January 4, 1909.

BANKRUPTCY—EXCLUSIVENESS OF ACT OF CONGRESS.—The State insolvency act of June 26, 1897, was superseded by the bankruptcy act of Congress of July 1, 1898, in so far as they relate to the same subject-matter and affect the same persons.

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

Thomas & Lee, for appellant.

C. F. Greenlee, for appellee.

BATTLE, J. This is an action by W. E. Hickman against his creditors, in which he asks to be declared an insolvent, and that a

receiver be appointed to take charge of his property and distribute it among his creditors in accordance with an act of the General Assembly of Arkansas, entitled "An Insolvent Act," approved June 26, 1897, (Acts 1897, p. 117), which was done. Plaintiff asked that he be allowed to hold certain property as his exemption from seizure or sale for debt. M. C. Hickman and D. D. Hickman, claiming to be creditors, presented claims against his estate, each claiming $1,000. The court disallowed the claim for exemption and the claims of M. C. and D. D. Hickman, and ordered that the assets in the hands of the receiver be distributed among the other creditors in accordance with the insolvency act. Plaintiff and M. C. and D. D. Hickman appealed.

The insolvency laws of Arkansas were suspended by the bankruptcy act of Congress of July 1, 1898, and since that date have remained and are now in abeyance, in so far as they relate to the same subject-matter and affect the same persons as the act of Congress, which is still in force. *Sturges* v. *Crowninshield,* 4 Wheat. 122; *Ogden* v. *Saunders,* 12 Wheat. 213; In re *Smith,* 92 Fed. 135; In re *Watts,* 190 U. S. 1; *Parmenter Mfg. Co.* v. *Hamilton,* 172 Mass. 178, s. c. 70 Am. State Rep. 258; *Harbaugh* v. *Costello,* 184 Ill. 110, cases cited in note 45 L. R. A. p. 186, 187; 5 Cyc. 240, 241, and cases cited.

In this case the plaintiff is an insolvent merchant, and seeks relief provided by the bankruptcy act of Congress. The chancery court was without jurisdiction, and its decree is void.

Decree reversed and cause remanded for the court to adjust the account of the receiver and the disposal of the property in the custody of the court, and for other proceedings, if necessary.

McCULLOCH, J., dissents.

SPARKS v. STATE.

Opinion delivered November 30, 1908.

CRIMINAL LAW—FORMER CONVICTION.—A former conviction of the offense of gaming does not bar a prosecution for gaming with a minor, though the two offenses grow out of the same transaction, the two offenses being distinct.

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

Abe Collins, for appellant.

A conviction in the circuit court for gaming is a bar to a subsequent prosecution in the same court for gaming with a minor growing out of, based upon and embraced in the identical act upon which conviction for gaming was had. Kirby's Digest, § 2514. An act is to be construed as it reads, and it is not permissible to go beyond the plain letter of the statute, unless its meaning can not be ascertained by reading the statute and context. 6 Ark. 9; 24 Ark. 487; 47 Ark. 406; 59 Ark. 237; 56 Ark. 103; 35 Ark. 59; 65 Ark. 535; 74 Ark. 302.

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

The two offenses, while they may be committed in the same act, are separate and distinct, and one is not embraced or included in the other. Kirby's Digest, § § 1740, 1939, 1940; 24 Fed. 571: 51 Ark. 170; 53 Ark. 24.

HART, J. On the 24th day of December, 1907, the appellant, Rudson Sparks, committed the crime of gaming in Sevier County, Arkansas, and Clyde Slaton, a minor under the age of twenty-one years, took part in the same game. At the January term, 1908, of the Sevier Circuit Court, appellant was indicted on a charge of gaming, based on and growing out of the above-named act. He entered a plea of guilty, and a fine of ten dollars was assessed against him. Subsequently, at the same term of the court, appellant was indicted for gaming with a minor, based upon the same game for which he had been previously convicted of gaming. To this indictment appellant entered a plea of former conviction based upon the facts above set forth.

The court below declared the law as follows: "A conviction for gaming in the circuit court is not a bar to a subsequent prosecution in the same court for gaming with a minor, growing out, based upon and embraced in the same identical act upon which the conviction for gaming was had." The court found appellant guilty of gaming with a minor, and assessed his punishment at a fine of fifty dollars. An appeal has been duly prosecuted to this court.

Section 2514 of Kirby's Digest reads as follows: "Whenever any party shall have been convicted before any police or mayor's court or before any justice of the peace or circuit court, said conviction shall be a bar to any further prosecution before any police or mayor's court or before any justice of the peace or circuit court for such offense or for any misdemeanor embraced in the act committed," etc.

Under the facts of this case, the only question raised by the appeal is whether the crime of gaming with a minor was embraced in the act committed.

"The established rule is that the former conviction is a bar to the subsequent indictment for any offense of which the defendant might have been convicted under the indictment and testimony in the first case." *State* v. *Nunnelly,* 43 Ark. 70. The same rule is announced in the case of *Ruble* v. *State,* 51 Ark. 170.

The lowest penalty for gaming is ten dollars, and for gaming with a minor fifty dollars. The two statutes are aimed at different sources of evil. The former is intended to suppress gambling; the latter to prevent the corruption of youth of the State. The first indictment was for gaming. That fact was confessed by the plea of guilty. But the confession of this crime does not constitute the crime of gaming with a minor. There is an added element to the latter offense. To sustain a conviction for it, there must also be proof that one of the players was a minor.

In the case of *State* v. *Morris,* 45 Ark. 62, the court in an opinion delivered by COCKRILL, C. J., held that the offense of exhibiting a gambling device created by the first section of the gaming act and that of knowingly permitting the device to be exhibited in a house owned or occupied by the accused, found in the fourth section of the same act, were not the same but distinct offenses; and for that reason required the prosecuting attorney to elect upon which count he would proceed.

In the present case the two acts are intended to suppress different evils. A new element is added to one of them. The punishment is made greater, and we are of the opinion that they are distinct offenses.

The judgment is therefore affirmed.

ON REHEARING.

Opinion delivered January 11, 1909.

HART, J. Counsel for appellant in his motion for a rehearing contends that the crime of gaming with a minor is embraced in the crime of gaming for which appellant was first convicted, and in support of his contention relies upon section 2514 of Kirby's Digest, which reads as follows: "Whenever any party shall have been convicted before any police or mayor's court or before any justice of the peace or circuit court, said conviction shall be a bar to any further prosecution before any police or mayor's court or before any justice of the peace or circuit court for such offense or for any misdemeanor embraced in the act committed; provided, no such conviction before any police or mayor's court shall be a bar unless the penalty imposed is at least the minimum penalty prescribed by the State laws for the same offense or act."

There is much force in his contention, but a careful consideration of the acts shows that such construction was not intended by the Legislature. The General Assembly of 1891 passed an act impowering cities and towns to prescribe the same penalties for violations of their ordinances as are prescribed for similar offenses by state laws by statute. It then provides that whenever a person shall be so convicted said conviction shall be a bar to any further prosecution for such offense, or for any misdemeanor embraced in the act committed. This act was amended by the Legislature of 1897 by impowering all cities and towns to punish any act which the laws of the State make a misdemeanor, and to prescribe penalties for all offenses in violating any ordinance of said city or town not exceeding the penalties prescribed for similar offenses against the State laws by the statutes of the State. Acts 1897, p. 30.

In the case of *Van Buren* v. *Wells*, 53 Ark. 368, it was held "that the same act may constitute an offense against the State and against the municipal corporation within whose limits it is committed, and both jurisdictions may punish it without violating the constitutional prohibition of double punishment." This decision was rendered on June 7, 1890. The act in question was evidently passed to prevent the punishment of the same offense in both the municipal and State courts. This construction is

borne out by the title of the act, which is as follows: "An act to amend an act entitled: "An act to prescribe penalties and render convictions in police and mayor's courts a bar to further prosecution for the same offense, approved March 30, 1891."

The motion for rehearing is denied.

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LOUISIANA & ARKANSAS RAILWAY COMPANY v. RATCLIFFE.

Opinion delivered November 23, 1908.

1. RAILROADS—CONTRIBUTORY NEGLIGENCE.—One who was injured at a railroad crossing cannot recover on account of the railroad company's negligence in failing to keep a lookout or to give the statutory signals if he himself was guilty of contibutory negligence. (Page 530.)
2. RAILROADS—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.—Where plaintiff, driving a team on a public road, attempted to cross a railroad track at a time when a switch engine was thirty or forty yards away and moving from the crossing, but before he got across the engine was reversed, and came back rapidly enough to strike his wagon and injure him, the question whether he was guilty of contributory negligence was properly submitted to the jury. (Page 530.)
3. INSTRUCTIONS—COMPLETENESS.—If the various instructions given in a case separately present every phase of the law as a harmonious whole, there is no error in a particular instruction failing to carry qualifications which are explained in others. (Page 531.)
4. RAILROADS—INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.—It was not error to instruct the jury in effect that plaintiff was not negligent in driving upon a railroad crossing unless in so doing he exposed himself to a danger that was obvious, such that a person of ordinary intelligence and prudence could not have acted upon in similar circumstances. (Page 531.)
5. SAME—BURDEN OF PROOF AS TO CONTRIBUTORY NEGLIGENCE.—The burden of proving contributory negligence is on the defendant, unless it is shown by plaintiff's testimony. (Page 531.)
6. NEGLIGENCE AS CONCURRENT CAUSE.—It was not error to instruct the jury that "if the plaintiff was in the exercise of ordinary care and prudence and the injury is attributable to the negligence of the defendant, combined with some accidental cause to which the plaintiff has not negligently contributed, the defendant is liable;" there being evidence that plaintiff's injuries were due to the concurring negligence of defendant and to plaintiff's team becoming frightened at some object. (Page 532.)

7. RAILROADS—CONTRIBUTORY NEGLIGENCE.—Where defendant railway company, sued for negligently injuring plaintiff, asked the court to charge the jury in effect that if defendant placed himself in a place of danger and was injured he was guilty of negligence and could not recover, it was not error to insert the word *obvious* before the word "danger." (Page 532.)

8. SAME—NEGLIGENCE.—A request for an instruction to the effect that if plaintiff attempted to cross a railroad track upon which an engine was being switched back and forth he was guilty of contributory negligence was properly modified by inserting *negligently* before the word "attempted." (Page 532.)

9. SAME—DUTY OF TRAVELLER TO STOP AT CROSSING.—There is no imperative duty resting upon a traveller at a railroad crossing to stop before attempting to cross; his duty is to look and listen, and if this duty cannot be properly discharged without stopping then he must stop. (Page 532.)

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

STATEMENT BY THE COURT.

This is an action for personal injuries by Ratcliffe against the Louisiana & Arkansas Railway Company. Upon the trial the plaintiff gave in substance the following evidence: He was in a wagon with his son, a lad of sixteen, and two men, and they were driving on a public road which crossed the tracks of the appellant railroad company in the town of Stamps. The tracks crossing the public road were the main track and two switch tracks. When he approached the west track, he found a switch engine switching backwards and forwards across the road crossing, and the nearest track contained a train of log cars on either side of the public road. His mules were used to cars, and he drove up close to the track and waited for the switch engine to get out of the way, and remained there about twenty minutes. During this time the switch engine passed the crossing four or five times. Finally it passed, without any cars attached to it, and the switch was thrown to carry it on the track which led to the commissary of the Bodcaw Lumber Company. The operatives of the engine stopped ringing the bell, and he supposed the engine was going to proceed farther on that track. The engine was thirty or forty yards away and still moving away from him when he started to cross the tracks. He had thirty or thirty-six feet to go to clear the tracks. When the wagon reached the main

line, and the heads of his mules were near the line of the east track, between the main line and the east track, the trainmen reversed the engine, commenced ringing the bell and started backing toward him. At that time they were thirty-five or forty yards from him. They started back very rapidly, and he raised his hand and commenced hallooing at the trainmen, as did another man in the wagon. He saw one of the men operating the engine with his head out of the window, looking in his direction. There was no one on the rear of the engine which was approaching. Immediately upon seeing the engine start back at him, he commenced to whip up his mules, and tried to get over the tracks before the engine reached him; but the engine came back too rapidly, although it slacked a little before it reached him, and struck the wagon, and he was thrown against it and injured. He was looking at the engine at the time he went on the track, and at all the time thereafter. The men on the engine did nothing in response to his call, unless it was to slacken the engine a little before it hit him.

On cross-examination he was asked why he had stated that he believed that they had run against him on purpose, and he said: "My belief is that it was all through their neglect and carelessness. My reason for believing it is simply this: When they crossed that track and turned in the direction of the Bodcaw commissary, they went some seventy-five or eighty feet or maybe more, maybe 100 feet or something like that, up there, and they never hitched their engine to a thing in the world, and when I got upon the track they saw me there, and it looked to me like they intentionally turned back—they came right back and after they knocked me off they went on that siding, and they did not hitch on to anything. Q. You mean by that that they saw you there, and the enginer or whoever had charge of the train tried to strike you in your wagon with the engine? A. It looked that way. I may be wrong about it."

There was testimony adduced tending to corroborate Ratcliffe in all material matters, and also testimony adduced on behalf of the defendant tending to exculpate it and to show contributory negligence on the part of Ratcliffe.

The court gave instructions on all phases of the case. Only those upon which error is assigned in this court will be set out.

They are the first, third, sixth, and seventh; and the court gave, with the modifications indicated by the words in italics, the fourth and fifth requested by defendant.

"1. It was the duty of the defendant's servants to exercise ordinary care to observe travelers about to cross the railroad upon the highway, and in the running and handling of said switch engine to have exercised that degree of care and prudence which an ordinarily careful and prudent person engaged in like business would have exercised under like circumstances; and a failure to exercise such degree of care and prudence would render the defendant guilty of negligence in that respect."

"3. The court instructs the jury that if you should find from a preponderance of evidence that the plaintiff was in a wagon upon the streets or highways at the crossing of defendant's railway track in question, and that defendant's switch engine which had been blocking the crossing moved down the track and onto another track, the switch of which had been thrown for its entry thereon, and which was seen by plaintiff and while said engine was distant about sixty feet, and to plaintiff it appeared from the conduct of the engine crew and other surrounding facts and circumstances that the engine would not immediately return, and that he would have time to cross, he had a right to go upon said crossing, unless you should further believe that plaintiff in so acting upon such appearances was exposing himself to a danger that was obvious, such that a person of ordinary intelligence and prudence would not have acted upon in similar circumstances."

"6. You are instructed that the burden of proof is upon the defendant to show by a preponderance of the evidence in the whole case that the plaintiff was guilty of contributory negligence; provided such negligence is not shown by plaintiff's testimony."

"7. The jury are instructed that if the plaintiff was in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendant, combined with some accidental cause to which the plaintiff has not negligently contributed, the defendant is liable."

"4. The jury are instructed that, even if it should be proved that the defendant company occupied or blocked the road cross-

ing in question by the switching of its engine or cars an inconvenient or unreasonable length of time, yet as a matter of law such action on the part of defendant would not justify or excuse the plaintiff for unnecessarily going into a place of danger; and if the jury believe from a preponderance of the testimony that the plaintiff, while the defendant company had said crossing occupied in switching back and forth, attempted to cross the track of defendant, and thereby put himself in a place of *obvious* danger and was injured, then he was guilty of contributory negligence, and your verdict should be for the defendant."

"5. The jury are instructed that it is the duty of any one before crossing or attempting to cross a railway track to exercise due care, which is ordinarily the duty to stop and look and listen for any approaching train, and the same duty rests upon any one in crossing a railroad track where a car or engine is being properly switched back and forth upon said track at a crossing; and if the jury believe from a preponderance of the evidence that the plaintiff saw the car or engine of defendant being switched back and forth upon its track at a crossing, and *negligently* attempted to cross said track or tracks of defendant company upon which said car or engine was being switched back and forth, then such attempt to cross said track or tracks was contributory negligence on the part of the plaintiff, and at his own peril, and your verdict must be for the defendant."

There was a verdict for the plaintiff, and the railroad company has appealed.

Henry Moore and *Henry Moore, Jr.*, for appellant.

1. The court erred in refusing to direct a verdict for defendant, because, indulging every presumption in favor of plaintiff and considering alone the evidence most favorable to him under the pleadings and proof, he was not entitled to have his case submitted to the jury. The uncontradicted evidence shows contributory negligence, which was the proximate cause of the injury.

The rules are:

1. A failure to keep a lookout as required by the statute does not excuse contributory negligence.

2. A failure to give statutory or other signals does not excuse contributory negligence.

3. Any negligence on the part of a railroad company which precedes and is contemporaneous with contributory negligence of the party injured does not excuse contributory negligence.

4. Nothing but a wanton or wilful injury or, what amounts to the same thing, a failure to exercise care to avoid the consequences of the contributory negligence of injured party after becoming aware of same excuses such contributory negligence,

5. It is negligence *per se* for an adult to go upon a railroad track, and to attempt to cross the same immediately in front of a moving train, with full knowledge of the surroundings and without being impelled to do so to avoid danger.

6. A failure to keep a lookout, or to give signals, or excessive speed, are not such acts or omissions as amount to wilful or wanton injury, nor do they constitute a failure to exercise care to avoid the consequences of one's contributory negligence. These acts and omissions, though they may be continuous in their operation, are prior to and contemporaneous with the contributory negligence of the injured party.

7. Though it is negligence to fail to keep a lookout or to give necessary signals, yet, unless such negligence is the proximate cause of an injury, no right of action can be based thereon, because "actionable negligence is a breach of duty resulting in injury to a person to whom such duty is owing."

See 36 Ark. 371; 40 *Id.* 298; 46 *Id.* 513; 48 *Id.* 106; 49 *Id.* 257; 54 *Id.* 431; 56 *Id.* 271; *Ib.* 457; 57 *Id.* 461; 61 *Id.* 549; 61 *Id.* 617; 62 *Id.* 156; 62 *Id.* 164-170; *Ib.* 235; *Ib.* 245; 64 *Id.* 364; 69 *Id.* 380; 70 *Id.* 603; 75 *Id.* 211; 76 *Id.* 10; *Ib.* 356; 77 *Id.* 398; 82 *Id.* 522; 84 *Id.* 240, 85 *Id.* 532; 74 U. S. 384; 29 Cyc. p. 505; Shearman & Redf. on Neg., § 25.

2. Under these decisions there was error in the instructions.

Searcy & Parks, for appellee.

1. A railroad can not commit an act calculated to lead one into danger, or to mislead him, and then be protected by a plea of contributory negligence. Contributory negligence is a question for the jury. 105 Ind. 406; 8 Fed. 729; 118 N. C. 1047-55; 102 Wisc. 213; 17 Mich. 99; 22 C. C. A. 520.

2. The negligence of defendant was the proximate cause of the injury. 1 Thompson on Negligence, § 85; 14 L. R. A. 749.

3. Even if plaintiff was negligent, the company knew of his

danger, or by the exercise of ordinary care could have known of it in time to have prevented the injury, and is liable. 79 Ark. 138; 76 *Id.* 229; 69 *Id.* 489; 76 *Id.* 384.

4. The instructions have been approved in various decisions of this court. 69 Ark. 132; 79 *Id.* 140; 81 *Id.* 187; 79 *Id.* 490.

HILL, C. J., (after stating the facts.) The point to which appellant chiefly directs his argument is that the evidence was insufficient to be submitted to the jury. It is insisted that failure to keep a lookout as required by the statute, or failure to give the statutory signals, does not excuse contributory negligence. This is undoubtedly correct. It is also insisted that it is negligence *per se* for an adult to go upon a railroad track and attempt to cross the same immediately in front of a moving train, with full knowledge of the surroundings, and without being impelled to do so to avoid danger; and this is undoubtedly correct. But the plaintiff's evidence shows that at the time Mr. Ratcliffe started to go upon the track the train was moving away from him, and did not start back until he was too near the track to attempt to back away from it. At least, the appearance at the time led him to believe that backing away was impossible. As said in *St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 227: "The care is to be measured by the act of going into this danger, not when it is too imminent for avoidance, and when excitement and danger dethrone judgment."

It is also insisted that any negligence on the part of a railroad company which precedes and is contemporaneous with contributory negligence of the party injured does not excuse contributory negligence, and this is unquestionably true; and it is also true that if the party injured is guilty of contributory negligence there is no liability upon the railroad company unless its employees failed to use the proper care to avoid injury after discovering his danger. All of these principles are thoroughly established, and the authorities to support them may be found in appellant's brief. Whether such cases as the one developed in the evidence here, a summary of which may be found in the statement, should go to the jury, has been thoroughly and repeatedly and recently considered by this court; and every principle involved here has been settled in favor of sending such cases to the jury, in *St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 227;

Scott v. *St. Louis, I. M. & S. Ry. Co.*, 79 Ark. 137; *St. Louis & S. F. Rd. Co.* v. *Wyatt*, 79 Ark. 241; *St. Louis, I. M. & S. Ry. Co.* v. *Dillard*, 78 Ark. 520; and *Choctaw, O. & G. Rd. Co.* v. *Baskins*, 78 Ark. 355, and others.

It would be idle to rediscuss the principles involved. It was the duty of the trial court to have sent the case to the jury under proper instructions; and the question remains whether the jury was properly instructed.

The first instruction is objected to on the ground that to declare it to be the duty of the railroad company to exercise care to observe travelers about to cross the railroad upon the highway, and that a failure to exercise such care in watching for travelers about to cross the railroad would render the defendant guilty of negligence, is to overturn the long and well-established doctrine of this court that it is the duty of travelers to be on the lookout and to look and listen, and shifts this duty of keeping a lookout from the travelers to the railway company. This argument, however, confuses the negligence of the railroad company with the contributory negligence of the traveler. It is made by statute the duty of a railroad company to keep a lookout; and especially is this duty incumbent upon it at public crossings; and it is guilty of negligence when it fails to do so. On the other hand, the traveler has the corresponding duty resting upon him to look and listen; and if he fails to perform this duty, he is guilty of contributory negligence.

This instruction was correct, and other instructions which presented the duty of the traveler were given, and properly so, for it was necessary for the jury to pass upon both questions. "It is generally impossible to state all the law of the case in one instruction; and if the various instructions separately present every phase of it as a harmonious whole, there is no error in each instruction failing to carry qualifications which are explained in others." *St. Louis S. W. Ry. Co.* v. *Graham*, 83 Ark. 61.

The next objection is to instruction number three. This instruction is in conformity to the principles announced in *St. Louis, I. M. & S. Ry. Co.* v. *Hitt*, 76 Ark. 227 and *Scott* v. *St. Louis, I. M. & S. Ry. Co.*, 79 Ark. 137.

The next objection is to instruction number six. It is said that this instruction is misleading. But it is not pointed out wherein it is misleading, and the instruction is in almost exactly

the language of the court in *Hot Springs Street Rd. Co.* v. *Hildreth,* 72 Ark. 572.

The next objection is to number seven. It is not objected that the instruction itself is erroneous, but that there is no evidence to which it is applicable except this, as stated by appellant's counsel: "A little bridge across a ditch in the roadway and which, by plaintiff's own testimony, is shown to have frightened his mules and caused them to step upon the track, when, but for the bridge and his mules becoming frightened thereat, he might, 'by the skin of his teeth,' have passed over in safety." This was sufficient evidence of a concurrent cause, combined with the negligence of the defendant, to submit the question to the jury.

The next objection is to the inserting of the word "obvious" before "danger" in the fourth instruction given at instance of the defendant. The authorities use this adjective in discussing the character of the danger which charges a party with contributory negligence when he voluntarily encounters it. Probably it is not necessary to so qualify it where the test is made as to whether the danger is such that an ordinarily prudent man would not meet it; but this is the accepted term in discussing the question, and it can not be error to insert it.

The next objection is to the insertion of the word "negligently" before "attempted to cross said track," in the fifth instruction given at the request of the defendant. This was a proper qualification, because he may have attempted to cross in a manner which was not negligent; and if he looked and listened, and the appearance of the danger was not such that a reasonably prudent person would regard it as imminent, then there would be no negligence in his attempting to do so; or, rather, it would be a question for the jury to say whether it was negligence to do so. This instruction stated the duty resting upon the traveler more favorably to the appellant than the law requires. There is no imperative duty resting upon him to stop and look and listen. The duty is to look and listen. If this can not be properly discharged without stopping, then he must stop. If it can be, then there is no necessity of stopping. *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549.

These are all the objections raised to the instructions, and the court fails to find any error in the instructions. The testi-

mony is sufficient to sustain the verdict. The case has been properly tried, and the judgment is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. BOLES.

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Opinion delivered November 30, 1908.

1. EMINENT DOMAIN—DEPOSIT OF ASSESSMENT—RIGHT TO APPEAL.—While Kirby's Digest, § 2954, providing that where damages from a railroad company's right of way have been assessed it shall be the duty of such railroad company to deposit or pay the amount assessed within thirty days after such assessment, does not require the payment of such assessment in case an appeal has been taken until the cause has been finally determined, a deposit of the assessment, made after an appeal therefrom has been taken, will not preclude the railroad company from prosecuting an appeal if such payment was made in good faith under a belief that it was necessary to make it within the required time, whether an appeal was taken or not. (Page 535.)

2. MUNICIPAL CORPORATIONS—CONTROL OF ALLEYS.—Alleys are public ways, which are under control of municipal authorities. (Page 537.)

3. LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS.—Since the passage of the act of March 26, 1885 (Kirby's Digest, § 5648, subdiv. 3), providing that no statute of limitations or lapse of time that any encroachment or obstruction upon any street shall have existed "shall be permitted as a bar or defense against any proceeding or action to remove or abate the same," no title to an alley of a city of the first class can be acquired by operation of the statute of limitations. (Page 537.)

4. EMINENT DOMAIN—VALUE OF SEVERAL LOTS AS UNIT.—Although several lots of land sought to be condemned for railway purposes are separated by an alley, they may be treated as parts of a single tract for the purpose of determining the damages if the testimony shows that they are used as a unit. (Page 538.)

5. SAME—DAMAGES—VALUE OF HOUSE.—In a suit to condemn for railroad purposes land on which stood defendant's house, it was proper to permit defendants to prove the kind and character of materials used in the construction thereof. (Page 539.)

6. SAME—VALUE OF LAND FOR INDUSTRIAL PURPOSES.—It was proper, in a condemnation suit, to permit the defendants to prove the present or prospective value of the land as industrial property, in order that

the jury may satisfactorily determine for what price it could be sold upon the market. (Page 539.)

7. SAME—TIME OF VALUATION OF LAND.—In a condemnation proceeding instituted by a railway company, the value of land taken for its right of way is to be estimated as of the time the petition was filed, (Page 540.)

8. LIMITATION OF ACTIONS—MUNICIPAL CORPORATION.—Kirby's Digest, § 5648, subdiv. 3, providing that no statute of limitations or lapse of time that any encroachment or obstruction upon any of the streets of a city of the first class "may have existed or been continued shall be permitted as a bar or defense against any proceeding or action to remove or abate the same, or to punish for its continuance *after an order has been made by the city council or the police court for its removal or abatement,*" does not contemplate that the statute of limitations shall not cease to run against a city until an order is made for the removal of the encroachment or obstruction; the clause italicized qualifying merely the punishment for the continuance of the encroachment or obstruction. (Page 540.)

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

STATEMENT BY THE COURT.

On the 6th day of August, 1907, condemnation proceedings were instituted by the Kansas City Southern Railway Company against Catherine K. Boles and others for the assessment of damages for the right of way of its railroad across lots one to twelve fractional in block 533, Reserve Addition to the city of Fort Smith, Arkansas, belonging to said defendants.

The issues were submitted to a jury under instructions of the court, and a verdict rendered for defendants in the sum of $32,500.

Objections were made by the plaintiff to the introduction of certain testimony and to the instructions of the court. A sufficient reference to the testimony for a proper understanding of the issues raised will be made under appropriate headings in the opinion. Hence it will not be necessary to abstract it here.

The plaintiff has duly prosecuted an appeal from a judgment rendered upon the verdict.

Read & McDonough and *S. W. Moore,* for appellant.

1. The jury were incompetent; they had formed an opinion. Kirby's Digest, § 4402; 60 Ark. 245; 21 *Id.* 336; 61 *Id.* 357.

2. It was inadmissible to prove the details of the materials that went into the construction of the building. *It is the market value of the property.* 49 Ark. 381; 106 Ill. 253; 66 *Id.* 219; 4 Suth. on Dam., § 1089; 3 Joyce on Dam., § § 2184-5; 43 So. Rep. 79; 39 Pac. 571; 12 *Id.* 641; 44 A. & E. R. Cas. 73. The testimony of Mrs. Boles and Reddick and all the witnesses as to material that entered into the house was incompetent. 49 Ark. 381; 104 N. Y. S. 667; 64 Atl. 680.

3. Alleys are public highways. 77 Ark. 177, 182. No damages allowable for an alley. 41 Ark. 49; Kirby's Digest, § 5648.

4. It was error to admit testimony as to increase in value. It is expressly prohibited. Kirby's Digest, § § 2901, 2953; 54 Ark. 144.

5. It is not the cost of reproduction of a building but the market value. 106 Ill. 253; 66 *Id.* 291; 4 Suth. on Dam., § 1089; 3 Joyce on Dam., 2184-5.

Ira D. Oglesby, for appellees.

1. There was no error in admitting the testimony of Mrs. Boles, T. T. Reddick and others. It was competent to show the character of material of which the residence was constructed to prove its value. 49 Ark. 381; 41 *Id.* 202.

2. It was proper to prove any facts that tended to show that values had improved or increased in that vicinity; in fact had advanced in price. 54 Ark. 140; 75 N. W. 501; 43 N. C. 359; 59 S. W. 556; 25 S. W. 826; 68 *Id.* 745.

3. The alley belonged to plaintiffs. The company could not take it without payment. 41 Ark. 49; 77 *Id.* 177.

4. There are no errors in the instructions, and the verdict is not excessive. 49 Ark. 381.

HART, J. (after stating the facts). Appellees have moved to dismiss the appeal in this case because, after appellant had been granted an appeal in the court below, it paid to the clerk of the circuit court the full amount of the judgment obtained against it by appellees. In response to this, counsel for appellant say that, at the time the deposit was made with the clerk, this court had not, to the knowledge of appellant, passed upon the meaning

of section 2957 of Kirby's Digest, which requires that the deposit of the amount of damages shall be made within 30 days after the assessment. That, before the expiration of the 30 days, they made the deposit solely for the purpose of complying with the statute above referred to, and also on the same day filed their supersedeas bond. That the deposit is still in the hands of the clerk, and has not been applied to the satisfaction of the judgment.

This court held in the case of *Arkansas, Louisiana & Gulf Railway Company* v. *Kennedy,* 84 Ark. 365, that the provision of section 2954 of Kirby's Digest does not prohibit the railroad company from appealing from the assessment, nor require that payment of the assessment be made until the cause has been finally determined, where an appeal has been taken.

The opinion was delivered on the 18th day of November, 1907. The deposit was made on November 25, 1907. Counsel for appellant lived in a distant part of the State, and did not know of the decision when the deposit was made. They could not be considered negligent in not having learned of the decision. The statute in question was of doubtful construction. The deposit avowedly was made for the purpose of complying with it. It was so understood by all parties concerned. Because of this understanding, the clerk refused to turn over the money to the appellees on demand by them. Under the circumstances surrounding the transaction, we think that the deposit was not made for the owner of the land, nor for the present satisfaction of the judgment, but was made to the order of the court to be held by the clerk for the landowner upon the final determination of the case, believing at the time that this was the proper construction of the act. In view of this, we think the motion to dismiss should be denied.

Counsel for appellant first insist that certain of the jurors were incompetent because they had formed and expressed an opinion concerning the matter in controversy. Inasmuch as the judgment must be reversed for the reasons hereinafter expressed, it will not be necessary to discuss this feature of the case; for the matters complained of will not likely arise on a new trial of the case.

2. Counsel for appellants also contend that the court erred

in instructing the jury that the defendants had a right to recover the value of the alley. The instruction is as follows:

"5. You are instructed that when the United States conveyed the Reserve to the city of Fort Smith, it was laid off and platted by blocks and lots, with streets and alleys; that at a sale of the Reserve property Thomas Boles bought all of the lots comprising block 533, and then inclosed the entire block, including the alley, and that said lot and alley has been inclosed for more than seven years next before August 6th, the said Boles and his heirs claiming to own same and being in adverse possession of same, then the alley belongs to defendants, and they are entitled to pay for it."

We think the court erred in giving this instruction. Counsel for appellees insist that the instruction was correct, and in support of his contention cites the case of *Ft. Smith* v. *McKibbin,* 41 Ark. 45, where it was held that "municipal corporations are bound, as individuals are, by the statute of limitations, and adverse possession of an alley in a city for the statutory period will give title to the occupant and bar the city." But that case was decided in 1883. Our Legislature changed the law as in regard to cities of the first class by the passage of the act of March 26, 1885. See Acts of 1885, p. 97; Kirby's Digest, § 5648, subdiv. third.

Sec. 5648 provides that "in order to better provide for the public welfare, safety, comfort and convenience of their inhabitants, the following enlarged and additional powers are hereby conferred upon cities of the first class, viz:

And the third subdivision of the section reads as follows:

"Third. To punish, prevent or remove encroachments or obstructions upon any of the streets, sidewalks, wharves or other public grounds of such city, by buildings, fences, or structures of any kind, posts, trees or any other matter or thing whatsoever, and no statute of limitation or lapse of time that any such obstruction or encroachment may have existed, or been continued, shall be permitted as a bar or defense against any proceeding or action to remove or abate the same, or to punish for its continuance, after an order has been made by the city council or the police court for its removal or abatement."

In the case of *Hope* v. *Shiver,* 77 Ark. 177, alleys were held

to be one of the public ways under the control of the municipal authorities.

Fort Smith became a city of the first class on the 29th day of January, 1887. The United States caused a part of the abandoned military reservation of Fort Smith, Arkansas, to be surveyed and platted into city lots and blocks. The streets and alleys were dedicated to the use of the public, and the lands were conveyed to the city of Fort Smith, the description giving the lot and block numbers. The lots in controversy were among the number. On the 25th day of May, 1885, the city of Fort Smith conveyed the lots involved in this suit to Thomas Boles. Judge Boles was the husband and father of the appellees. In the deed from the city to him the lots were sold by number and reference made to the same map, which is made part of the deeds from the United States to the city of Fort Smith. Thus it will be seen that a title to the alleys could not have been vested in the appellees by operation of the statute of limitations on March 26, 1885, the date of the passage of the act removing the bar of the statutes of limitations against cities of the first class. Hence we conclude that the court erred in telling the jury that they might find that the alley belonged to the appellees.

For the reasons that the case must be tried anew in the circuit court, we will consider the other assignments of error of counsel for appellant.

3. Counsel for appellant also contend that the court erred in admitting testimony to show that the alley was fenced, and that all the lots were in a common inclosure and were used as a part of the home of appellees. This testimony was competent to show the connected use of the lots. Although the lots are separated by an alley, they may be said to be contiguous and may be treated as parts of a single tract for the purpose of determining damages in condemnation proceedings, if the testimony shows that they are used as a unit.

This court has frequently held that in a proceeding by a railroad company to condemn a right of way the assessment of damages is not restricted to the injury done to the legal subdivision of land described in the petition, and that if the tract described is part of a larger connected body of land the owner may recover for the injury done to the tract as a whole. It

follows from this that where the whole of a tract of land is taken it should be valued as a whole, and not according to the legal subdivisions as distinct and separate parcels of land.

"Whether a particular lot of land constitutes an independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by fences; nor can it be determined in the negative by the mere fact that it is all in one ownership and is not divided by streets or by paper lines." *Wellington* v. *Boston & Maine Rd.*, 164 Mass. 380; *St. Louis, M. & S. E. Rd. Co.* v. *Aubuchon* (Mo.), 9 L. R. A. (N. S.), 426, and cases noted.

4. Counsel for appellants also contend that it was error to permit appellees to prove the details of the materials that went into the construction of the home. There was no error in this regard. In the case of *Little Rock Junction Ry.* v. *Woodruff*, 49 Ark. 381, the court said:

"When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving location, advantages and surroundings, though ordinarily this would be uncalled for unless his estimate was attacked on his cross examination. . . . How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps we should say cumulative, facts, to support the estimates made by witnesses, is a matter that must be left very largely to the discretion of the trial judge. . . . As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the landowner should be allowed to state, and have his witnesses state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual."

Certainly, in such case the buyer would want to know the kind and character of the materials used in the construction of the house, whether it was well or ill built and the like. These things would not be apparent only in a general way by an inspection of the house.

5. Counsel for appellant urge that it was error to admit tes-

timony as to what the property was worth as prospective industrial property. The rule as established in this State is that "the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market." *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. *supra; Little Rock & Ft. S. Ry.* v. *McGehee,* 41 Ark. 207.

6. Counsel for appellant also contend that it was error for the court to admit testimony as to the increase in value of the property from the 6th day of June to the 6th of August, 1907. The railroad contemplated taking the property on the date first named, but the petition for condemnation was not filed until the latter date. In the case of *Newgass* v. *Railway Co.,* 54 Ark. 140, it was held that "in a condemnation proceedings instituted by a railway company, the value of land taken for its right of way is to be estimated as of the time the petition was filed."

6. Other errors are urged as to the admissibility of testimony, but they are not sufficiently abstracted for us to determnie them.

For the error indicated in giving the 5th instruction requested by the appellees, the judgment must be reversed, and the cause remanded for a new trial.

ON REHEARING.

Opinion delivered January 11, 1909.

HART, J. Counsel for appellee contends that, under subdivision 3 of sec. 5648 of Kirby's Digest, the statute of limitations does not cease to run against a city until after an order has been made for the removal or abatement of the obstruction. This seems to us to be a strained construction to put upon the statute. It is obvious that the seven year statute is applicable to such cases. If the city council desired the obstruction or encroachment removed, and should make an order for its removal or abatement, it is barely possible that it would wait seven years to enforce the order. If that was the construction intended, there would seem to be no necessity for the passage of the act. It could hardly serve any useful purpose. On the other hand, if the construction placed upon it by the court in our opinion is

correct, the statute could serve a useful purpose. If the city does not require the use of all or any part of its streets or alleys, it may permit the abutting owners to use and encroach upon them for an indefinite period of time, and yet lose none of its rights. In the case of *Fort Smith* v. *McKibbin,* 43 Ark. 45, it was held that municipal corporations are bound, as individuals are, by the statute of limitations; and adverse possession of an alley in a city for the statutory period will give title to the occupant and for the city. This opinion was delivered in 1883, and the act in question was passed in 1885 at the next session of the Legislature. It was evidently passed to remedy what the Legislature considered a defect in our municipal laws, which was brought to their attention by the decision of *Ft. Smith* v. *McKibbin, supra.*

We think the words "after an order has been made by the city council," etc., are limited to the words "or punish for its continuance," and that the obvious and natural construction is that the city council may punish for a continuance of an encroachment or obstruction to the streets after it had made an order directing its removal or abatement.

The motion for a rehearing is denied.

SNIDER v. SMITH.

Opinion delivered January 4, 1909.

TENDER—COSTS.—Where, in a suit to redeem land from a tax sale, the parties agree of record as to the amount due in case plaintiff is entitled to redeem, which amount is paid into court by the plaintiff, and the court holds that he is entitled to redeem, he does not incur liability for costs on appeal because the trial court erred in directing payment of a less sum on redemption than was tendered.

Appeal from Clark Chancery Court; *James D. Shaver,* Chancellor; modified and affirmed.

John H. Crawford, for appellant.

McMillan & McMillan, for appellee.

HILL, C. J. This case has been here before. See *Snider* v. *Smith,* 75 Ark. 306. From a decree allowing redemption the defendant has apealed, and assigns two errors:

1. "That the court erred in permitting appellees to read in evidence the so-called 'duplicate deed' to Willis S. Smith, Jr." The same question was presented in case number 364, *Thornton* v. *Smith, post* p. 543. For the reasons given in the opinion of the court in that case, written by Mr. Justice BATTLE, this contention can not be sustained.

2. "That, if a redemption of any interest in the said land is permissible, the court erred in fixing the *pro rata* amount of taxes and interest paid by appellant to be refunded to him." The court found the amount due Snider to be $8.80, and he contends that it should have been $17.85. In the original decree, which was reversed, is found this statement: "Both parties admit that if the plaintiffs are entitled to redeem they should pay to the defendant two-thirds (2-3) of the taxes due on said land, amounting to the sum of $18.90." This was on June 9, 1903. In the decree now appealed from is this statement: "And the court further finds that the plaintiffs did on the 25th of June, 1903, pay into the registry of this court for the redemption of said land the sum of $18.90, and that said sum of $18.90 has remained in the registry of this court, and still remains there, as a tender to the defendant, Geo. W. Snider."

It is thus seen that the parties by record agreement eliminated the question of amount due in the event of redemption, and litigated over the right of redemption. This agreement was executed shortly thereafter by a payment into court as a tender of the amount agreed to be due in event of redemption. The court should, when it decreed redemption, have fixed the amount thus agreed upon. The tender was more than the court found due or the appellant now claims was due, and the appellees could not go back on their executed tender, or seek to have a lesser sum found due. The appellees should not incur the costs of this appeal for this error, because appellant could have had this sum at any time since it was deposited in the registry of the court, and the litigation has been over other questions, and not this one. See *Ozark Ins. Co.* v. *Leatherwood,* 79 Ark. 252.

The decree is modified so as to allow appellant the recovery of the $18.90 deposited in court as redemption money, and remanded for the purpose of said modification; and in all other respects the decree is affirmed.

THORNTON v. SMITH.

88 543
188 542

Opinion delivered January 4, 1909.

1. PUBLIC LANDS—ISSUANCE OF DUPLICATE DEEDS.—Kirby's Digest, § 4732, providing that "in all cases where sufficient proof of the loss or destruction or erroneous issue of any deeds heretofore made to any lands belonging to the State, by any officer authorized so to do, when evidence exists in the Commissioner's office of the proper issue of such former deeds, it shall be the duty of the Commissioner to issue duplicates or make new deeds therefor, as the case may be," contemplates that the Commissioner of State Lands shall issue a duplicate deed of lands forfeited for taxes upon proper proof of loss of the original deed. (Page 547.)

2. SAME—DEED OF STATE LAND COMMISSIONER AS EVIDENCE.—A deed of the Commissioner of State Lands, conveying lands forfeited for taxes, authenticated by his official seal, is *prima facie* evidence of title, although it has not been recorded. (Page 547.)

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

John H. Crawford, for appellant.

The alleged "duplicate deed" to Willis S. Smith, Jr., was improperly admitted. The Commissioner of State Lands being merely an agent of the State, all of his acts must be authorized by statute. There are but two statutes (Acts 1875, p. 91, and Acts 1885, p. 10), which authorize him to issue "duplicate deeds" or "new deeds" in cases where original deeds have been lost or destroyed, and neither of these mentions "forfeited tax lands." The "duplicate deed" was not admissible because it was never recorded, and its execution was not otherwise established. Kirby's Digest, § 756. The instrument shows on its face that it is not a copy, nor even substantially a copy, of the original, which is the meaning of "duplicate." Rapalje & Lawrence, Law Dict.; American Encyclopedic Dict.; 52 Ark. 454. It is not only not a duplicate, but it is a present grant as of the date of its issue to one who had long since died. There could be no delivery of such a deed, hence it is void. A deed to a fictitious or nonexistent person is a nullity. 25 Mo. 24; 69 Am. Dec. 446; 97 Tenn. 458; 39 L. R. A. 423; 7 Col. 256; 3 Pac. 225. See also 39 Pac. 130; 1 So. 860; 73 Am. Dec. 453; 53 Miss. 665; 6 Pet. 261.

McMillan & McMillan, for appellee.

At the time of the donation the law permitted each head of a family to take up a quarter section in the name of each minor child, which land was not transferable until the minor attained majority. Gantt's Digest, § § 3900, 3902. The Auditor's deed and the collector's receipt for tax paid upon land held under such donation was made evidence in all courts of a good title in the donee, that the land had been regularly forfeited, etc. *Id.*, § 3897. And the burden of proof is upon the party asserting the invalidity of the tax forfeiture. 76 Ark. 554; *Id.* 450; 69 Ark. 424; 36 Ark. 508. The original deed from the State to Smith having been lost, the Commissioner of State Lands had ample authority, upon proper proof of that fact, to issue a duplicate, or new deed. Kirby's Digest, § § 4732, 4898. See also Acts 1867, pp. 162-3; Acts 1868, pp. 61-72, and 105-6; Acts 1881, pp. 40-1; Kirby's Digest, § § 4733, 4712; 73 Ark. 608. Appellant's contention that the deed is not a "duplicate," etc., and that it is a grant *in praesenti* to one long since dead, is without merit. It is strictly in conformity to the statute. Moreover, the original deed when delivered, carried title to Smith, and its loss or destruction did not deprive him of title nor place it back in the State. The deed was properly admitted in evidence.

BATTLE, J. This suit was instituted by Eliza W. Smith against Charles S. Thornton and Justes Chancellor to redeem certain lands which were sold for taxes. The court, after hearing the evidence, found the facts as follows: "That James B. Smith received from the State a donation deed in 1873 for the land sought to be redeemed; that said land was forfeited and sold in 1894 for the taxes of 1893 to the Gurdon Lumber Company. That said land, not having been redeemed from said sale, was in 1896 conveyed to the Gurdon Lumber Company, a business name for the St. Louis Refrigerator & Wooden Gutter Company; that in 1902 the last-named company by its warranty deed conveyed said land to appellants. That at the time of said tax sale (in 1894) the said James B. Smith was an insane person, and continued so until his death in April, 1901. That he died intestate, leaving his mother, Eliza W. Smith, his sole heir. That those under whom the plaintiff claims title to said land paid the taxes thereon from and after said donation in 1873 to and including 1892. The court found that a duplicate deed was issued Decem-

ber 2, 1902. It recites "that whereas evidence exists in the office of the Commissioner of State Lands that on the 28th of October, 1873, James B. Smith received as a donation from the State of Arkansas the following described tract of land in the county of Clark which remained forfeited to the State for the nonpayment of the taxes for the years 1865,'66, and '67, viz: the southeast quarter of section three, in township eleven south, range nineteen west. * * * And, whereas, the affidavit of J. H. McMillan has been filed in this office showing that said deed had been lost or destroyed, and that said James B. Smith desires a duplicate deed in place of the original. Now, therefore, I, F. E. Conway, Commissioner of State Lands, * * * do hereby grant and convey to the said Jas. B. Smith, his heirs and assigns, all the right, title and interest of said State to said land, * * * and this deed is issued by me in lieu of the original, * * * shall be taken and considered as in lieu and cancellation of said original deed."

The court allowed the plaintiff to redeem the land, and the defendants appealed.

The defendants objected to the introduction of the "duplicate deed" as evidence at the time it was offered: "(1) Because said deed had not been recorded before it was offered in evidence, its execution not being otherwise proved. (2) Because the said deed was not in fact a duplicate deed, but was in fact a new deed in lieu of the old one, containing a present grant of the title to the land as of December 4, 1902, to James B. Smith, who was dead at that time." This is the only question in the case. The decision of it depends upon the statutes copied below.

Section 4729 of Kirby's Digest is as follows: "The said commissioner is authorized and impowered to execute under his hand and official seal a deed or deeds to purchasers, or their assigns, or legal representatives, of sixteenth section or school lands, upon presentation to such commissioner of proper evidence of full payment for the same in all cases where the sale of such land occurred prior to the passage of 'An act to provide for the sale of the sixteenth section in this State,' approved March 22, 1881."

Section 4730 is as follows: "The owner of any certificate of purchase for any swamp and overflowed, seminary, saline, internal improvement, Real Estate Bank, or State Bank lands, or

the assignee, or the party or parties in whom the legal title to such lands exists, may present such certificates and other evidences of the legal title to such lands to the Commissioner of State Lands, who, if he find that the sale of such lands was made in conformity to law and have been fully paid for, and that such evidence of assignment have been made in accordance with law, shall execute under his hand and official seal a deed or deeds, conveying all the right, title and interest of the State in and to such lands: provided, the deed of the State shall not be issued to any 'approved' swamp and overflowed lands until after the issuance of the patent by the United States to the State for such lands."

Section 4732 is as follows: "The certificates and evidences of assignment mentioned in section 4729, upon which deeds are so made, shall be filed in the Commissioner's office, and he shall keep a record of the deeds so made, from which he may issue duplicates upon sufficient proof of loss of, or errors in, such original deeds; and in all cases where sufficient proof is presented of the loss or destruction or erroneous issue of any deeds heretofore made to any lands belonging to the State, by any officer authorized so to do, when evidence exists in the Commissioner's office of the proper issuance of such former deeds, it shall be the duty of the Commissioner to issue duplicates or make new deeds therefor, as the case may be, referring therein to the deeds theretofore issued; and such duplicates or new deeds shall have the like force and effect as the original deeds."

Section 4897 of Kirby's Digest contains provisions similar to those contained in section 4730; and section 4898 contains provisions similar to those contained in 4732. But appellant says "forfeited tax lands" are not mentioned in any of these sections, and therefore sections 4732 and 4898 do not apply to such lands.

Section 4732 does not mention swamp and overflowed, seminary, saline, internal improvement, Real Estate Bank, or State Bank lands; yet they are mentioned in section 4730, a part of the same act. It is obvious they were in the minds of the General Assembly when section 4732 was enacted, and that it referred to lands other than sixteen section or school lands mentioned in section 4729 when it says: "And in all cases where sufficient proof of the loss or destruction or erroneous issue of any deeds

heretofore made to *any lands* belonging to the State, by any officer authorized so to do, when evidence exists in the Commissioner's office of the proper issue of such former deeds, it shall be the duty of the Commissioner to issue duplicates, or make new deeds therefor, as the case may be," etc. "Any lands" includes all lands of the State, and there is nothing in the section or any good reason to confine them (the words "any lands") to any particular lands; and hence the statute authorized the issue of the deed in question.

Appellant contends that the deed issued by the Commissioner of State Lands in lieu of the original deed that had been lost or destroyed was not a duplicate deed, but is a present grant, as of the date of its issue, to James B. Smith, who had been dead eighteen months at the time it was executed to him, and was, therefore, void. The statute, in case of the loss or destruction of a deed, authorizes the issue of a new deed. It is evident it means by a "new deed" a substitute for the lost deed which shall take the place of the original as evidence of title. The substitute could convey no title; that had been conveyed to James B. Smith in his lifetime, and it had descended upon his death to his heirs. The loss or destruction of the original deed did not divest title and vest it in the State. A duplicate or new deed could convey nothing, but would be only evidence that a former deed conveying title had been made; and this is the only purpose it can or was intended to subserve.

Appellant says that the so-called "duplicate deed" was never recorded, and its execution was not established by other evidence, and therefore was not competent evidence. But it was authenticated by the official seal of the Commissioner of State Lands, and this was sufficient to make it evidence of title. Sections 4712, 4733, 4807, 4820 of Kirby's Digest; *Scott* v. *Wills,* 49 Ark. 266.

The new deed was competent evidence.

Decree affirmed.

88 548
189 549

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

Opinion delivered January 4, 1909.

1. MASTER AND SERVANT—ASSUMED RISK.—The negligence of the master, whether committed directly or through a fellow servant, may be assumed. (Page 549.)
2. SAME—ASSUMPTION OF RISK QUESTION FOR JURY WHEN.—The question whether a risk was assumed by the servant in any case is one of fact for the jury to answer, unless the facts are undisputed and present a situation so plain that the minds of intelligent men could not draw different conclusions as to the effect thereof. (Page 549.)
3. SAME—ASSUMPTION OF RISK.—Where a servant makes complaint to the master that a fellow servant is in the habit of violating a rule of the master adopted for his safety, he has a right to assume, for a reasonable time that the master will require the fellow servant to obey such rule, and consequently he will not be deemed to have assumed the risk of disobedience thereof. (Page 549.)

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

Lovick P. Miles, for appellant.

The negligence of the master may be assumed when known to exist, as well as the ordinary hazards of the service. 86 Ark. 508. If the servant realizes the danger, and still elects to expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk. 77 Ark. 367. By appellee's own testimony, clearly showing that he knew of the negligence and appreciated the danger and made complaint of it, we have a clear case of assumption of risk of master's negligence, and he ought not to recover. Appellants request for peremptory instruction in its favor should have been granted.

Sam R. Chew, for appellee.

The question of assumed risk in this case was one of fact (under the testimony) for the jury to determine, and not of law for the court. While he assumed, in entering upon the service, all the risks ordinarily incident to that service, he did *not* assume the risk growing out of the negligence of the master. 77 Ark. 367; *Id.* 458; 112 S. W. (Ark.), 886.

HILL, C. J. Elsey Hawkins was employed by the appellant company as a cinder shoveller, working in a cinder pit in its yards in Van Buren. His testimony tended to prove: That while intent upon his work an engine was backed into the cinder pit, without the usual signals of approach, and he was injured by it. The day before this occurred he had complained to his foreman of the hostler operating this engine having taken engines into the cinder pit without signals, and threatened to quit his employment unless the required signals were given of the approach of engines to the pit. His foreman promised to speak to his superior, and that night told him he had reported it to his (the foreman's) superior, but he did not know what he (the vice-principal) had done about it. The next morning Hawkins returned to work, and knew that the same hostler of whom he had complained was handling engines. He was injured about eight o'clock, after the hostler had taken three or four engines into the cinder pit.

From a judgment in plaintiff's favor the railroad company has appealed, and says that the trial court should have given a peremptory instruction for the defendant on the ground that his evidence showed that he had assumed the negligence of the company by reason of which he suffered his injury. This occurrence took place subsequent to the passage of the act of March 8, 1907, charging the master with fellow servant's negligence.

Unquestionably the negligence of the master, whether committed directly or through a fellow servant, may be assumed. *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367; *Choctaw, O. & G. Rd. Co.* v. *Craig,* 79 Ark. 53; *St. Louis, I. M. & S. Ry. Co.* v. *Mangan,* 86 Ark. 508; *Pettus* v. *Kerr,* 87 Ark. 396.

Ordinarily, the question of assumption of risk is one of fact for the jury to answer, unless the facts are undisputed and present a situation so plain that the minds of intelligent men could not draw different conclusions as to the effect thereof. Then, and then only, should the court declare as a matter of law that the risk was assumed. *Choctaw O. & G. Rd. Co.* v. *Craig,* 79 Ark. 53; *Pettus* v. *Kerr,* 87 Ark. 396; *Schlemmer* v. *Buffalo, R. & P. Ry. Co.,* 205 U. S. 1.

The evidence here shows that the hostler violated the rules of the company made for the safety of the cinder shovellers by

taking engines into the pit without signals, that complaint was duly made of this to the vice-principal, and the next morning, after knowledge that his complaint had been properly lodged, Hawkins returned to his work, knowing that the servant complained of was still on duty. He had every right to assume, for a reasonable time, that his just complaint would be heeded, and that the master would require the offending servant to obey this simple and necessary rule to protect the life and limb of his fellow laborers.

The court would have erred had it declared as a matter of law that the risk was assumed. No other question is presented.

Judgment affirmed.

MERCHANTS' FIRE INSURANCE COMPANY v. MCADAMS.

Opinion delivered December 21, 1908.

1. INSURANCE—CONCURRENT INSURANCE—WAIVER OF FORFEITURE.—Where insured solicited fire insurance from a certain company which accepted the application but divided the risk with two other companies, which issued policies covering their *pro rata* of the risk, and thereafter insured mailed the three policies to the first company with request that the three policies be cancelled, and subsequently took out two policies in other companies, notifying the latter's agent at the time the policies were issued of the facts concerning the alleged surrender of the policies, the latter companies will be held to have waived any forfeiture on account of the prior insurance policies, whether they were ever cancelled or not. (Page 555.)
2. TRIAL—DIRECTING VERDICT.—It is error to direct the jury to find according to the testimony of a witness if he is interested in the result of the trial, or is contradicted by other witnesses, or if his testimony contains such inconsistencies or inaccuracies as would have warranted the jury in declining to accept as established the existence of facts which depended entirely on his testimony. (Page 555.)
3. INSTRUCTIONS—CONFLICT.—It is prejudicial error to give conflicting instructions if it is impossible for the court to say which the jury followed in making up their verdict. (Page 556.)
4. INSURANCE—SURRENDER OF POLICIES.—Where there was a conflict in the testimony as to whether an insurance company was authorized to cancel insurance policies issued by two other companies, it was error to

instruct the jury that mailing the two latter policies to the former company constituted a surrender of such policies. (Page 556.)

5. SAME—ALLOWANCE OF ATTORNEY'S FEE.—Acts 1905, c. 115, providing that where an insurance company fails to pay a loss within the time specified in the policy it shall be liable "for reasonable attorneys' fees for the prosecution and collection of such loss," contemplates that the company shall pay a reasonable fee, but not a speculative or contingent fee based upon the uncertainty of the result of the litigation. (Page 556.)

Appeal from Saline Circuit Court; *W. H. Evans,* Judge; reversed.

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

1. By the terms of the application and the policy sued on the answers to the questions in the application were made warranties; and it is expressly stipulated in the policy that it should become void if the insured at the time had, or should thereafter procure, any other insurance, whether valid or not, on the property covered in whole or in part by this policy. If appellee's testimony that he mailed the policies of the other insurance companies be true, and if it be conceded that he thought they had been cancelled, his case is not strengthened. Though an assured may honestly believe what he said to be true, still, if such statement is made the basis of a warranty, and it be in fact not true, the insurance is vitiated. 14 N. W. 792; 5 Fed. 674; 12 Am. St. Rep. 807-8; 31 S. W. 566; 98 Pa. 45.

2. It is obvious from the application made to the Queen of Arkansas Insurance Company that appellee understood that that company was not expected to take the entire amount of the application. When the application was given to that company, and it sought insurance in other companies, it was a mere broker acting for him, which agency ceased when the policies were issued by the other companies and were returned to and accepted by appellee. These policies were issued subject to appellee's approval, and when they were received and retained by him without objection they were approved, and thereafter the Queen of Arkansas company had nothing further to do with, nor any control over, them. 1 S. W. 689; 83 Md. 22; 36 Mich. 502; 63 N. W. 784; 1 Cooley's Briefs on Ins. 68; 105 Ala. 282.

3. The policies of the Capital and American Fire Insurance companies both provided the manner in which they should be cancelled. When a contract provides how it may be cancelled,

its terms must be pursued, or there can be no cancellation, and the court's instruction to the effect that if appellee mailed the policies to the Queen of Arkansas Insurance Company this was a cancellation of the policies, is contrary to this court's declaration of the law. 72 Ark. 305.

4. The second and fourth instructions given by the court are both peremptory instructions to find for the plaintiff, and are erroneous.

C. P. Harnwell, for appellee.

MCCULLOCH, J. Appellee, McAdams, instituted separate actions against appellants, Merchants' Fire Insurance Company and Planters' Fire Insurance Company, to recover the amount of the several insurance policies, each for $1,000, issued to him by said respective companies on his frame store building, stock of merchandise and store furniture and fixtures. The court made an order consolidating the two actions as involving the same issues, and a trial resulted in a judgment in appellee's favor against each company for the full amount of its policy and for damages and attorney's fees under the statute. The insurance companies appealed.

The defenses offered by each appellant were that there were breaches by appellee of his warranty contained in the "iron safe clause" of the policy with reference to the preceding itemized inventory and the keeping of books, and of his warranty concerning other insurance on the property. The facts upon which the latter defense is based are as follows: In June, 1906, he applied to the Queen of Arkansas Company for insurance in the sum of $2,500 on this property, and paid a part of the premium and executed his note to that company for the balance, which note he afterwards paid. That company accepted and approved the application, but, not desiring to carry insurance in that amount on the property, issued to appellee a policy for $900, but procured for him on the application two policies each for $800 from the Capital Fire Insurance Company and the Peoples' Fire Insurance Company, thus making the total amount of insurance asked for in the application. All of the policies were for one year, expiring on June 21, 1907, and the Queen of Arkansas Company accounted to the other two companies for the premiums. The People's Fire Insurance Company afterwards passed into the

hands of a receiver, and the American Insurance Company issued a policy in lieu of the one issued by the People's Company.

In March, 1907, the managing officers of the Queen of Arkansas Company decided to cancel its policy, and sent its agent to see appellee to demand the surrender of the policy, but appellee refused to do so except on condition that all of the premium be returned. On March 28, 1907, that company sent appellee a check for the unearned premium on its policy and again demanded a surrender of the policy, and on the day appellee received the check he mailed to the Queen of Arkansas Company, postage prepaid, all three of said policies with a letter stating that he surrendered same. The envelope containing this letter and the policies was never received by the company, and this warrants the conclusion from the evidence that it was lost in the mail. The officers of the other two companies testified that they never received the policies nor cancelled them, but considered them in force until the date of expiration on June 21, 1907.

The two policies in suit were both issued to appellee on April 2, 1907, and the fire occurred on June 27, 1907. They were issued on appellee's application made to the Planters' Fire Insurance Company through one of its solicitors.

Appellee testified that when he made application to the soliciting agent he informed the latter that he had returned all the policies for cancellation, and had no insurance on the property, and that he showed him the letter received from the Queen of Arkansas Company concerning the cancellation.

The written application upon which the policies were issued contained the following among other questions and answers, the truth of which answers are by the express terms of the policies, warranted:

"Q. What other insurance on property? (Give companies and amounts.) Answer. No. * * * * * *

"Q. Has any company cancelled or refused insurance on the property? Answer. Insured in the People's when it made assignment."

Each of the policies sued on contained the following clause

"This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the insured now has or shall hereafter make and procure any other contract

of insurance, whether valid or not, on property covered in whole or in part by this policy."

The court, over the objections of appellant, gave the following instruction, viz:

"2. The court now instructs you that if you find from the evidence the plaintiff, L. C. McAdams, made application to the Planters' Insurance Company for indemnity against loss by fire upon a stock of merchandise, store fixtures and store building at Bryant, Arkansas, for $2,000 and the said Planters' Insurance Company accepted his application and issued its policy for $1,000 thereof and placed the other $1,000 in the Merchants' Fire Insurance Company, and the said Merchants' Fire Insurance Company accepted the risk and issued and delivered its policy to the Planters' Fire Insurance Company for delivery to and collection of the premium from the assured and plaintiff, L. C. McAdams, and that said L. C. McAdams accepted such policy and paid the premium therein stipulated, and that subsequently the property insured was totally destroyed by fire, and said L. C. McAdams made and delivered proofs of loss to said companies as in the policies provided, and that he suffered loss in the sum set forth in the proofs, you will find for the plaintiff.

"4. The court further instructs you that under section 4375 of chapter 90 of Kirby's Digest, 1904, a fire insurance policy in case of total loss by fire of the property insured is a liquidated demand against the company for the amount upon which it charged, collected, and received a premium, except as to personal property, and, therefore, if you find from the evidence the frame store building thereby insured for $300 was totally destroyed you will find for plaintiff on said item in the sum of $300, and if you find the sound value of the merchandise destroyed was $2,124.15 and of the store fixtures $270, you will apply the three-fourths loss clause to the items to determine the companies' liability, but which under the policies can not exceed $1,500 on the item of merchandise and $200 on the item of store fixtures.

"8. The court further instructs you that if you find from the evidence that the assured, L. C. McAdams, before applying for the policy of defendants herein, inclosed the policies of the Capital Fire Insurance Company, the Peoples' Fire Insurance Company and the American Fire Insurance Company sealed in

an envelope addressed to the Queen of Arkansas Insurance Company at Little Rock, Ark., and deposited the same in the post-office at Bryant, Arkansas, postage prepaid, that in fact constituted and was a surrender of the policies to the companies issuing same, and was in fact a cancellation, and the policies thenceforth ceased to be in force and effect, even though the said Queen of Arkansas Insurance Company did nothing with them."

The second and fourth instructions copied above were, in effect, peremptory ones in favor of appellee, as the facts there recited were undisputed, and they ought not to have been given. They entirely ignored the defenses offered by appellants.

If, as contended by appellee, he informed the agent who, by authority from the companies, solicited and procured the application for insurance, of all the facts concerning the alleged surrender of the policies, and the companies accepted the application and issued the policies sued on with full knowledge on the part of their agent of said facts, it operated as a waiver, and the companies are liable, notwithstanding the fact that the policies were never, in fact, received by the other companies and cancelled. *German-American Ins. Co.* v. *Harper,* 75 Ark. 98; *People's Fire Ins. Assoc.* v. *Goyne,* 79 Ark. 315; *Mutual Reserve Fund Life Assoc.* v. *Cotter,* 81 Ark. 205.

But it can not be said to be an undisputed fact in the case that appellee did so inform the agent. It is true that appellee testified that he so informed the agent, and Hooper, the agent, was not called as a witness to deny it, but appellee was the only witness who testified to that fact, and his testimony does not establish it so that the court and jury were bound to accept it as an undisputed fact. He was not only vitally interested in the result of the trial, but his testimony was on some points in conflict with other testimony, and the jury had the right to discard his statements. He testified that his son mailed all the policies to the Queen of Arkansas Company, but it is shown that they never in fact reached that company, and the jury could have believed, either that they were lost in the mail or that they were never posted in the mail as appellee claims. There were also other inconsistencies and inaccuracies in his testimony which would have warranted the jury in declining to accept as established the existence of facts which depended entirely on his testimony.

Judge RIDDICK, speaking for the court in *Skillern* v. *Baker,* 82 Ark. 86, said: "It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict may be directed based on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury." Citing cases.

There were other instructions given by the court which submitted to the jury the question whether or not there was a breach of the warranty with respect to other insurance, but they were necessarily in conflict with the two we have just commented on, and it is impossible for the court to say which the jury followed in making up their verdict. *Murch Bros. Construction Co.* v. *Hayes, ante* p. 292; *St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 224.

The eighth instruction copied above was erroneous in telling the jury, in substance, that the mailing to the Queen of Arkansas Insurance Company of the two policies issued by the other two companies constituted a surrender and cancellation of those policies. If it be conceded that there was some evidence tending to establish the fact that, according to the customary course of dealing between the several insurance companies, the Queen of Arkansas Company was authorized to cancel policies for the other companies, or to accept for them the surrender of policies, there is certainly evidence tending to show that the Queen of Arkansas Company had no such authority to act for the other companies, and the question should have gone to the jury. It was error to place it before the jury as an undisputed fact that the Queen of Arkansas Company possessed such authority, and to tell the jury as a matter of law that the mailing to that company of the policies constituted a surrender and cancellation.

There are other assignments of error which we need not pass upon, as the errors indicated call for a reversal.

In view, however, of another trial we will call attention to

an error of the court in fixing the amount of attorney's fee to be taxed against the insurance company based on evidence as to what would be a reasonable contingent fee. The statute provides that a reasonable attorney's fee for the prosecution of the suit and collection of the amount of the loss under the policy shall be taxed against the company. This means such a fee as would be reasonable for a litigant to pay his attorney for prosecuting the case, and not a speculative or contingent fee based upon the uncertainty of the result of the litigation.

Reversed and remanded for new trial.

LANIER v. LITTLE ROCK COOPERAGE COMPANY.

Opinion delivered January 4, 1909.

1. SALES OF CHATTELS—INSPECTION—CONCLUSIVENESS.—Where a contract for the sale of staves provided that the vendee should make inspection of the staves, the vendor is bound by such inspection, in the absence of fraud or such gross mistake as would necessarily imply bad faith. (Page 559.)
2. SAME—BREACH OF CONTRACT—ESTOPPEL.—Where a contract for the sale of staves stipulated that inspection should be made by the buyer's agent, but, on account of such agent not being able to make inspection as fast as desired, the seller furnished an inspector, the seller is estopped to claim that such inspection was a violation of the contract. (Page 560.)
3. AGENCY—DELEGATION OF AUTHORITY.—An agent has no power to delegate his authority to another. (Page 560.)
4. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot complain of an instruction given at appellee's instance if he asked one to the same effect. (Page 560.)
5. SALES OF CHATTELS—INSPECTION—FRAUD.—The fact that staves culled by the buyer were afterwards sold by the seller did not of itself tend to prove that the culling was improperly or fraudulently done, in the absence of proof that the staves so culled and sold were of the dimensions and character specified in the contract, as staves which did not come up to the contract might nevertheless have some market value. (Page 561.)
6. SAME—WAIVER OF BREACH OF CONTRACT.—Where staves were sold to be inspected by the vendee, and the vendee's inspector improperly culled staves tendered under the contract, yet if the vendor knew of such

improper culling and failed to notify the vendee that it expected to insist upon such improper culling as a breach of the contract, and if, after such alleged breaches, the vendor continued to ship staves to the vendee under the contract, and thereby the vendee was induced to perform its part of the contract and rely upon performance by the vendor, this constituted a waiver on the vendor's part of any improper culling by the vendee's inspector. (Page 561.)

7. SAME—BREACH—MEASURE OF VENDEE'S DAMAGES.—The measure of the vendee's damages for the vendor's failure to perform his contract is the difference between the actual cash market value of the undelivered goods at the time of the vendor's refusal to fulfill its contract, and the amount which the vendee agreed to pay therefor, together with six per cent. damages thereon from the date of such breach to the date of judgment. (Page 561.)

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

W. C. Rodgers and *Sain & Sain,* for appellant.

There is no evidence that the staves were not according to contract. The court erred in assuming that they did not come up to the contract. 14 Ark. 530; 36 *Id.* 641; 37 *Id.* 580; 54 *Id.* 336; 56 *Id.* 457; 61 *Id.* 549; 70 *Id.* 441; 74 *Id.* 19; *Id.* 468; 75 *Id.* 232; 76 *Id.* 348; 77 *Id.* 109. Where one of two innocent parties must suffer by reason of an injury, it should be he who is first at fault. 95 Ga. 69. The court has no right to assume that a disputed fact is established one way or the other. 37 Ark. 580. Conflicting instructions necessarily call for a reversal. 74 Ark. 437. Where one party to a contract refuses to perform, the other party is justified in treating the contract as rescinded. 38 Ark. 174; 64 *Id.* 228; 65 *Id.* 320; 46 Ia. 235. The principle of estoppel can not be invoked except where one has induced another to act. 36 Ark. 96; 39 *Id.* 131; 53 *Id.* 196; 63 *Id.* 289; 38 *Id.* 174. It is the province of the jury to judge of the strength or weakness of the facts to support an issue. 37 Ark. 580.

W. P. Feazel and *Scott & Head,* for appellee.

In the absence of fraud or mistake, the estimates of the engineer are conclusive. 48 Ark. 522; 68 *Id.* 185; 79 *Id.* 506; 115 Ala. 138.

WOOD, J. The appellee sued appellant, alleging that appellant, for a consideration of $21 per thousand, agreed to manufacture and deliver to appellee six hundred thousand staves, mill

run, dead culls out, of the following dimensions, 34 inches long, and, when dry, to plane three-fourth inches thick; that appellant had failed to deliver 365,000 staves, and that by this breach of the contract appellee was damaged in the sum of $2,500.

Appellant answered, denying any breach of the contract on its part, and averred that it had been ever ready to perform the contract, but that appellee, in culling the staves, refused and failed to correctly and fairly cull the same and rejected, as dead culls, a large number of staves which were above the grade of dead culls and refused to accept staves which conformed to the grade and character called for by the contract. It alleged that such refusal to accept staves within the class called for by the contract was the cause of the abandonment of the contract on the part of appellant. The case has been to this court before. *Little Rock Cooperage Co.* v. *Lanier,* 83 Ark. 548. At the beginning of the last trial appellant abandoned the defense of a failure of appellee to make payments, which had also been relied upon in the former trial, and rested its defense solely upon the other ground set up in the answer *supra.* It will be observed therefore that the crux of the controversy was whether or not there had been a breach of the contract on the part of appellee in culling and refusing to accept staves under the contract that justified appellant in its admitted abandonment thereof.

The contract provided for "the inspection to be made at the point of loading by the party of the second part." This provision made the appellee the agent of appellant in the matter of inspection, and, in the absence of fraud or such gross mistake as would necessarily imply bad faith, the appellant was bound by the inspection that appellee made. As to whether or not there was bad faith upon the part of appellee, through its agent appointed for the purpose of making the inspection, the court permitted the evidence to take a wide range. The evidence was voluminous, and it could serve no useful purpose to review it here. Suffice it to say, it was a jury question, which the court correctly submitted under several instructions according to the above doctrine announced by us in many cases. *Boston Store* v. *Schleuter, ante* p. 213; *Carlile* v. *Corrigan,* 83 Ark. 136; *Ark-Mo Zinc Co.* v. *Patterson,* 79 Ark. 506; *Ozan Lumber Co.* v. *Haynes,* 68 Ark. 285; *Hot Springs Railway Co.* v. *Maher,* 48 Ark. 522.

There was evidence to the effect that appellee's inspecting agent could not do the work as fast as appellant desired, and appellant sent its own agents to assist in making some inspections. They did assist the agent of appellee, and he approved of the inspections that they made. There was evidence to the effect that these agents were to work under the supervision of the agent of appellee in making the inspection, and if a dispute arose it was to be referred to him. In view of this evidence, it was not error for the court to tell the jury, as it did in the seventh prayer by appellee, that if the inspector employed by appellant jointly inspected any staves with appellee's inspector, and the two agreed upon the culling, then the appellant was estopped from claiming any breach of contract by reason of the inspections that were thus jointly made. Certainly, appellant could not complain of an inspection which its special agents were instructed to make, even though appellee's agent supervised and approved such inspection. For, if such an inspection were contrary to the contract, appellant, and not appellee, caused it, and to allow appellant to claim such inspection as a breach would be to give it an advantage from its own wrong. The agent designated by appellee to make the inspection had no power which he could delegate to another, and appellee would not be bound by any conduct of the agent in this respect beyond the scope of his employment of which it had no notice. There is no proof that appellee had such notice, and therefore nothing to show its consent to a joint inspection. Moreover, if the giving of the seventh prayer of appellee was error, appellant waived it by asking the court to instruct the jury "that the joint inspection shown in evidence, where and to the extent it was approved by John Caperton, is as conclusive upon the plaintiffs (appellee) and the defendants (appellant), as though done by Caperton alone." Thus appellant itself asked that such joint inspection be declared conclusive upon it as well as appellee, and the court granted the request.

The court correctly construed the contract to call for staves that were thirty-four inches long and that would plane not less than three-fourth of an inch thick, and that appellee was not required to accept any staves that did not conform to these dimensions. There was no error therefore in telling the jury, as the court did in prayer eight of appellee, that the proof that staves

culled by appellee were afterwards sold by appellant to other parties would not of itself tend to show fraud and a violation of the contract in culling the staves. But, before such proof could be considered as tending to establish fraud, it would have to further appear by a preponderance of the evidence that the staves culled and sold were of the dimensions and character specified in the contract.

Under the contract "dead culls," *i. e.*, culls that had no market value whatever, were expressly excluded. Staves that had some market value, but which were not according to the contract specifications, would be also excluded under the rule of *expressio unius est exclusio alterius.* Prayers nine and ten of appellee (Reporter set out in note) were correct instructions under the evidence on the subjects of waiver and estoppel.* They were in accord with the language of the opinion on these subjects heretofore rendered in this cause, on precisely similar facts. Furthermore, the contention of appellant that the requirements of the law would have been met had the notice been given to the culler designated by appellee is unsound. The culler was the agent of both parties to inspect for both. His authority was limited and special. He had no power to receive notice of his own delinquencies that would bind appellee. But, if any notice of defective culling was given, the undisputed evidence is that it was given to appellee's manager, Gaggs, who had authority to act. Therefore, even if appellant be correct in its contention, the instruction was harmless error.

Instruction number eleven at the request of appellee correctly declared the law under the evidence as to the measure of damages.

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*Instructions 9, 10 and 11, given at appellee's request, were as follows:

"9. If the jury find from a preponderance of the evidence that plaintiff's inspector fraudulently or grossly improperly culled staves tendered under the contract, and if you should further find from the evidence that defendants knew of such fraudulent or improper culling, and that, notwithstanding such knowledge, they failed to notify the plaintiff or some agent having authority to act that they expected to insist upon such improper culling as a breach of the contract, and that, after said alleged breaches occurred, defendants continued to ship staves to the plaintiff and induced plaintiff to believe that they would continue to ship staves under the contract, and thereby the plaintiff was induced to perform its part of the contract and to rely on performance by defendants, then you are instructed that this would be a waiver on the part of the defendants of

The court did not err in its rulings upon the prayers for instructions by appellant. Those that were correct the court gave, or else had covered same fully in instructions already given.

We are of the opinion, upon the whole record, that the cause has been fairly tried, and that the judgment is correct.

Therefore affirm.

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any improper culling that you may find, if any, on the part of plaintiff's inspector, and your verdict should be for the plaintiff.

"10. The court instructs the jury that the defendants owed the plaintiff the duty of being candid with it, and if in fact the plaintiff's inspector at any time improperly culled the staves tendered by the defendants, and the defendants intended to insist upon such improper culling as a breach of contract, and to take advantage of such breach, it was the duty of the defendants to have notified some officer of plaintiff company who had power to act upon such complaint, and if they failed to make such notification they cannot do so now.

"11. The court instructs the jury that if you find for the plaintiff the measure of its damages will be the difference between the actual cash market value of such staves as were still undelivered under the contract, at cars at Nashville, Arkansas, at the time of the refusal of the defendants to fulfill their contract, if proved, and the amount which plaintiff was to pay for such staves at the price agreed upon by the parties as shown by such contract, if any such difference has been shown by a preponderance of the evidence, together with six per cent. interest thereon from the date of such breach to this date." (Rep.)

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88 562
89 102

BOLAND v. STANLEY.

Opinion delivered January 4, 1909.

1. HUSBAND AND WIFE—ALIENATION OF WIFE'S AFFECTIONS—LIABILITY OF JOINT TORTFEASORS.—Where two persons were sued by a husband for enticing away his wife and alienating her affections from him, it was error to instruct the jury that both of the defendants were liable if either of them aided or assisted in enticing away plaintiff's wife. (Page 568.)
2. SAME—LIABILITY FOR ENTICEMENT OF WIFE.—Whoever, without justifiable cause, entices away a wife and alienates her from her husband commits an actionable wrong against the husband's rights. (Page 569.)
3. SAME—ALIENATION OF WIFE—GOOD FAITH.—In an action for alienating a wife's affections it is always a material consideration whether or not there were malevolent or improper motives. (Page 569.)
4. SAME—ENTICEMENT OF WIFE—BURDEN OF PROOF.—If a stranger in blood by advice or enticement induces a wife to leave her husband, or takes

her away with or without her consent, and encourages her to remain away from him, or harbors and protects her while doing so, the burden is on him to show good faith. (Page 569.)

5. SAME.—In an action by a husband against his wife's father for enticing away his wife and alienating her affections, bad or improper motives on the father's part will not be presumed, but they must be positively shown or necessarily deduced from the facts and circumstances detailed. (Page 569.)

6. SAME—VOLUNTARY ABANDONMENT BY WIFE.—Where a wife abandons her husband without enticement or inducement from a third person, no cause of action for civil damages arises against such person for alienation of her affections. (Page 570.)

7. SAME—ALIENATION OF WIFE'S AFFECTIONS—EVIDENCE.—Where a husband sues his wife's father and a stranger in blood jointly for alienating his wife's affections, statements of the wife after she left plaintiff and returned to her father's home are inadmissible to explain the causes of leaving her husband. (Page 570.)

8. APPEAL AND ERROR—EXCLUSION OF EVIDENCE—PREJUDICE.—The error of excluding a statement of a witness will not be considered on appeal if appellant did not offer to show what the statement was, in order that it might be seen whether it was competent or relevant. (Page 571.)

Appeal from Little River Circuit Court; *James S. Steel,* Judge; reversed as to one of appellants.

STATEMENT BY THE COURT.

The appellee sued appellants, J. T. Boland and W. H. Robinson, alleging: "That Era Stanley is and at all the times hereinafter mentioned was the wife of this plaintiff. That on or about the 7th day of November, 1906, while the plaintiff was living, cohabiting with and supporting her at Winthrop, and while they were living together happily as man and wife, the defendants, wrongfully contriving and intending to injure the plaintiff and to deprive him of her comfort, society and assistance, maliciously, wilfully and wickedly induced her away from the plaintiff's and her then residence in the town of Winthrop in Little River County, Arkansas, and, after so inducing her away from her and plaintiff's residence, forcibly seized her and by force carried her to the residence of the defendant, J. T. Boland, in Little River County, and have ever since said date forcibly detained plaintiff's said wife and harbored her against the consent of this plaintiff and have alienated the affection of plaintiff's said

wife from him and caused her to become dissatisfied with her married state. That by reason of said acts the plaintiff has been and still is wrongfully deprived by the defendants of the comfort, society and aid of his said wife, and has suffered great distress of both mind and body in consequence thereof and great discomfort, inconvenience and anxiety, and will continue to so suffer, all to his damage in the sum of $10,000. And the plaintiff says that by reason of said wilful, malicious and wicked acts this plaintiff is entitled to $10,000 as exemplary or punitive damages against said defendant."

The answer of appellant denied all the material allegations of the complaint, and set up that plaintiff's wife of her own free will and accord left plaintiff on the 7th day of November, 1906, and came to her father's house, J. T. Boland, where she has since resided and made her home, and that no one has persuaded her or induced plaintiff's wife to live separate and apart from him, and that no one has alienated or attempted to alienate her affections from him.

The evidence on behalf of appellee tended to show that appellee on the 4th of November, 1906, married Era Boland, the daughter of appellant, J. T. Boland. Appellee married at his father's house about 11 o'clock Sunday night. He remained with his wife at his father's house for a few days. The next day after the marriage he and his wife went to the house of one Grider, a neighbor. While there, appellant Boland came and said to his daughter: "Era, I have come to bring you a letter from your dear old father, the last one you will ever get from him. You are laughing on one side of your face today, but you will be laughing on the other side tomorrow." He gave the letter to his daughter, and said to appellee: "Young man, don't say anything to me; don't say a word. I could eat three like you before night." He remained about five minutes. After he left appellee read the letter. Its contents were as follows: "Era, you have played hell with your ducks—you are laughing on one side of your face today, but you will be laughing on the other side tomorrow. I don't want you to ever come inside of my yard again, not even in sickness or death. Don't you ever speak to your sisters or your brothers again. You have disgraced yourself, and you are no more your father's child."

The day after the marriage appellant Robinson went to a near neighbor of Boland, and asked him what he thought of Era's marriage, and said something about Miss Era disgracing herself by taking Stanley. He said Mr. Boland would try to get her back, and that he was going to do all he could to help him. Robinson often went to Boland's house. They were musicians, and made music together. Robinson was at Boland's house Tuesday night after the marriage. Wednesday morning he went back to Boland's. Robinson and Boland's wife, oldest daughter and little boy went in Boland's wagon over to Stanley's, where appellee lived. Boland was at home when they left to go to Stanley's, and he was there when they returned. When they reached Stanley's, they stopped the wagon at the gate about fifty yards from his house. Robinson went into the house, and told appellee's wife that her mother was out there and wanted to see her. Mrs. Stanley went out to the wagon and talked to her mother and sister and Mr. Robinson. Then they carried her back into the house. Robinson had her by one arm and her sister by the other. Robinson was holding her up. When she got into the house, she lay on the bed crying. Her mother and sister gathered up her things in the house. Then Robinson raised her up off the bed and took her off. They took her by the arms and led her out to the wagon. She got in the wagon. When Robinson took her up to carry her to the wagon, she did not resist in any way or act like she did not want to go. She sat on the back seat in the wagon between her mother and sister. The little brother and Robinson sat on the front seat, and drove the wagon. Just as the wagon was leaving, Stanley came up. They met him fifteen or twenty steps from the gate. As they drove away, Stanley's wife hallooed back to him, and said she was going home to get her things.

A witness who saw them pass the house in the wagon going towards Boland's stated that Mrs. Stanley looked like she had been crying, that her appearance, conduct and words indicated that she was sad and dejected. The appellee testified that his wife lived with him from Sunday night when they were married till Wednesday when they came and took her away; that she seemed to be as happy as she could be. She was that way Wednesday morning when he left the home for his work making ties.

They had talked about keeping house on Tuesday night, and the next day he was going to get a housekeeping outfit and move to themselves. He returned from his work Wednesday morning between eleven and twelve o'clock and saw, as he came up, his wife going off in the wagon with Robinson and the Boland folks. He understood from what she said to him as they drove off that she was going home after her things. When he went into the house, he found that the few things she had there were gone. Then he first discovered that she was leaving him. He went to a neighbor's, and asked him to go over there. He did not get her to come back. He didn't go over to Boland's himself, because he was warned several times not to go over there. He tried several times to get some one to go with him, but they would not go. He had not seen his wife since that time to speak to her, had seen her with her father and sisters but never alone. Appellee was twenty years old when he married. He loved his wife, and he says she seemed to love him. He sent some of his relations over to Boland's to get his wife to come back. He wanted to talk to his wife after she left, but could not get the chance.

On behalf of appellants, appellant Boland testified that he had done nothing to induce the wife of Stanley to return to his (Boland's) house, or to induce her to stay there. After his daughter ran away, he went up there and gave her a letter and talked to her, and told her never to come back home any more and told her under no circumstances would he ever forgive her for doing like she did. He never spoke to her about coming home at any time. Since she came home, she had been just like she always was, occupied the same room, and everything just like she was before. When he saw his daughter return, he was surprised. "It was like a clap of thunder from a clear sky." "She came back home on her own consent." The young man, Stanley, had never said anything to him about the girl coming back.

Appellant Boland was asked the following question, "Did she (meaning his daughter) make any statement to you, after she returned to your house, as to why she returned?" Appellee objected, and the court sustained the objection, and excluded all statements of plaintiff's wife after she returned to the home of her father. Appellants duly excepted to this ruling of the court.

The verdict and judgment were in favor of appellee against the appellants in the sum of six hundred and thirteen dollars. This appeal has been duly prosecuted.

Stevens & Stevens, for appellant.

If the fact that appellant's daughter remained at his home is to be considered as evidence against him, the daughter should be allowed to speak. The *res gestae* is admissible. 34 Am. Dec. 469; 14 S. W. 1085; 4 Elliott on Evidence, § 1648. The exclusion of the evidence was error. 38 Law. Ed., U. S. Rep. 292; 1 Thompson on Trials, § 704. Judgment for alienating a husband's affections can not be sustained on mere evidence that defendant disliked plaintiff and took occasion to show it in petty ways. 81 N. W. (Ia), 788; 80 N. W. (Minn.), 950; 8 Okla. 124; 147 Mo. 387; 20 Wash. 266. Guilt of the parents is not to be presumed from the fact that their daughter leaves her husband and lives with them at their home. 21 Ark. 77. On the contrary, worthy motives are to be presumed. 21 Ark. 77; 98 N. W. 683; 13 Hun, 204; 29 N. Y. Supp. 37; 5 Johns. 196; 106 Ga. 130; 32 S. E. 78; 48 N. H. 211; 97 Am. Dec. 605; 27 Conn. 414; 24 Tex. 426; 60 Kans. 697; 57 Pac. 942; 74 Miss. 93; 19 So. 955; 32 L. R. A. 623; 124 N. C. 19; 32 S. E. 320; 70 Am. St. Rep. 574; 34 Ohio St. 621; 32 Am. Rep. 397; 51 Am. St. Rep. 310. The gravamen of the offense is the alienation with malice. 52 Am. Rep. 385; 10 L. R. A. 468. The burden of proof was on the plaintiff. 98 N. W. 683; 13 Hun, 204; 9 Misc. (N. Y.), 196; 40 Am. St. Rep. notes, p. 849; 51 Am. St. Rep. 310; 32 Am. Rep. 397; 21 Ark. 77; 70 Am. St. Rep. 574.

J. T. Cowling and *B. J. Stewart,* for appellee.

An exception to several instructions in gross will not be considered if any one of them be good. 28 Ark. 8; 32 *Id.* 223; 38 *Id.* 528; 39 *Id.* 337; 50 *Id.* 348; 54 *Id.* 16; 59 *Id.* 312; *Id.* 370; 60 *Id.* 250. The wife's parents are liable in damages for enticing away their daughter from her husband. 15 Am. & Eng. Enc. of L. (2 Ed.), 762. Rodgers on Dom. Rel. 177. The burden is upon the defendant to explain his conduct in inducing plaintiff's wife to leave him. 1 Enc. Ev. 762. A general exception to the court's refusal to give several instructions collectively will not be considered on appeal if any of them is bad. 75 Ark. 181.

WOOD, J., (after stating the facts.) We find no error in the rulings of the court in giving and refusing prayers for instructions, except in adding the modification to appellants' prayer number nine. The instruction as modified and given is as follows: "The court instructs the jury that the acts, conduct and words of Mrs. J. T. Boland and daughter in enticing and inducing plaintiff's wife to abandon him, if you find that said persons did anything to entice plaintiff's said wife from him, would not bind the defendants unless you further find from the evidence that said Mrs. J. T. Boland and daughter acted under and by instructions of defendants, J. T. Boland and W. H. Robinson; and the burden of proving such fact is on the plaintiff, unless you further find that either of the defendants was present aiding or abetting said parties in said acts."

The last paragraph was added as a modification.

The effect of this instruction was to tell the jury that if either defendant Robinson or Boland was present aiding or abetting Mrs. J. T. Boland and daughter in enticing appellee's wife to abandon him, if they did entice her to do so, this would render Robinson and Boland both liable. The uncontroverted proof showed that defendant Boland was not present aiding and abetting Mrs. Boland and her daughter in whatever may have been done by them, if anything, in enticing or taking away appellee's wife from her home. The undisputed evidence shows that Robinson alone was present on that occasion, and Boland, unless there was a conspiracy between him and Robinson to entice or take away appellee's wife, could not be held liable for the conduct of Robinson which took place in Boland's absence. The court, by giving the instruction, virtually assumed that there was such a conspiracy. But that was a question of fact for the jury to determine. The added amendment was also well calculated to mislead the jury as to the burden of proof. For adding the amendment told the jury, in effect, that if either of the defendants was present aiding Mrs. Boland and her daughter, then the burden was on both of the defendants to show that Mrs. Boland and her daughter did not act under and by their instructions. It is suggested by learned counsel for appellee that the ninth instruction is not copied as amended, and that it is impossible to tell how it read after it was amended. We have copied the

prayer as it appears in the bill of exceptions. Then follows the recital: "The court refused to give this instruction, but added an amendment to the same which amendment reads as follows:" Then the amendment as set out above is copied. The reasonable construction of this language is that the amendment was added at the conclusion of the prayer. But whether so added or inserted anywhere in the prayer, the amendment so qualified the other language of the first paragraph as to render it misleading and prejudicial as to Boland. The prayer as asked was correct, but the amendment was error.

The loss of what is termed in law *"consortium,"* that is, the society, companionship, conjugal affections, fellowship, and assistance of the wife, is the principal basis for actions of this kind. Tiffany's Persons and Domestic Relations, p. 75 and authorities cited in note. 15 Am. & Eng. Enc. Law (2 Ed.), 862 (b), note 6. Whoever invades the hallowed precincts of a home, and, without justifiable cause, by any means whatsoever severs the sacred tie that binds husband and wife, alienating her affections from him, and depriving him of the aid, comfort and happiness of a loyal union between them, is liable in civil damages for his wrongful conduct. Rodgers, Dom. Rel., § 177; Schouler's Dom. Rel., § 41; Tiffany, Per. & Dom. Rel. 74; 15 Am. & Eng. Enc. Law, 862. In such cases whether or not there were malevolent or improper motives is always a material consideration. In case of a stranger in blood the causes must be extreme that will warrant him in interfering with the relation of husband and wife. If he by advice or enticement induces a wife to leave her husband, or takes her away with or without her consent, and encourages her to remain from him, or harbors and protects her while away from him, he does these things at his peril, and the burden is on him to show good cause and good faith for his conduct. As is said by Mr. Rodgers: "It would seem upon principle to be rare indeed if the motive by a stranger in breaking up a family could be a good one." Rodgers, Dom. Rel., § 176; 1 Jaggard on Torts, 467; Tiff. Per. & Dom. Rel. 76 Schouler, Dom. Rel. 41, and cases cited by these. But the rule is different in case of a parent. In *Hutcheson* v. *Peck,* 5 Johns. N. Y. 196, where a father harbored his daughter, Chancellor Kent says: "A father's house is always open to his children, and, whether they be mar-

ried or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. * * * I should require, therefore, more proof to sustain the action against the father than against the stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives can not be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed." See *Burnett* v. *Burkhead,* 21 Ark. 77; *Trumbull* v. *Trumbull,* 98 N. W. 683; *Payne* v. *Williams,* 4 Bax. (Tenn.), 585, and other cases cited in Tiffany's Persons & Domestic Rel., p. 77, note 116; *Brown* v. *Brown,* 124 N. C. 19; *Glass* v. *Bennett,* 89 Tenn. 478, and cases cited. Parents will not be protected under the above doctrine unless they acted from proper motives. *Holtz* v. *Dick,* 42 Ohio St. 23. In actions of this character "the term malice does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions the injury. If the conduct was unjustifiable, and actually caused the injury complained of, malice in law would be implied." The terms "malice" and "improper motives," as here used, mean the same thing. *Brown* v. *Brown, supra;* Tiffany's Persons & Dom. Rel. 76. If no enticements are held out to the wife to leave her husband or to cease to love him, and nothing is said or done by a third party to cause her to abandon him, her act being of her own accord and for reasons best known to herself, then there is no cause of action for civil damages against any one for alienation of affections. For in such case the estrangement would be voluntary, and not the fault of any third party. Rodgers, Dom. Rel. p. 134, and cases cited. Instructions presenting these principles of the law were given by the court, and the charge upon the whole, except in the particular wherein the error has been pointed out, correctly submitted the issues to the jury.

The court did not err in excluding all statements of the plaintiff's wife after she returned to the home of her father. In cases where parents are defendants alone, and the alienation not a single act of removal from her home, but a continuing one after such

removal to her parents' home, declarations of the wife of plaintiff, after taking up her residence with her parents, are generally admitted, as such evidence is regarded as explanatory of the causes for her residence with them, and is the only means of showing such relations except calling her as a witness, and that is not permissible. 3 Elliott's Evidence, § 1648, and cases cited. However, such declarations are admitted in suits against the parents as an exception to the general rule which excludes them as hearsay. 3 Elliott's Evidence, *supra.*

But here another is sued as joint tort feasor with the parent. Moreover, appellants did not offer to show what the statements of appellee's wife were. In the absence of such offer, it could not be seen that the evidence was competent or relevant, and hence no error is discovered in its exclusion. 1 Thompson on Trials, § § 703-4. See also *Meisenheimer* v. *State,* 73 Ark. 407.

For the error indicated reverse and remand for new trial, as to appellant Boland. As to appellant Robinson, the instruction was not prejudicial error, and the judgment as to him is affirmed.

FRITZ v. STATE.

Opinion delivered January 4, 1909.

1. FISH AND GAME—VALIDITY OF NONEXPORTATION ACT.—The act of February 14, 1905, providing that it shall be unlawful "to ship, export or carry beyond the lines of this State any deer, turkey, wild fowl, game fish or game of any description," etc., is a valid statute. (Page 576.)
2. SAME—VALIDITY OF REGULATION AS TO CATCHING FISH.—Acts 1907, p. 912, providing that "no person shall be allowed to place, erect or cause to be placed or erected or maintained in any of the waters of this State, or in front of the mouth of any stream, slough or bayou, any seine net, gill net, trammel net," etc., is a valid exercise of the State's power to regulate the catching of fish. (Page 578.)
3. SAME—RIGHT TO CATCH FISH IN LAKE.—Fish in a lake not wholly upon any one's premises cannot be lawfully caught except in the manner provided by the statute. (Page 578.)

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

Randolph & Randolph (of Memphis, Tenn.), and *H F. Roleson,* for appellant.

As to the first case, Fritz, having acquired title to the lands while the common-law right of fishery was the law of the State, he thereby acquired, as a part of, and appurtenant to, his grant, the right to take fish from the lands, and also the right to ship them from the State; and the act of the Legislature prohibiting the shipment of fish from the State was, as to him, unconstitutional and void.

As to the second case, the court should have declared the law to be that the owner of opposite shores of an inland unnavigable lake, who acquired title thereto while the common-law respecting the rights of fishing was in force, acquired as a part of the grant of the lands, as privileges and appurtenances thereof, the right to take fish therefrom by net, and that the act of the Legislature was unconstiutional and void as to appellant. The fish were a part of the land, or the produce of the land, owned by appellant, and belonged to him absolutely as his individual property. Treaty between United States and Republic of France, April 30, 1803, art. 3, Kirby's Digest, p. 171; Kirby's Digest, p. 174 (admission of Arkansas into Union); *Id.* p. 177; *Id.* § 623; 8 Wheaton, 1; 23 Minn. 144; 44 Mich. 274; 13 How. 518, 566, s. c. 18 How. 432-433; 5 Wall. 737; 95 U. S. 517; 18 How. 173; 179 U. S. 223; Rev. Stat. U. S. § 2395, *et seq.*; 3 How. (U. S.), 663; 7 Wall. 270; Rev. Stat. U. S. § § 2476, 2478; 1 Lester's Land Laws, 714; 134 U. S. 178; 140 U. S. 414; 190 U. S. 452; 109 Fed. 354; 69 Ark. 39; 71 Ark. 390; 76 Ark. 44; Gould on Waters, § 76. The act of Congress of September 28, 1850, vested title in the State to all the swamp and overflowed lands in the State then remaining unsold, and it remained only to ascertain the particular lands included in said grant, and, when the selections were made, approved and patents issued, the State's title to the lands was perfect. Act of Congress, March 3, 1857; 11 U. S. Stat. at Large, 251; Rev. Stat. U. S. § 2484; 20 Ark. 100; *Id.* 237; 24 Ark. 431; 29 Ark. 56; 33 Ark. 833; 46 Ark. 17; 54 Ark. 251; 11 Fed. 389; 121 U. S. 488; 138 U. S. 134; 138 U. S. 573; 149 U. S. 79; 171 U. S. 93; 31 U. S. App. 731. In the absence of any reservation of title or interest by the United States in its patent or grant either directly to Fritz or his grant-

ors, or by way of the Swamp Land Act of 1850 to the State and thence to Fritz or his grantors, the whole of the Government's title in the lands, whether in the lake or abutting thereto, passed absolutely by the patent, grant or act of Congress. Kirby's Digest, § 733; 128 U. S. 691; 44 Mich. 403; 52 Minn. 181; 190 U. S. 519; 96 U. S. 530; 109 Fed. 354; 209 U. S. 447. If the State acquired title under the Swamp Land Act, then its grant to Fritz or his grantors conveyed all the title to the land and lake that either the State or the United States ever had therein. 141 Ind. 197; 145 Ind. 221; 69 Ark. 341; 190 U. S. 518; 209 U. S. 447; 24 How. 41; 4 Mo. 342; 17 Johns. (N. Y.), 195; 134 N. Y. 355; 10 Mich. 125; 58 Ind. 248; 7 Wall. 272; 140 U. S. 406; *Id.* 371; 159 U. S. 87. The lands under the lake are therefore held and owned by Fritz as incidents of the grants of the lands outside of the lake or its meander lines. 128 U. S. 691; 17 Johns. 195. See also 20 Johns. 90; 32 N. Y. L. 369; 2 Conn. 481; Angell on Watercourses, § § 11, 61-2, 65, 545-547; 5 Mason (U. S.), 191; 5 Paige Ch. (N. Y.), 137; Gould on Waters, § 79 *et seq.*, and 182. As to what is included in the term "land," see Coke's Littleton, 19-20; 2 Blackstone's Com. ch. 2, *17, 18. And as to how rivers, lakes and ponds are considered in this country as to navigability and non-navigability, etc., see Angell on Watercourses, § § 1-5, and 535-541; Gould on Waters, § § 42, *et. seq.*, 86 *et seq.*, 110 *et seq.*; 3 Cates (Tenn.), 668; 69 S. W. 782; 53 Ark. 314; 33 W. Va. 14; 10 S. E. 60; 25 Am. St. Rep. 862; 116 N. Car. 731; 21 S. E. 941.

2. A fishery at common law was always regarded as a part of the landed estate. The State, as representative of the public, has no title to the fish in waters belonging to private individuals, and no right to regulate the taking or use of such fish. Where they are in a pond or stream of water which does not connect with any public water, the individual owner has the right to the fishing, without regulation by the public as to the manner in which he does the same. 2 Farnham on Waters and Water Rights, § § 368c, 371, 373, 375, 378, 380, 382, 396, 397a, 398-9; 26 Wend. (N. Y.), 404; 33 N. Y. 472; 35 N. Y. 454; Gould on Waters (3 Ed.), § 46; 19 Cyc. 999, and cases cited. Where the title to small lakes and ponds has been retained by the State, the right of fishery is also retained; but where waters are private

property, the fishery therein is private. In such case the only way whereby the State or public may acquire the right of fishery therein is by the exercise of the power of eminent domain upon making compensation. 3 App. Cas. 641; Ir. Rep., 8 C. L. 68; Ir. L. R., 23 Eq. 402; 68 Vt. 338; 33 L. R. A. 569; 35 Atl. 323; 43 Ill. 447; 92 Am. Dec. 146; 26 Can. S. C. 444; 47 O. St. 326; 8 L. R. A. 578; 21 Am. St. Rep. 686; Gould on Waters, § 46; 92 N. Y. 465; 134 N. Y. 355.

3. The rights of the owner of a stream extend as far as the boundaries of his land; and if he owns the soil on one shore of a non-navigable stream, his rights extend to the centre, the middle of the stream at low water mark being the limit or dividing line between owners of opposite shores, with respect to the right to fish from opposite banks. 2 Farnham on Waters and Water Rights, § 396; 3 Kent's Com. *p. 411-418, *et seq.* If the fish are confined in ponds or on private property, so that they can not escape, the title is in the owner of the pond, though it may be stocked at public expense. 2 Farnham on Waters, etc., § 397a; 67 N. H. 529; 64 N. J. L. 330. The mere fact that one who owns part of a pond does not own the whole thereof, and that there is nothing to prevent the fish from going over on the land of another, does not give strangers a right to fish over the lands of the owner of a part of the pond without his permission. 2 Farnham on Waters, etc., § 400; 162 Mass. 219.

4. Any attempt by the statutes upon which the indictments in these cases are based to curtail, limit, qualify or control appellant's right to the fish in the lake, his right to take, or the method of taking them by him, or his use or disposition of them after taking, is an infringement of his rights, privileges and immunities secured to him by the Constitution of the State and of the United States. 53 Ark. 490; 73 Ark. 236; 75 Ark. 542; Cooley's Const. Lim. (6 Ed.), 489, note 3; 113 U. S. 27; 118 U. S. 369.

5. If there is any law in this State whereby, under the agreed statement of facts, appellant may be held guilty of a violation thereof, punishable by law, such law is void as to him because it violates (a) that part of the Constitution of the United States which prohibits any State from passing any law impairing the obligation of contracts; (b) that part same Constitution which grants to Congress the exclusive right to regulate com-

merce; (c) that part same Constitution and 14th Amendment thereof securing to the citizens of every State the rights, privileges and immunities of citizens of the several States, and entitling them to the equal protection of the laws of every State, and (d) that part same Constitution and Amendment declaring that no person shall be deprived of liberty or property without due process of law. Such law is also in violation of art. 2, § 2, art. 2, § 8, art. 2, § 21, art. 2, § 22, art. 2, § 28, Const. Ark. (1874.)

William F. Kirby, Attorney General, for appellee; *Brown & Anderson* (of Memphis, Tenn.), and *A. B. Shafer,* of counsel.

The owner of land upon which is located a lake or stream which is not *entirely* upon the property of the landowner is subject to such rules and regulations as the Legislature may see fit to enact for the preservation of fish and game. Such owner has no such property in the fish found in such lake or stream as he has to the crops grown upon land. It has always been the law in this State that the title to fish and game is in the State as trustee for the public, and the State has the paramount right to make such rules and regulations in regard to fish and game as, in the opinion of the Legislature, is for the best interests of the public and for the preservation of such fish and game. 56 Ark. 267; 68 Ark. 487; 68 Ark. 555; 73 Ark. 248. It was manifestly the intention of the Legislature to provide a general system of laws for the preservation of fish and game within the State. Kirby's Digest, § § 3598-3626. "Waters of this State" has been defined to mean "all streams, lakes, ponds, sloughs, bayous or other waters, wholly or in part within this State." *Id.* § 3605.

2. The mere fact that appellant owned the land on opposite sides of the lake does not bring appellant within the *proviso* to the act, excepting "waters wholly on the premises of such person or persons using such device or devices." Under the agreed statement of facts, the waters of Horseshoe Lake are not wholly on the premises of appellant. Its waters are therefore public. 96 Tenn. 681; 157 Pa. 208; 85 Mo. 543. And appellant's rights are subordinate to that of the State as representative of the public. 73 Ark. 248, citing 161 U. S. 519; 56 Ark. 267; 68 Ark. 867; 69 Ark. 555.

3. One can not acquire a complete property right in game so as to exempt him from the provisions of a State law enacted

for the preservation of the game supply of that State for the use of its inhabitants. 161 U. S. 519; 152 U. S. 132.

BATTLE, J. In the first case Louis Fritz was indicted by the grand jury of Crittenden County and accused as follows: "The said Louis Fritz and Henry Smith on the 5th day of November, 1907, in the county of Crittenden, State aforesaid, did then and there unlawfully ship and export beyond the lines of this State certain game fish."

He pleaded not guilty, and by agreement was tried before the judge, sitting as a jury, upon the following agreed statement of facts: "It is agreed, as the facts in this case, that defendant, within one year prior to the return of the indictment in this case, took certain game fish from that part of Horseshoe Lake, bounded on the east side by frl. southwest quarter of section twenty-five, and on the west side by frl. southeast quarter of section twenty-six, in township 4 north, range 7 east, and shipped the same from the State of Arkansas to Memphis, Tennessee. That said tracts of land border upon said lake on opposite sides of the same. That Horseshoe Lake is an unnavigable inland lake, lying in Crittenden County, Arkansas, and that the grantors of the defendant owned the fee simple title to said lands prior to the passage by the Legislature of Arkansas of any laws regulating or prohibiting the taking of fish from the waters of this State, or any law prohibiting the shipping of the same from this State. That said lands were at the time they were acquired by the defendant, and are now, chiefly valuable for the fishing adjacent thereto."

He was found guilty and his punishment was fixed at a fine of one hundred dollars, and plaintiff appealed.

The indictment is based upon section one of an act entitled "An act to amend section 3620 of Kirby's Digest," approved February 14, 1905, which is as follows:

"It shall be unlawful for any person, or persons, or corporation, to ship, export or carry beyond the lines of this State any deer, turkey, wild fowl, game fish, or game of any description, and any railroad company, express company, corporation, or individual who shall ship, export or carry, or receive for shipment, or export, or carry beyond the State line of Arkansas, any game fish, deer, turkey, or game of any kind, except rabbits, shall be

deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than one hundred dollars, nor more than five hundred dollars, for each separate offense," etc.

This statute has been sustained and held valid by this court. *Organ* v. *State,* 56 Ark. 267; *State* v. *Mallory,* 73 Ark. 236, 248, 249. See *Geer* v. *Connecticut,* 161 U. S. 519.

The evidence was sufficient to sustain the conviction in the first case.

In the second case Fritz was indicted and accused as follows:

"The said Louis Fritz, on the 20th day of November, 1907, in the county of Crittenden, State aforesaid, did then and there unlawfully place and erect in the waters of this State, then and there being in the county of Crittenden and State of Arkansas, a certain net for the purpose of taking fish from said waters."

He was by agreement tried before the judge, sitting as a jury, upon an agreed statement of facts in writing as follows:

"The defendant, Louis Fritz, admits that he is guilty of the crime of unlawful fishing, as charged in the indictment, unless the following agreed facts exonerate him:

The State of Arkansas admits that the defendant is the owner in fee simple of the fractional southwest quarter of section twenty-five, township four north, range seven east, which borders on the east bank of Horseshoe Lake, and that he also owns in fee simple the fractional southeast quarter of section twenty-six, same township and range, which borders on the west bank of said lake, directly opposite the first described tract. That the fishing alleged to be unlawful in the indictment was done between the two tracts of land in said lake. Horseshoe Lake is an unnavigable inland lake wholly within said county of Crittenden, running in the shape of a horseshoe a distance of about seven miles, and different persons own different parts of the lands which border it on each side. That the defendant's grantors acquired title to the above lands prior to the passage of any law prohibiting or regulating the catching of fish in this State. That the said lands are now, and were at the time when acquired by the defendant, principally valuable for the fishing adjacent thereto in said lake."

He was found guilty, and his punishment was fixed at a fine of ten dollars; and he appealed.

The second indictment was based upon the following statute:

"No person shall be allowed to place, erect, or cause to be placed or erected or maintained in any of the waters of this State, or in front of the mouth of any stream, slough or bayou, any seine net, gill net, trammel net, set net, bag weir, bush drag, any fish trap or dam, or any other device or obstruction, or by any such means to take or catch any fish in the waters of this State. Provided the prohibition of this section shall not apply to waters wholly on the premises belonging to such person or persons using such device or devices," etc. Acts of 1907, page 912.

"Waters of this State," as defined in an act of which the above statute is an amendment in part, are "all streams, lakes, ponds, sloughs, bayous, or other waters, wholly or in part, within this State." Act of March 27, 1885, section 2.

Section 3601 of Kirby's Digest makes a violation of these statutes a misdemeanor, punishable by fine of not less than five dollars nor more than $200.

The statute upon which the indictment in the second case was based was upheld and sustained as a good and valid statute in *Lynch* v. *State,* 69 Ark. 555, and by the reasoning of the court in *State* v. *Mallory,* 73 Ark. 236. The right and power of the State to regulate the catching of fish is generally conceded. *Lawton v. Steele,* 152 U. S. 133; *Geer* v. *Connecticut,* 161 U. S. 519.

It is contended, on behalf of appellant, that the statute did not prohibit him from placing or erecting a net in Horseshoe Lake. It (lake) is "about seven miles long, and different persons own different parts of the land which border on each side. It is not wholly upon the premises of the appellant, and is a part of the "waters of the State," as defined by the statute. The fish in the same were not in the possession or control of any one, and constituted the private property of no one, and could not be lawfully caught except in the manner provided by the statute. *Peters* v. *State,* 96 Tenn. 682; *Reynolds* v. *Commonwealth,* 93 Pa. St. 458; *Benscoter* v. *Long,* 157 Pa. St. 208; *State* v. *Blount,* 85 Mo. 543.

The evidence was sufficient to sustain the conviction.

The judgments in the two cases are affirmed.

JONES v. STATE.

Opinion delivered January 4, 1909.

1. TRIAL—OPENING STATEMENT.—In a prosecution for murder it was reversible error for the attorney for the State in his opening statement to say: "This is not the first time the defendant has taken human life;" such statement being foreign to the issues and calculated to prejudice the jury against defendant. (Page 580.)
2. EVIDENCE—RES GESTAE.—A statement by the deceased, made a few minutes after receiving the blow from which he died, as to the circumstances of his killing, was not admissible as part of *res gestae.* (Page 581.)
3. SAME—DYING DECLARATIONS—Whether declarations were made under a sense of impending death is a preliminary question of fact for the trial judge, and his finding that they were so made will not be overturned where there is evidence to support it. (Page 582.)
4. HOMICIDE—MODIFICATION OF JUDGMENT.—Where, on appeal from a conviction of murder in the second degree, error is established, but the defendant's testimony shows that he is guilty of voluntary manslaughter, the judgment will be affirmed for voluntary manslaughter unless the Attorney General elects to have the cause remanded for a new trial. (Page 583.)

Appeal from Logan Circuit Court; *Jeptha H. Evans,* Judge; affirmed with modification.

Sam R. Chew, for appellant.

Wm. F. Kirby, Attorney General, and *Daniel Taylor,* Assistant, for appellee; *C. A. Cunningham* and *Oscar L. Miles,* of counsel.

HART, J. W. F. Jones was convicted of the crime of murder in the second degree, and his punishment was assessed by the jury at a term of twenty-one years in the State penitentiary. From the judgment of conviction a writ of error has been duly prosecuted to this court. The circumstances of the killing, as detailed by the witnesses for the State, are substantially as follows:

The defendant, W. F. Jones, was a sub-renter of the deceased, Horace Swearingen. Coot McAnnally, a brother-in-law of Horace Swearingen, went to the defendant Jones's house, about sun-up the morning of the killing to collect some money. Swearingen owed Jones about the same amount, and McAnnally proposed that he would take Jones's debt on Swearingen in settle-

ment of the amount owed him by Jones. Jones told him that "the dog-goned whelp didn't have the money." McAnnally then said that he was willing to take him. Jones replied that "the plague-goned whelp has been lying to me about that." It was then agreed that Swearingen, who owed Jones twelve dollars, should pay McAnnally the twelve dollars, and that would be a full settlement of Jones's debt to McAnnally. McAnnally then went back and told Swearingen that Jones said he had lied. On that morning Swearingen was plowing in his field about forty-nine steps away from Jones's house. Some time after McAnnally left, Jones went down to the field and talked with Swearingen awhile. Swearingen rested on his plow handles with his back to them while talking to Jones. After talking awhile, he said to Jones: "Get out of the field. I don't want to hear anything more about it," and turned to his plow. After the plow had moved about two feet, Jones walked behind Swearingen and struck him with a knife. Swearingen was not looking when the blow was struck. He died shortly afterwards. This is the statement of the circumstances of the killing as detailed by Victor Morgan, a boy fifteen years of age, who was at Jones's house, and saw the occurrence. Other evidence was adduced by the State tending to corroborate his testimony that defendant struck deceased from behind. Jones struck deceased with a long single-bladed barlow knife. The wound was in the right side just below the ribs. The incision began about one inch behind the little short rib, and extended about two inches in front of it. The wound was two and a half or three inches deep, and was fatal.

Jones testified substantially as follows: "I went into the field to have a friendly talk with Swearingen. After we had talked about various things for twenty or thirty minutes my wife called me. I got up from the ground to start home. Swearingen asked me if I said for him to pay McAnnally. I said yes, and told him of my conversation with McAnnally. When I told him I had said he lied, he called me a vile epithet, and told me I could not call him a liar. He then struck me on the side of the head and drew back to strike me again. I was standing there, and before I knew what I was doing I struck him with my knife. I weigh 178 and Swearingen about 147 pounds."

One of the attorneys for the State, over the objections of the

defendant, was permitted, in his opening statement to the jury, to use the following language: "And this is not the first time the defendant has taken human life, the testimony will show as I understand it." This was reversible error. In the case of *McFalls* v. *State,* 66 Ark. 16, the object of an opening statement was declared to be to enable the court and jury to more readily understand the issues to be tried and the evidence subsequently adduced. The scope of the opening statement should be limited to getting before the jury a detail of the testimony expected to be offered, and counsel has no right to state to the jury facts which he may not prove. The fact that the defendant had at a prior time taken human life was foreign to the issue involved in the present case and was not admissible for any purpose. It had a tendency to excite the prejudice of the jury against the defendant. This was the rule announced by the court in the case of *Marshall* v. *State,* 71 Ark. 415. The syllabus states the facts and the application of the rule as follows: "The prosecuting attorney in his opening statement stated to the jury, over defendant's objection, that he would prove that defendants had the reputation in various cities of being professional pickpockets and thieves, and that their pictures were in the rogue's gallery at St. Louis, and the court permitted the statement, saying that if the evidence became inadmissible he would exclude it. Subsequently evidence in support of such statement was held inadmissible, and the jury were directed not to consider the statement. *Held,* that the statement was prejudicial, and that the error was not eliminated by the court's charge."

Mrs. Lula Swearingen, the wife of Horace Swearingen, testified substantially as follows:

The day Horace was killed, I was at home sweeping. Our house is about 170 yards from where he was plowing. The first information I had of my husband's being hurt was when I heard him halloo. I recognized his voice, and started to the door. Before I got there, I heard him again. I ran down to the field, and saw Horace coming towards the house, and Mr. Jones going toward his house. I got to the gate, which was about fifty yards from where he had been plowing, and asked him what was the matter. He said "Oh, Bill has cut me." I asked what about, and he said: "He called me a liar, and he cut me." I opened

the gate, and then ran back toward the house. After I had gone ten or fifteen steps, I ran back to him, and by the time I got to him, he had come through the gate. I said, "Oh, why didn't you run before you let him cut you?" He said "Oh, he slipped up behind me."

The testimony shows that Swearingen, the deceased, was bleeding a good deal, and in a few minutes complained of being sick, and then became cold. He laid down and asked for his father and brothers, saying that he wanted to tell them good bye, and died in a few minutes thereafter.

It is insisted by the State that deceased's statement as to the circumstances of the cutting was admissible on the ground that it was part of the *res gestae*. We think it was a narration of a past transaction, and not a part of the *res gestae*.

Counsel for the defendant also insist that the statement of deceased was not admissible as a dying declaration because it was not made under a sense of impending death.

Whether declarations were made under a sense of impending death is a preliminary question of fact for the trial judge, and his finding to that effect will not be overturned where there is evidence to support it. *Newberry* v. *State,* 68 Ark. 355; *Dunn* v. *State,* 2 Ark. 229; *Evans* v. *State,* 58 Ark. 47. In the latter case the court said: "'It is within the province of the court to hear the circumstances under which the declarations were made and to determine whether they are admissible. But after they are admitted it is within the province of the jury to weigh them and the circumstances under which they were made, and give to them only such credit, upon the whole evidence, as they may think they deserve." Swearingen suffered acute pain from the time he received the wound until his death, which occurred shortly afterwards. In a very few minutes after making the statement he called for his father and brothers to bid them good bye. His wound was bleeding profusely, and he died within ten minutes after calling for them. If, on a trial anew, the judge shall make a finding to the effect that the statement is admissible as a dying declaration, we think the circumstances under which the declarations in question were made are sufficient to sustain the finding of the judge on that point.

The defendant's own testimony shows that he is guilty of

manslaughter, and his counsel admitted that fact in his oral argument before the court.

The judgment will be affirmed for manslaughter, and the punishment fixed at seven years, unless the Attorney General shall elect within fifteen days to take a new trial, in which event the judgment will be reversed and the cause remanded for new trial. See *Warren* v. *State, ante* p. 322, and cases therein cited.

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

Opinion delivered January 4, 1909.

RAILROADS—LIABILITY FOR ACTS OF PEACE OFFICER.—A railway company is not liable for the unauthorized acts of a town marshal in assaulting a trespasser upon its train and ejecting him therefrom, although it had furnished him a pass over its road to encourage him to perform his official duties.

Appeal from Jackson Circuit Court; *M. M. Stuckey,* Special Judge; reversed.

T. M. Mehaffy and *E. B. Kinsworthy,* for appellant.

While it is within the discretion of the court as to whether a continuance is granted, it is error to abuse that discretion. 60 Ark. 564; 71 *Id.* 180. When plaintiff is permitted to amend his complaint showing an entirely different date, defendant, on proper motion, should be granted a continuance on ground of surprise. 71 Ark. 197; 67 *Id.* 143. A party stealing a ride on a train commits a misdemeanor. Acts 1905, c. 191. A peace officer may make an arrest without a warrant where a public offense has been committed in his presence. Kirby's Digest, § 2119. If the act be committed in the discharge of or in an effort to discharge the official duties of such officer, though wrongful and in excess of his authority, the railroad company is not liable, though it pays such officer's salary. 58 Ark. 383. Such officer acts in his official capacity, and not as agent of the railroad company. 34 Am. & Eng. R. Cases, 307; 20 Atl. 189; 42 Ark. 542; 115 Mo.

596; 58 Ill. App. 278. The argument of plaintiff's counsel was error. 80 Ark. 23; *Id.* 158.

Oldfield & Cole, and *McCaleb & Reeder,* for appellee.

Substituting the word "July" for "August" does not come within section 6150, Kirby's Digest, providing for continuances. Where the new evidence would tend to enhance the damages, it is not error to overrule defendant's motion for a continuance to enable him to secure such evidence. 67 Ark. 143. The evidence tending to prove the officer to be the railroad company's agent was sufficient. 76 Ark. 220. The proof is sufficient when the person to be charged as principal assents to the acts of the agent. 53 Ark. 210. In the Buchanan case the officer was not employed by the railroad company, nor under its control. The railroad company is liable for the acts of an officer in such cases. 6 Ind. App. 202. In the Hackett case, 58 Ark. 381, the assault committed was not in the line of the officer's duties as an officer. The manager of a theater is responsible for the acts of a special policeman who was appointed for the theater at the request of the manager. 41 Am. St. R. 440; 24 L. R. A. 483; 22 S. W. 488. Where a stranger, at the request or by permission of the railroad company's servant, performs such act in such manner that an injury ensues, the company is liable. 40 Mo. App. 654; 34 *Id.* 512; 17 La. Ann. 166. The master is charged with negligence of an employee of a servant, though he has no immediate control of such employee. 5 So. 537. The appointment of the officer as agent of the railroad company was ratified. 53 Ark. 210; 76 *Id.* 220. Argument of counsel is not reversible error unless an undue advantage is thereby secured which works a prejudice to the losing party. 74 Ark. 256; *Id.* 289; 75 *Id.* 67. The legitimacy of questions for argument is left to the sound legal discretions of the presiding judge. 20 Ark. 219; 34 *Id.* 649; 38 *Id.* 304. There is no error in allowing counsel to comment on the failure of defendant to produce a witness. 74 Wis. 470; 102 Ga. 319; 40 L. R. A. 84.

MCCULLOCH, J. Eugene Morrow, a young man twenty years of age, sues the railway company for damages on account of having been forcibly ejected from a passenger train and shot with a pistol by one who is alleged to have been a special watchman employed by the company. A judgment for damages in the

sum of one thousand dollars was recovered against the company, and it appealed to this court.

The event which gave rise to this litigation occurred at the station of Hoxie, Arkansas, where appellant's railroad crosses the railroad of another company, and where extensive yards are maintained by appellant. Appellee and his younger brother and two other boys were stealing a ride on a passenger train, and the fireman, on payment of twenty-five cents each to him, permitted them to ride on the tender of the engine. Appellee and his brother had ridden in the passenger coach of another train, paying the fare, from St. Louis to Poplar Bluff, but were attempting to steal a ride on this train from Poplar Bluff to Newport. When the train reached Hoxie, W. F. Gilkerson and Tom McMillan ejected the boys from the train, and in doing so McMillan shot and wounded appellee with a pistol. The evidence tends to show that the shooting was done wilfully and without provocation, and that Gilkerson encouraged McMillan to do it. Gilkerson was town marshal of Hoxie, and McMillan was his deputy as well as constable of the township in which Hoxie is situated. It is contended on behalf of appellee that Gilkerson and McMillan were employees of appellant as watchmen, and that they were acting in that capacity when they ejected the boys from the train and shot appellee.

At the time of the injury complained of Gilkerson was the holder of a pass from appellant allowing him to ride on trains, and McMillan used the pass once, signing Gilkerson's name to auditor's slip or receipt. The pass shows on its face that it was issued to Gilkerson as an employee of the company as special watchman.

The only testimony, except the pass itself, bearing on the relationship between Gilkerson and McMillan and the railway company was that of Gilkerson, who said that J. J. McHugh, a special agent of the company, arranged with him to give special attention to the company's property and agreed to send him the pass. His testimony on that point is as follows:

"McHugh came to me, and says, 'Gilkerson, I want you to do some little special work for me.' I says 'Mack, I have got more than two men can do;' and he says, 'My business is so I can't be here, and they are just tearing this yard up, breaking in the cars

and getting produce of different kinds, bums burning up the fence.' And I says to him, I says, 'That is in my jurisdiction.' I says, 'It is in the corporation.' I says, 'I have to go through there anyway.' And he says, 'That is what I know. Now, I can make it worth your while to give this your special attention;' says, 'It will save me a lot of trouble.' I says, 'What can you pay?' He says, 'I can't pay you anything in way of price, but can get you a pass, which will be of advantage to you if any of the boys get away; you could go after them. Later on we expect to hire a man, but at the present time can't pay any money.' I says, 'I will accept it; I have to be here anyway.' And he says, 'That closes the bargain. Look out; I will have you a pass here in a few days.' That the pass came, and he worked ahead, gathering the bums up, and when McHugh would come down he would report to Mr. McHugh and tell him how many he had gotten; just as if he was working for him by the month. That McHugh dropped out, and Mr. Stanley was his successor, and that he told Mr. Stanley that the bums were getting so numerous and thick he would not go down in the yards; that he was afraid to go down there, and that he told Stanley and McHugh he would have to have some one to go down there with him. Mr. McHugh said, 'Here is your deputy; what is the matter with him?' and that he told him McMillan did not feel disposed to go down there for nothing; that McHugh said he could do McMillan just like he was doing him (witness.) That that buoyed McMillan up, and he went to helping him. That he went to McHugh for a pass for McMillan, and was told that he could not get but one, but that he could ride on Gilkerson's pass."

Appellant requested the court to give the following instruction which was refused: "The issuing of the pass in question with the understanding that it was only to encourage Gilkerson as city or town marshal to perform his official duties as such officer with reference to any property of the defendant railway company, or even if it was to be special compensation for special attention to those things which would come in the line of his duty as town marshal, would not constitute Gilkerson an agent of the defendant railway company."

It is doubtful whether the evidence is sufficient to establish the fact that Gilkerson or McMillan were employees of the rail-

way company at all, or that they were acting as agents of the company when they ejected appellee from the train and shot him. As the case is to be reversed, and the evidence may be different at the next trial, we express no opinion as to its legal sufficiency.

It is plain, however, that the refused instruction quoted above correctly stated the law applicable to the case, and it should have been given. If Gilkerson and McMillan were only acting in the performance of their duties as public officials, the railway company was not responsible for their acts, even though they exceeded their authority; and if the company gave them a pass merely to encourage them in the performance of their duties as public officers, that did not constitute them the agents of the company, so as to make it responsible for their acts. *Railway Company* v. *Hackett,* 58 Ark. 381; *Chicago, R. I. & Pac. Ry. Co.* v. *Buchanan,* 87 Ark. 524.

The evidence warranted the jury in finding that these men were not employed by the railway company, but that the pass was issued to them merely to encourage them to discharge their official duties with reference to the company's property. The instruction does not, as contended by counsel for appellees, assume the existence of these facts, but leaves it to the jury to say whether or not they existed.

No other instruction given by the court covered this phase of the law applicable to the case, and the error in refusing to give it was therefore prejudicial.

Reversed and remanded.

JORDAN v. MUSE.

Opinion delivered January 4, 1909.

1. LIMITATION OF ACTIONS—FOREIGN JUDGMENT.—Kirby's Digest, § 5073, providing that "actions on all judgments and decrees shall be commenced within ten years after the cause of action shall accrue, and not afterwards." applies to foreign as well as domestic judgments (Page 588.)
2. PARTIES—WAIVER OF DEFECT.—A defect of parties defendant in a complaint was waived by defendant failing to plead it specifically in the trial court, either by demurrer or answer. (Page 589.)

3. FOREIGN JUDGMENT—CONCLUSIVENESS.—A judgment of a court of another State is conclusive as to the merits of the original cause of action. (Page 589.)

4. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—A law court's finding of facts, based on conflicting evidence, will not be disturbed on appeal. (Page 590.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

E. W. Rector, for appellant.

The limitation act as to foreign judgments and decrees is five years. 23 Cyc. 1564; Wood on Limitations, § 30 n. 3; 10 Ark. 597; 5 *Id.* 510. The plaintiff can not recover of the defendant alone. The plaintiff in an action on a judgment must recover against all of the defendants or none. Freeman on Judgments, § 439.

A. J. Murphy, for appellee.

The judgment of the Tennessee court may be enforced in this State. 11 Ark. 157; 12 *Id.* 756; 13 *Id.* 33; *Id.* 431; 14 *Id.* 360; 22 *Id.* 453; *Id.* 389; 35 *Id.* 331; 48 *Id.* 50; 52 *Id.* 160. The action was brought in time, it having been brought within ten years. Kirby's Digest, § 5073; 47 Ark. 420; 54 *Id.* 311. If the statute applies to judgments generally, it includes both foreign and domestic judgments. 23 Cyc. 1509. The action was brought in time here, even though it was barred by the law of Tennessee. 13 Ark. 262; 7 *Id.* 475; 6 *Id.* 484; *Id.* 513; 15 *Id.* 252; 21 *Id.* 95; 24 *Id.* 371; 10 *Id.* 147; *Id.* 512; Black on Judgments, § 892.

McCULLOCH, J. This is an action instituted in the Garland Circuit Court by appellee against appellant upon a decree of a chancery court in the State of Tennessee rendered in favor of the former and against the latter and certain other parties for the recovery of the sum of two thousand, three hundred and twenty-one and 84-100 dollars. Appellant recovered judgment below for the full amount of the Tennessee decree.

The decree of the Tennessee court was rendered in the year 1899, and the present action was commenced in 1907, more than five, but less than ten years later.

A section of statute of limitations provides that "actions on all judgments and decrees shall be commenced within ten years

after the cause of action shall accrue, and not afterwards." Kirby's Digest, § 5073. Does this apply to foreign as well as domestic judgments?

Prior to 1844 there was no statute of limitations applicable in express terms to actions on judgments and decrees, and this court decided that the general statute making five years the period of limitation as to all actions not otherwise provided for was applicable to actions on foreign judgments. In that year the Legislature enacted the statute quoted above as to "actions on all judgments and decrees."

This court in *Hallum* v. *Dickinson,* 47 Ark. 120, and *Hallum* v. *Dickinson,* 54 Ark. 311, held that the ten-year statute of limitation was applicable to actions on foreign judgments. It is true, as contended by counsel here, that the point was not argued as to which statute was applicable, and the court did not discuss the distinction, but the judgment sued on was more than five years old when the action thereon was commenced here, the statute of limitations was pleaded as a defense, and the court held that the action was not barred. We think that is the correct construction of the statute. It is general in its terms, and by its express terms relates to "actions on *all* judgments and decrees." 23 Cyc. 1509.

We can not presume that the Legislature used these comprehensive terms merely for the purpose of including all kinds of domestic judgments. *Brearley* v. *Norris,* 23 Ark. 169; *Hicks* v. *Brown,* 38 Ark. 469.

It is further contended that the judgment was a joint one against appellant and one Nelson, and that he could not be sued on it without joining Nelson. If this be conceded, the defect of parties was waived by failure to specifically plead it below—by demurrer or answer.

Another objection raised is that appellant's alleged liability to appellee is based upon the latter's violation of his public duty as commissioner of Henderson County, Tennessee, for the purpose of building a court house. The original cause of action was merged in the decree of the Tennessee court, and we are commanded by the Constitution of the United States to give full faith and credit to judicial proceedings of every other State. The decree of the Tennessee court is therefore conclusive as to the merit of the original cause of action. *Peel* v. *January,* 35 Ark.

331; *Mills* v. *Duryee,* 7 Cranch, 480; *McElmoyle* v. *Cohen,* 13 Pet. 312; *Christmas* v. *Russell,* 5 Wall. 290.

Appellant's motion to quash the service of summons on the alleged ground that he was mentally deranged at the time of the service was heard by the court on conflicting evidence and overruled. The finding of the court is conclusive, as there was sufficient evidence to sustain it.

Judgment affirmed.

BROWN v. NORVELL.

Opinion delivered January 11, 1909.

APPEAL—FINAL DECREE.—Where the defendants in an ejectment suit set up a claim for reimbursement for improvements, and the court decided in favor of plaintiff as to the title, but, without awarding possession of the land, made reference to a master to ascertain the rents and profits chargeable against the defendants and the value of improvements made and taxes paid by them, the judgment is interlocutory and not appealable until the questions submitted to the master are disposed of.

Appeal from Crittenden Chancery Court; *W. J. Lamb,* Special Chancellor; appeal dismissed.

R. G. Brown, for appellants.

Randolph & Randolph and *Berry & Shafer,* for appellees.

McCULLOCH, J. This case was formerly here on appeal from the chancery court, and was reversed with directions to transfer it to the circuit court. In accordance with the mandate, the case was transferred to the circuit court, where it proceeded as an action in ejectment. The defendants asserted title to the lands in controversy and also set up a claim, in the event the court should decide against them on the issue as to title, for compensation for improvements made on the lands.

On the hearing of the case, the court found in favor of the plaintiff as to the title to the land, rendered a judgment declaring plaintiff's right to recover the land, and made a reference to a special master to ascertain from proof and state an account of the amount of rents and profits received by the defendants and

the value of the improvements made by them and also the amount of taxes paid. The defendants took an appeal from that judgment without waiting for the report of the master. Was the judgment final and appealable?

The statutes of this State provide that any person who, under color of title, believing himself to be the owner, peaceably improves lands which upon judicial investigation shall be decided to belong to another shall be repaid the value of such improvements, together with all taxes paid by him, before the court rendering judgment in the proceedings shall cause possession to be delivered to the successful party; 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 occupant 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." Kirby's Digest, § § 2754, 2755.

According to the terms of this statute, there should be no final judgment rendered for recovery of possession of the land until the value of improvements be ascertained, if the court finds that the defendant has brought himself within the terms of the betterment statute and is entitled to re-imbursement for improvements made on the land. If the trial court renders judgment for recovery of immediate possession without deciding whether or not the defendant is entitled to re-imbursement for improvements and, if found to be so entitled, without ascertaining the value of the improvements, it is a final and appealable judgment, though an erroneous one, for it decides finally the rights of the parties concerning the possession of the land. On the other hand, if the court merely decides the question as to ownership of the land

without awarding immediate possession, and retains control of the proceedings for the purpose of adjudicating the rights of the parties with reference to claim of betterments, then the judgment is interlocutory and not final, for the rights of the parties as to possession of the land are not finally determined until the question of betterments is disposed of.

The principles announced by this court in *Hargus* v. *Hayes,* 83 Ark. 186, and *Davie* v. *Davie,* 52 Ark. 224, are decisive of the present question, though those were cases in equity and not ejectment cases.

The phraseology of the judgment below is a little ambiguous, and does not clearly show whether the court meant to withhold possession until the amount of taxes paid and value of improvements should be ascertained so as to enable the court to render a final judgment in accordance with the terms of the statute if the taxes and value of improvement should be found to exceed the mesne profits, or whether the court meant to adjudge to plaintiff the right of immediate possession and only allow the defendants a credit for taxes and improvements against the assessment of mesne profits. In this state of doubt, however, we should indulge the presumption that the court meant to follow the statute and to await the ascertainment of value of betterments before rendering final judgment, and not to prematurely render final judgment or one that is erroneous because not in accord with the statute.

It follows that the appeal is premature, and must be dismissed. It is so ordered.

SWABODA v. THROGMORTON-BRUCE COMPANY.

Opinion delivered January 16, 1909.

STATUTE OF FRAUDS—UNDERTAKING TO PAY ANOTHER'S DEBT.—A verbal undertaking by A to pay B's debt, though made before the debt was created, was a collateral undertaking, and within the statute of frauds.

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

Hunter & Castleberry, for appellant.

The promise was nothing more than a collateral undertaking. 12 Ark. 174; 70 *Id.* 79; 3 Bl. Com. (Lewis Ed.), 1151, note 35; 104 N. W. 1046; 139 N. C. 533.

W. W. Bandy, for appellee.

McCULLOCH, J. Appellee sued appellant for goods delivered and charged to one Thurman, appellant's tenant. Mr. Throgmorton testified on behalf of appellee that, after he had refused to let Thurman have goods without security, appellant came to the store and told him (witness) "to let Thurman have what goods he wanted, and he would see him paid," and that "upon Swaboda's agreement to become surety for Thurman he (witness) advanced to the said Thurman merchandise from time to time" and charged same on the books to Thurman. Another witness testified that he heard appellant tell Throgmorton, in speaking about the Thurman account, that he would "see him paid." Appellant pleaded the statute of frauds, and denied in his testimony that he ever agreed to pay or secure the Thurman account.

The evidence was insufficient to sustain a verdict in appellee's favor, and a peremptory instruction should have been given as requested by appellant. The facts bring the case squarely within the doctrine announced by this court in *Kurtz* v. *Adams,* 12 Ark. 174, as follows: "Where there is no previously existing debt, or other liability, but the promise of one is the inducement to and ground of the credit given to another, by which a debt or liability is executed, such a promise is a collateral undertaking; the general rule being that wherever the party undertaken for is originally liable upon the same contract the promise to answer for that liability is a collateral promise, and must be in writing. As, if B gives credit to C for goods sold and delivered to him on the promise of A to see him paid or to pay him if C should not, in that case it is the immediate debt of C, for which an action would lie against him, and the promise of A is a collateral undertaking to pay that debt, he being [liable] only as security."

In the case of *Emerson* v. *Slater,* 23 How. 28, the Supreme Court of the United States said: "Cases in which the guaranty or promise is collateral to the principal contract, but is made at

the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds."

Appellant's agreement, if made as claimed by appellee, was a collateral one to answer for the default of Thurman, and was not based upon any separate consideration or benefit passing to appellant.

As the evidence was fully developed in the trial, no useful purpose will be served by remanding the case for a new trial.

Reversed and dismissed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. PHOENIX COTTON OIL COMPANY.

Opinion delivered January 11, 1909.

1. CARRIERS—DELAY IN SHIPMENT OF FREIGHT—DEFENSE.—A carrier, sued for damages on account of delay in shipping freight, cannot defend on ground that it had cars enough to transport all freight tendered for shipment, but that a large per cent. of its cars were off its line engaged in taking to their destination shipments offered along the line for points in other States. (Page 596.)
2. SAME—RESTRICTIONS OF LIABILITY—CONSIDERATION.—Stipulations in a bill of lading restricting a carrier's liability are not binding where there was no consideration for them, no choice of rates or contracts being given to the shipper. (Page 597.)
3. INSTRUCTION—RELEVANCY TO ISSUES.—An instruction upon an issue not sustained by the evidence was properly refused. (Page 597.)
4. CARRIERS—CLAIM FOR DAMAGES—ACCRUAL.—A claim for damages to freight in transit accrues upon the delivery of the goods in a damaged condition. (Page 597.)
5. SAME—MEASURE OF DAMAGES FOR INJURY TO FREIGHT.—The measure of damages for freight injured in transit is the difference in value between the goods as they would have arrived but for the carrier's negligence and their actual condition when delivered. (Page 597.)

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

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

1. A carrier is not liable in damages for failure to ship promptly goods tendered to it for shipment, where there is an unavoidable shortage of cars resulting from an unforeseen and unexpected accumulation of business along its line. 70 Ark. 357; *Id.* 59; 61 Ark. 560; 43 L. R. A. 225 and notes.

2. In this case the cotton was damaged when received.

3. Under the stipulation in the contracts providing against liability if the cotton was injured from moisture, decay or dirt, appellee is not entitled to recover. 39 Ark. 523; 40 Ark. 375; 44 Ark. 208; 50 Ark. 397; 67 Ark. 407.

4. Because of failure to give written notice within ninety days of its claim, stating the nature and extent of the damages, appellee ought not to recover.

Johnson & Burr, for appellee.

1. This action is not based upon a failure to furnish cars, but upon delay in shipment. Cases cited by appellant do not apply. When goods are offered for shipment, and at the time conditions exist that will prevent the carrier's delivering them within a reasonable time, the latter may refuse to accept them for shipment; but if it accepts them without informing the shipper of the conditions and that prompt delivery can not be made, such acceptance is tantamount to an agreement to deliver within a reasonable time, except for subsequent excusing cause. 89 S. W. (Mo.), 908-10; 79 Mo. 296.

2. There is no evidence whatever that the cotton was damaged when received by the railway company.

3. Contracts limiting the liabilities imposed on carriers by law are void unless based upon a consideration. 73 Ark. 112; 112 S. W. (Ark.), 742. No reduced rate nor other consideration is shown, nor any opportunity offered to appellee to contract for unrestricted transportation. 81 Ark. 469; 57 Ark. 112.

HILL, C. J. The Phoenix Cotton Oil Company of Memphis, Tenn., purchased cotton at Arkansas points and shipped it to Memphis over the line of the St. Louis Southwestern Railway Company. On November 27, 1906, one bale was shipped from Marmaduke; on December 14, 1906, five bales were shipped from the same place; on December 17, 1906, one bale was shipped from Paragould; on December 18, 1906, two bales were

shipped from Rector; and on December 29, 1906, seven bales were shipped from Marmaduke. These sixteen bales were delivered to the Oil Company in Memphis as follows: One bale on January 2, 1907; three on January 8, 1907; one on January 10, 1907; four on January 14, 1907, and seven on January 17, 1907.

The Oil Company sued for $347.34 damages to the cotton, incurred on account of the delay in the shipments, and recovered the amount sued for; and the railroad company has appealed.

It is admitted that the proof shows the cotton was damaged to the extent sued for when it was delivered in Memphis, but appellant seeks to avoid liability upon four grounds, which will be discussed in the order presented:

I. It is contended that the railroad company was unable to ship promptly on account of shortage of cars, resulting from an unexpected and unforeseen accumulation of business on its line, and that it did ship as promptly as possible.

The evidence of the railroad trainmaster is that in November and December, 1906, the company, although equipped with more freight cars per mile than any other company in the State, was unable to move its freight promptly on account of the freight being chiefly sent beyond its line, and because it could not get its cars back. He says that if the company had seventy-five per cent. of its own equipment in its possession it could easily have moved all business offered, but that eighty per cent. or more of its equipment was off the line, engaged in taking to their destination shipments offered along the line for other points in other States. That for this reason the company was unable to promptly move the cotton for whose damage this suit is prosecuted.

This question was considered in *St. Louis S. W. Ry. Co.* v. *State*, 85 Ark. 311, and the court there held that the failure of the company to control its own cars did not excuse it to the shipper. There is nothing shown here to take this case without the principle controlling that one. Other questions on this subject have been discussed, but as appellant's own evidence brings it within this case it is not necessary to pursue them.

II. It is contended that the cotton was damaged when received by the railroad company. The testimony of the agent of the oil company who bought all of this cotton is that he did not

purchase a damaged bale of cotton; the testimony as to the damaged condition of the cotton on its delivery to the oil company is undisputed. The jury was the final judge in this matter.

III and IV. The third and fourth grounds arise on stipulations in the contract of shipment, and there appears to have been no consideration for the contract; no choice of rates or contracts was given, and the agents only authorized to ship on the terms of this contract; but if the contract is given force, the result is the same.

The court refused an instruction based on a clause providing that the railroad company should not be liable for damages or injury caused by water, moisture or decay while in transit. There was no evidence to justify the submission of such an instruction.

The other clause relied upon required notice in writing, distinctly setting forth the claim, to be given within ninety days from the date of the accrual of such claim. The action for damage to the goods in transit accrued when the goods were delivered in the damaged condition. The measure of liability is the difference in value between the goods as they would have arrived but for the negligence of the carrier and their actual condition when delivered. The claim was made within ninety days after the first bale was delivered; and appellant's contention that the claim accrued prior to delivery in Memphis is untenable.

The judgment is affirmed.

GREGG v. STUTTGART.

Opinion delivered January 11, 1909.

MUNICIPAL CORPORATIONS—SIDEWALKS—VALIDITY OF ORDINANCE.—Under Kirby's Digest, § 5542, providing that cities of the first and second class may, by ordinance, resolution or order, compel the owners of property abutting on street or public squares to build, rebuild, maintain and repair sidewalks, and may designate the kind of sidewalk, the kind of material to be used, etc., an ordinance requiring property owners to build sidewalks was not void because it failed to designate the material of which they should be made, if that defect was supplied by a subsequent resolution designating that they should be made of cement.

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

STATEMENT BY THE COURT.

The city of Stuttgart brought suit in the circuit court of Arkansas County against R. B. Gregg, the material parts of the complaint being as follows: That Stuttgart is a city of the second class; that on the 7th of December, 1903, its city council duly passed an ordinance to provide for the construction of sidewalks within said city. The ordinance divided the city into two sidewalk districts, namely, Sidewalk District No. 1 and Sidewalk District No. 2, and designated the territory to comprise each.

Sections 4 and 5 read as follows: "Section 4: That hereafter all sidewalks of Sidewalk District No. 2 shall be built of brick, cement, concrete or plank, at the option of the city council or the street and alley committee. All walks in this district shall not be less than four feet wide and such distance from the ground as the city council or the street and alley committee shall prescribe.

"Section 5. It shall be the duty of all property owners in Sidewalk District No. 2, when served with notice to do so, to construct sidewalks along their respective property within thirty days from the date of said notice, which notice shall be signed by the recorder and served by the marshal in the same manner that notices and summonses are served."

The ordinance further provides that if a property owner in District No. 2 fails to construct the sidewalk required, after being notified as provided in section 5, then the city council may contract with a suitable person to construct the same, first giving ten days' notice, etc. It further provides that the cost of construction thus incurred should constitute a charge against the owner of the property and a lien thereon.

The complaint alleged that the defendant Gregg was the owner of lots 1, 5 and 6 of block 1, Chamberlain's Addition, which lots abut on Maple Street, and lie in Sidewalk District No. 2. That on the 23d day of August, 1904, in pursuance of orders of the council, Gregg was served with notice to build a sidewalk of concrete four feet wide, on or before thirty days from date. A notice of similar import was served upon him April 15, 1905.

On October 3, 1904, at a regular session of the council, the following resolution was unanimously passed, and duly entered on the record book of the council's proceedings:

"An Order Directing R. B. Gregg to Construct Certain Sidewalk in the City of Stuttgart.

"Section 1. It is expressly ordered and directed by the city council of the city of Stuttgart that R. B. Gregg, the owner of the property hereinafter described, shall construct, or cause to be constructed and completed, a cement sidewalk along the east end of lots number one, five and six in block one, Chamberlain's Addition to the town (now city) of Stuttgart, Arkansas County, Arkansas, abutting on Maple Street and along the east end of any other lots you may own in said block within thirty days after the date of the service of this notice and order upon you, as provided by Ordinance No. 44, entitled 'An ordinance to provide for the construction of sidewalks in the city of Stuttgart,' approved December 8, 1903, by the city council of the city of Stuttgart. Said sidewalk shall not be less than four feet in width, and shall be of the same height or grade as the sidewalk already constructed on the west side of Maple Street between 4th and 6th streets, in said city, so as to present an even surface between said streets, and said sidewalk shall be constructed substantially as follows," etc.

"Section 2. And the said R. B. Gregg is hereby notified that, if he shall fail or refuse to comply with this ordinance notice by constructing the sidewalk hereinbefore referred to, the city of Stuttgart will cause the same to be constructed as provided by law, the expense on account of same to be a charge against said property.

"Section 3. The recorder of this city will give notice to the said R. B. Gregg as aforesaid, and cause a copy of this notice and order to be served upon the said R. B. Gregg."

A copy of this order was served upon Gregg April 15, 1905. The complaint alleged that Gregg neglected to build said sidewalk, and the city, in pursuance of the ordinance, proceeded to contract for the work to be done, after notice of its intention to Gregg, and proceeded to do so and caused the work to be done, and sued to recover the amount therefor.

The defendant demurred to the complaint, and the demurrer

was overruled; the defendant elected to stand upon the demurrer, and judgment went for the plaintiff, and defendant has appealed.

John L. Ingram, for appellant.

The ordinance does not conform to the requirements of the statute on which it is based. To be valid, the ordinance should set out what is to be done, where and how it is to be done, and when. Kirby's Digest, § 5542; 1 Abbott's Mun. Corp. 874; 158 Ill. 442; 161 Ill. 199; 172 Ill. 607; 178 Ill. 560.

Pettit & Pettit, for appellee.

1. The general ordinance with notices thereunder required the construction of the sidewalk.

2. Aside from the general ordinance the special order or resolution subsequently passed, with notices thereunder, required the construction of the sidewalk. The ordinance did in a general way designate the kind of sidewalk, the material to be used, and the width and height thereof. The ordinance and resolution conform to the statute.

3. Appellant's property, as appears in the record, having been benefited by reason of the construction of the sidewalk more than the cost of such construction, he is estopped to question the proceedings.

HILL, C. J., (after stating the facts.) This appeal questions the sufficiency of an ordinance of the city of Stuttgart providing for the construction of sidewalks. The parts of it attacked and the proceedings under it will be found in the preceding statement. The ordinance was passed under authority of the act of April 8, 1903, giving enlarged and additional powers to cities of the first and second class, so as to enable them to require property owners to construct sidewalks. The act is section 5542 of Kirby's Digest. It is said that the act gives the council power to compel the property owner to build, rebuild, maintain and repair sidewalks and to designate the kind of sidewalk, the kind of material to be used, the specifications to be followed, and the time within which such improvement is required; and that, as this ordinance fails to designate the kind of sidewalk, the kind of material and the specifications, it is fatally defective.

The ordinance required sidewalks in District No. 2 to be built of brick, cement, concrete or plank, at the option of the city

council or the street and alley committee; and the walk to be not less than four feet wide, and such distance from the ground as the council or committee shall prescribe; and this work was required to be done within thirty days from notice. The notice of August required, pursuant to an order of the council, a cement walk four feet in width within thirty days. This order was not complied with, and in October the council passed an order requiring the construction of a cement sidewalk in front of the designated property within thirty days from service of notice; the sidewalk to be not less than four feet in width, of the same length and grade as the sidewalk already constructed on the west side of Maple Street, so as to present an even surface between said streets and said sidewalk. This order, and a renewal of the former notice, was served on Gregg April 15th, and the failure to comply with it is the basis of this suit.

Every requirement of the statute is met in these proceedings. If the specifications are not more definite, it is the misfortune of the city, and affords no ground of complaint for Gregg. When he builds such sidewalk as is called for in the notice served upon him, he has fulfilled his duty; and whether it is such an one as desired can not be questioned by the city, because it did not specify more particularly the kind wanted. However, these orders, reasonably construed, furnish all the information which is needed to build a proper cement sidewalk; and a builder of sidewalks would have no difficulty in complying therewith.

Counsel attack provisions relating to District No. 1, but that is no concern of Gregg's; only so much of the ordinance as affects his property in District No. 2 is involved in this suit. It is contended that the proceeding must be tested by the ordinance, and not by the resolution of October. There is no reason why the proceedings can not be tested under both. The resolution is evidently supplementary, and in aid of the enforcement of the ordinance. It is somewhat in the nature of an amendment, making certain some of the matters left at large in the general ordinance. The council is expressly authorized by the statute to require sidewalks to be constructed by ordinance, resolution or order; and therefore the form of the city's mandate may be in any one of these methods of procedure which the council may see fit to adopt; or, if it pleaseth the council, it may adopt all of them

to reach to the same end. It is a mere choice of tools, or weapons, to require the property owner to lay a sidewalk.

Judgment affirmed.

STEWART v. STATE.

Opinion delivered January 11, 1909.

1. INSTRUCTION—REASONABLE DOUBT.—As the phrases "beyond a reasonable doubt" and "to a moral certainty" are synonymous, the refusal to give one of them in an instruction is not prejudicial if the other be used. (Page 602.)
2. TRIAL—IMPROPER ARGUMENT—EFFECT OF WITHDRAWAL.—A statement made by the prosecuting attorney, in the prosecution of one for carnal abuse of his stepdaughter, that "if the defendant had not been guilty of the charge he would have resented it with all of the blood of his body" was not so prejudicial that its evil effects could not be removed by its withdrawal from the jury. (Page 603.)

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

J. C. Pinnix and *W. P. Feazel,* for appellant.

The court erred in refusing to instruct the jury that they must be satisfied of defendant's guilt "to a moral certainty." 69 Ark. 538. The argument of the prosecuting attorney was prejudicial. 58 Ark. 481. The offensive argument was calculated to strike deep, and neither rebuke nor retraction could destroy its evil effect. 70 Ark. 305; 76 N. W. 462.

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

McCULLOCH, J. Appellant was convicted of the crime of carnally abusing his step-daughter, a girl under sixteen years of age, and appeals to this court. There is a sharp conflict in the evidence as to whether or not he ever had sexual intercourse with the girl, and there is evidence legally sufficient to sustain a verdict either way.

The instructions of the court given at the instance of the prosecuting attorney and also those given at the instance of ap-

pellant's attorney embraced the idea that before a conviction could be had the charge must be proved beyond a reasonable doubt. One requested by appellant was to the effect that the jury must be satisfied to a moral certainty beyond a reasonable doubt as to the guilt of the accused before they could convict him, but the court struck out the words *to a moral certainty.* This was not prejudicial, as that phrase, when used in this connection, is synonymous with the other. To be satisfied to a moral certainty is to be satisfied beyond a reasonable doubt. *Commonwealth* v. *State,* 118 Mass. 1; *Jones* v. *State,* 100 Ala. 88; *Woodruff* v. *State,* 31 Fla. 320; *Carlton* v. *People,* 150 Ill. 181.

Error is also assigned in the refusal of the court to incorporate in an instruction requested by appellant a direction to the effect that in passing upon his credibility as a witness they should "take into consideration the fact, if such is a fact, that he has been corroborated by other credible evidence."

The court gave correct instructions to the jury on this subject, and there was no error in refusing to give the statement contended for by appellant. No prejudice could have resulted from the failure to incorporate it in the instructions, as the jury must, under the instructions of the court, have considered the corroborative evidence if they deemed it credible.

The prosecuting attorney, in his closing argument to the jury, stated that "if the defendant had not been guilty of the charge he would have resented it with all of the blood of his body." Appellant's counsel objected to the remark, and asked the court to withdraw it from the jury, whereupon the presiding judge said to the prosecuting attorney in the presence of the jury that the statement was improper, and the jury should not regard it. This was equivalent to a withdrawal of the statement from the jury. It was all that appellant's counsel asked the court to do, and all that the court could have done except to have administered a more severe reprimand. The statement was not, in itself, so harmful that its effect could not be removed by its withdrawal.

It is unnecessary for us to determine whether or not the statement was a legitimate inference to draw in argument from appellant's conduct while resting under the revolting accusation

of having had sexual intercourse with his young stepdaughter. We content ourselves with deciding that no harmful effect remained on the minds of the jury after the remark was withdrawn.

Judgment affirmed.

TURPIN v. BEACH.

Opinion delivered January 11, 1909.

1. SALE OF LAND—FORFEITURE—WAIVER.—Where land was sold partly for cash and partly on credit, and several notes were taken for the unpaid money, payable at intervals, and stipulating that upon the first or any subsequent default made in the payments all of the notes remaining unpaid shall at once become due and payable, and that the vendor may surrender them at any time after 30 days, and the obligation resting on him shall become null and void, a forfeiture by reason of nonpayment of the notes at maturity was waived by the vendor accepting payment of certain of the notes after maturity and waiting until third persons have purchased the land from the vendee before seeking to enforce the forfeiture. (Page 608.)
2. SAME—MODE OF DECLARING FORFEITURE.—Where a contract of sale of land stipulated that, upon default in payment of any of the negotiable notes given for the purchase money, the vendor may declare forfeiture and surrender the unpaid notes whereupon his obligation should become null and void, an attempt by the vendor to declare a forfeiture by offering to surrender the unpaid notes, some of which were not yet due, upon the vendee's surrender of the contract was insufficient. (Page 608.)
3. APPEAL AND ERROR—BRINGING OF EVIDENCE—PRESUMPTION.—The decree appealed from recites that the cause was submitted upon the pleadings, the depositions of three witnesses, *and other evidence.* The clerk certifies that the transcript contains all the pleadings, papers, files, etc., in the action. Certain exhibits were attached to the depositions. *Held,* that it will be presumed that these exhibits constituted the "other evidence" mentioned in the recitals of the decree. (Page 608.)

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; reversed.

STATEMENT BY THE COURT.

On the 1st day of February, 1904, L. B. Beach entered into a written contract with Willis Guinn, a negro, to convey to him the real estate involved in this controversy. The consideration named in the contract was $550. The contract recities that $25 of it were paid in cash, and that notes bearing the same date as the instrument were executed for the deferred payments. They were negotiable and payable to the order of L. B. Beach as follows: $30 due March 28, 1904, and thirty dollars every three months thereafter until $510 are paid and one other note for $15 due June 28, 1908. The agreement stipulates that, upon the payment of the purchase money, a deed will be executed to the purchaser, and that upon the first or any subsequent default made in said payments all of said notes remaining unpaid shall at once become due and payable, and that Beach may surrender them at any time after 30 days, and the obligation resting on him shall become null and void, and that the money theretofore paid by Guinn on account of said purchase shall be considered as so much rent paid by Guinn for the use of the property from the date of the contract. Guinn went into possession of the property, but did not meet all his payments as they fell due. L. B. Beach was the daughter of A. D. Beach, and he acted as her agent in the whole transaction. He says that Guinn never made any of the payments when the notes fell due except the first one. Thereafter the payments were made at irregular intervals. Five of the notes of $30 each have been paid, and an indorsement of $14 paid on the sixth note. Guinn kept making excuses for his delay in making payments which Beach accepted and received each payment as it was made. Guinn went to see Beach about his deferred payments in November, 1906. Beach said that he owed him more than he thought he ought to, and told him that had forfeited his rights. He agreed with Guinn that if he would pay the balance of the purchase money by the 1st day of December he would execute him a deed to the land. He gave Guinn a memorandum showing the total amount to be due as $465. On the 8th day of December, 1906, Beach wrote to Guinn the following letter:

"Mr. Willis Guinn,
"31st and Cumberland Sts.,
"Little Rock.

"Dear Sir: I hereby give you notice that the contract between L. B. Beach and yourself, dated February 1, 1904, is hereby declared cancelled and void, in accordance with the terms and provisions therein, and I hereby demand immediate possession of the real estate therein described. All of your unpaid notes will be cancelled and delivered to you on surrender of your copy of said contract, properly assigned to me.

"Very truly yours,
(Signed) "L. B. Beach,
"By A. D. Beach, Agent."

On the contract appears the following assignment: "I hereby assign all my right, title and interest in and to the written contract to Yates & Turpin, agents, for and in consideration of one hundred dollars cash in hand paid by said Yates & Turpin, which I hereby acknowledge. December 11, 1906."

(Signed "Willis Guinn."

Thus far there is no controversy about the facts.

Turpin testified that the agreement for the assignment was made several days before this writing was executed. That he paid Guinn $15 at the time. That he then went to see Beach, and demanded a deed. That Beach refused to execute the deed, although the purchase money was tendered to him. That $85 was paid to Guinn when the written assignment was executed.

Beach testified that he refused to make the deed as requested by Turpin. That he told him Guinn had no rights in the contract, and he had better not put any money into it. That Turpin said as he was going out, "Well, I have not put any money in it yet." Turpin denies this.

Beach further testified:

"Q. (By the court): Was that before or after you had written this letter (referring to the letter of December 8, 1906)? A. My impression is that it was the same day I had written the letter."

Again the following appears in his testimony:

"Q. You told him (Guinn) that he had forfeited his right, and you would have to eject him, and wrote him this letter all

before you knew about the interest Yates & Turpin claimed in it, or knew he was dealing with them?

"A. I am not sure about that. I don't know whether my conversation with Turpin was before or after this, but my recollection is that it was the same day. Of course, I knew that they had been talking with him, but I thought they would not make any deal with him after I had talked with them, and was surprised when I heard they had."

The chancellor denied appellants the right of specific performance and rendered a decree dismissing the complaint for want of equity; and the case is here on appeal.

I. S. Humbert and *Malloy & Danaher,* for appellants.

Courts of equity abhor forfeitures; and, when the contract will admit of a construction that will prevent it, refuse to declare a forfeiture. 59 Ark. 408; 77 *Id.* 168; *Id.* 307. Beach waived a forfeiture. 75 Ark. 414; 59 *Id.* 405; 83 *Id.* 553. Failure to pay the purchase money according to the agreement will not authorize the vendor to institute suit to rescind the contract. 12 L. R. A. 243; 38 Tex. 139; 27 Miss. 498; 65 Ill. 42; 2 Warvell on Vendors & Pur. 849-880; 21 Ill. 619. The unpaid negotiable note must always be returned or cancelled before a forfeiture can be declared. 47 Ill. 243. Before the vendor can rescind, he must place himself where he cannot enforce the contract against the vendee. 21 Ill. 236. Time is not of the essence of the contract, and notice to quit not a sufficient declaration of an intention to declare a forfeiture. 97 Mich. 412; 89 Ala. 405. It would be unconscionable to permit the vendor to keep both the money and the property. 91 N. Y. App. 400. And if there had been a forfeiture, equity will relieve against it. 59 Ark. 405. A forfeiture is waived by extending time for payment. 49 Mich. 56; 74 Hun, 256.

Frank H. Dodge and *J. H. Carmichael,* for appellee.

The case should be affirmed on the authority of *Braddock* v. *England,* 87 Ark. 393. Granting specific performance is always discretionary with the court. Eaton on Equity, 529; Pomeroy's Equity, (Student's Ed.) sec. 1404; Pomeroy's Eq. Vol. 6. sec. 762. A chancellor's finding of fact will not be set aside unless against the clear preponderance of the evidence. 68 Ark. 314;

71 *Id.* 605; 68 *Id.* 134; 73 *Id.* 489; 67 *Id.* 200; 75 *Id.* 52; 85 *Id.* 83. Where the record shows that it does not contain all the evidence, it will be presumed that the evidence was sufficient to sustain the finding and decree of the chancellor. 80 Ark. 79; 77 *Id.* 195; 63 *Id.* 513; 45 *Id.* 240; *Id.* 304; 58 *Id.* 134. It is too late after expiration of the term to cure the defect by order *nunc pro tunc.* 45 Ark. 240.

HART, J., (after stating the facts.) We think the decree of the chancellor was erroneous, and that it would be inequitable to declare a forfeiture under the facts disclosed in the record. *Braddock* v. *England,* 87 Ark. 393, and cases cited. Besides, the unpaid notes were negotiable, and some of them not yet due, and the contract contemplates a surrender of the notes if a forfeiture is declared. In his letter to Guinn, Beach only offers to cancel and deliver the notes to him on Guinn's surrendering his copy of the contract properly assigned. The notes were never cancelled or surrendered to Guinn. See *Staley* v. *Murphy,* 47 Ill. 243.

Counsel for appellees claim that the record shows that it does not contain all the evidence, and in support of their contention cite the case of *Hardie* v. *Bissell,* 80 Ark. 79. In that case, RIDDICK, J., speaking for the court, said:

"We have to look to the record alone; and as the record recites that tax receipts and also the record of tax receipts were read in evidence, and as these are not found in the transcript here, we must presume that the chancery court had before it evidence which the transcript does not contain." To the same effect, see *Matlock* v. *Stone,* 77 Ark. 199 and *East* v. *Key,* 84 Ark. 429.

So, too, in the case of *White* v. *Smith,* 63 Ark. 513, which was an appeal from the Pope Circuit Court in chancery, RIDDICK, J. said: "We are of the opinion that the decree of the circuit court should be affirmed. The record shows that the case was heard partly on evidence taken orally at the bar of the court, and this oral evidence was not reduced to writing or preserved by bill of exceptions, and is not contained in the transcript upon which the case was submitted for decision here."

The above decisions are based upon the fact that the record did not show the evidence upon which the decree was based, and for that reason this court could not tell whether or not the

cause was correctly decided in the chancery court. In such cases the presumption is that the omitted evidence was sufficient to sustain the decree of the chancellor.

In the case of *Lenon* v. *Brodie,* 81 Ark. 208, the decree, after reciting in part upon what the cause was heard, continuing, said: "The depositions of witnesses [were] taken *ore tenus* at the bar of the court, and agreed to be filed and used as depositions in the case." The certificate of the clerk to the transcript was in the same language as the certificate in the present case. The court held that it was sufficient to show the evidence upon which the case was heard. The rule is that the transcript must show all the evidence upon which the cause is heard, and, if there is any conflict between the certificate of the clerk to the transcript and the recitals of the decree in that respect, the latter governs.

The decree in the present case recites that the cause was submitted "upon the complaint and amended complaint of plaintiffs, the answer of the defendant, and the depositions of A. D. Beach, J. E. Turpin and T. G. Malloy, and other evidence." The clerk of the chancery court certifies that "the annexed and foregoing 52 pages of within typewritten matter contains a true, correct and compared transcript of all the pleadings, papers, files and entries of proceedings in the action styled in the caption, as hath appeared by comparing the same with the originals thereof now on file and of record in my office." The original contract, the notes marked paid and the letter of date of December 8, 1906, from A. D. Beach to Willis Guinn are included in the transcript, and are referred to and made exhibits to the depositions. These instruments of writing are independent evidence. The object of the witness referring to the exhibits is to prove them to be what they purport to be, and the provision of the statute requiring exhibits to be attached to the deposition, etc., was only intended for greater certainty and security in proving them. *Atkins* v. *Guice,* 21 Ark. 174; *Nick's Heirs* v. *Rector,* 4 Ark. 276. We must indulge the presumption that the "other evidence" mentioned in the recitals of the decree is these instruments of writing referred to in the depositions as exhibits. They are contained in the transcript and certified by the clerk as having been introduced in evidence,

and this is not contradicted by the recitals of the decree. Hence we conclude that it is sufficiently shown that the transcript contains all the evidence upon which the cause was heard.

Therefore, the decree of the chancellor is reversed, and the cause remanded with directions to enter a decree for specific performance upon the payment of the balance of the purchase money in accordance with the prayer of the complaint.

CANNON v. STEVENS.

Opinion delivered December 21, 1908.

1. PARTITION—JURISDICTION.—A bill in equity will not lie to partition lands held adversely or the title to which is in dispute. (Page 612.)
2. SAME—SUFFICIENCY OF POSSESSION.—Constructive possession is sufficient to sustain a suit for partition, and between cotenants the possession of one is the possession of all, unless there has been an actual ouster or the possession of one be hostile to the rights of the others. (Page 612.)
3. SAME—Where the possession of a cotenant is held at the time of commencement of a suit for partition in recognition of the rights of cotenants and not adverse, it cannot thereafter be converted into an adverse holding for the purpose of defeating the court's jurisdiction. (Page 612.)
4. SAME.—Where the defendant in a suit in equity for partition alleged that she was in adverse possession, but failed to prove it, the court's jurisdiction was not defeated. (Page 613.)
5. TENANCY IN COMMON—LIABILITIES FOR RENTS.—A tenant in common in possession of the common land will not be liable to his co-tenants for rent if there has been neither an ouster of the latter nor a promise to pay them rents. (Page 613.)

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

C. F. Greenlee, for appellant.

Equity is without jurisdiction of a suit for partition of lands held adversely by another. 27 Ark. 77; *Id.* 159; 40 Ark. 155; 47 Ark. 235; 70 Ark. 432; 71 Ark. 544; 74 Ark. 484; 75 Ark. 6; 72 Ark. 256; Kirby's Digest, § 6518.

H. A. Parker; for appellee.

Having acquired jurisdiction of an action on any equitable ground, a court of chancery will retain jurisdiction to settle all matters in controversy. 1 Ark. 31; 1 Crawford's Digest, cols. 638--640; 3 *Id.* 348; 11 Ark. 349; 31 Ark. 345.

McCULLOCH, J. The plaintiffs, Annie E. Stevens and others, instituted this suit in chancery against the defendant, Katie Cannon, praying for the partition of a tract of land containing eighty acres. They alleged in their complaint that they were the owners of four-fifths of said land by inheritance from their deceased parent, J. W. Puckett, Sr., who in his lifetime owned said land and was in actual possession thereof, and that the defendant, who had purchased the interest of Mrs. Kerr, another one of the heirs, is in possession of the land. They also alleged that the defendant had received the rents of the land for four years, and prayed for accounting thereof and decree for their shares.

The defendant answered, admitting that she was in possession of said lands and alleging that she occupied the same as the homestead of her deceased husband, J. W. Puckett, Jr., who was the owner and in actual possession thereof at the time of his death. She denied that J. W. Puckett, Sr., was ever the owner or in possession of said land. She also demurred to the complaint on the grounds that it failed to state facts sufficient to constitute a cause of action, that plaintiffs have an adequate remedy at law, and that they can not maintain the suit for partition because defendant is in adverse possession of the land.

The plaintiffs then filed an amendment to their complaint, alleging, in substance, that the defendant had in her possession a deed to said J. W. Puckett, Sr., showing that he had title to said land; that said Puckett, Sr., was in adverse possession of said land for more than seven years continuously prior to his death; that J. W. Puckett, Jr., up to the time of his death, and the defendant since that time, had occupied the land as co-tenant of plaintiffs, and had never claimed to hold adversely to them until she did so in her answer to this cause, which was done, as they allege, in order to defeat the jurisdiction of the chancery court.

The defendant answered the amendment to the complaint, denying all the allegations thereof and reiterating her claim that she held the lands adversely. No ruling of the court was ever called for on the demurrer to the complaint, and the case was

heard on depositions of witnesses, and a final decree was rendered in favor of the plaintiffs, ordering the partition of the land according to the several interests of the parties, as found by the court.

The court found that there were six shares or interests in the land inherited from J. W. Puckett, Sr.; that the share purchased by defendant from one of the heirs of J. W. Puckett, Sr., had passed from her to the purchaser at foreclosure sale to enforce the vendor's lien against defendant, and that the share of J. W. Puckett, Jr., defendant's deceased husband, should be divided, giving defendant one-half thereof as dower and the other half to plaintiffs as collateral heirs of J. W. Puckett, Jr.

The evidence is sufficient to sustain the finding of the court that the land in controversy was owned and occupied by J. W. Puckett, Sr., that it was occupied after his death by J. W. Puckett, Jr., as one of the heirs and as co-tenant of plaintiffs with their permission, and that after the death of J. W. Puckett, Jr., it was previously occupied by the defendant.

The only point urged against the ruling of the court is that the plaintiffs were out of possession and could not sue for partition of the land until they recovered possession in an action at law.

The principle is well settled by repeated decisions of this court that partition can not be had of lands held adversely or the title to which is in dispute. *Byers* v. *Danley,* 27 Ark. 77; *London* v. *Overby,* 40 Ark. 155; *Moore* v. *Gordon,* 44 Ark. 334; *Ashley* v. *Little Rock,* 56 Ark. 391; *Criscoe* v. *Hambrick,* 47 Ark. 235; *Head* v. *Phillips,* 70 Ark. 432; *Eagle* v. *Franklin,* 71 Ark. 544.

But constructive possession is sufficient to justify a partition, and between co-tenants the possession of one is the possession of all unless there has been an actual ouster or the possession be hostile to the rights of the others. *Brewer* v. *Keeler,* 42 Ark. 289; *Cocke* v. *Simmons,* 55 Ark. 104; *McKneely* v. *Terry,* 61 Ark. 527; *Eagle* v. *Franklin,* 71 Ark. 544; 2 Wood, Lim. 266; 21 Am. & Eng. Enc. Law, 1149; Freeman on Cotenancy & Partition, § § 241, 242.

Where the possession of a co-tenant is held at the time of commencement of a suit for partition in recognition of the rights of the co-tenants and not adverse, it can not thereafter be con-

verted into an adverse holding for the purpose of defeating the jurisdiction of the court. Jurisdiction acquired by the court at the commencement of the action will be retained for the purpose of granting the relief sought.

The answer of defendant, stating that she was in adverse possession of the land, stated a good defense to the suit for partition; but in order to sustain that defense it must have been established by the evidence. Merely setting it forth in the answer did not defeat the jurisdiction of the court. *Eagle* v. *Franklin, supra.*

As we have already stated, the evidence does not show that defendant's possession was adverse when the action was commenced. On the contrary, it shows that she was holding the land in distinct recognition of the rights of her cotenants.

The plaintiffs have cross-appealed on the ground that the court erred in refusing to give them a decree against the defendants for their portion of the rental value of the land before the commencement of the suit. The ruling of the court on this point was correct. According to the contention of plaintiffs, the defendant's occupancy of the premises was by their permission, and it is not claimed that she agreed to pay rent. They were therefore not entitled to recover rent where there had been neither an ouster nor a promise to pay rent.

Chief Justice COCKRILL, speaking for the court in *Hamby* v. *Wall,* 48 Ark. 134, said: "Neither tenant can lawfully exclude the other. The occupation of one, so long as he does not exclude the other, is but the exercise of a legal right. If for any reason one does not choose to assert the right of common enjoyment, the other is not obliged to stay out; and if the sole occupation of one could render him liable therefor to the others, his legal right to the occupation would be dependent upon the caprice or indolence of his cotenant, and this the law would not tolerate;" citing cases.

Decree affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

Western Fuel Co. *v.* Fuller; appeal from Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; affirmed, November 23, 1908; *per* Battle, J.

Storthz *v.* Crusoe; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; reversed, November 16, 1908; *per* McCulloch, J.

DeLoney *v.* State; appeal from Little River Circuit Court; James S. Steel, Judge; affirmed, November 30, 1908; *per* Hill, C. J.

Farmer *v.* First National Bank of Malvern; appeal from Union Chancery Court; E. O. Mahoney, Chancellor; motion to dismiss appeal denied, December 21, 1908; *per curiam.*

Smith *v.* Rucker; appeal from White Chancery Court; John E. Martineau, Chancellor; affirmed, December 21, 1908; *per* Hill, C. J.

Halfacre *v.* State; appeal from Jackson Circuit Court; Charles Coffin, Judge; affirmed, January 11, 1909; *per* Hart, J.

II.

CASES DISPOSED OF ON MOTION.

Chicago, Rock Island & Pacific Railway Company *v.* George Kelley; appeal from Hot Spring Circuit Court; W. H. Evans, Judge; settled and appeal dismissed, November 2, 1908; *per curiam.*

Charles Parsel, *ex parte;* certiorari to Pulaski Circuit Court; R. J. Lea, Judge; circuit court's action in refusing bail sustained, and bail denied, November 9, 1908; *per curiam.*

Mississippi River, Hamburg & Western Railway Company *v.* R. B. McCombs; appeal from Ashley Circuit Court; Henry W. Wells, Judge; settled and appeal dismissed, November 9, 1908; *per curiam.*

Dr. J. C. Parrish *v.* City of Hot Springs; appeal from Garland Circuit Court; W. H. Evans, Judge; cause abated by reason of the death of appellant, and stricken from the docket, November 9, 1908; *per curiam.*

Kansas City Southern Railway Company *v.* Mary M. Barnes; appeal from Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; settled and appeal dismissed, November 9, 1908; *per curiam.*

St. Mary's Woodstock Company *v.* D. O. Steele; appeal from Nevada Circuit Court; Jacob M. Carter, Judge; settled and appeal dismissed, November 16, 1908; *per curiam.*

St. Louis Southwestern Railway Company *v.* Bettie L. Whittlesey; appeal from Pulaski Circuit Court, Second Division; Edward W. Winfield, Judge; affirmed under stipulations of counsel, November 16, 1908; *per curiam.*

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