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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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TABLE

OF CASES REPORTED

A

American Jobbing Association *v.* Wesson 287
Archie (Western Union Tel. Co. *v.*) 59
Arkansas Lbr. & Contractors' Supply Co. *v.* Benson 392
Arkansas Smokeless Coal Co. *v.* Pippins 138
Askew (Western Union Tel. Co. *v.*) 133
Austin (Beebe Stave Co. *v.*) 248

B

Bailey *v.* O'Neal 327
——— *v.* State 216
Baker *v.* Nanny 91
Bank of Jonesboro *v.* Hampton 492
Banks (Chancellor *v.*) 497
Barnett *v.* Malvern 483
Barton (Board of Directors of St. Farncis Levee Dist. *v.*) 406
Beckett *v.* Whittington 230
Beebe Stave Co. *v.* Austin 248
Benedict *v.* Griffith 195
Benson (Arkansas Lbr. & Contractors' Supply Co. *v.*) 392
Black (King *v.*) 598
Blake *v.* Scott 46
Bloomer *v.* Cone 622
Blum *v.* Pulaski County 101
Blythe (Ward *v.*) 208
Board of Directors of St. Francis Levee Dist. *v.* Barton 406
Board of Equalization of Independence Co. (First Nat. Bank of Batesville *v.*) 335
Boles (Young *v.*) 242
Bouldin *v.* Jennings 299
Bragg *v.* Hartney 55
Bratton (Missouri & N. A. Rd. Co. *v.*) 563
Brooks (Russell *v.*) 509
Bryant (St. Louis, I. M. & S. Ry. Co. *v.*) 425
Buckeye Cotton Oil Co. (Cotton Plant Oil Mill Co. *v.*) 271
Bullock (Hogins *v.*) 67
Burnside *v.* Union Sawmill Co. 118
Burke (Maney *v.*) 84
Byrne (King *v.*) 88
——— *v.* Less 211

C

Campbell *v.* Hyde 128
——— *v.* Samples 79
Carr *v.* Fair 359
Carroll *v.* Carroll 625
Carter (Pacific Mut. Life Ins. Co. *v.*) 378
Caruthers *v.* Greer 167
Castleberry (W. T. Adams Machine Co. *v.*) 310
Central Arkansas & E. Ry. Co. *v.* Goelzer 569

Chancellor *v.* Banks..... 497
Cherokee Construction Co. *v.* Harris 260
Chew (Maryland Casualty Co. *v.*) 276
Chicago, R. I. & P. Ry. Co. *v.* Hamilton 400
——— (Lonoke *v.*) 546
——— *v.* McElroy 600
——— *v.* Miles 573
——— *v.* Moore 446
Collins (Cook *v.*) 291
——— *v.* Southern Brick Co. 504
Conditt *v.* Holden 618
Cone (Bloomer *v.*) 622
Cook *v.* Collins 291
Corman (St. Louis, I. M. & S. Ry. Co. *v.*)..... 102
Cotton Plant Oil Mill Co. *v.* Buckeye Cotton Oil Co..... 271
Crow (Lawhon *v.*) 313
Crutchfield (Lasater *v.*)..... 535

D

Davis *v.* Spann..... 213
——— (Vandeventer *v.*).... 604
Derrick *v.* State..... 237
Dreyfus (Pine Bluff Aerie No. 209 Fraternal Order of Eagles *v.*) 284
Dyer (Jones *v.*)..... 460

E

Eagle Generater Co. (O'Neil *v.*) 416
Elder (Johnson *v.*)..... 30
Ewing-Merkel Electric Co. *v.* Lewisville Light & Water Co. 594

F

Fair (Carr *v.*) 359
Ferguson (Ozark & Cherokee Central Ry. Co. *v.*)..... 254
——— *v.* State 120
First Nat. Bank (Latham *v.*) 315
First Nat. Bank of Batesville *v.* Bd. of Equalization of Independence Co. 335
Flowers *v.* Reece..... 611
France *v.* Shockey..... 41

G

Gaines (Jones *v.*) 519
Garrison *v.* St. Louis, I. M. & S. Ry. Co. 437
George (Hamburg Bank *v.*) 472
Gilmore *v.* State..... 205
Godbold (Spaulding Mfg. Co. *v.*) 63
Goelzer (Central Arkansas & E. Ry. Co. *v.*) 569
Gordon (St. Louis, I. M. & S. Ry. Co. *v.*)..... 617
——— (Western Union Tel. Co. *v.*) 219
Goss (St. Louis, I. M. & S. Ry. Co. *v.*) 372
Grayson *v.* State..... 413
Greer (Caruthers *v.*) 167
Griffith (Benedict *v.*) 195
Griffin (Western Union Tel. Co. *v.*) 219

H

Hamburg Bank *v.* George... 472
Hamilton (Chicago, R. I. & P. Ry. Co. *v.*)..... 400
Hampton (Bank of Jonesboro *v.*) 492

Hardy *v.* Samuels..... 289
Harris (Cherokee Construction Co. *v.*)..... 260
Hartney (Bragg *v.*) 55
Hill (St. Louis, I. M. & S. Ry. Co. *v.*) 484
Hogins *v.* Bullock 67
Holden (Conditt *v.*) 618
Hyde (Campbell *v.*) 128

J

Jackson *v.* State..... 71
——— *v.* Williams..... 486
Jennings (Bouldin *v.*)..... 299
Johnson *v.* Elder..... 30
——— *v.* Johnson..... 292
Jones *v.* Dyer..... 460
——— *v.* Gaines..... 519
Junction City Lbr. Co. *v.* Sharp 538

K

Kansas City So. Ry. Co. (Kelly *v.*) 465
Kelly *v.* Kansas City So. Ry. Co. 465
Kettering (Mabry *v.*)..... 81
Kirchman *v.* Tuffli Bros. Pig Iron & Coke Co..... 111
King *v.* Black..... 598
——— *v.* Byrne..... 88

L

Lasater *v.* Crutchfield..... 535
Latham *v.* First Nat. Bank... 315
Lawhon *v.* Crow..... 313
Less (Byrne *v.*)..... 211
Levy *v.* McDonnell..... 324
Lewisville Light & Water Co. (Ewing-Merkel Electric Co. *v.*) 594
Light (Mueller *v.*)..... 522
Little Rock Ry. & El. Co. (Maryland Casualty Co. *v.*).... 306
Lonoke *v.* Chicago, R. I. & P. Ry. Co..... 546

M

Mabry *v.* Kettering..... 81
McAbee *v.* Wiley..... 245
McComb *v.* Saxe..... 321
——— (Stoneman - Zearing Lbr. Co. *v.*)..... 297
McCown *v.* Wilson..... 153
McCrae *v.* State..... 28
McDonald *v.* Rankin..... 173
——— *v.* Shaw..... 15
McDonnell (Levy *v.*)..... 324
McElroy (Chicago, R. I. & P. Ry. Co. *v.*)..... 600
McNair (Naylor *v.*)..... 345
Malvern (Barnett *v.*)..... 483
Maney *v.* Burke..... 84
Maryland Casualty Co. *v.* Chew 276
——— *v.* Little Rock Ry. & El. Co. 306
Miles (Chicago, R. I. & P. Ry. Co. *v.*)..... 573
Missouri & N. A. Rd. Co. *v.* Bratton 563
——— *v.* State..... 1
Moore (Chicago, R. I. & P. Ry. Co. *v.*)..... 446
Morris (Prescott & N. W. Ry. Co. *v.*)..... 365
Mueller *v.* Light..... 522
Murphy *v.* St. Louis, I. M. & S. Ry. Co..... 159

N

Nanny (Baker *v.*) 91
Naylor *v.* McNair 345
Nichols *v.* State 421
Noll (Walker *v.*) 148

O

Oliver (St. Louis, I. M. & S. Ry. Co. *v.*) 432
O'Neal (Bailey *v.*) 327
O'Neil *v.* Eagle Generator Co. 416
Osborne *v.* Waters 388
Ozark & Cheroke Central Ry. Co. *v.* Ferguson 254

P

Pacific Mut. Life Ins. Co. *v.* Carter 378
Parkview Land Co. *v.* Road Improvement Dist. No. 1 .. 93
Pine Bluff Aerie No. 209 Fraternal Order of Eagles *v.* Dreyfus 284
Pippins (Arkansas Smokeless Coal Co. *v.*) 138
Potts *v.* State 165
Prescott & N. W. Ry. Co. *v.* Morris 365
Pulaski County (Blum *v.*) ... 101

Q

Qualls *v.* State 200

R

Rankin (McDonald *v.*) 173
Reece (Flowers *v.*) 611
Reed (St. Louis, I. M. & S. Ry. Co. *v.*) 350
Ridling (Scroggin *v.*) 630
Road Improvement Dist. No. 1 (Parkview Land Co. *v.*) 93
Ross *v.* State 481
Rowe *v.* State 155
Russell *v.* Brooks 509

S

St. Louis & S. F. Rd. Co. (State *v.*) 74
St. Louis, I. M. & S. Ry. Co. *v.* Bryant 425
——— *v.* Corman 102
——— (Garrison *v.*) 437
——— *v.* Gordon 617
——— *v.* Goss 372
——— *v.* Hill 484
——— (Murphy *v.*) 159
——— *v.* Oliver 432
——— *v.* Reed 350
——— *v.* Williams 534
——— *v.* York 554
Samples (Campbell *v.*) 79
Samuels (Hardy *v.*) 289
Saxe (McComb *v.*) 321
Scott (Blake *v.*) 46
——— (Smith *v.*) 143
Scroggin *v.* Ridling 630
Sennett *v.* Walker 607
Settles *v.* State 202
Sharp (Junction City Lbr. Co. *v.*) 538
Shaw (McDonald *v.*) 15
Shockey (France *v.*) 41
Shocklee (Wilson *v.*) 370
Slatton (Snyder *v.*) 530
Smith *v.* Scott 143
——— *v.* Weatherford 6
Snyder *v.* Slatton 530
Soard *v.* Western Anthracite Coal & Mining Co. 502
Southern Brick Co. (Collins *v.*) 504
Spann (Davis *v.*) 213

Spaulding Mfg. Co. *v.* Godbold 63
State (Bailey *v.*)..... 216
——— (Derrick *v.*)..... 237
——— (Ferguson *v.*)..... 120
——— (Gilmore *v.*)..... 205
——— (Grayson *v.*)..... 413
——— (Jackson *v.*)..... 71
——— (McCrae *v.*)..... 28
——— (Missouri & N. A. Rd. Co. *v.*)..... 1
——— (Nichols *v.*)..... 421
——— (Potts *v.*)..... 165
——— (Qualls *v.*)..... 200
——— (Rowe *v.*)..... 155
——— (Ross *v.*)..... 481
——— *v.* St. Louis & S. F. Rd. Co. 74
——— (Settles *v.*)..... 202
——— (Wiley *v.*)..... 586
Stevenson (Welch Stave & Mercantile Co. *v.*)..... 266
Stoneman-Zearing Lbr. Co. *v.* McComb 297

T

Tuffli Bros. Pig Iron & Coke Co. (Kirchman *v.*)..... 111

U

Union Sawmill Co. (Burnside *v.*) 118

V

Vandeventer *v.* Davis..... 604

W

Walker *v.* Noll..... 148
——— (Sennett *v.*)..... 607
Ward *v.* Blythe..... 208
Waters (Osborne *v.*)..... 388
Weatherford (Smith *v.*).... 6
Welch Stave & Mercantile Co. *v.* Stevenson..... 266
Wesson (American Jobbing Association *v.*) 287
Western Anthracite Coal & Mining Co. (Soard *v.*).... 502
Western Union Tel. Co. *v.* Archie 59
——— *v.* Askew..... 133
——— *v.* Gordon..... 219
——— *v.* Griffin 219
Whittington (Beckett *v.*).... 230
Wiley (McAbee *v.*)..... 245
——— *v.* State..... 586
Williams (Jackson *v.*)..... 486
——— (St. Louis, I. M. & S. Ry. Co. *v.*)..... 534
Wilson (McCown *v.*)..... 153
——— *v.* Shocklee..... 370
W. T. Adams Machine Co. *v.* Castleberry 310

Y

Young *v.* Boles..... 242
York (St. Louis, I. M. & S. Ry. Co *v.*)..... 554

TABLE OF CASES
CITED BY THE COURT

A

Abbott *v.* Rowan, 33 Ark. 596..... 305
Aberdeen Bank *v.* Chehalis County, 166 U. S. 440..... 338
Adsit *v.* Lieb, 76 Ill. 200..... 496
Aiken *v.* Kennison, 58 Vt. 665..... 476
Allen *v.* Phillips, 87 Ark. 185..... 87
Allison *v.* State, 74 Ark. 454..... 73
Aluminum Co. of N. A. *v.* Ramsey, 89 Ark. 522..... 504
American Ins. Co. *v.* Hampton, 54 Ark. 75 385
——— *v.* Hornbarger, 85 Ark. 337 385
American Mtge. Co. *v.* Milam, 64 Ark. 305..... 526
American Soda Fountain Co. *v.* Futrall, 73 Ark. 464..... 480
Arkadelphia *v.* Clark, 52 Ark. 23... 551
Arkansas & La. Ry. Co. *v.* Sanders, 69 Ark. 619..... 378
——— *v.* Stroude, 77 Ark. 109.12, 228
Arkansas Central Rd. Co. *v.* Janson, 90 Ark. 494..... 45
Arkansas Ins. Co. *v.* McManus, 86 Ark. 115 387
Arnold *v.* McBride, 78 Ark. 275.... 606
Atchison, T. & S. F. Rd. Co. *v.* Stanford, 12 Kan. 377..... 583
Atkinson *v.* Burt, 65 Ark. 316..314, 315
Ayers *v.* Anderson-Tully Co., 89 Ark. 160..... 102
Ayers *v.* Walson, 132 U. S. 394..... 162

B

Bailey *v.* Gatton, 14 Ark. 180..... 287
Baltimore & O. Rd. Co. *v.* Baugh, 149 U. S. 368..... 355
Baltimore & Potomac Rd. Co. *v.* Fifth Baptist Church, 108 U. S. 317 542
Bank of Commerce *v.* Tennessee, 161 U. S. 134..... 338
Bank of Little Rock *v.* Frank, 63 Ark. 16..... 518
Barnett *v.* Higgins, 4 Dana 565.... 186
——— *v.* St. Francis Levee Dist., 102 S. W. 583..... 412
Battell *v.* Matot, 58 Vt. 271..... 398
Baxter *v.* Camp, 41 Atl. 803..... 476
Beard *v.* Dansby, 48 Ark. 183..... 183
Beecher *v.* Beecher, 83 Ark. 424.... 623
Beekman Lbr. Co. *v.* Ahern, 75 Ark. 107 330
Bell *v.* Welch, 38 Ark. 139..... 45
Bentonville Ry. Co. *v.* Baker, 45 Ark. 253..... 569
Birmingham *v.* Rogers, 40 Ark. 254. 431
Bivens *v.* State, 11 Ark. 455....125, 126
Black *v.* Baskins, 79 Ark. 382..... 500
Blacknall *v.* State, 90 Ark. 570..... 416
Blake *v.* Bunburry, 1 Ves., Jr., 523. 22
Bloom *v.* Strauss, 70 Ark. 483..... 184
Board Directors St. Francis Levee Dist. *v.* Barton, 92 Ark. 406..... 470
Board of Equalization Cases, 49 Ark. 518 493
Bohan *v.* Port Jarvis Gas Light Co., 9 L. R. A. 711.....542, 552
Bond *v.* Montgomery, 56 Ark. 563.. 263
Borden *v.* State, 11 Ark. 519..... 235
Boyd *v.* Bryant, 35 Ark. 69..... 4
Boykin *v.* State, 34 Ark. 443..... 590
Boynton *v.* Ashabranner, 75 Ark. 514 37
Brewster *v.* Western Union Tel. Co., 65 Ark. 539..... 137
Brice *v.* Taylor, 51 Ark. 75..... 236

Bronson *v.* Oakes, 76 Fed. 735..434, 436
Brown *v.* Haselman, 79 Ark. 213... 80
——— *v.* Nelms, 86 Ark. 368.....
.....90, 147, 184, 187, 624
——— *v.* Norvell, 88 Ark. 590.191, 610
——— *v.* Rawlings, 72 Ind. 505.. 399
Buck *v.* Lee, 36 Ark. 525..... 320
Builder's Supply Co. *v.* Cox, 36 Atl. 797 476
Burgett *v.* Apperson, 52 Ark. 213... 263
Butler *v.* Dodson, 78 Ark. 569..... 532
Byers *v.* Fowler, 12 Ark. 292..... 183
Byrne *v.* Railroad, 83 N. Y. 620.... 444

C

Calloway *v.* Cossart, 45 Ark. 81.... 499
Carl Lee *v.* Ellsberry, 82 Ark. 209. 326
Carlson *v.* Phoenix Bridge Co., 132 N. Y. 273..... 358
Carman *v.* Emerson, 71 Fed. 264... 132
Carothers *v.* State, 75 Ark. 574..... 415
Carpenter *v.* Smith, 76 Ark. 447.... 323
——— *v.* State, 62 Ark. 286..... 162
Carrens *v.* State, 77 Ark. 16..... 423
Carrier *v.* Chicago, R. I. & P. Ry. Co., 79 Ia. 80..... 621
Carrigg *v.* Oaks, 110 Mass. 144.... 476
Carson *v.* Levee District, 59 Ark. 513 4
Carter *v.* Burnham, 31 Ark. 212.... 320
Casat *v.* State, 40 Ark. 524..... 125
Central Branch Union Pac. Rd. Co. *v.* Twine, 23 Kan. 585..... 412
Central Coal & Coke Co. *v.* Neimeyer Lumber Co., 65 Ark. 107..
.....312, 425
Chamberlain *v.* State, 50 Ark. 137.. 270
Chambers *v.* State, 45 Ark. 56..... 201
Chapman *v.* Liggett, 41 Ark. 292.. 364
Chapman & Dewey Land Co. *v.* Bigelow, 77 Ark. 338.....34, 40
Chase *v.* Cartright, 53 Ark. 358..... 198
Chatfield *v.* Iowa & Ark. Land Co., 88 Ark. 395..... 501
Chicago Mill & Lbr. Co. *v.* Cooper, 90 Ark. 326.....111, 580
Chicago, R. I. & P. Ry. Co. *v.* Joliet, 79 Ill. 25..... 551
Chicago, R. I. & P. Ry. Co. *v.* McCutchen, 80 Ark. 235..... 410
——— *v.* Planters' Gin & Oil Co., 88 Ark. 87..... 579
——— *v.* Simpson, 87 Ark. 335... 434
Chitwood *v.* State, 18 Ark. 453. 124, 590
Choctaw & M. Rd. Co. *v.* Speer Hdw. Co., 71 Ark. 126..... 458
——— *v.* Sullivan, 70 Ark. 262.. 458
Choctaw, O. & G. Rd. Co. *v.* Jones, 77 Ark. 367..... 109
——— *v.* Thompson, 82 Ark. 11
.....109, 110, 560, 561, 563
City Electric St. Ry. Co. *v.* First Nat. Exch. Bank, 62 Ark. 33..... 320
Clark *v.* Jonesboro, L. C. & E. Rd. Co., 87 Ark. 385..... 602
——— *v.* State, 12 S. W. 729..... 592
Clay *v.* Bilby, 72 Ark. 101.....501, 616
Clementson *v.* Gandy, 1 Keen 309.. 22
Cleveland, C. C. & St. L. Ry. Co. *v.* Ward, 147 Ind. 256..... 357
Clinton *v.* Estes, 20 Ark. 216..... 592
Coats *v.* Hill, 41 Ark. 151.....270, 603
Cochran *v.* Chetopa Mill & Elevator Co., 88 Ark. 343..... 289
Codlin *v.* Kohlhauser, 181 U. S. 151 244
Cofer *v.* Brooks, 20 Ark. 542..... 36
Cohn *v.* Huffman, 52 Ark. 436..... 191
Collins *v.* Mack, 31 Ark. 694..... 162
——— *v.* Paepcke-Leicht Lumber Co., 74 Ark. 81.....52, 236, 614, 616
Commercial Fire Ins. Co. *v.* Belk, 88 Ark. 506..... 387
Commonwealth *v.* Evan, 13 Serg. & R. 426 158
——— *v.* Montgomery, 11 Metc. 534 591
——— *v.* Sargent, 129 Mass. 115 476
Conrades *v.* Spink, 38 Mo. App. 309 65
Cone *v.* Bloomer, 85 Ark. 334..... 623
Connerly *v.* Dickinson, 81 Ark. 258. 37
Conrand *v.* State, 65 Ark. 559..... 415
Cooper *v.* Lee, 59 Ark. 460..... 37
——— *v.* Newton, 68 Ark. 157.... 65
——— *v.* State, 86 Ark. 30..... 424

Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79..... 4
Cowling *v.* Nelson, 76 Ark. 146... 184
Cox *v.* Daugherty, 75 Ark. 395..... 36
——— *v.* Donnelly, 34 Ark. 762.. 290
Cracraft *v.* Meyer, 76 Ark. 450.... 87
Craig *v.* Craig, 90 Ark. 40..... 553
——— *v.* Hedges, 90 Ark. 430... 501
Crandall *v.* Milwaukee, St. P. & St. Ste Marie Ry. Co., 96 Minn. 434 434
Crane *v.* Crane, 51 Ark. 287..... 237
Crawford *v.* Fisher, 10 Sim. 479.... 459
Cribbs *v.* Benedict, 64 Ark. 555..... 100
——— *v.* Walker, 74 Ark. 104.... 210
Crill *v.* Hudson, 71 Ark. 390..... 37
Crisman *v.* Cannon, 33 Ark. 316.... 320
Crittenden, *Ex parte,* 10 Ark. 33.... 191
Crouch *v.* Puryear, 1 Rand. 258..... 265
Crow *v.* Hardage, 24 Ark. 282..... 152
Crowley, *v.* Mellon, 52 Ark. 1..... 616
Cummings *v.* Stark, 138 Ind. 94.... 496
Cunningham *v.* Ashley, 16 Ark. 182. 183
Currie *v.* Franklin, 51 Ark. 338.... 235
Czarnecki *v.* Bolen-Darnell Co., 91 Ark. 58..... 545

D

Dale *v.* Donaldson Lumber Co., 48 Ark. 188..... 538
Dallas County *v.* Banks, 87 Ark. 484 339
Daniel *v.* Garner, 71 Ark. 484..... 215
Davidson *v.* Isham, 9 N. J. Eq. 186. 553
Davie *v.* Davie, 52 Ark. 224.... 191, 609
Davis *v.* Gaines, 48 Ark. 370..... 4
——— *v.* Kline, 70 Mo. 310..... 65
——— *v.* Milburn, 32 Ia. 163.... 597
——— *v.* Railway, 53 Ark. 117.. 163
——— *v.* Yonge, 74 Ark. 101.... 320
Decker *v.* Laws, 74 Ark. 286..... 13
Dedman *v.* Earle, 52 Ark. 164..204, 532
Deeds, *Ex parte,* 75 Ark. 542..... 100
Dempsey *v.* State, 83 Ark. 81..... 399
Denmark *v.* State, 58 Ark. 576..... 590
Denny *v.* New York Cent. Ry. Co., 13 Gray 481..... 584
Dey *v.* Dox, 9 Wend. 127..... 137
Dickinson *v.* Hardie, 79 Ark. 364... 37
Directors of N. E. Ry. Co. *v.* Wanless, L. R., 7 E. & I. App. Cas. 12 .....403, 404
Dixon *v.* State, 22 Ark. 213....124, 590
Doe *v.* Chichester, 4 Dow. 76..... 22
Doniphan Lumber Co. *v.* Reed, 82 Ark. 31..... 87
Dooley *v.* Dooley, 14 Ark. 122..... 235
Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545 621
Dotson *v.* State, 51 Ark. 119..... 204
Douglass *v.* State, 91 Ark. 492..... 590
Dow *v.* State, 77 Ark. 464..... 126
Dowd *v.* Chicopee, 116 Mass. 93... 444
Drennen *v.* Lindsey, 15 Ark. 359.... 162
Driggs *v.* Norwood, 50 Ark. 42... 320
Dubuque Wood Co. *v.* Dubuque, 30 Iowa 176 582
Durfey *v.* Thalheimer, 85 Ark. 544.. 543
Dyer *v.* Ambleton, 56 Ark. 170..485, 558

E

Earle Improvement Co. *v.* Chatfield, 81 Ark. 296..... 500
Edminson *v.* Baxter, 4 Hayw. 112.. 597
Edmonds *v.* State, 34 Ark. 720..... 312
Eising *v.* Andrews, 66 Ark. 58.... 621
Eller *v.* Koehler, 68 Ohio St. 51..... 543
Elliott *v.* Pearce, 20 Ark. 508..... 36
Emerson *v.* State, 43 Ark. 372..... 416
English *v.* Oliver, 28 Ark. 325..... 270
——— *v.* Progress Elec. Light & M. Co., 95 Ala. 256..... 543
Erie & Pac. Despatch *v.* Cecil, 112 Ill. 180 476
Erb *v.* Morasch, 177 U. S. 585..... 5
Evans *v.* Lake Shore, etc., Ry. Co., 88 Mich. 442..... 403
——— *v.* St. Louis, I. M. & S. Ry. Co., 87 Ark. 628..... 446
——— *v.* State, 2 L. R. A. (N. S.) 619 202
Evetts *v.* Tendick, 44 Tex. 570.... 186

F

Faisst *v.* Waldo, 57 Ark. 270..... 600
Faust *v.* Hosford, 119 Ia. 97..... 621
Fee *v.* Cowdry, 45 Ark. 410..... 183

Ferguson *v.* Carr, 85 Ark. 246..... 463
Fidelity Mut. Ins. Co. *v.* Bussell, 75 Ark. 25..... 385
Files *v.* Law, 88 Ark. 449.....45, 215
Finley *v.* Hogan, 60 Ark. 499..... 37
First National Bank *v.* Chehalis County, 166 U. S. 440..... 342
——— *v.* Chehalis County, 66 Wash. 64..... 342
Fisher *v.* State, 73 Ga. 395..... 592
Fitzhugh *v.* Hubbard, 41 Ark. 64.. .....20, 22, 25, 27
Fitzpatrick *v.* Phillips, 41 Ark. 85... 191
——— *v.* State, 37 Ark. 256..... 125
Fleener *v.* State, 58 Ark. 98..... 204
Fletcher *v.* Eagle, 74 Ark. 585.330, 331
Floyd *v.* State, 12 Ark. 43..... 124
Fly *v.* Screeton, 64 Ark. 183..... 254
Foote, *Ex parte,* 70 Ark. 12..... 551
Forbes *v.* Cooper, 88 Ky. 285..... 597
Fordyce *v.* Edwards, 65 Ark. 98..... 558
——— *v.* Jackson, 56 Ark. 595... 117
——— *v.* Key, 74 Ark. 19..... 12
——— *v.* Nix, 58 Ark. 136..... 477
Forgy *v.* Harvey, 151 Ind. 507..... 36
Forrester-Duncan Land Co. *v.* Evatt, 90 Ark. 301..... 215
Foster, *Ex parte,* 11 Ark. 304..... 120
——— *v.* State, 45 Ark. 328..... 592
Fowle *v.* N. H. & N. Co., 107 Mass. 352 412
Freeman *v.* Cook, 2 Exch. 654..... 50

G

Gaines *v.* Waters, 64 Ark. 609..... 551
Galliher *v.* Cadwell, 145 U. S. 368.. 500
Garibaldi *v.* Jones, 48 Ark. 230..... 263
Garland County *v.* Hot Spring Co., 68 Ark. 83..... 45
Gannon *v.* Moore, 83 Ark. 196..... 147
Gates *v.* Kelsey, 57 Ark. 523..... 37
George *v.* Butler, 57 L. R. A. 396.... 199
——— *v.* Norwood, 77 Ark. 216... 364
——— *v.* St. Louis, I. M. & S. Ry. Co., 34 Ark. 613..... 435
Gerkins *v.* Ky. Salt Co., 66 Am. St. 370 265
German-Am. Ins. Co. *v.* Humphrey, 62 Ark. 348..... 385
Gibbons *v.* Dillingham, 10 Ark. 9.. 319
Gibbs *v.* Dickson, 33 Ark. 107..... 600
Gill *v.* State, 59 Ark. 422..... 592
Gist *v.* Barrow, 42 Ark. 521..... 364
Glasscock *v.* Rosengrant, 55 Ark. 376 117
Glory *v.* State, 13 Ark. 236..... 124
Glushing *v.* Sharp, 96 N. Y. 676.... 403
Goerke *v.* Rodgers, 75 Ark. 72..... 364
Gottlieb *v.* Rinaldo, 78 Ark. 123... 289
Govan *v.* Jackson, 32 Ark. 553..... 70
Gray *v.* Matheny, 66 Ark. 36..... 100
Green *v.* Biddle, 8 Wheat. 1..... 183
——— *v.* State, 51 Ark. 189..... 124
Greer *v.* Fontaine, 71 Ark. 605..... 190
——— *v.* White, 90 Ark. 117.... 489
Gregory *v.* Gates, 30 Gratt. 83..... 20
Griffin *v.* Colver, 16 N. Y. 489..... 137
Griffith *v.* State, 37 Ark. 324..... 162
Grimes *v.* Luster, 73 Ark. 266..... 146
Guess *v.* Stone Mountain Granite & Ry. Co., 67 Ga. 215.....458, 459
Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150..... 3
——— *v.* Mosely, 161 Fed. 72.... 412
Gunn *v.* Thompson, 70 Ark. 500... 631
Gunter *v.* State, 79 Ark. 433..... 590

H

Hacker *v.* Howe, 101 N. W. 255.... 496
Hadley *v.* Baxendale, 9 Exch. 341.. .....228, 578
Haggart *v.* Chapman & Dewey Land Co., 77 Ark. 527..... 120
——— *v.* Ranney, 73 Ark. 334.... 39
Hall *v.* Denckla, 28 Ark. 506..... 526
——— *v.* Doyle, 35 Ark. 445..... 431
Hamilton *v.* State, 3 Ind. 452..... 494
Hamilton-Brown Shoe Co. *v.* Choctaw Mercantile Co., 80 Ark. 438.. 74
Hanna *v.* Pitman, 25 Ark. 275..... 152
Hare *v.* Shaw, 84 Ark. 32..... 235
Hargus *v.* Hayes, 83 Ark. 186....191, 610
Harris *v.* Brady, 87 Ark. 428..... 147
——— *v.* State, 31 Ark. 196...124, 590
Harris Lbr. Co. *v.* Morris, 80 Ark. 260 12

Harrison *v.* Lamar, 33 Ark. 827.... 146
Harvey *v.* Dewoody, 18 Ark. 252.. 551
——— *v.* Aurora & G. R. Co., 186 Ark. 267 399
Haskins *v.* Spiller, 3 Dana, 573..... 186
Havens *v.* Sackett, 15 N. Y. 365..... 23
Hayes *v.* Missouri, 120 U. S. 68..... 78
Heard *v.* Ewan, 73 Ark. 513..... 558
——— *v.* Knights of Honor, 56 Ark. 267..... 399
Hempstead County *v.* Hempstead County Bank, 73 Ark. 515..... 341
Hendricks *v.* Block, 80 Ark. 333.... 4
Hepburn *v.* School Directors, 23 Wall. 480..... 338
Hershey *v.* Clark, 27 Ark. 527..... 36
Hicks *v.* Branton, 21 Ark. 186..... 463
Hill *v.* Mitchell, 5 Ark. 608..... 296
Hinkle *v.* Broadwater, 73 Ark. 489.. .....35, 553
Hoadley *v.* Transportation Co., 115 Mass. 304..... 582
Hoback *v.* Miller, 44 W. Va. 635... 296
Hodgkins *v.* Price, 141 Mass. 162.. 188
Hogg *v.* Laster, 56 Ark. 382..... 51
——— *v.* Thurman, 90 Ark. 93.. 253
Holland *v.* Rogers, 33 Ark. 251.164, 320
Holt *v.* State, 47 Ark. 196.....124, 590
Home Ins. Co. *v.* North Little Rock Ice & El. Co., 86 Ark. 538..... 309
Hook *v.* Garfield Coal Co., 112 Iowa 210 265
Hoskins *v.* Fayetteville Gro. Co., 79 Ark. 399..... 254
Houston *v.* Brush, 66 Vt. 331..... 355
Howard *v.* State, 72 Ark. 586..... 483
Howcott *v.* Kilbourn, 44 Ark. 213.. 320
Hubbard *v.* State, 10 Ark. 378, 124, 590
Hudson *v.* Stillwell, 80 Ark. 575.... 38
Hughes *v.* Watt, 28 Ark. 153..... 36
Hughes Bros. *v.* Redus, 90 Ark. 149 199
Hyatt *v.* Bell, 83 Ark. 360..... 533

I

Ince *v.* State, 77 Ark. 418..... 600

J

Jacks *v.* Chaffin, 34 Ark. 534..... 37
Jackson *v.* Boyd, 75 Ark. 194..... 499
——— *v.* State, 92 Ark. 71....218, 219
James *v.* James, 58 Ark. 157.579, 581, 585
——— *v.* Miles, 54 Ark. 460..... 36
Jett *v.* Crittenden, 89 Ark. 349..45, 624
Johnson *v.* Duval, 27 Ark. 599..... 151
——— *v.* Johnson, 84 Ark. 307... 294
——— *v.* State, 75 Ark. 427..... 483
Jones *v.* Graham, 36 Ark. 383..... 235
——— *v.* Great Southern Fire Proof Hotel Co., 30 C. C. A. 108. 183
——— *v.* Harris, 90 Ark. 51..... 330
——— *v.* Mitchell, 83 Ark. 77... 623
——— *v.* Montague, 194 U. S. 147 244
——— *v.* State, 153 Ind. 440..... 70
Jonesboro, L. C. & E. Rd. Co. *v.* Brookfield, 87 Ark. 409..... 602
——— *v.* Cable, 89 Ark. 518..... 12
Jordan *v.* Hunnell, 96 Ia. 334..... 237
Judge *v.* Curtis, 72 Ark. 132..... 251

K

Kansas City So. Ry. Co. *v.* Carl, 91 Ark. 97..... 579
——— *v.* Henrie, 87 Ark. 443..... 560
——— *v.* Murphy, 74 Ark. 256... 127
Keaton *v.* State, 73 Ark. 265..... 423
Kellar *v.* James, 14 L. R. A. (N. S.) 1003..... 490
Kelley *v.* Carter, 55 Ark. 112..... 364
Kempner *v.* Gans, 87 Ark. 221..... 398
Kessinger *v.* Wilson, 53 Ark. 400.. .....147, 264
Keyes *v.* Cedar Falls, 78 N. W. 227. 284
Kies *v.* Young, 64 Ark. 381..... 491
King *v.* State, 68 Ark. 572..... 125
Kirksey *v.* Cole, 47 Ark. 504..... 263
Koen *v.* Bartlett, 41 W. Va. 559... 265
Krause *v.* Commonwealth, 93 Pa. St. 418..... 204

L

Land *v.* State, 84 Ark. 199..... 201
Landon *v.* Morris, 75 Ark. 6..... 66
Langford *v.* Searcy College, 73 Ark. 211 189
Lanier *v.* Union Mortgage, Banking & Trust Co., 64 Ark. 39..... 210
Lasater *v.* State, 77 Ark. 468..... 423

Lawrence *v.* Zimpleman, 37 Ark. 644 34
Ledbetter *v.* Fitzgerald, 1 Ark. 448. 37
Leggett *v.* Grimmett, 36 Ark. 496.. 150
Liddell *v.* Landau, 87 Ark. 438.... 305
Little *v.* Williams, 88 Ark. 37, 34, 39, 40
Little Rock & F. S. Ry. Co. *v.* Blewitt, 65 Ark. 235..... 443
——— *v.* Chapman, 39 Ark. 463. 468
——— *v.* Trotter, 37 Ark. 593... 378
——— *v.* Worthen, 46 Ark. 312... 100
Little Rock & H. S. W. Rd. Co. *v.* Castle, 74 Ark. 539..... 431
Little Rock Ry. Co. *v.* Talbot, 47 Ark. 97..... 582
Little Rock Ry. & El. Co. *v.* Goerner, 80 Ark. 158..... 74
Licermore *v.* Northrup, 44 N. Y. 107 399
Locke *v.* Frasher, 79 Va. 409..... 36
Logan *v.* Jelks, 34 Ark. 547..... 37
Louisiana & Ark. Ry. Co. *v.* State, 85 Ark. 12..... 4
Love *v.* McAlister, 42 Ark. 183..... 152
——— *v.* Scatcherd, 77 C. C. A. 1 385
Lucas *v.* Brooks, 18 Wall. 436..... 36
Lyman *v.* Howe, 64 Ark. 436..... 493

M

McAdams *v.* State, 25 Ark. 405..... 125
McAllen *v.* Western Union Tel. Co., 70 Tex. 243..... 62
McAndrew *v.* Hollingsworth, 72 Ark. 446..... 264
McBride *v.* Berman, 79 Ark. 62... 107
McCall *v.* Helena, 86 Ark. 442..... 484
McCloy *v.* Arnett, 47 Ark. 458..183, 263
McConnell *v.* Swepston, 66 Ark. 141 37
McCoy *v.* State, 46 Ark. 141..... 124
McCurry *v.* Hawkins, 83 Ark. 202.. .....215, 398
McDonald *v.* Rankin, 91 Ark. 173.. 147
——— *v.* Shaw, 81 Ark. 235.... 20
McElhiney *v.* Commonwealth, 22 Pa. St. 365..... 158
McGehee *v.* Blackwell, 28 Ark. 27.. .....525, 526
McGill *v.* Hughes, 84 Ark. 238..... .....527, 528, 529
McKee *v.* Rudd, 121 S. W. 312.... 270
McKenzie *v.* State, 26 Ark. 339... 125
McKneely *v.* Terry, 61 Ark. 527.... 621
McLeod *v.* Dial, 63 Ark. 10..... 264
McNamara *v.* Logan, 100 Ala. 187. 142
McRae *v.* Merrifield, 48 Ark. 160.. 532
Mabry *v.* Kettering, 89 Ark. 551... 83
——— *v.* State, 80 Ark. 345..... 73
Mallory *v.* Brademyer, 76 Ark. 538. 425
Marcum *v.* Three States Lbr. Co., 88 Ark. 28..... 580
Marianna *v.* Vincent, 68 Ark. 247. 484
Marshall *v.* Cowles, 48 Ark. 362.... 290
Martin *v.* Railway Co., 55 Ark. 510.....579, 581, 582, 584
Mason *v.* Gates, 82 Ark. 294..... 34
Matlock *v.* Reppy, 47 Ark. 148..... 311
Matthews *v.* Lane, 65 Ark. 419..... 152
Mayo *v.* Cartwright, 30 Ark. 407.. 199
Meeks *v.* State, 80 Ark. 579..... 623
Merrill *v.* Harris, 65 Ark. 355..... 266
Merrigan *v.* Boston & A. Rd. Co., 154 Mass 189..... 403
Meyer *v.* Rousseau, 47 Ark. 462.... 236
Merchants, etc., Bank *v.* Pennsylvania, 167 U. S. 461..... 338
Miller *v.* Nuckolls, 77 Ark. 64..... 12
——— *v.* Springer, 70 Pa. 269... 23
Mills *v.* Green, 159 U. S. 651..... 242
Mississippi, O. & R. R. Rd. Co. *v.* Cross, 20 Ark. 443..... 507
Missouri *v.* Lewis, 101 U. S. 22..... 78
Mitchell *v.* N. Y., L. E. & W. R. Co., 36 Hun 177..... 469
——— *v.* State, 86 Ark. 486..... 320
Mock *v.* Pleasants, 34 Ark. 63..... 235
Modlin *v.* Kennedy, 53 Ind. 267.... 264
Momence Stone Co. *v.* Groves, 197 Ill. 88..... 356
Montgomery *v.* Edwards, 46 Vt. 151 398
Moore *v.* Camden Marble & Granite Works, 80 Ark. 274..... 398
——— *v.* Horsley, 42 Ark. 163... 463

Morgan *v.* Kennedy, 30 L. R. A. 521 490
Morris *v.* Cohn, 55 Ark. 401..... 117
Morrison *v.* Davis & Co., 20 Pa. St. 171 584
——— *v.* Western Union Tel. Co., 24 Tex. Civ. App. 347..... 62
Murray *v.* Galbraith, 86 Ark. 50.... 489
Murry *v.* Meredith, 25 Ark. 164.... 312
Myar *v.* Poe, 79 Ark. 465..... 330
Myers *v.* Hawkins, 67 Ark. 413.... 120
Myrick *v.* Jacks, 33 Ark. 428..... 236
Mutual Life Ins. Co. *v.* Abbey, 76 Ark. 328..... 385
——— *v.* Parrish, 66 Ark. 612.... 385

N

Narramore *v.* Cleveland, etc., Ry. Co., 37 C. C. A. 499..... 561
National Bank *v.* Commonwealth, 9 Wall. 353.....338, 342, 343
Nattin *v.* Riley, 54 Ark. 30..... 532
Neale *v.* Peay, 21 Ark. 93..... 152
Nebraska Nat. Bank *v.* Walsh, 68 Ark. 633..... 330
Nelson *v.* Cowling, 89 Ark. 334..44, 235
——— *v.* Hirschberg, 70 Ark. 39. 117
New Orleans *v.* Gaines, 15 Wall. 624 191
——— *v.* Gaines, 131 U. S. 191.. 183
191 183
Newgass *v.* Railway Co., 54 Ark. 145 569
Niagara Fire Ins. Co. *v.* Boon, 76 Ark. 156..... 321
Nichols *v.* Council, 51 Ark. 26..... 290
——— *v.* Shearon, 49 Ark. 75.... 263
Noble *v.* State, 75 Ark. 246..... 127
Nolen *v.* Harden, 43 Ark. 307..... 364
Northern Central Ry. Co. *v.* Com., 90 Pa. 300..... 552
Northern Pac. Ry. Co. *v.* Adams, 116 Fed. 324..... 434
Noys *v.* Mordaunt, 1 Wh. & T. Lead. Cas. Eq. 510..... 23
Nunn *v.* Lynch, 89 Ark. 41..... 189

O

Ong Chair Co. *v.* Cook, 85 Ark. 300 .....164, 283
Orr *v.* State Board, 28 Pac. 419... 494
Osceola Land Co. *v.* Henderson, 81 Ark. 432..... 500
Overman *v.* State, 49 Ark. 364..... 150
Owens *v.* Gunther, 75 Ark. 37..... 391
Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664.....338, 343
Ozan Lumber Co. *v.* Biddie, 87 Ark. 587 504

P

Palmer *v.* McMahon, 133 U. S. 660. 338
——— *v.* Melson, 76 Ga. 803..... 36
Parham *v.* Dedman, 66 Ark. 26..... 38
Parker *v.* Chambliss, 12 Ga. 235.... 265
Parr *v.* Matthews, 50 Ark. 300..... 499
Patterson *v.* Stewart, 41 Minn. 84.. .....330, 331
Paul *v.* McGraw, 3 Wash. 296..... 342
Payne *v.* McCabe, 37 Ark. 318..... 44
——— *v.* Rittman, 66 Ark. 201... 69
Pearce *v.* State, 55 Ark. 387..... 201
Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181..... 78
Pembroke *v.* Logan, 71 Ark. 364.... 210
Penn *v.* Guggenheimer, 76 Va. 838. 24
Pennsylvania Co. *v.* Roy, 102 U. S. 451 435
Penrose *v.* Doherty, 70 Ark. 256... 499
Penzel *v.* Brookmire, 51 Ark. 105.. 292
People *v.* Cornetti, 92 Ark. 85..... 125
——— *v.* Hislop, 77 N. Y. 331... 158
——— *v.* Tax Commissioners, 4 Wall. 244..... 338
People's Fire Ins. Co. *v.* Goyne, 79 Ark. 315..... 386
People's Gas Co. *v.* Tyner, 131 Ind. 227 265
Percifull *v.* Platt, 36 Ark. 456..... 65
Perkins *v.* Ewan, 66 Ark. 175..... 480
Perry *v.* Little Rock & F. S. Ry. Co., 44 Ark. 395.....485, 558
Perry County Bank *v.* Rankin, 73 Ark. 589..... 314

Pettigrew *v.* Washington Co., 43 Ark. 33 65
Phelan *v.* Dalson, 14 Ark. 79 518
Phelps *v.* Buck, 40 Ark. 219 44
Philadelphia *v.* Thirteenth and Fifteenth St. Ry. Co., 8 Phila. 648 ... 551
Phillips *v.* Hollenberg Music Co., 82 Ark. 9 204
Pierce *v.* Scott, 37 Ark. 308 365
Pike *v.* Underhill, 24 Ark. 124 296
Pitchcock *v.* Donnahoo, 70 Ark. 68. 533
Polk *v.* State, 40 Ark. 482 423
——— *v.* State, 45 Ark. 165 592
Pope's Heirs *v.* Boyd, 22 Ark. 535. ..... 526, 530
Porter *v.* Doe, 10 Ark. 186 558
——— *v.* Roseman, 6 A. & E. Am. Cas. 718 597
Postal Tel. Co. *v.* Lathrop, 131 Ill. 575 135
Prescott & N. W. Ry. Co. *v.* Weldy, 80 Ark. 454 ..... 218, 219
Priebe *v.* Ames, 104 Minn. 419 412
Prudential Assurance Co. *v.* Thomas, 3 L. R. Ch. App. 76 459
Pulaski County *v.* Downer, 10 Ark. 589 602
Pultney *v.* Darlington, 2 Ves., Jr., 544 23

Q

Quertermous *v.* Hatfield, 54 Ark. 16 326
Quick *v.* Lemon, 105 Ill. 578 597

R

Railway Co. *v.* Clark, 58 Ark. 493. 164
——— *v.* Allen, 54 Ark. 431 443
——— *v.* Neel, 56 Ark. 279 582
——— *v.* Reeves, 10 Wall. 190 .. 584
——— *v.* Schneider 45 O. St. 678. 403
Rankin *v.* Fletcher, 84 Ark. 156 174
——— *v.* Schofield, 70 Ark. 83.78, 174
——— *v.* Schofield, 71 Ark. 168 ... 174
——— *v.* Schofield, 81 Ark. 440 ... 174
——— *v.* Schofield. 81 Ark. 440 ... 174
Redd *v.* State, 65 Ark. 475 127
Reed *v.* Reed, 62 Ark. 691 553
Reinhardt *v.* Gartrell, 33 Ark. 727 .. 235
Rhodes *v.* Cissell, 82 Ark. 367 ...39, 500
——— *v.* Driver, 69 Ark. 501 70
Richardson *v.* State, 47 Ark. 562 ... 126
Rightor *v.* Gray, 23 Ark. 228 44
Ringo *v.* Woodruff, 43 Ark. 469 530
Ritchie *v.* Bluff City Lbr. Co., 86 Ark. 175 309
Ritter *v.* State, 70 Ark. 472 204
Road Improvement Dist No. 1 *v.* Glover, 89 Ark. 513 ..... 99, 101
Robbins *v.* Hawley, 1 T. B. Mon. 18. 597
Roberts *v.* Bodman-Pettit Lumber Co., 84 Ark. 227 320
Robinson *v.* Metropolitan St. Ry. Co., 86 N. Y. Supp. 443 444
——— *v.* Nordman, 75 Ark. 593 .. 324
——— *v.* United States, etc., Soc., 132 Mich. 695 436
Rodgers *v.* Missouri Pac. Ry. Co., 88 Pac. 885 584
Roe *v.* Chitwood, 36 Ark. 210 489
Roehm *v.* Horst, 33 C. C. A. 550 .. 116
——— *v.* Horst, 178 U. S. 1 116
Roesch *v.* Johnson, 69 Ark. 30 189
Rogers *v.* Mo. Pac. Ry. Co., 88 Pac. 885 580
Rolling Mill Co. *v.* Ore & Steel Co., 152 U. S. 596 597
Rooney *v.* Sewall & Day Cordage Co., 161 Mass. 153 109
Rosenblatt *v.* Johnston, 104 U. S. 462 338
Ross *v.* Butler, 19 N. J. Eq. 294 543
——— *v.* Frick Co., 73 Ark. 45 .. .. 527, 528, 529
——— *v.* Moskowitz, 95 S. W. 86. 476
——— *v.* Royal, 77 Ark. 324 37
Rowland *v.* State, 45 Ark. 132 592
Rucker *v.* Dixon, 78 Ark. 99 37
Ruddell *v.* Folsom, 14 Ark. 213 247
Russell *v.* Berry, 70 Ark. 318 266

S

St. Louis & S. F. Rd. Co. *v.* Bowman, 76 Ark. 32 81
——— *v.* Crabtree, 69 Ark. 134 .. .. 218, 219, 443

St. Louis & S. F. Rd. Co. *v.* Dryer, 87 Ark. 531.....218, 219
——— *v.* Hill, 79 Ark. 76..... 142
——— *v.* Satterfield, 75 Ark. 61. 378
——— *v.* Shore, 89 Ark. 418..... 572
——— *v.* Townsend, 69 Ark. 380. 12
——— *v.* Wells, 82 Ark. 372..... 356
St. Louis, I. M. & S. Ry. Co. *v.* Alexander, 49 Ark. 190.....170, 171, 172
——— *v.* Anderson, 62 Ark. 360.. .....409, 468, 470, 569
——— *v.* Biggs 52 Ark. 240..409, 470
——— *v.* Birch, 89 Ark. 424..... 109
——— *v.* Broomfield, 83 Ark. 288. 485
——— *v.* Caraway, 77 Ark. 405.. 563
——— *v.* Cleere, 76 Ark. 377..... 405
——— *v.* Commercial Ins. Co., 139 U. S. 223.....582, 585
——— *v.* Deshong, 63 Ark. 443.. 600
——— *v.* Evans, 74 Ark. 407..... 445
——— *v.* Haist, 71 Ark. 258..... 107
——— *v.* Hall, 71 Ark. 302..... 399
——— *v.* Hardie, 87 Ark. 475.... 469
——— *v.* Hitt, 76 Ark. 225..... 443
——— *v.* Holmes, 88 Ark. 181... .....559, 563
——— *v.* Morris, 35 Ark. 622..... .....409, 468, 470
——— *v.* Neal, 83 Ark. 591..... 558
——— *v.* Paul, 64 Ark. 83..... 429
——— *v.* Pickett, 70 Ark. 226... 429
——— *v.* Puckett, 88 Ark. 204.... 563
——— *v.* Rice, 51 Ark. 467..... 559
——— *v.* Reed, 88 Ark. 458..... 353
——— *v.* Sparks, 81 Ark. 187.... 444
——— *v.* Sweet, 63 Ark. 563..... 163
——— *v.* Taylor, 87 Ark. 531..... 425
——— *v.* Taylor, 210 U. S. 281.. 559
——— *v.* Tomlinson, 69 Ark. 489. 405
——— *v.* Wells, 82 Ark. 372..... 559
——— *v.* Woodward, 70 Ark. 441. 12
——— *v.* York, 92 Ark. 554..... 358
St. Louis S. W. Ry. Co. *v.* Bolton, 36 Tex. Civ. App. 87..... 444
——— *v.* Costello, 68 Ark. 32.... 378
——— *v.* Grayson, 72 Ark. 119... ....4, 490, 578, 579
St. Louis S. W. Ry. Co. *v.* Trotter, 89 Ark. 273..... 573
——— *v.* Thompson, 89 Ark. 496. 445
Salinger *v.* Black, 68 Ark. 449..... .....526, 528, 529
Sanders *v.* Brown, 65 Ark. 498..... 349
——— *v.* Moore, 52 Ark. 376.... 237
Sansom *v.* Harrell, 51 Ark. 429..... 146
——— *v.* Harrell, 55 Ark. 572.... 263
——— *v.* Southern Ry. Co., 50 C. C. A. 53..... 434
Sartwell *v.* Sowles, 72 Vt. 270..... 398
Schlemmer *v.* Buffalo, etc., Ry. Co., 205 U. S. 1..... 559
Schofield *v.* Rankin, 86 Ark. 86..... 174
School District *v.* Long, 10 Atl. 769. 36
——— *v.* Weston, 31 Mich. 85.. 458
Scott *v.* Fowler, 14 Ark. 427..... 558
——— *v.* St. Louis, I. M. & S. Ry. Co., 79 Ark. 138..... 443
Searcy *v.* Turner, 88 Ark. 213..... 484
Sexton *v.* Brock, 15 Ark. 345..... 283
Shegogg *v.* Perkins, 34 Ark. 117.. 235
Shepherd *v.* Jernigan, 51 Ark. 275.. 184
——— *v.* State, 44 Ark. 39..... 590
Sherman *v.* Lewis, 46 N. W. 318.... 23
Shorter University *v.* Franklin, 75 Ark. 571..... 215
Sibley *v.* England, 90 Ark. 420..... 34
Sidway *v.* Nichol, 62 Ark. 146..... 606
Siloam Springs *v.* Broyles, 87 Ark. 202 624
Smith *v.* Mayberry, 61 Ark. 515.... 326
——— *v.* Smith, 31 S. E. 135..... 265
——— *v.* State, 50 Ark. 545..... 74
Sparkman *v.* Roberts, 61 Ark. 26.. 263
Springfield & M. Rd. Co. *v.* Henry, 44 Ark. 360..... 569
——— *v.* Rhea, 44 Ark. 262..... 569
Snyder *v.* State, 86 Ark. 456..... 73
Sparks *v.* Farris, 71 Ark. 117..... 37
Squire *v.* Western Union Tel. Co., 98 Mass. 232..... 136
Stallings *v.* Whittaker, 55 Ark. 494. 489
Standard Life & Acc. Ins. Co. *v.* Ward, 65 Ark. 295..... 283
Stanton *v.* State, 13 Ark. 319..... 126
State *v.* Bailey, 62 Ark. 489..... 416

State *v.* Baxter, 38 Ark. 462..... 187
——— *v.* Baxter, 50 Ark. 447..... 187
——— *v.* Blahut, 48 Ark. 34..... 416
——— *v.* Deschamp, 53 Ark. 490. 100
——— *v.* Kirk, 53 Ark. 337..... 270
——— *v.* Marsh, 37 Ark. 357.... 100
——— *v.* Miller, 45 Minn. 521.... 591
——— *v.* Nichols, 29 Minn. 357... 202
——— *v.* Osborne, 60 Neb. 415... 496
——— *v.* Rottaken, 34 Ark. 144. 236
——— *v.* St. Louis & S. F. Rd. Co., 83 Ark. 254..... 77
State Bank *v.* Woody, 10 Ark. 638. 247
Stayton *v.* Halpern, 50 Ark. 329... 263
Stephens *v.* Shannon, 43 Ark. 464. 198
Sulek *v.* McWilliams, 72 Ark. 67... 553
Summers *v.* Heard, 66 Ark. 550.... 480
Sunny South Lbr. Co. *v.* Neimeyer Lbr. Co., 63 Ark. 269.....204, 480, 532
Swamscot Machine Co. *v.* Walker, 22 N. H. 457..... 476
Swift *v.* Broyles, 58 L. R. A. 390... 544

T

Taliaferro *v.* Barnett, 47 Ark. 359. 558
Tatum *v.* Croom, 60 Ark. 487..... 66
——— *v.* Mohr, 21 Ark. 349..... 312
Taylor *v.* Godbold, 76 Ark. 399..... 398
——— *v.* McClintock, 87 Ark. 281. 74
——— *v.* State, 65 Ark. 595..... 34
——— *v.* State, 82 Ark. 540..... 239
——— *v.* Stowell, 4 Met. 175..... 597
Tennessee *v.* Condon, 189 U. S. 64. 244
Terrall *v.* Wright, 87 Ark. 213..... 543
Texas & Pac. Ry. Co. *v.* O'Fiel, 78 Tex. 486..... 357
Texas & St. L. Ry. Co. *v.* Hall, 44 Ark. 375..... 431
Third Nat. Bank *v.* Stone, 174 U. S. 432 338
Thomas *v.* Hinkle, 35 Ark. 450..... 150
——— *v.* Johnston, 78 Ark. 574.. 326
Tiffin *v.* St. Louis, I. M. & S. Ry. Co., 78 Ark. 55.....403, 443
Tilghman v. Proctor, 125 U. S. 136. 363
Tiner *v.* Christian, 27 Ark. 306.... 296
Townsend *v.* Martin, 55 Ark. 192. 212
Traer *v.* Clews, 115 U. S. 528..... 621
Trimble *v.* James, 40 Ark. 393..... 235
Trotter *v.* Trotter, 31 Ark. 145..... 263
True *v.* International Tel. Co., 60 Me. 9.....135, 136
Tucker *v.* Hawkins, 72 Ark. 21..... 305
——— *v.* Ry. Co., 59 Ark. 81..... 458
Turner *v.* Burke, 81 Ark. 352..... 501
——— *v.* Overton, 86 Ark. 406.411, 470

U

Ultima Thule, A. & M. Ry. Co. *v.* Calhoun, 83 Ark. 318..... 357
Union Pac. Ry. Co. *v.* Daniels, 152 U. S. 684.....356, 358
United States *v.* Atchison, T. & S. F. Ry. Co., 163 Fed. 517..... 559
——— *v.* Chicago Gt. Western Ry. Co., 162 Fed. 775..... 559
——— *v.* Southern Pac. Ry. Co., 169 Fed. 407..... 559
Updegraff *v.* Marked Tree Lumber Co., 83 Ark. 154..... 500

V

Van Allen *v.* Assessors, 3 Wall. 573. 338
——— *v.* Farmers' Joint Stock Ins. Co., 4 Hun 413..... 387
Van Etten *v.* Daugherty, 83 Ark. 534 37
Vaughan *v.* State, 57 Ark. 10..... 592
Vestal *v.* Knight, 54 Ark. 97..... 606
Vogel *v.* Little Rock, 55 Ark. 609. 558

W

Wagoner *v.* Wabash R. Co., 94 S. W. 295..... 435
Wallace *v.* Berdell, 101 N. Y. 13... 188
——— *v.* Turner, 89 S. W. 432.. 236
Walters *v.* Meyer, 39 Ark. 560..... 326
Washington *v.* Govan, 73 Ark. 612. 235
——— *v.* Moore, 84 Ark. 220.... 36
Washington & Georgetown R. Co. *v.* Gladmon, 82 Ark. 401..... 443
Waterman *v.* Hawkins, 75 Ark. 120. 4
Waters *v.* Townsend, 65 Ark. 613. 551
Watson *v.* Pugh, 51 Ark. 218..... 326
Wear *v.* Skinner, 46 Md. 257..... 621
Webber *v.* Stanley, 16 C. B., N. S., 698 22

Welch Stave & Merc. Co. *v.* Stevenson, 92 Ark. 266..... 602
Wells Fargo & Co. *v.* State Bd. of Equalization, 56 Cal. 194..... 496
Wells *v.* Fletcher, 17 Ark. 581.... 616
Western & Atlantic Ry. Co. *v.* Young, 81 Ga. 397..... 444
Western Coal & Mining Co. *v.* Buchanan, 82 Ark. 499.....218, 219
——— *v.* Burns, 84 Ark. 74.73, 218, 219
Western Tie & Timber Co. *v.* Newport Land Co., 75 Ark. 286..... 120
Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299..... 135
——— *v.* Fellner, 58 Ark. 29.... 137
——— *v.* Ford, 77 Ark. 531..... 228
——— *v.* Hall, 124 U. S. 444..... 136
——— *v.* Hanley, 85 Ark. 263..... 62
——— *v.* Hogue, 79 Ark. 33..228, 578
——— *v.* Hyer, 22 Fla. 637..... 135
——— *v.* Love-Banks Co., 73 Ark. 205 137
——— *v.* Moxley, 80 Ark. 554.227, 228
——— *v.* Nelson, 86 Ark. 336.... 228
——— *v.* Raines, 78 Ark. 545.228, 578
——— *v.* Woodard, 84 Ark. 323. 227
Wheat *v.* Smith, 50 Ark. 266..... 70
Wheeler *v.* Foote, 80 Ark. 435....37, 38
Whetstone *v.* Hunt, 78 Ark. 230... 326
White *v.* Beal & Fletcher Gro. Co., 65 Ark. 278..... 349
——— *v.* McCracken, 60 Ark. 613 117
Whitehead *v.* Henderson, 67 Ark. 200 35
Wilkerson *v.* Crescent Ins. Co., 64 Ark. 80..... 521
Williams *v.* Bennett, 75 Ark. 312.. 499
——— *v.* Emberson, 55 S. W. 596. 476
——— *v.* State, 50 Ark. 511..124, 590
Williamson *v.* Jones, 43 W. Va. 562. 265
Wilson *v.* Pryor, 44 Ark. 535..... 247
——— *v.* Spring, 38 Ark. 182..... 37
——— *v.* New York, etc., Ry. Co., 18 R. I. 491..... 403
Wimberly *v.* State, 90 Ark. 514..... 201
Winningham *v.* Holloway, 51 Ark. 385 237
Winter *v.* Davis, 51 Ark. 335..... 264
Wood *v.* Wylds, 11 Ark. 754..... 247
Woodward *v.* State, 84 Ark. 119... 483
Wootton *v.* Redd, 12 Gratt. 196.... 24

Y

Yates *v.* Milwaukee, 77 U. S. 497.. 550
Young *v.* Rose, 80 Ark. 513..... 610

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MISSOURI & NORTH ARKANSAS RAILROAD COMPANY *v.* STATE.

Opinion delivered June 28, 1909.

1. RAILROADS—FENCE—CONSTRUCTION OF STATUTE.—Acts 1905, c. 165, requiring the St. Louis & North Arkansas Railway Company to fence its right of way in certain counties, is binding upon a company which purchased the railroad from the above company. (Page 3.)
2. CONSTITUTIONAL LAW—SPECIAL ACTS.—The Constitution permits special legislation when general laws cannot be made applicable, and the Legislature is the sole judge of the necessity for a special statute. (Page 3.)
3. SAME—REASONABLENESS OF STATUTE.—While the reasonableness of the legislative exercise of police power is to be determined by the courts, the necessity for its exercise in a given instance is addressed to the discretion of the Legislature. (Page 4.)
4. RAILROADS—VALIDITY OF FENCING ACT.—A statute requiring a particular line of railroad running through a certain locality to fence its right of way is not unconstitutional in singling out such railroad and requiring it to do what other railroads in the State are not required to do. (Page 4.)
5. SAME—FENCING ACT—PENALTY.—Under Acts 1905, c. 165, § 5, imposing a penalty upon the St. Louis & North Arkansas Railway Company for failure or refusal to comply with its provisions, the penalty is prescribed for failure or refusal to comply with any of the requirements of the act, one of which is to keep the fence and stockguards in good repair. (Page 6.)

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

Moore, Smith & Moore, for appellant.

1. The act of April 13, 1905, is unconstitutional, as being contrary to section 1, art. 14, of amendments to the Constitution of the United States. 47 Ark. 330; 61 Kans. 146; 125 U. S. 181; 115 Mo. 307; 2 Yerger 260-270; 134 U. S. 232-7;

Cooley's Principles of Const. Law, 251; 183 U. S. 79; Cooley's Const. Lim. (5 Ed.) 484-6; 118 U. S. 356-369-70.

2. The indictment and information are for failure to keep the fence in repair and not for failure to build, and neither should have been sustained.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. It is conceded that statutes compelling railroads to fence their rights of way are proper exercises of the police power. 129 U. S. 26; 149 *Id.* 364; 115 *Id.* 512.

2. The act is not unconstitutional as special discriminatory legislation, nor does it deny appeal equal protection of the law. 113 U. S. 703; 165 *Id.* 157; 129 *Id.* 29; 177 *Id.* 585.

3. The right to impose double damages is unquestioned. 115 U. S. 512; 165 *Id.* 157.

4. Double damages are not the only penalty for non-compliance with the act. Section 4. It also provides a fine for not keeping the fence in repair. 115 U. S. 572.

McCULLOCH, C. J. The Missouri & North Arkansas Railroad Company appeals from judgments of the circuit court of Boone County in two cases, assessing penalties against it for alleged violations of a statute enacted by the Legislature in 1905 requiring the St. Louis & North Arkansas Railway Company to fence its right of way in the counties of Carroll, Boone and Searcy, in this State. The appellant is a railroad corporation, and succeeded to all the rights, franchises and property of said St. Louis & North Arkansas Railway Company by purchase from a commissioner of the United States Circuit Court in a mortgage foreclosure suit.

The statute was enacted in 1905, but was made to take effect on September 1, 1906, and appellant received its deed of conveyance from the commissioner on June 26, 1906. The first section of the statute reads as follows: "Sec. 1. That the St. Louis & North Arkansas Railway Company is hereby required to fence its right of way in the counties of Carroll, Boone and Searcy, as hereinafter provided."

The second section requires that the fence shall be built on both sides of the roadbed, so as to prevent stock from crossing the track, and specifies how the fence shall be constructed. Sec-

tion 3 requires the company to make gates at private crossings and stockguards at public crossings, and further provides that the company shall not be required to fence the track in cities or towns or at places where natural barriers render it impossible for stock to go upon the track. Section 4 requires the company to keep the fence and stockguards in good repair, and makes it liable for double damages in case stock is injured or killed on the track when the fence is not in good condition, but provides that when the fence is kept in good repair the company shall not be liable for killing or injuring stock.

Section 5, which prescribes the penalty, is as follows: "That if said railroad company shall fail, refuse or neglect to comply with the provisions and requirements of this act, it shall be deemed guilty of a misdemeanor, and, upon conviction before any court of competent jurisdiction, be fined not less than fifty dollars nor more than five hundred dollars, and every day said railroad company shall fail to comply with the provisions of this act shall be a separate offense." Acts 1905, c. 165.

1. The statute in question took effect after the appellant became the owner of the line of railroad described herein. It cannot well be contended, and is not contended here, that the statute, if valid, does not apply to appellant as the owner of the railroad. The statute was aimed at the line of railroad described, and not at the particular corporation which owned and operated it. It is in the nature of a police regulation applicable to a certain line of railroad.

2. It is contended that the statute is violative of that part of the 14th Amendment to the Constitution of the United States which forbids that a State shall "deny to any person within its jurisdiction the equal protection of the laws." Corporations fall within this provision, and are entitled to its protection. It is insisted that the statute singles out one line of railroad, and imposes upon the owner of it the unequal burden of fencing the track when similar burdens are not placed on other railroad companies. Decisions of the Supreme Court of the United States are relied on, holding that States cannot, by arbitrary classification based upon no difference which bears a reasonable and just relation to the act or business regulated, place burdens upon one class of persons not shared by others. *Gulf, C. & S. F. Ry.*

Co. v. *Ellis,* 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79.

In the Cotting case, *supra,* a statute of Kansas was considered which, though general in terms, was found to apply only to a single company engaged in operating stock yards. The statute attempted to regulate the charges of the company, among other regulations, and the court held that the classification was arbitrary and unjust, and denied to that company the equal protection of the laws. In that case the regulation of rates, etc., was found to be such as would have applied to any other company engaged in similar business, and that the classification was not based upon any distinction between the business of that company and that of other companies in the same business.

The statute now under consideration falls within a different principle. It is a special act, applicable to a given locality; that is to say, to a particular line of railroad running through a certain locality. It is purely local in its operation. The selection of this line of railroad is necessarily the selection of a given territory over which the statute is to operate, and it implies a determination by the lawmakers of the question of necessity for such provision as a protection to the property along that particular route. Now, the Constitution of this State permits special legislation when general laws cannot be made applicable (Const., art. 5, § 25), and this court has repeatedly held that the Legislature is the sole judge of the necessity for a special statute. *Boyd* v. *Bryant,* 35 Ark. 69; *Davis* v. *Gaines,* 48 Ark. 370; *Carson* v. *Levee District,* 59 Ark. 513; *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 119; *Waterman* v. *Hawkins,* 75 Ark. 120; *Hendricks* v. *Block,* 80 Ark. 333.

The legislative exercise of the police power must be reasonable, and whether or not such legislation is reasonable is a question for the courts to determine; but the necessity for the exercise of the power in a given case is a matter addressed to the discretion of the Legislature. *Louisiana & Ark. Ry. Co.* v. *State,* 85 Ark. 12; 2 Tiedeman on State and Federal Control, p. 987.

It is not contended that a statute requiring railroad companies to fence their tracks is not a proper exercise of the police power, nor that it places an unreasonable or unnecessary burden upon the appellant company in this instance to fence its track.

The only complaint is that this company should not be singled out and compelled to do that which other railroad companies in the State are not required to do. The answer which we make to the contention is that the Legislature has determined, it is presumed, after due investigation, that the conditions are such along the route of this railroad that the track should be fenced in a particular manner, pointed out in the statute, for the protection of live stock and, maybe, for the better security of human life, in the operation of trains. The particular reasons which prompted the Legislature in arriving at this decision we are not called on to inquire into. The fact that there are other railroads in that portion of the State, and that another railroad traverses one of the counties mentioned in the statute, does not stamp the enactment as an arbitrary classification. Different conditions, calling for different regulations, may exist in the same county, and, as we have already said, the Legislature alone can inquire into and determine the necessity of putting into force a police regulation in a given locality. The Supreme Court of the United States in *Erb* v. *Morasch,* 177 U. S. 585, has, we think, announced the principle which controls in this case. There the court upheld, as a valid exercise of police control, an enactment regulating the speed of trains on all railroads save one in Kansas City. The court said: "If there were nothing in the record beyond the mere words of the ordinance, we are of the opinion that the contention could not be sustained, because it is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations. One may pass through crowded parts, crossing or along streets constantly traveled upon by foot passengers and vehicles, while others may pass through remote parts of the city, where there is little danger to individuals or carriages. One may pass through such parts of the city as will prevent its tracks from being fenced, and where it is not in fact fenced, while another may pass through parts which will permit the fencing of the tracks, and where the tracks are in fact fenced. Under those circumstances, a different regulation as to the matter of speed would be perfectly legitimate, and it could not be held that the classification was arbitrary or without reasonable reference to the conditions of the several roads. With the presump-

tion always in favor of the validity of the legislation, State or municipal, if the ordinance stood by itself, the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains."

3. The track was fenced by the St. Louis & North Arkansas Railroad Company before the appellant acquired title to the property, and in each of the two cases before us the appellant is charged with having permitted the fence to remain out of repair so that its condition was not such as the statute requires. It is urged that the penalty applies only to the failure to fence the track, and not to failure or refusal to repair it so as to keep it in the condition required by the statute. We construe the act to prescribe a penalty for failure or refusal to comply with *any* of the requirements of the act; and one of the requirements is to keep the fence and stockguards in good repair. A separate penalty is prescribed for each day's failure or refusal to comply. The statute measures the offense by the period of time, viz: by the day, and not by the number or extent of breaches.

The judgment in each case is affirmed.

SMITH v. WEATHERFORD.

Opinion delivered October 11, 1909.

1. INSTRUCTIONS—AMBIGUITY.—An ambiguous and misleading instruction was properly refused. (Page 10.)
2. SAME—CORRECTNESS OF REQUEST.—A party cannot complain of the court's refusal to give an instruction that is not correct in every particular. (Page 10.)
3. CONTRACT—MAKING AND DELIVERY OF TIES—CONSTRUCTION.—Where a contract called for the making of railroad ties and their delivery from time to time on the railroad right of way, and provided that the market price at the time of delivery should apply, the maker was entitled to the market value of the ties at the times when they were delivered, and to a reasonable time in which to make his deliveries, but not to withhold delivery after making the ties to await an increase in prices; the question as to what is a reasonable time being for the jury. (Page 10.)

4. SAME—BURDEN OF PROOF—MATTER OF DEFENSE.—Where a plaintiff sues upon a contract for the making and delivery of ties, under which he claims that he was to receive the market price at the times of their delivery, he is bound only to show the date of delivery and the ruling prices at the time thereof, the burden being on the defendants to show wrongful or negligent delay in delivering the ties after they were made. (Page 11.)

5. INSTRUCTIONS—RELEVANCY—PREJUDICE.—The giving of an abstract instruction is not reversible error if it appears that no prejudice could have resulted from its being given. (Page 12.)

6. COMPROMISE AND SETTLEMENT—BURDEN OF PROOF.—Where defendants produce a check given by them and accepted by plaintiff, reciting a settlement in full, but there was a conflict in the evidence as to whether the check contained this recital at the time of its acceptance, it was not error to instruct the jury that the burden was on the defendant to show that such a settlement was made. (Page 12.)

7. SALES OF CHATTELS—PLEADING—VARIANCE.—Where a complaint on an account for materials furnished alleged that the agreement to furnish certain items of the account was made on a certain date, but the evidence showed that the agreement was made on a subsequent date, the variance was not material, as the gist of the action was the sale of the articles described in the account. (Page 14.)

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

Jos. M. Hill and *Crump, Mitchell & Trimble,* for appellant.

1. The court erred in not submitting to the jury the question of a bonus. No instruction was given on this subject. 82 Ark. 499.

2. Defendant was entitled to have the jury instructed that plaintiff could not take advantage of the delay in furnishing ties.

3. The instruction regarding the settlement was erroneous. It is error to instruct upon an issue not in the case. 69 Ark. 380; 70 *Id.* 441; 80 *Id.* 200; 79 *Id.* 375; 76 *Id.* 348.

4. The fourteenth instruction is erroneous as to the burden of proof. 74 Ark. 286.

5. It was error to admit evidence as to the second contract. 85 Ark. 322; 84 Ark. 315.

6. It was error to give the seventh instruction. The court should not assume facts in dispute as proved. 71 Ark. 38.

7. The case should have been transferred to chancery. 82 Ark. 547; 31 *Id.* 345.

Pace & Pace, for appellee.

It is not error to refuse an instruction not applicable to the issues in the case. A party is not entitled to a charge on the subject-matter of his contentions where there is no evidence to authorize it. While it is true that in actions involving long and complicated accounts the remedy in equity is more adequate and complete, yet courts of law have jurisdiction, and it is not error to refuse to transfer to equity. When the record shows that it does not contain all the evidence, this court will presume that that part that was omitted was sufficient to sustain the court's finding and decree. 45 Ark. 242; 54 Ark. 162.

McCULLOCH, C. J. This is an action instituted by the plaintiff, L. E. Weatherford, against defendants Smith and others as partners, under the firm name of C. H. Smith Tie & Timber Company, on account for railroad ties and stave bolts and piling manufactured by plaintiff for defendants and alleged to have been delivered to them. The amount of balance alleged to be due on the account is $2,398.34, and on the trial below before a jury the plaintiff recovered $1,800.

It is alleged in the complaint that in July, 1905, the plaintiff was employed by defendants to make ties, stave bolts and piling out of timber which had been purchased by him from them; that for the first lot of ties he was to receive 23 cents each, and for subsequent lots the current prices at the time of the respective deliveries. The account exhibited with the complaint shows a debit of $12,032.21, with payments thereon aggregating $9,633.87, leaving an unpaid balance of $2,398.34, the amount sued for; and it shows an aggregate of 35,930 ties claimed to have been delivered by plaintiff.

The defendants in their answer alleged that they had paid the plaintiff for 35,460 ties, but that they have received only 33,024, leaving 2,436 ties which they had paid for but which had never been delivered. They further alleged that they had had a final settlement with plaintiff, and that plaintiff had given a receipt acknowledging payment in full. The case was tried before a jury on conflicting evidence, and the result, as before stated, was a verdict and judgment for plaintiff in the sum of $1,800.

It appears from the evidence that the defendants were engaged in the business of supplying ties to a railroad company, and owned timber on two tracts of land. They engaged plaintiff

to make ties and deliver them on the right of way of the railroad company, and agreed to let him have the timber at the prices they had paid for it; to purchase other tracts of timber for him and to charge the price thereof to him as an advance on ties to be delivered, as well as to advance him money to pay for cutting and hauling the ties. Afterwards they agreed also to take stave bolts and piling. The only point of difference between the parties, as far as concerns the contract, was as to the price to be paid for the ties. The plaintiff testified that he was to receive the ruling current prices for ties after the first lot delivered, for which he was to receive 23 cents each; and the defendants contended that they were only to pay 23 cents each for all ties delivered.

The defendants admitted that during the progress of the transaction between them they agreed to increase the price of ties above the stipulated sum of 23 cents, but that this was a bonus or gratuity which they were not required under the original contract to pay. Both sides introduced testimony in support of their respective contentions. They also testified in support of their respective contentions with reference to the alleged settlement in full. One of the defendants testifies that he made a compromise and final settlement with the plaintiff and paid him $150, which he said the plaintiff accepted in full satisfaction of all his demands; that the payment was made by two checks, one for $100 and the other for $50, the latter check containing in writing on its face the words: "Settlement in full for all lands and ties cut up to this date;" and that the plaintiff accepted the check with this written on its face and collected the same. The plaintiff denied that the amount was paid in full settlement, and testified that the words above quoted were not on the check when it passed through his hands.

The defendant introduced in evidence the check containing the words quoted above. Numerous errors of the court are assigned, which will be discussed in the order presented in argument.

1. The court refused to give the following instruction at defendant's request: "No. 4. You are instructed if defendants, after the original contract was entered into, voluntarily gave plaintiff a bonus amounting in all to thirty cents as the whole price per first-class ties, then in fact defendant was under no legal obligation to make such a gift, and the plaintiff cannot recover in

law for said 30 cents on any ties on which same was not voluntarily given."

Doubtless, the defendants intended by this instruction to have the law declared to be that if, under the original contract with plaintiff, they were only to pay 23 cents each for all the ties delivered, they were not, without a new consideration, bound by their agreements to increase the price to 30 cents per tie. But the instruction falls far short of expressing this idea with sufficient clearness for jurors of ordinary intelligence to understand it. It entirely ignored the plaintiff's contention that the price of ties furnished from time to time was to be increased to the prevailing or current price at the time of the respective deliveries; and it was calculated to mislead the jury into believing that, even though they accepted the plaintiff's contention as true, if the prices were voluntarily increased by the defendants, the increased prices could not be recovered. The words "voluntarily gave plaintiff a bonus amounting in all to thirty cents" do not clearly express the idea intended to be conveyed, and might have had a misleading effect upon the minds of the jurors.

The meaning of the latter part of the instruction is also far from being clear. It says that the plaintiff "cannot recover in law for said thirty cents on any ties on which same was not voluntarily given." A party cannot complain of the refusal of a court to give an instruction unless it is correct in every particular. The court no doubt would have given an instruction on the subject if a correct one had been requested; for the law as contended for by defendant's counsel was declared in another instruction. After setting forth these issues in the case, the court gave this to the jury:

"No. 10. You are instructed that the burden is on the plaintiff to show that he had a contract with defendant by which defendant was to pay the prevailing market price for ties; that he furnished ties under that contract. If you so find, your verdict will be for the plaintiff in whatever sum to be due him by a preponderance of the evidence."

With this instruction before them, the jury were properly advised as to the law on this feature of the case.

2. Error is assigned in the refusal of the court to give the following instruction: "No. 1. You are instructed that under the terms of the agreement when the plaintiff had made a tie the

date of its making marks the time of the prevailing price, if you find that the plaintiff held up ties purposely or negligently, and that the plaintiff could not hold same until there was a rise in the market price. The date of making such ties, being in the exclusive knowledge of the plaintiff, must be shown by him, if not so shown, the original lowest price paid as shown will govern." And also in striking the following from instruction No. 12, requested by the defendants: "If you should further find that he cut and kept them in the woods a longer time than he should have done, and you find that the ties had in the meantime risen in value, and you cannot arrive accurately at the true date at which ties ought to have been delivered, then I instruct that the plaintiff ought not to recover more than the lowest sum paid because he cannot fraudulently or negligently take advantage of his own wrong."

Instruction No. 1 was erroneous in several particulars. In the first place, it was not correct to say that the date each tie was made marked the time for fixing the price to be paid. The contract called for the delivery of the ties on the railroad right of way; and if the plaintiff correctly stated the terms of the contract, he was entitled to the market value at that time. He could not rightfully withhold delivery after the making of the ties to await an increase in prices; but he was entitled to a reasonable time in which to make his deliveries, and he was entitled to any increase in prices occurring during that time. What constituted a reasonable time under the peculiar circumstances of the case was a question for the jury to determine.

Nor was it correct to instruct the jury, as requested, that, if the plaintiff failed to show the date of making the ties, he could only recover the minimum price under the contract. The plaintiff was only bound to show the date of delivery and the ruling prices at the time thereof. It devolved on the defendants to prove negligent or wrongful delay in delivering the ties after they were manufactured.

The omitted portion of the twelfth instruction above quoted was also erroneous in saying that the plaintiff was not entitled to recover more than the minimum price if he failed to prove *accurately* the *true* date of making the ties. The instruction would have cut the plaintiff off from a recovery of more than the minimum price for any of the ties, notwithstanding he proved the

increase in price, merely because he could not show the date of making the ties.

3. The court gave the following instruction concerning the alleged final settlement: "No. 13. The court instructs the jury that if you find from the evidence [that] plaintiff and defendant had a final settlement, and defendant paid plaintiff $150, then the plaintiff is bound by settlement, and could not recover for any difference that might have been due him to the said time, although it might have been more than said $150, *but you are further instructed that said settlement, if you find that there had been one, would not apply to the business after said settlement.*"

The part in italics was objected to on the alleged ground that there was no evidence of business transacted between the parties after the date of the alleged settlement. If it be conceded that there was no such evidence, we fail to see how the instruction could have had a prejudicial effect. The jury could not, by the abstract instruction, have been misled into disregarding the settlement. It has often been held by this court that it is prejudicial error to give an abstract instruction which might be construed as an intimation from the court that there was some evidence on that issue when there was in fact none. *St. Louis & S. F. Rd. Co.* v. *Townsend,* 69 Ark. 380; *St. Louis, I. M. & S. Ry. Co.* v. *Woodward,* 70 Ark. 441; *Harris Lbr. Co.* v. *Morris,* 80 Ark. 260; *Fordyce* v. *Key,* 74 Ark. 19; *Ark. & La. Ry. Co.* v. *Stroude,* 77 Ark. 109.

But the rule thus announced is not an inflexible one; and, where it can be seen that no prejudice could have resulted from the giving of such an instruction, the verdict will not be set aside. It is only where it can be seen that prejudice might have resulted that a reversal follows. *Miller* v. *Nuckolls,* 77 Ark. 64; *Jonesboro, L. C. & E. Rd. Co.* v. *Cable,* 89 Ark. 518.

The distinction will be found by a comparison of the cases above cited.

The court also gave the following instruction over the defendant's objection: "14. The burden of proof is upon the defendant to show that such a final settlement was had between the parties, if any, must outweigh the evidence tending to show that he (no) such settlement was made."

This instruction is not complete, and there is a manifest error in copying it into the transcript. Learned counsel for the

defendant, in their argument, have presented this instruction as having told the jury in substance that the burden of proof was on the defendant to show that a final settlement had been made between the parties. They say that an instruction to that effect was erroneous, and in conflict with the principle announced in *Decker* v. *Laws*, 74 Ark. 286. We do not think so. The case above referred to was quite similar to the instant case. The defendant in that case, as in this one, claimed to have consummated a settlement in full with a check containing words acknowledging payment in full. But the plaintiff denied that the check contained those words when it passed through his hands. In that state of the proof the court instructed that if the check contained those words when it was given and accepted, the burden was on the plaintiff to show that the check was not given and accepted as full payment; but that the burden of proof was on the defendant to show that those words were not contained at the time plaintiff accepted it. This court approved those instructions, and in the opinion said: "As appellants were claiming a special benefit from certain words in the $50 check, the burden was upon them to prove that Laws was bound by these words. The check was a special phase of the case introduced and relied upon by appellants, and it was correct to place the burden upon that particular question upon appellants. For Laws denied in his proof that the check contained any such words when he signed the check. There is nothing antagonistic or inconsistent in the two instructions. If Laws really signed the check with the words 'in full payment of all demands' in it when he signed, then the burden was upon him to show that these words were not intended as full payment, as they purported to be, as the court told the jury in instruction numbered 2. But, on the other hand, if the check did not have the words 'in full of all demands' when Laws signed same, then he was not bound by them, and the burden was upon appellants, in order to get the benefit of these words, to show that Laws signed the instrument containing them."

And again the court said: "The words, 'in full payment of all demands,' being contested, the question as to when, by whom, and with what intent they were written was left to the jury upon the whole evidence, with the burden upon him who produced and claimed the benefit of the instrument to prove it, and the burden left with the plaintiff to establish his claim."

So in the present case, having pleaded settlement in full, it devolved on the defendants to prove it. It also devolved on them to prove that the check contained words acknowledging acceptance of the amount in full satisfaction when it passed through plaintiff's hands, that being denied by the plaintiff. It was an essential part of their defense of payment. They would have been entitled to an instruction, as in *Decker* v. *Laws,* if they had requested one, to the effect that if the plaintiff accepted the check with these words in it, then the burden would be on him to show that the check was not accepted as full payment. But the defendants did not ask for such an instruction, and cannot now complain because none was given.

4. It is next insisted that the court erred in admitting evidence to sustain a contract for furnishing stave bolts and piling, which was not declared on in the complaint. The contention is not well founded. The complaint set forth a cause of action on an itemized account for the price of ties, stave bolts and piling. It is true that the complaint alleged that the defendants employed the plaintiff on a day in July, 1905, to make and deliver ties, stave bolts and piling, and the evidence shows that the agreement with reference to the stave bolts and piling was made on a subsequent date. But this variance was not material, as the gist of the action was the sale of the material described in the exhibited account; and the variance as to the date of sales was not fatal. The evidence tended to establish the allegations of the plaintiff, viz., that the plaintiff had sold certain quantities of stave bolts and piling to the defendant; and they could not have been misled by the variance, and they do not claim to have been misled. In the answer filed in the case they met the issue tendered in the complaint concerning the stave bolts and piling by admitting the sale and delivery of the same and pleading that they had paid for same at the time of the delivery.

5. The final contention of the defendants is that the court erred in giving the following instruction: "No. 7. The court instructs the jury that the plaintiff sues the defendant on an alleged contract in which suit he alleges that the defendants are indebted to him in the sum of $2,398.34 for timber by plaintiff as defendant. *The defendant admits the delivery of all the timber except 2,436 cross ties.*"

The part in italics is objected to on the alleged ground that it incorrectly stated the defendants' admission to be that all of the timber except 2,436 cross ties was delivered, when in fact they only admitted that they had received the ties in the woods, but that the same were not hauled to the stipulated place or delivered, and that they had to do the hauling at their own expense. Their answer on this point reads as follows: "The defendants deny that they received 35,930, but admit that they received 33,024, and claim that they paid for the hauling of the same and for the making of 35,460, leaving a balance due to the tie company of 2,436 ties paid for by defendants but never delivered by plaintiff."

We think the court was correct in its interpretation of the defendant's admission. The acceptance of the ties in the woods amounted to a waiver of delivery by the plaintiff at the place named in the contract. But they were entitled to credit for the additional expense of hauling. This instruction did not deprive them of the right to claim credit for the expense of hauling. If they feared such a prejudicial effect on the minds of the jury, they should have asked for a specific instruction saying that the expense of hauling the ties to the stipulated place of delivery should be deducted from the amount which would have been due the plaintiff had the ties been delivered at the agreed place.

Judgment affirmed.

McDONALD v. SHAW.

Opinion delivered July 12, 1909.

1. WILLS—ELECTION—WHEN REQUIRED.—An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by the same instrument. (Page 20.)
2. SAME—NECESSITY OF ELECTION.—It is not material, in determining whether a party is put to an election, that the testator, in disposing of that person's property, was in error as to its ownership, or that the testator in fact knew that he had no title to it; in either case if the party whose property is given away decides to take against the will, he must relinquish his legacy under the will. (Page 21.)

3. SAME—PAROL EVIDENCE INADMISSIBLE.—Where a testatrix, being seized of real and personal property, devised a one-half interest in all of her estate, real and personal, to her daughter, subject to certain legacies and bequests, and left the other half of her property to another, it is not admissible to show by parol evidence that the testatrix believed that she owned certain property which in fact belonged to her daughter; the rule being that the purpose to put the devisee to an election must appear from the will itself. (Page 21.)

4. SAME—WHEN ELECTION MADE FOR INFANT.—The court will make an election for an infant or other incompetent person only when it becomes necessary to do so. (Page 26.)

5. SAME—ELECTION.—As the basis of the doctrine of election is that a person cannot assume two inconsistent positions—cannot accept and reject under the same instrument—it follows that in case of election a person can be required to give up that which is his own only to the extent that it is necessary to relieve his position of inconsistency. (Page 27.)

6. EQUITY—JURISDICTION TO GIVE COMPLETE RELIEF.—Where equity assumes jurisdiction of a cause for one purpose, it should retain it for the purpose of completely adjudicating the rights of the parties concerning the subject-matter of the controversy. (Page 28.)

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

Winchester & Martin, for appellant.

1. The will of John Hare was void, as his only child was not mentioned in his will. His child took title to all his real estate at his death as his only heir. Kirby's Dig., § 8020; 23 Ark. 569; 70 *Id.* 483.

2. The doctrine of election can not be invoked. In order to create the condition for an election, it must clearly appear that the testator undertakes to dispose of some property belonging to the person called upon to elect. 2 Jarman on Wills, p. 1, Am. Notes by Randolph & Talcott; Story, Eq. Jur., § 1075; 41 Ark. 69.

2. It is immaterial whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power that belongs to him. In either case whoever claims in opposition to the will must relinquish what the will gives him. But the intent of the testator to dispose of that which is not his must appear in the will. 1 Vesey, Jr., 523; 4 Dow. 76, 89, 90; 2 Jarman on Wills, pp. 15, 16, 17; Story, Eq. Jur., § § 1086, 7-8-9; 15 N. Y. 365; 2 Johns. Ch. 448; 41 Ark. 69; 70 Pa. St. 269;

2 Beach, Mod. Eq. Jur., § 1071; L. R. 5 Ch. Div. 163; 13 How. (U. S.) 385; 8 Bing. 248; 5 Dana (Ky.) 351.

3. Parol evidence is not admissible, and no case was made for an election. Authorities *supra.*

Read & McDonough, Brizzolara & Fitzhugh, Youmans & Youmans, and *Joseph M. Hill,* for appellees.

1. The facts of this case require that Ella Hare should elect as to whether she will take under the will of her mother or reject the provisions and claim as heir to her father. Story, Eq. Jur., § 1075; Underhill on Law of Wills, § 726; Adams, Eq. 93; 62 Am. Dec. 205; Pom. Eq., p. 431; 1 Dana (Ky.) 203-4; 7 S. W. 309; 77 N. C. 421; 48 S. E. 676; Story, Eq. Jur. 1096; 21 N. C. 634; 48 S. E. 675; 79 N. Y. 136.

2. The intention of Mrs. Hare to devise by will the property devised to her by her husband, as well as the property accumulated by her, can be shown by testimony *dehors* the will. Underhill on Wills, § 734; 24 Tex. 652; Wigram on Wills (3 Ed.), 53; 68 Pa. St. 479; 98 U. S. 315; L. R. 5 Ch. Div. 163; 41 Ark. 64; Bisp. Eq., § 295; 1 Lead. Cas. in Eq. 342; Story, Eq. Jur., § 1076; 2 Redf. on Wills, 745.

Ira D. Oglesby, for Ella Hare.

1. There is no intention of election expressed in the will, or from which it must arise, and testimony *dehors* the will was not admissible to make a case for election. Underhill on Wills, p. 1101; 41 Ark. 6; 70 *Id.* 483; *Ib.* 374; 65 Pa. St. 451; 15 N. Y. 370; 16 N. J. Eq. 189; 76 Va. 809; Pom. Eq. 472-489; Story Eq. 1087; 7 S. W. 309; Underhill on Wills, § § 726 to 734.

Joseph M. Hill, for appellees.

1. Extrinsic circumstances should be admitted in order to properly interpret the will. 4 Wigmore on Ev., § 2462-3-7, 2470, etc.; 41 Ark. 64.

2. The extrinsic circumstances show that Mary Hare intended to dispose of the estates owned by herself and Ella Hare. 2 Redf. Wills 745.

McCULLOCH, C. J. Ella Hare, who is and has been since she was an infant of tender years an imbecile, instituted separate actions by her guardian against certain defendants to recover possession of real estate in the city of Fort Smith, title to which is

asserted for her by inheritance from her father, John Hare, who is shown to have owned it at the time of his death. The defendants filed separate answers and cross-complaints, praying that the actions be transferred to the chancery court. They each alleged, in substance, that they held the property in controversy, and claimed title thereto by purchase and conveyance, one from the devisee under the last will of Mary A. Hare, mother of Ella Hare, and the others from the administrator of the estate of said Mary Hare; that said Mary Hare by will devised property of her own to Ella Hare, and also devised property of Ella Hare to others, and that said Ella Hare should therefore be put to an election, whether she would take her own property and repudiate her mother's will, or conform to said will and permit the defendants to keep the property conveyed to them. The prayers of the cross-complaints were that the court should make such election for Ella Hare on account of her incapacity to elect for herself. The cases were transfererd to the chancery court and consolidated, and on final hearing the court made an election for Ella Hare that she should conform to the will of her mother, thus permitting the defendants to keep the property devised to their grantor. The guardian of Ella Hare appealed to this court.

The facts of the case are practically undisputed. John Hare and his wife, Mary A., came to Fort Smith in 1852. They were members of the Roman Catholic Church, belonging to the parish of the Church of the Immaculate Conception, one of the two Catholic churches of Fort Smith. They had one child, Ella, who was in infancy rendered an imbecile by a stroke of paralysis. She is now about thirty-five years of age, and is unable to walk without assistance or to care for herself, and has but a small degree of intelligence. She is in the care of the Catholic Sisters in a convent at Fort Smith.

When she was a small child, her father died in 1883, leaving an estate consisting of $2,028.05 personal property and a large amount of real estate, which was then valued at $26,000, including the property now in controversy. He left a will devising all his property to his wife, Mary A. Hare, the will being in due form in all other respects but omitting to mention the name of his child or to make any provision for her. Mrs. Hare then owned no real estate.

Among other tracts of land owned by John Hare was one of 470 acres in sections 1 and 2, township 7 north, range 31 west, worth about six or seven dollars per acre. It is admitted that the title to this property was in John Hare; but after his death the record shows that for some reason or other his wife, Mary Hare, accepted a quitclaim deed from one Carnall, describing and conveying the property. It is not shown that Carnall had any title to convey.

The will of John Hare was probated, and Mrs. Hare administered on his estate and closed the same up with an order of the probate court vesting all the above estate of John Hare in her. She exercised acts of ownership over the same after her husband's death. She built houses on some of it and sold some of it.

The evidence tends to show that Mrs. Hare was never advised that the last will of her husband was ineffectual to devise his property to her on account of omitting the name of their child. After her husband's death, Mrs. Hare accumulated personal property which, at the time of her death, was valued at $1,347.87, and real estate valued at $9,800, exclusive of improvements which she had placed on the property owned by her husband. She died in 1893, leaving a will in due form which, in addition to making certain minor bequests, contains the following clauses:

"After all my just debts and funeral expenses are paid, I give and bequeath to the boy Paul, whom I have raised, 80 acres of land described as follows, said 80 to be taken out of my lands I own in township 7 north, range 31 west, the 80 to be in one body, Paul to have choice, and also the sum of one hundred dollars. * * * *

"I give, devise and bequeath to the Convent of the Sisters of Mercy of Fort Smith, known as Saint Ann's Convent, one-half of all my estate, real and personal, after deducting the legacies and bequests mentioned in this my last will and testament, for the support and maintenance of my daughter, Ella Hare, during her life, and after the death of my said daughter, Ella Hare, I give, devise and bequeath to the said Sisters of Mercy the said half of my estate, real and personal, for the purpose to educate poor Catholic children.

"I give, devise and bequeath to the pastor of the parish of the Church of the Immaculate Conception of Fort Smith, in the State of Arkansas, half of all of my estate, real and personal, to be used by the said pastor for the said purposes of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood."

This will was construed and its provisions sustained in *McDonald* v. *Shaw,* 81 Ark. 235. "The boy Paul" referred to in the will was Paul Herring, who was an orphan reared by Mrs. Hare.

After the death of Mrs. Hare the Catholic Sisters took charge of Ella, and have given her all the care that loving solicitude could suggest. There is no doubt that they are attempting to carry out the provisions of Mrs. Hare's will in spirit as well as in letter.

Under the statutes of this State (Kirby's Digest, § 8020), the will of John Hare was void as to the child Ella, whose name was omitted therefrom. As to the child, he is deemed to have died intestate, and the title to his property passed to her as the sole heir. There is no disagreement between learned counsel in this case as to the general principles requiring election in cases of this kind. A concise statement of such principles may be found quoted from Bispham's Principles of Equity, § 295, in the opinion of this court, delivered by Mr. Justice SMITH in the case of *Fitzhugh* v. *Hubbard,* 41 Ark. 64, as follows:

"An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere by title paramount to prevent another part of the same instrument from having effect according to its construction; he cannot accept and reject the same instrument."

The Virginia Court of Appeals, in *Gregory* v. *Gates,* 30 Grat. 83, states the same doctrine in somewhat different language, as follows: "The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will must adopt the

whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

It is further conceded to be settled that "it is not material, in determining whether a party is put to an election, that the testator, in disposing of that person's property, was in error as to its ownership, or that the testator in fact knew that he had no title to it. In either case if the party whose property is given away decides to take against the will, he must relinquish his legacy under the will." 2 Underhill on the Law of Wills, § 736.

The real controversy arises concerning the application of the rules of evidence—whether parol evidence is admissible to show that Mary A. Hare by her will attempted to dispose of property which belonged to Ella Hare as sole heir of her father, John Hare. The defendants claim the right to show, by evidence *dehors* the will of Mary Hare, that she intended by the words in her will "all of my estate, real and personal," to describe the property of Ella Hare; and to do so they adduced parol evidence tending to show that Mrs. Hare claimed to own the property, believed herself to be the owner, and exercised acts of ownership over it. On the other hand, learned counsel for the plaintiff insist on adherence to what they assert to be the settled rule of evidence, that "the intent of the testator to dispose of that which is not his ought to appear on the face of the will itself," and that when it appears that the testator was seized and possessed of property which in fact answered the descriptive words "all of my estate," parol evidence should not be admitted for the purpose of showing, in order to require an election on the part of the devisee, that the testatrix believed she owned other property which in fact belonged to such devisee and intended to devise it by her will. In other words, they insist that where the testator in the will uses merely the general descriptive terms "all of my

property," it may be shown what property she owned, but that the inquiry must stop there. We think that the authorities fully sustain this contention.

This court in *Fitzhugh* v. *Hubbard, supra,* which is clearly in line with all the authorities on the subject, said: "You may show the condition of the subject-matter and the surrounding circumstances so as to place the court in the position of the testator. But his purpose to put the devisee to his election must appear from the will itself."

In *Blake* v. *Bunbury,* 1 Vesey, Jr., 523, which was a case of election under a will, it was said that "the intent of the testator to dispose of that which is not his ought to appear on the will, with such explanation, however, of the *prima facie* appearance as the law admits," meaning, of course, the rule permitting evidence identifying the property called for by the descriptive terms used.

In *Clementson* v. *Gandy,* 1 Keen 309, the substance of the syllabus as follows: "Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property in which she had only a life interest to be her own, and that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible."

Lord Eldon in *Doe* v. *Chichester,* 4 Dow. 76, which is cited with approval in Jarman on Wills (6th Ed.), vol. 1, p. 469, said: "It must appear on the face of the will that the testator proposes that there should be an election, and as to what subjects."

In *Webber* v. *Stanley,* 16 C. B., N. S., 698, the Court of Common Pleas announced the general rule that under a general devise of "my manor house," and "all of my manor farms, lands," etc., in a certain county, where there was property which fitted every particular of the description, and on which every word of the devise could have full effect, the meaning of the words could not be enlarged by extrinsic proof.

The English cases are discussed at length in Jarman on Wills at the page indicated above, and the prevailing rule shown there as contended for by counsel for plaintiff. An interesting discussion of the subject may also be found in the notes of Hare & Wallace to the case of *Noys* v. *Mordaunt,* beginning on page 510 of White & Tudor's Leading Cases in Equity, vol. 1. They state the prevailing rule, and cite numerous English cases to sustain it, as follows: "In order to raise a case of election there must appear in the will or instrument itself a clear intention on the part of the author of it to dispose of that which is not his own."

The only English case declaring a different doctrine is *Pultney* v. *Darlington,* 2 Ves., Jr., 544, which has been expressly disapproved by many of the greatest judges of that country. The American cases are equally harmonious, and of the same purport.

In *Havens* v. *Sackett,* 15 N. Y. 365, Chief Justice Denio gives the following statement of the law (quoting from the syllabus): "In order to raise a case for election under a will, a clear and decisive intention of the testator must be manifested by the will itself to dispose unconditionally of that which did not belong to him. If his expressions will admit of being restricted to some interest in property belonging to or disposable by the testator, they will not be held to apply to that over which he had no disposing power."

In *Miller* v. *Springer,* 70 Pa. 269, Judge Sharswood, speaking for the court, said: "A general devise of the testator's real estate has always been held to show an intention to give what strictly belongs to him, and nothing more, even if the testator had no real estate of his own upon which the devise could otherwise operate. 1 Jarman on Wills, 393. Nor can evidence *dehors* the will be admitted to show that the testator considered the land in question to belong to him, and intended it to pass under the will."

Judge Mitchell, delivering the opinion of the Supreme Court of Minnesota in *Sherman* v. *Lewis,* 46 N. W. 318, laid down the law on the subject, as follows: "The rule is that a general bequest and devise of the testator's property will be construed as intended to extend only to such property as he could dispose of by will. Also that, even where specific property is

disposed of by will, in which the testator had only a partial interest, the courts will, if possible under any reasonable rule of construction, construe the language of the will as intended to apply only to the interest which the testator was able to dispose of; the presumption being that he did not intend it to apply to that over which he had no disposing power. Also that, in order to raise a case for an election, the intention as manifested by the will itself must be clear and decisive. It must be clear, beyond reasonable doubt, that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift (citing cases). And while parol evidence is admissible, to the same extent as in other cases, in aid of the construction of written instruments, that is, to show the condition of the subject-matter and the surrounding circumstances, so far as to place the court in the position of the testator, yet the intent of the testator to dispose of that which was not his must appear from the words of the will itself, and cannot be proved by evidence *dehors* the instrument."

The Virginia Court of Appeals, in *Wootton* v. *Redd,* 12 Gratt. 196 (quoting the syllabus) said: "Though it may be possible the testator intended to give more, yet, if there be a subject found to satisfy the description in the will, the court can neither enlarge nor extend it."

The same court in the case of *Gregory* v. *Gates, supra,* said: "In order to raise a case of election, there must appear in the will itself a clear intention on the part of the testator to dispose of that which is not his own." And again, that court in *Penn* v. *Guggenheimer,* 76 Va. 839, held that "generally, when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as 'all my lands,' or 'all my estate,' no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own."

Judge Story clearly announced the same doctrine as follows: "A case of election cannot ordinarily arise where property is devised in general terms; as a devise of 'all my real estate in A,' which estate is subject to the claims of a devisee or legatee; for it is not apparent that he meant to dispose of any property but what was strictly his own subject to that charge." 2 Story, Eq. Jur. 1087.

Prof. Pomeroy also reaches the same conclusion. 1 Pomeroy's Eq. Jur., 473, 474.

The diligence of learned counsel has not brought to light a single case directly holding the contrary view. We assume that there are none. They rely mainly upon certain general observations of Mr. Wigmore in his work on Evidence, expressing views as to the general growth of the law of evidence on this subject. But that learned author does not undertake to show that the rule announced by the various authorities hereinbefore cited is erroneous.

Counsel also rely to some extent on the decision of this court in *Fitzhugh* v. *Hubbard, supra;* but the doctrine announced in that case by no means reaches to the point raised in this. There the testator in general terms released the debt of a certain party to him, and it appeared that the only debt which the party had ever owed him was a note which he had previously assigned to the testator's wife, who was also a beneficiary under the will. It was held competent in that case to show these facts in order to give some effect to the language of the will, otherwise the entire bequest would have been void.

In the present case the devise was for the benefit of Ella Hare, and was in the language, "one-half of all of my estate," and the testator owned property which fitted the language. We find it nowhere announced that evidence is inadmissible to show the circumstances with which the testator was surrounded in order to explain the language which he used or to identify property which he intended to devise. But the description of the property cannot be entirely supplied by evidence *dehors* the will, where there is nothing in the language of the will itself to point out what property is meant; nor, where the language does point out the property, and some is found which answers the description, can the description be enlarged by parol testimony. We are therefore of the opinion that the parol testimony was inadmissible for the purpose of showing that Mrs. Hare intended to convey the property which Ella Hare held by inheritance from her father, and that no case was made out for an election.

It is further insisted by counsel for plaintiff that the devise of 80 acres of land to Paul Herring was a specific devise of property owned by Ella Hare, and that that called for an election.

We do not deem it necessary for the purposes of this case to determine whether the devise to Paul Herring was sufficiently specific to indicate an intention on the part of the testator to devise property which belonged to Ella Hare and which called for an election. If it be conceded that such was the case, the defendants are in no position to demand an election because the position of Ella Hare, the claimant by inheritance from her father, is inconsistent with the rights of Paul Herring. Paul Herring is not a party to this suit, and no controversy has arisen with him. It is the duty of the court to make an election for an infant or other incompetent person only when it becomes necessary. 2 Underhill on Wills, 737. Now, if hereafter the guardian of Ella Hare should, under orders of the court, seek to recover from Paul Herring the property devised to him, then a case for election may arise as to that individual. These defendants can never inject themselves into that controversy and claim the right to require an election because Paul Herring may have the right to demand it. If, in a controversy with Paul Herring, the necessity for an election should arise, the court could either elect for Ella Hare to conform to her mother's will, so far as to leave Paul Herring undisturbed in his right thereunder, or could elect for her to take from him the property so devised, and render compensation to him out of the property devised to Ella Hare under her mother's will. In no event can the other devisee under the will of Mrs. Hare, or the grantees of such devisee, or the purchaser from Mrs. Hare's administrator be interested in that controversy.

If Mary Hare had attempted by her last will to devise to them property which was owned by Ella Hare, then they would be in position to require of Ella Hare an election whether she would abide by the will or repudiate it, but such is not the case. Since we hold that none of the property claimed by them was described in the will, what interest have they in any election made by or for Ella Hare or in requiring her to make an election at all? If an election should be made by or for Ella Hare, that would not involve the property in controversy, which is owned by her, and is not affected by the will of her mother, for, if the court in a proper proceeding should elect for her to abide by the will of her mother, she would only have to relinquish her claim to that portion of her property which is given to others under the will.

That portion of her property which is not covered by the terms of the will, regardless of the source of her title, would not be affected by an election, for her claim to it is not inconsistent with the terms of the will; and she can conform to every provision of the will without relinquishing any of the property in controversy because the testatrix did not by the terms of the will purport to devise it.

The basis of the doctrine of election is that a person cannot assume two inconsistent positions—he cannot accept and reject under the same instrument. *Fitzhugh* v. *Hubbard, supra.* It follows, therefore, that in case of an election a person can be required to give up that which is his own only to the extent that it is necessary to relieve his position of inconsistency.

The chancellor erred in declaring an election. The decree is reversed, and the cause remanded with directions to remand the case to the circuit court for further proceedings not inconsistent with this opinion.

ON REHEARING.

Opinion delivered October 25, 1909.

McCULLOCH, C. J. Learned counsel for appellees have again argued the questions pressed upon us on the original consideration of the case, but after careful re-examination of those questions we are convinced that we reached the correct conclusion, and the decision is adhered to.

In addition to this, they ask that, instead of giving directions to remand the case to the circuit court, the chancery court be directed to retain the case for further proceedings.

Appellees in their answer claim reimbursement for improvements made on the property in controversy and for taxes paid thereon. After the case was transferred to the chancery court, the several parties entered into the following stipulation, viz:

"It was further stipulated and agreed by the respective parties in open court that, if the court should find against the said defendants and cross-plaintiffs on the issues made by their answers and cross-complaints, the said respective causes should then be referred to a master to take testimony as to the mesne profits due plaintiffs, if any, from said defendants respectively and as to the amounts due defendants respectively for improve-

ments made and taxes paid, if any, by them or either or any of them upon the property in controversy in said several cases."

Now, aside from this stipulation, we are of the opinion that, the chancery court having properly assumed jurisdiction for the purpose of considering the defense interposed by appellees, it should retain it for the purpose of completely adjudicating the rights of the parties concerning the subject-matter of the controversy. It is proper, therefore, for the controversy as to the amount of mesne profits, if any, to be recovered by appellant, and the amount of reimbursement, if any, to be recovered by appellees, should be determined in the chancery court. We do not mean to decide, however, at this time, whether or not appellees are entitled to any reimbursement, for that question has not been presented and was not decided below. We merely leave that matter open for further consideration in the court below.

Other matters are set up in the cross-complaints of some of the appellees, viz., the claim by some of them who purchased from the administrator of the estate of Mary A. Hare to subrogation against the property of that estate for the amount of purchase price paid, and also the claim of the Sisters of Mercy against Ella Hare for an accounting of the amounts paid out for her benefit. But these matters we do not think are germane to this controversy, and find no proper place in this litigation. If causes of action exist, they should be made the subject of separate suits.

The judgment of this court is therefore modified so as to change the directions; and the decree of the chancery court is reversed with directions to enter a decree in accordance with this opinion, and for further proceedings not inconsistent herewith. It is so ordered.

McCRAE v. STATE.

Opinion delivered October 4, 1909.

CONTINUANCE—ABSENCE OF WITNESS.—A continuance on account of the absence of a witness was properly refused in a misdemeanor case when the applicant contented himself with having a subpœna issued and served on the witness, without seeking any other process of the court

and without showing that the witness was beyond reach of the court's process at the time of the trial.

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

H. A. Parker, for appellant.

The testimony of the absent witness was material, due diligence was shown, and when he failed to appear an attachment was asked for, which was refused, and appellant forced into trial. This was such an abuse of discretion as is a ground for reversal. 42 Ark. 273, 275; 85 Ark. 334; 90 Ark. 78; 9 Cyc. 166, 168, 173, 180-81, 190, 191.

Hal L. Norwood, Attorney General, and *C. A. Cunningham*, Assistant, for appellee.

The record nowhere shows that appellant asked for an attachment for the absent witness. Due diligence is *not* shown, no attempt even to get the motion before the jury as the truth or as evidence. Appellant is in no position to complain. 56 Ark. 493. This court will not interfere with the discretion of the trial court unless it affirmatively appears that there has been such an abuse of that discretion as to shock the sense of justice. 40 Ark. 114; 26 Ark. 223; 24 Ark. 599. The question is not properly before the court. No exception was saved to the court's ruling. 73 Ark. 407; 25 Ark. 380; 35 Ark. 451; 16 Ark. 211; 7 Ark. 341.

McCULLOCH, C. J. Appellant was tried and convicted in the circuit court of Monroe County for selling whisky without license, and appeals to this court. He was convicted on the testimony of one Smith, who testified that he purchased the whisky from appellant. The only assignment of error insisted on here is as to the refusal of the trial court to grant a continuance on account of the absence of a witness.

Appellant alleged in his motion for continuance that he could prove by the absent witness, Flemons, that Smith had stated to him, Flemons, that he had never purchased any whisky from appellant, and did not know of appellant ever having sold whisky. It is also alleged in the motion that the witness Flemons lived in Clarendon, and that a subpoena had been issued and served on him requiring his attendance at that term of court.

Before a party can complain of the ruling of a court in refusing to postpone a trial, he must affirmatively set forth facts

in his motion which show that he is entitled to the postponement. He must show that he has exercised proper diligence to procure the attendance of the witness at that time, and that his efforts in that direction have failed. Now, the motion for continuance in the present case affirmatively shows that the witness resides in Clarendon, where the court was held; but it does not otherwise account for his whereabouts. For aught that appears to the contrary, the witness may then have been in the town or county, and his attendance could have been secured at that time by the compulsory process of the court, if that had been sought, without postponing the trial to a distant date. Appellant contented himself with having a subpoena issued and served, without seeking any other process of the court, and without showing that the witness was then beyond reach by the process of the court. We are unable, therefore, to discover in the ruling of the court any abuse of discretion. The appellant had a fair trial, and the evidence was sufficient to sustain the judgment.

Affirmed.

JOHNSON v. ELDER.

Opinion delivered June 21, 1909.

1. TAXATION—RECORD OF SALE—LIST.—Failure of the county clerk to attach to the record of the list and notice of sale of delinquent tax lands the certificate required by Mansf. Dig., § 5763, is a fatal defect. (Page 34.)
2. CLOUD ON TITLE—BURDEN OF PROOF.—In a suit to quiet title to land the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's. (Page 34.)
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of fact will be sustained on appeal unless it is clearly against the preponderance of the evidence. (Page 35.)
4. LANDLORD AND TENANT—EFFECT OF ATTORNMENT.—One who is in possession of land under claim of ownership may attorn to and become the tenant of another who claims to be the owner, whereupon the former's possession becomes that of the latter. (Page 35.)
5. SAME—ATTORNMENT TO AVOID LAWSUIT—DURESS.—The fact that one in possession of land under claim of ownership agreed to attorn to another claimant in order to avoid a lawsuit does not constitute duress. (Page 36.)

6. STATUTE OF LIMITATIONS—COLOR OF TITLE.—A void tax deed may be color of title for the purpose of the statute of limitations. (Page 36.)

7. SAME—CONSTRUCTIVE POSSESSION.—Actual possession of a part of a tract of land under a deed describing the entire tract is in law possession to the limit of the tract. (Page 36.)

8. SAME—POSSESSION UNDER TAX DEED.—Possession of land under a tax title for more than two years is sufficient to confer title. (Page 37.)

9. LANDLORD AND TENANT—CONSIDERATION.—After land has been in the actual possession of one who claims to own it for more than 7 years, even though by mistake his possession extended beyond his true boundary line, an agreement on his part to attorn to another for the land is without consideration and void. (Page 37.)

10. ADVERSE POSSESSION—ATTORNMENT—VALIDITY.—An agreement without consideration by the owner of land to attorn to another who claims it is not sufficient to give the latter constructive possession of the land for the purposes of the statute of limitations. (Page 38.)

11. SAME—ATTORNMENT—NOTORIETY.—A bare agreement on the part of one in the possession of land to attorn to another who claimed it is insufficient, in the absence of any notoriety, to render the latter's possession adverse to a third party. (Page 38.)

12. WATERS—NONNAVIGABLE LAKE—RIPARIAN RIGHTS.—The title of the owner of land adjoining a non-navigable lake extends *prima facie* to the center of such lake by virtue of his riparian ownership. (Page 39.)

13. PUBLIC LANDS—UNSURVEYED LAND—TITLE.—Where the original Government survey showed that certain land was the bed of a lake, and subsequently the Government deeded the unsurveyed lands in this particular township to the State as part of the swamp land grant, the question whether the land passed to the owner of adjacent surveyed land as part of the bed of a non-navigable lake or to the State's grantee as part of the swamp land grant depends upon whether the tract was lakebed or land at the time of the original survey. (Page 39.)

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

Johnson & Burr, for appellants.

1. In ejectment or other real estate actions the plaintiff must recover on the strength of his own title, and not upon the weakness of his adversary's. 113 S. W. (Ark.) 340; 106 S. W. (Ark.) 1169; 77 Ark. 246; *Id.* 338; *Id.* 477; 73 Ark. 199; 102 S. W. (Ark.) 190. The burden of proving two years adverse possession is upon the appellee, and that proof must be clear and positive. 82 Ark. 51; 65 Ark. 422; 43 Ark. 486; 113 S. W. (Ark.) 27; 34 Ark. 534; *Id.* 547; 48 Ark. 196; 1 Am. & Eng. Enc. of L., 2d Ed. 887; 1 Cur. Law, 55

2. Appellee, not having at any time had actual possession in his own person of the small tract cultivated by Byers, cannot establish the relation of landlord and tenant between himself and Byers by showing that the latter allowed him in 1907 to haul away two bushels of corn as rent for that year. There must have been two full years adverse possession, either actual or by tenant, and actual attornment by the tenant for two consecutive years in recognition of appellee's title. 18 Am. & Eng. Enc. of L., 2d Ed. 163; Kirby's Dig., § 5061; 60 Ark. 163.

3. As to the cultivated tract, the proof shows that Nutt had acquired title by 20 years possession, and Byers succeeded to his title by purchase. He is owner of this tract unless his title was divested by the forfeited land deed. But this deed and the tax sale are void. 65 Ark. 595. If Byers' attornment had been in good faith made to Elder, it was not sufficient to make him Elder's tenant. 66 Ark. 26; 80 Ark. 444; *Id.* 575; 4 Brewst. (Pa.) 361.

Huddleston & Taylor, for appellee.

1. One in actual possession of any portion of a tract of land under a deed which amounts to color of title will be held to be in actual possession of all the land described in the deed.

2. The relation of landlord and tenant existing between Elder and Byers for four years before this suit commenced, and three years before appellants bought their speculative title, is fully established by the proof. The relation. having been once established, is continued by operation of law from year to year without any new contract. 61 Ark. 377; 24 Cyc. 1031F and note 24.

3. Although title to land has been acquired by adverse possession, it may, like any other title, be defeated by a subsequent adverse possession for the statutory period. 1 Cyc. 1121.

4. The affidavits of Sellmeyer and Weatherby, filed with appellee's petition for confirmation, are not competent evidence against appellee after the amendment of the petition. 16 Cyc. 976; 58 Ark. 490; 39 Cent. Dig., Pleadings, 84-86; 16 Cyc. 974; 89 Ark. 483.

5. In the Taylor case, 56 Ark. 595, the tax sale of 1892 was held to be void because the clerk failed to certify to the publication of the list of lands and the notice of sale; but this irregu-

larity was not sufficient to prevent the deed from being color of title. 71 Ark. 117. When appellee purchased the land and claimed it, and Byers rented from him, appellee's possession then began as a mere continuation of, and to the same extent as, the former Byers possession. The good or bad faith of the transaction is immaterial, provided the intention to take and hold adversely is shown. 77 Ark. 210; 80 Ark. 435. Taking the profits of which land is susceptible is possession. *Pedis possessio* is not necessary except where the estate to be acquired is personal to the one in actual possession. 35 Am. Dec. 760.

FRAUENTHAL, J. This action was originally instituted by the plaintiff, W. S. Elder, by filing an *ex parte* petition on October 14, 1907, in the Greene Chancery Court seeking to confirm his title to the land involved in this suit, and which is described as the fractional northeast quarter of section 27, township 19 north, range 5 east, containing 142.08 acres in Greene County, Arkansas. His claim of title was founded upon a tax deed executed to him by the State of Arkansas on June 4, 1903, in which it is recited that the land was sold to the State for the nonpayment of the taxes of 1891.

The defendants, Johnson & Burr and A. H. Glasscock, filed an intervention in said suit, and were made parties thereto. They claimed title to the land by virtue of the grant of said land to the State of Arkansas as swamp lands by the United States under the act of Congress approved September 28, 1850; by a deed from the State of Arkansas to John B. Jones on March 18, 1879; and by mesne conveyances from Jones to defendants. In this original petition the plaintiff alleged that the land was wild and unoccupied, but subsequently he filed an answer to defendants' intervention and a cross-complaint against the defendants in which he stated that the allegation that the land was wild and unoccupied was made by mistake, and alleged that he was and had been in possession of the land for a number of years; and he asked in this cross-complaint to have his title to the land quited. He also filed a motion to have the above allegation as to the occupancy of said land stricken from the petition, and this was by the court granted. The defendants made answer to the cross-complaint of the plaintiff; and this cause thereupon became an action by plaintiff to quiet his title to said land.

The chancellor found that the plaintiff had acquired title to the land by adverse possession of the land for two years under said tax deed; and entered a decree quieting the title to the land in the plaintiff.

The evidence in the case was taken partly by depositions and partly by the agreed statement of facts. From this it appears that the tax sale of said lands for the year of 1891, and upon which is founded the tax deed executed by the State of Arkansas to plaintiff, is void for the reason that the county clerk failed to attach to the record of the list and notice of sale of delinquent lands for that year, the certificate required by section 5763 of Mansfield's Digest; and the sales of lands in said county for said year were held to be void by this court in the case of *Taylor* v. *State,* 65 Ark. 595. But the plaintiff claims that he has had possession of the land under said tax deed for a period of more than two years next before the commencement of this action, and in this way claims title to the land. The muniments of title introduced by defendants indicate a chain of title from the United States to them. But it is unnecessary to inquire further into the alleged title of defendants because in a suit like this to quiet title the plaintiff must succeed upon the strength of his own title, and not upon the weakness of the title of his adversary. *Lawrence* v. *Zimpleman,* 37 Ark. 644; *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338; *Mason* v. *Gates,* 82 Ark. 294; *Little* v. *Williams,* 88 Ark. 37; *Sibly* v. *England,* 90 Ark. 420. And, if the plaintiff has title to the land by reason of said tax sale and the possession thereunder, it would be superior to the alleged title of defendants.

The sole question, therefore, involved in this case is whether the plaintiff has had the possession of said land under said tax deed for such time as under the law will invest him with the title.

This tract of land is located within the meandered lines of what is known as Cache Lake according to the original survey of the United States Government. At the time of the purchase of the land by the plaintiff in 1903 from the State, a number of acres of the land was above the former marshy lands of the lake, and some acres of it were dry; but the greater part of it was covered with timber. About one and one-half acres of the land were cleared

and in cultivation, and were located within an inclosure of another tract owned by one Don Byers. Byers and his grantors had supposed that this one and one-half acres of the land, which is in the shape of a triangle, was part of a different and distinct tract of land owned by them, and so had been inclosed with a fence in conjunction with their tract; and this triangle was then in the actual possession of Byers. In the fall of 1903 the plaintiff saw Byers, and laid claim to this part of the land; and thereafter in 1904 had the same surveyed, and by the survey showed that this triangular portion was a part of the tract of land described in his tax deed. Byers and the plaintiff then entered into an agreement by which Byers should hold the possession of the triangular tract as the tenant of the plaintiff, and should attorn to the plaintiff as such tenant therefor. He then executed his note to the plaintiff for the rent of the land for the year of 1904 in the sum of five dollars. He agreed to thus become the tenant of the plaintiff and to recognize the title of the plaintiff to the tract of land for the reason that he did not want any litigation over it. But he testified that he then held and for all the years since 1904 continued to hold the possession of this tract of land as the tenant of the plaintiff. Byers and his grantors of the land adjoining this tract had had possession of this tract for a number of years before 1903; but in 1903 Byers thus surrendered the possession to the adverse claim and demand of the plaintiff and in subordination to the rights of the plaintiff; and as the tenant of plaintiff he agreed to hold the possession of the lands for the plaintiff, and did so hold it up to the date of the commencement of this suit. The chancellor in effect made this finding of fact. And, while the evidence is not entirely satisfactory, nevertheless it is sufficient in our opinion to support that finding. Where the chancellor's finding is not clearly against the preponderance of the evidence, it must be sustained. *Whitehead* v. *Henderson,* 67 Ark. 200; *Hinkle* v. *Broadwater,* 73 Ark. 489.

It is urged by the defendants that, inasmuch as Byers was already in possession of the land, he could not become the tenant of the plaintiff. But we cannot see how that would affect the relation between those parties, if as a matter of fact an agreement of tenancy was made. The relation of landlord and tenant is created by a contract; that may be either express or implied; and

its validity is, like all other contracts, based on an agreement between the parties. The fact that the tenant is in the possession of the land at the time of the creation of the tenancy does not affect such contract, if made; and it will not affect it, even though the tenant had prior to that time claimed to have a better title to the land. 24 Cyc. 938; *Hershey* v. *Clark,* 27 Ark. 527; *Hughes* v. *Watt,* 28 Ark. 153.

In the case of *Locke* v. *Frasher,* 79 Va. 409, it is held that the general rule that a tenant cannot dispute his landlord's title is not varied when the tenant is in actual possession at the time he makes the contract of tenancy.

The effect of the acceptance by such person of such a contract is a recognition of the title and the possession of the lessor, and is the same as if the party, lessor, had entered and taken possession. The mere fact that such a contract is entered into in order to avoid litigation will not defeat it. That is not equivalent to duress; and if possession was not given in this way, it could probably have been secured by the lessor through other legal avenues. In the case of *School District* v. *Long,* 10 Atl. 769, one claiming to own land in the possession of another procured the execution of a rental contract by an assertion of title in himself and a threat of eviction; and it was held that such rental contract was valid, and the tenant could not dispute the landlord's title. In the case in review, therefore, Byers could agree to become the tenant of the plaintiff, although previously in the possession of the land; and under such agreement the possession of Byers as tenant became the possession of the plaintiff as landlord. 1 Cyc. 996; *James* v. *Miles;* 54 Ark. 460; *Cox* v. *Daugherty,* 75 Ark. 395; *Washington* v. *Moore,* 84 Ark. 220; *Lucas* v. *Brooks,* 18 Wall. 436; *Palmer* v. *Melson,* 76 Ga. 803; *Forgy* v. *Harvey,* 151 Ind. 507. Under the evidence in this case, therefore, the plaintiff was in the actual possession of one and one-half acres of the tract of land in controversy for more than two years continuously before the commencement of this suit, and such possession was open and adverse. That possession was held under the tax deed, which, though void, was yet a color of title. *Elliott* v. *Pearce,* 20 Ark. 508; *Cofer* v. *Brooks,* 20 Ark. 542. It had been repeatedly held by this court that the actual possession of a part of the land under a deed describing the entire tract is

in law possession to the limit of the whole land. *Ledbetter* v. *Fitzgerald,* 1 Ark. 448; *Logan* v. *Jelks,* 34 Ark. 547; *Sparks* v. *Farris,* 71 Ark. 117; *Crill* v. *Hudson,* 71 Ark. 390; *Boynton* v. *Ashabranner,* 75 Ark. 514; *Rucker* v. *Dixon,* 78 Ark. 99; *Connerly* v. *Dickinson,* 81 Ark. 258; *Van Etten* v. *Daugherty,* 83 Ark. 534.

The case of *Wheeler* v. *Foote,* 80 Ark. 435, is very similar to the case at bar on this question of possession. In that case a part of the land in controversy—about one and one-half acres—had been cleared, fenced and occupied by the owner of the adjoining tract, and had been thus occupied by him under a mistake that this part was on his own tract. The occupant, upon the claim made by the holder of a tax title, agreed to hold possession as tenant of the tax owner, and in consideration that he would protect the timber on the land from trespassers. In that case the court held that through the tenancy thus created the holder of the tax deed obtained possession of this one and one-half acres of the land, and that through the tenant he thus held possession under color of title to the whole; and that this gave the holder of the tax deed title to the whole land described in the deed. It results from this, and we are of opinion that the evidence sustains the finding of the chancellor, that the plaintiff was in continuous adverse possession of the land for more than two years under the tax deed, conveying the land in controversy to him. The effect of this was to confer on the plaintiff a valid title to all the land in controversy. *Jacks* v. *Chaffin,* 34 Ark. 534; *Wilson* v. *Spring,* 38 Ark. 182; *Gates* v. *Kelsey,* 57 Ark. 523; *Cooper* v. *Lee,* 59 Ark. 460; *Finley* v. *Hogan,* 60 Ark. 499; *McConnell* v. *Swepston,* 66 Ark. 141; *Ross* v. *Royal,* 77 Ark. 324; *Dickinson* v. *Hardie,* 79 Ark. 364.

We find, therefore, no error in the decree; and the same is affirmed.

ON REHEARING.

Opinion delivered November 1, 1909.

McCULLOCH, C. J. On further consideration of the evidence in this case, we find the facts to be that the grantor of Byers, the alleged tenant of plaintiff Elder, occupied the small area of cleared land, claiming it as his own, for about twenty-

six years, before he conveyed to Byers. This constituted a complete investiture of title, notwithstanding the mistake in getting beyond the boundary line. *Hudson* v. *Stillwell,* 80 Ark. 575.

Byers being the owner of the land, his alleged agreement to attorn to plaintiff was void and unenforcible. The note which he gave to plaintiff was also void for want of consideration. *Parham* v *Dedman,* 66 Ark. 26.

The question is therefore presented whether or not the void agreement of Byers, the owner and occupant of the small tract of cleared land, to attorn to plaintiff constituted such possession by the latter of that part of the land as to extend his possession constructively over the unoccupied land in controversy to which he had color of title, and ripen into title by limitation. We conclude that it did not. The plaintiff was never in possession of any part of the land, either actually or constructively. He had neither title nor possession nor right of possession. If the real owners of the land had made inquiry during the alleged period of limitation and ascertained the true facts, they would not have found the plaintiff in possession of any part of their land, because he was not, in fact, in possession either in person or by agent or tenant.

This conclusion is not in conflict with the doctrine announced in *Wheeler* v. *Foote,* 80 Ark. 435, for the facts of that case are clearly distinguishable from the facts in this. There, as soon as Bloomer cleared part of the tract by mistake as to boundary, and before he acquired title by lapse of time, he agreed to attorn to the plaintiff, Mrs. Foote, and he thereafter occupied the cleared land as her tenant, and acted as her agent in keeping trespassers off the adjoining timber land. He had never acquired any title to the land when he agreed to attorn to Mrs. Foote as his landlord, and his occupancy was notorious as her tenant and agent for a long time thereafter, until the commencement of the litigation.

We think, also, that the alleged attornment of Byers to plaintiff was insufficient, for another reason, to extend his possession constructively over the unoccupied land. It lacked sufficient notoriety to amount to adverse possession. The facts, as we find them to be, are that Byers did only one act before the commencement of this litigation which could be claimed as an attornment

to plaintiff. That was his agreement, about three years before the commencement of the action, to pay plaintiff a small amount of rent. After the suit had been commenced, he permitted plaintiff to send a man into his field and gather about two bushels of corn, which was claimed as rent. There was no visible change of possession, and nothing was done to give notoriety to the agreement to attorn. There was nothing done to put the real owners upon notice that the actual possession of the small tract of cleared land by one who had no color of title was transferred to another person who had color of title, so as to extend the possession constructively. The injustice of permitting a secret transfer of possession to one who had color of title so as to extend his possession over the unoccupied portion of the land is manifest. The title to one and a half acres of the land had already been taken from the true owner by Byers and his vendor, through their occupancy for the full period of limitations. But they had no color of title which extended their possession beyond the limits of the actual occupancy; and in order to acquire the title to the remainder of the tract there must have been something in the nature of actual notice to the true owner or its equivalent. The element of notoriety must be added to adverse possession before it can ripen into title by limitation. Possession follows the title of the true owner until that possession is actually invaded. *Haggart* v. *Ranney,* 73 Ark. 334. We conclude, therefore, that the plaintiff's claim of title by adverse possession cannot be sustained.

This conclusion makes it necessary to give attention to another feature of the case not discussed in the original opinion. The tract of land in controversy was, at the time of the Government survey in the year 1846, within the meandered lines of Cache Lake, according to the official plat of that survey, and the plaintiff is the owner of a tract of 17.92 acres abutting on the meandered line. This gives the plaintiff the *prima facie* title to the center of the lake by virtue of his apparent riparian rights. *Little* v. *Williams,* 88 Ark. 37; *Rhodes* v. *Cissell,* 82 Ark. 367.

But a mistake in the survey is subject to correction by the Government. *Little* v. *Williams, supra.*

The United States Government in 1885 patented to the State of Arkansas all of the unsurveyed lands in this and certain

other townships as swamp and overflowed land, and it does not appear that the Land Department ever caused another survey to be made and officially determined that the area in controversy was land, instead of lake-bed, at the time of the original survey. The patent does not specifically describe the several tracts of land, but in general terms conveys "all of the unsurveyed land" in the township named. If it was in fact land, instead of lake-bed, at the time of the original survey (of which there is no direct proof in this record), the subsequent patent by the Government of unsurveyed land conveyed the title to the State of Arkansas, and the State, in turn, conveyed it to Jones, the defendants' grantor. And if it be found that the Land Department of the United States has officially declared this particular tract to have been land, instead of lake-bed, at the time of the original survey, that would overturn the *prima facie* riparian rights of the plaintiff.

These matters are not sufficiently developed in the records for us to reach a decision as to the rights of the parties on this branch of the case. We cannot determine whether the facts of the case fall within the doctrine announced in *Little* v. *Williams, supra,* or of *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338.

The plaintiff is not entitled to an affirmance of the decree on the strength of his *prima facie* showing of riparian rights, for it is obvious that, if he be given that portion of the land between parallel or converging lines running to the center of the lake, he would not be entitled to all of the land in controversy; and we cannot tell from this record how much, if any, he would be entitled to. Inasmuch as this branch of the case was not fully developed, we will leave it open for further proceedings in the chancery court, with leave to both parties to introduce further testimony.

A rehearing is therefore granted, and the decree is remanded with directions to deny the plaintiff's right to recover on his alleged title by adverse possession, but for further proceedings not inconsistent with the opinion on the other branch of the case.

Mr. Justice BATTLE concurs in the judgment and also in all of the opinion except that part which holds that the alleged attornment of Byers to plaintiff was ineffectual to give possession of the cleared land to the latter because Byers was then in possession and was the owner of the land by limitation. He expresses

no opinion on that point, and prefers to place the decision, as to this branch of the case, on the other ground stated in the opinion, viz: That the alleged attornment by Byers to plaintiff was not of itself an act of sufficient notoriety to constitute adverse possession in him, so as to constructively extend his possession over the unoccupied land.

Mr. Justice FRAUENTHAL concurs in the judgment, but not in the opinion.

FRANCE v. SHOCKEY.

Opinion delivered October 18, 1909.

1. GUARDIAN AND WARD—CONCLUSIVENESS OF CONFIRMATION OF SETTLEMENT.—The confirmation of a guardian's settlement by the probate court is a judgment which can be appealed from, but which cannot be otherwise disturbed save in chancery upon an allegation of fraud or some other equitable ground. (Page 44.)
2. APPEAL AND ERROR—PRESUMPTION WHERE ABSTRACT IS INCOMPLETE.—Where the testimony is not abstracted in full, it will be presumed that the finding of the trial court was not erroneous. (Page 44.)
3. SAME—CONCLUSIVENESS OF COURT'S FINDINGS.—Findings of fact made by the trial court in an action at law are as conclusive on appeal as the findings of a jury. (Page 45.)
4. GUARDIAN AND WARD—COMPENSATION—ALLOWANCE.—Under Kirby's Digest, § 3828, providing that "guardians and curators shall receive such compensation for their services as the court shall decide to be just and reasonable," the probate court may allow a guardian compensation in his final settlement where no allowance has been made in any of the prior settlements. (Page 45.)

Appeal from Benton Circuit Court; *J. S. Maples,* Judge; affirmed.

W. N. Carpenter, for appellant.

1. The probate court has ample equitable jurisdiction over guardians' settlements to reopen and review them at any time for frauds and errors. Const. 1874, art. 7, § 34; 40 Ark. 443; 33 Ark. 728.

2 A guardian may not be allowed, and the probate court is without authority to award to a guardian, for maintenance

and education of the ward, more than the clear income of the estate unless such expenditures have been made under direction of the court. Sandels & Hill's Dig., § 3604; 63 Ark. 454; 60 Miss. 277; 53 Miss. 143; 67 Tex. 76. An allowance for clothing, books, tuition, music and medicine, with no voucher shown for any part of it, is clearly erroneous. 63 Ark. 455. Where the ward renders services to the guardian, he is chargeable with the value thereof as against the cost of her maintenance, etc. *Id.* 450.

3. The court erred in allowing the guardian credit for $40 commissions. It is not intended by the law to allow compensation where the guardian has neglected his duties, mismanaged the property of his ward, or has done positive wrong and injustice. 23 Ark. 47.

FRAUENTHAL, J. In 1895 the appellee, J. B. Shockey, was appointed guardian of Courtney Holland, a minor, by the probate court of Benton County. As such guardian he made eight annual settlements of the guardianship thereafter, and each of these settlements was confirmed by said probate court. No appeal was taken from any of said orders confirming said settlements. The last of these annual settlements was confirmed by said probate court in 1903. On January 20, 1904, Courtney Holland married and became Courtney France, and in April, 1904, she arrived at the age of 18 years. In April, 1904, the guardian filed his ninth and final settlement. In this final settlement the guardian took credit for an item of support, education, and money advanced to the ward since last settlement, amounting to $386.25, which was more than the amount of the rents and interest received, the clear income of the estate. According to the final settlement there was a balance of $250 due to the ward, and a number of months after the filing of the final settlement the appellee paid to the appellant the said alleged balance and took the receipt of herself and her husband therefor. During this time the final settlement, although long since filed, was not acted on by said probate court. In March, 1906, the appellant filed in the said probate court exceptions to the said final settlement. In this pleading she incorporates also exceptions to each of the eight annual settlements. Each exception is in the same language except as to the item of amount, so that the exceptions to the first will indicate the exceptions to the other annual settlements.

The exceptions to the first settlement are as follows: "1. She excepts to the annual settlement of the said J. B. Shockey filed July 20, 1896, and says there is due her on said settlement $442.99." The amount of the balance actually found due on this first setttlement by the order of confirmation was $427.99. But neither in this exception, nor in any of the exceptions, is it alleged that any item of charge, property or asset is omitted from the settlements, or that any item of credit was allowed which was not set out in the settlements. It would appear from the argument of counsel for appellant that the objections to the annual settlements were based on the claim that certain items of credit were excessive as to amount, and this excessive amount had been allowed; and it is his contention that the probate court has jurisdiction to investigate the annual settlements in that particular and, if found erroneous, to correct them.

The above exceptions made to each of the annual settlements are incorporated in and made a part of the exceptions to the final settlement; and the specific exceptions to the final settlement are that the balance should be larger in amount. No specific item of asset is alleged or claimed to have been omitted from the final settlement; no item of credit taken is complained of, except the item: "Support, education, money advanced to the ward since last settlement, $386.25."

The probate court confirmed the final settlement as made by the guardian. From that judgment the appellant appealed to the circuit court, and that court restated the account. It found that it was concluded from investigating any erroneous or excessive allowances of credits in the annual settlements by the orders confirming those settlements. It found that the items of charges in the final settlement were correct. It allowed a credit of $125 on the item of support, education and money furnished ward, and a credit of $40.75 for compensation or commission to the guardian, and other credits of the allowance of which no complaint is made. It found that there was still a balance due to the ward after the payment of said $250, and that this balance should bear interest at the rate of 6 per cent. per annum from July, 1904, the date when the hearing of the matter on the confirmation of the final settlement could be first entertained in the probate court; and it remanded the proceedings to the probate court with di-

rections to enter in that court an order in accordance with the judgment of the circuit court.

It is urged by counsel for appellant that the probate court has the power to open the settlements of guardians after confirmation thereof and to correct any errors in such settlements. But it has been uniformly held by this court that the order of confirmation of a settlement of a guardian by the probate court is a judgment which can be appealed from, but which cannot be otherwise disturbed, except in a court of chancery upon an allegation of fraud or some other recognized ground for equitable relief. Each order confirming each settlement becomes final and conclusive of all matters therein embraced, and cannot be reopened for alleged errors. The order of confirmation is a finding and an adjudication of each item of charge and credit contained in such settlement, and the investigation of the correctness of such finding and adjudication is concluded. *Rightor* v. *Gray,* 23 Ark. 228; *Payne* v. *McCabe,* 37 Ark. 318; *Phelps* v. *Buck,* 40 Ark. 219.

The record does not show that any item of property of the ward has been omitted from these annual settlements, or that any credit was allowed except upon items of credit specifically set out in the settlements. The probate court passed upon these and made a finding of the justice of their allowance and of their amounts. If its finding was erroneous, it could only be corrected upon appeal. No appeal has been taken from the orders of confirmation of these annual settlements within the time prescribed by law, and they have therefore become final. Thereafter the probate court has not the jurisdiction to reopen these settlements. *Nelson* v. *Cowling,* 89 Ark. 334.

It follows that the court did not err in refusing to surcharge the final settlement with a larger charge on the item of the balance of the eighth annual setttlement. It is urged that in the final settlement the guardian should be charged with rent of homestead. But in the final settlement there is a charge made on an item of rent without specifically setting forth of what property it is the rent. The appellant in her abstract of the evidence has wholly failed to abstract the testimony of the witnesses of the appellee. As shown by the transcript, nine witnesses actually testified on the part of the appellee. We have repeatedly held that it is necessary that a fairly complete abstract of the record should be

made in order to secure a review of questions depending on the record. *Files* v. *Law,* 88 Ark. 449; *Jett* v. *Crittenden,* 89 Ark. 349.

In this case there is no abstract of the testimony of any of the nine witnesses who testified on the part of the appellee, and we are therefore led to presume from the court's finding that the contention of appellant that no charge was made for this rent is not well founded.

It is urged that the court erred in allowing the item of credit of $125 for support, education and money furnished the ward. The probate court allowed upon this item the sum of $386.25, and the appellant claimed that this was in excess of the income of the ward, and that the expenditures were made without the direction of the probate court, and that it was error to allow it.

Section 3792 of Kirby's Digest provides that "without such direction the guardian shall not be allowed in any case for the maintenance and education of the ward more than the clear income of the estate." The circuit court allowed on this item the sum of $125, and the evidence does not show that this exceeded the amount of the rent and interest received, which constituted the income of the estate. It is urged that appellant was a member of appellee's family, and by her work earned for appellee the amount of her support. But the testimony of appellant herself shows that the appellee sent her to college from September to January and paid the expenses of her tuition and books; that he purchased for her clothes to the amount of $75, and that he furnished her money. The appellee denied that the appellant performed any work. The appellant has wholly failed to abstract the testimony of appellee and the witnesses in his behalf; and it cannot therefore be found that items to the value of $125 were not furnished to appellant, for which she is chargeable. In addition to this, the finding of the trial court sitting as a jury is as conclusive on appeal as the finding of a jury; and we cannot say in this case that there is not sufficient evidence to support the findings of the lower court. *Bell* v. *Welch,* 38 Ark. 139; *Garland County* v. *Hot Spring County,* 68 Ark. 83; *Ark. Central Rd. Co.* v. *Janson,* 90 Ark. 494.

It is urged that the court erred in allowing the item of compensation to the guardian. Upon an examination of the various

settlements, we find that no allowance was ever made and no credit taken by the guardian as a compensation for his services. The court here allowed him $40.75 for such compensation. Section 3828 of Kirby's Digest provides: "Guardians and curators shall receive such compensation for their services as the court shall decide to be just and reasonable." We cannot say that this amount allowed for compensation of the guardian was unjust, and certainly it was not excessive. We do not think that error was committed by allowing only six per cent. interest on the balance found due from the guardian; nor do we find from the record any prejudicial error committed by the lower court.

The judgment of the Benton Circuit Court herein is affirmed.

BLAKE v. SCOTT.

Opinion delivered October 18, 1909.

1. MUNICIPAL CORPORATIONS—SIDEWALK—LIABILITY OF ABUTTING OWNER.—Where an abutting owner contracted with another to construct a sidewalk and retaining wall along his property, and the latter performed the work, the abutting owner's liability to pay for the work is not affected by the invalidity of the city ordinance which required the sidewalk and retaining wall to be built; and the city, not being a party to the contract nor in privity therewith, was not liable in an action upon such contract. (Page 49.)
2. CONTRACTS—HOW PROVED.—To form an agreement, it is essential that there be a distinct intention that is common to both parties; but this intention need not be express, but may be reasonably implied from the acts and words used. (Page 50.)
3. SAME—WHEN PRESUMED.—Where a sidewalk contractor was requested by a landowner to build a sidewalk for him, and it was necessary to build a curb to protect the walk, and this was known to the landowner, it will be presumed that he intended to pay for the curb, as well as the sidewalk. (Page 50.)
4. ACTIONS—WRONGFUL TRANSFER—WAIVER.—The error of transferring a law case to equity is waived if no objection is made thereto. (Page 51.)

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

Hamby & Haynie, for appellant.

1. Appellee is not entitled to recover because he did not contract for the building of the curb.

2. It was not appellee's duty, under the circumstances, to build the curb.

3. It is inequitable to compel appellant to bear the extra expense due to the inequalities of sidewalk improvements on the street in question, caused by the grading and ditching done by the city of Prescott. The statute expressly requires uniformity. Kirby's Dig., § 5593; 17 Atl. 139; 53 Ark. 500.

H. B. McKenzie, for appellee.

1. The city of Prescott is not liable. It was not a party to the contract. 7 Am. & Eng. Enc. of L. 113, and cases cited; 101 U. S. 43; 4 Ark. 251; 17 Ark. 78.

2. Whether the ordinance requires curbs to be built or not, does not alter the status of the case in so far as relates to the liability of the city of Prescott. If it does require it, then it was appellant's duty to build them. Kirby's Dig., § 5542; 87 Ark. 85; 49 Ark. 199.

3. The city has the right to grade its streets and make ditches, wherever necessary. Kirby's Dig., § 5530; 58 Ark. 502; 66 Ark. 40; Elliott on Roads & Highways, 311, 312.

FRAUENTHAL, J. The plaintiff below, H. V. Scott, instituted this suit against the defendant, G. R. Blake, upon an account for building a concrete sidewalk and curb. In effect, it was an action for a balance claimed due upon the account. The total amount due for the walk and curb was $273.90, and upon that the defendant had paid $132.45, leaving a balance of $145.45, for the recovery of which amount this suit was brought.

The defendant denied that he had employed the plaintiff to build the sidewalk and curb, but had only employed him to build the walk; that the cost of the walk amounted to $132.45, which he had paid; and that the balance of $141.45 was the cost of the curb, for which he claimed that he was not liable. In his answer he also alleged that some years before the building of this walk and curb the city of Prescott had dug a ditch in front of his property, and graded the street at that place, and thereby made an elevation in front of his property and next the street, which extended in depth from twelve inches to three feet from

the top of the sidewalk to the bottom of the ditch; and that the plaintiff built a wall or curb of that depth in front of the sidewalk, and that this suit is for the price thereof. He claimed that he did not employ plaintiff to build the wall or curb; that the necessity for building same was created by the city of Prescott in digging the said ditch and elevating the grade of the sidewalk; and that the city of Prescott was on this account liable for the price of building the wall or curb. He asked that the city of Prescott be made a party to the suit, which was done. The city of Prescott filed its answer, in effect denying that it had made any contract with any one for the doing of the work which was involved in the suit, and denied that it was in any manner liable therefor. Thereupon the circuit court, of its own motion and without any objection made by any party to the suit, transferred the action to the chancery court. The chancery court without objection of any of the parties assumed jurisdiction of the cause and proceeded to trial in the case. It rendered a judgment in favor of plaintiff and against defendant Blake for the amount of the claim, and dismissed the action as against the city of Prescott. Blake prosecutes this appeal.

It appears from the evidence that the defendant Blake owned a lot situated in a block along which the city of Prescott by ordinance required sidewalks to be built by the various owners of the lots. The lot of defendant was quite low, and some years prior to the building of this sidewalk the city of Prescott had dug a ditch and raised the grade before defendant's property as set out in his said above answer. The plaintiff was engaged in building sidewalks along the block for other owners of lots, and in building such walks he also built for the other owners the curb or retaining wall in the front of such walks down to the bottom of the ditch, for all of which work these other owners were paying. When, in doing this work for the other owners, the plaintiff was near to the property of the defendant, the defendant requested the plaintiff to proceed and do the work of building the walk before his property, as he was doing for the other owners; and about the only other definite understanding the parties had was as to the terms of payment. Nothing was definitely said as to the exact amount or extent of the work.

In order to build the sidewalk, it was necessary to build the curb or wall as a part thereof so as to retain the earth upon which

the walk rested, and the top of the curb became also a part of the walk. Upon receiving request from defendant to build the sidewalk in front of his property, the plaintiff began with building the curb or wall, and the defendant was present and saw the plaintiff doing every part of the work.

The only person or authority that requested the plaintiff to do the work was the defendant Blake, and it was only at his request that the plaintiff proceeded to do any of the work, and only at defendant's request that he did the entire work. This the defendant knew, and if he did not expect or intend to pay for the work of building the curb or wall he did not make any statement to that effect to plaintiff. In the progress of the work the defendant Blake made payments from time to time to plaintiff; and, after the entire work of building the curb or wall and walk had been completed and the plaintiff presented his claim for the balance due on said entire work, the defendant for the first time told the plaintiff that he thought the city of Prescott should pay for the curb or wall, and suggested that plaintiff sue the defendant Blake and said city for the cost of the curb or wall, and whatever the court said he would do.

The plaintiff claims that he understood from the agreement of his employment by defendant that he was to do the work of building the walk and curb or wall as constituting the sidewalk in the same manner as he was doing for the other owners at the time of the employment by defendant, and that defendant, and only the defendant, was to pay for the entire work. The defendant, Blake, contends that he thought it was the duty of the city of Prescott to pay for the work of building the curb or wall, and that the city would pay therefor and not he; and on that account made no mention relative thereto.

The right of the plaintiff to recover herein against the defendant Blake is determined by the contract which he made with Blake, either express or implied. The liability of Blake is not diminished or affected by any act done or ordinance passed by the city of Prescott. If he is liable for the indebtedness sued for, that liability is solely dependent upon his own acts and contract. It is contended by defendant Blake that the city of Prescott had dug a ditch before his property, and had in grading the sidewalk raised a high embankment, and thus had made the work in the front of his property so unequal that it was not uniform with like

work required of other owners, and on this account the ordinance of that city requiring him to lay sidewalks could not require him to build this curb or retaining wall. But, if that contention should be deemed to be correct, it would only be a defense to Blake in resisting the enforcement of that ordinance. If, on the other hand, he did not resist the enforcement of the ordinance, but proceeded to comply with its requirements and to build his sidewalk, and contracted with plaintiff to do the work, then his liability to plaintiff could not be affected by any act done by the city of Prescott. In fact, the city of Prescott was not a necessary or proper party to this suit. It was not a party to the alleged contract between plaintiff and Blake, and was not in privity therewith. It could not therefore be held liable in any action based upon such a contract. 7 Am. & Eng. Ency. Law, 113.

The rights of the parties herein are founded and rest upon the contract that was made between the plaintiff and Blake, and solely upon that contract. The uncertainty of these rights, if there is any uncertainty, grows out of the dispute in the testimony as to scope of that contract and to the failure of the parties when making the contract to specifically name its extent and scope in express language. When a contract is entered into, it is either express in its terms or its terms may be implied from the acts, conduct and express words of the contract. To form the agreement of the parties, it is essential that there should be a distinct intention that is common to both. But the intention of the parties need not be express; it may be implied from the acts and words used, and the law will impute to the parties an intention which the meaning of their words and acts reasonably import.

In *Freeman* v. *Cook*, 2 Exch. 654, 18 L. J. Exch. 114, that rule is formulated as follows: "If, whatever a man's intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

In this case the plaintiff was building sidewalks for other owners in the same block and along the same line of frontage of defendant's property. In doing the work for the other owners he also built as a part of their sidewalks the curb or wall down to

the bottom of the ditch, and of the same character as that which of necessity would have to be built for defendant in the construction of the sidewalk in front of defendant's property; and the other owners were directing that the curb or wall should be built before their property in constructing their sidewalks, and were paying therefor. The plaintiff offered to do the work in front of defendant's property in the same way and to the same extent. The defendant Blake requested him to build the sidewalk, without specifically mentioning the curb or wall; and when, in pursuance of that request, the plaintiff began the work by starting on the curb, the defendant stood by and saw the work of building the curb proceed. He must have known that plaintiff was only doing that work at his request and at the request of and by the direction of no other person or party. It was not suggested that any other person or that the city of Prescott would pay therefor, or was liable to pay therefor. The circumstances are sufficient to justify the finding, from the words and conduct of the defendant, Blake, and the plaintiff, that the defendant Blake requested this work of building the curb or wall to be done as a part of the work of building the sidewalk; and that he would pay the plaintiff therefor. "An implied contract to pay will be presumed if under all the circumstances the services were such as to lead to a reasonable belief that they would be paid for." *Hogg* v. *Laster,* 56 Ark. 382.

The work here done was specifically beneficial to Blake, and from his words and acts it is but reasonable to presume that it was the intention of both the parties that he requested the work to be done, and it is just to imply that he intended to pay therefor. Bishop on Contracts, § 188; 2 Page on Contracts, § 772; 9 Cyc. 248.

It follows that there is ample evidence to support the finding of the chancellor that defendant Blake employed the plaintiff to build the curb or wall, and that he is liable to the plaintiff for the cost of same by reason of that employment.

It is the opinion of BATTLE, J., that the circuit court should not have transferred this cause to the chancery court, and that, in as much as there was no right or remedy in the case that called for the interposition of a court of equity, the chancery court had no jurisdiction to entertain or to try the case; that on this account the judgment of that court should be reversed and the

cause remanded to the chancery court with direction to transfer the cause to the circuit court. But he is of opinion that the plaintiff is entitled to recover of defendant Blake the amount sued for, and that the city of Prescott was not a proper party to the suit. The majority of the judges are of opinion that, in as much as none of the parties objected to the transfer of the cause to the chancery court and did not object to the chancery court entertaining and trying the action, any objection to such transfer would now be considered waived, although none of the parties has made any objection to such transfer or to the trial of the cause by the chancery court, in this court; and that under this state of the case the chancery court had jurisdiction to try and determine the cause. *Collins* v. *Paepcke-Leicht Lumber Co.*, 74 Ark. 81, and authorities there cited.

The decree is affirmed.

BATTLE, J. (dissenting). The Constitution of this State provides: "Until the General Assembly shall deem it expedient to establish courts of chancery, the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law." Art. 7, § 15. And further provides that the General Assembly may establish separate courts of chancery when deemed expedient. Art. 7, § 1. That it has done. Such courts were vested only with jurisdiction in matters of equity. The Legislature could vest them with no other.

Before the enactment of the "Code of Practice in Civil Cases," this court would have reversed a decree of the court in chancery on appeal and dismissed the suit, when no equity was involved, notwithstanding there was no objection to the jurisdiction of the trial court. It was, however, with great reluctance the court did so in such cases. In *Daniels* v. *Street*, 15 Ark. 307, 311, Chief Justice WATKINS, speaking for the court, said: "Admitting the complainant could have had a remedy at law, the question of jurisdiction is now, for the first time, made in the appellate court. Such being the case, where there has been a resort to chancery in the first instance for relief, and it has acquired jurisdiction by the submission of the defendant to answer and make the discovery prayed for, and he has availed himself of whatever benefit he could have by means of his sworn

answer, without objecting to the want of jurisdiction by plea, answer, or motion at the hearing, the appellate court should lay hold of any vestige of chancery jurisdiction before it would unravel the proceedings, direct the cause to be dismissed, and send the plaintiff to begin anew in a court of law." *Cockrill* v. *Warner,* 14 Ark. 354.

In *Mooney* v. *Brinkley,* 17 Ark. 340, 358, Chief Justice ENGLISH, in delivering the opinion of the court, said: "The defendant submitted to answer the whole bill, and did not, by demurrer, nor in his answer, object to the jurisdiction of the court of equity over any of the matters set up in the bill. Having thus submitted the cause to the cognizance of the court, it was too late for him upon the hearing, and it is too late here, to object to the jurisdiction, *unless the court were wholly incompetent to grant the relief which complainant sought by the bill.*" *Apperson* v. *Ford,* 23 Ark. 746, 763.

This ruling was doubtless based upon the elementary principle of law that consent cannot give a court jurisdiction of the subject-matter of an action. It has been repeatedly held by this court that consent cannot give jurisdiction. *Frank* v. *Frank,* 88 Ark. 1, 6; *Little Rock & Ft. Smith Ry. Co.* v. *Jamison,* 70 Ark. 346; *Grimmett* v. *Askew,* 48 Ark. 151; *Waggener* v. *Lyles,* 29 Ark. 47; *Jacks* v. *Moore,* 33 Ark. 31.

In *Frank* v. *Frank, supra,* Chief Justice HILL, delivering the opinion of the court, said: "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 without the demurrer, however, the court should have declined to pass upon the issue tendered, as it is not the subject-matter of the 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."

When equity jurisdiction was vested in the circuit courts, no question could arise as to the jurisdiction in matters of equity and law. The circuit court exercised both. As said in *Harris* v. *Townsend,* 52 Ark. 411: "Under the Code a plaintiff is only re-

quired to make a plain statement of his case in his complaint. If the case stated would have formerly been an action at law, either party is entitled to a trial by jury after the manner of the common law; but if the cause as stated would have been distinctly equitable under the old system, then it is triable according to the former chancery method. That is the substantial difference between law and equity under the new procedure. It does not recognize one judge as presiding over separate tribunals, the clash of whose jurisdictions confounds the practitioner and ruins the suitor. One court, endowed with the powers to try all causes, administers the whole law. For its convenience separate dockets are provided for the two classes of cases. If no objection is made to the form of trial—that is, whether it shall be according to the common law or chancery practice—it is adjudged not to be error to try a common-law case according to equity practice, or an equitable case according to the practice of the common law. *Organ* v. *Ry.*, 51 Ark. 235. It follows that, if objection is made, and the court applies the wrong form of trial to the case in hand, it commits only an error in the exercise of rightful jurisdiction, because the power to determine the cause and the method by which it shall be tried is devolved upon it. An erroneous judgment pronounced in such a case is not a nullity."

Since the creation of chancery courts, questions of jurisdiction arise and are important. The circuit courts can no longer rightfully exercise equity jurisdiction, nor can chancery courts exercise law jurisdiction; and judgments rendered by either class without jurisdiction are void. And the Supreme Court acquires no jurisdiction by appeal from such judgments, especially in cases where there is not a vestige of jurisdiction.

In the case at bar there was not a vestige of equitable jurisdiction. The matters involved were purely of common-law jurisdiction.

I think the judgment of the chancery court should be reversed.

BRAGG *v.* HARTNEY.

Opinion delivered October 18, 1909.

TRUSTS EX MALEFICIO—WHEN ENFORCED—Wherever the legal title to property, real or personal, has been obtained through fraud or duress, or under circumstances which render it inequitable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust in favor of the one equitably entitled to the same as against the original wrongdoer or any subsequent holder until a purchaser in good faith acquires title.

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

R. H. Dudley, for appellant.

1. The test of mental incapacity is not merely that the grantor's mental powers are impaired, but whether he has sufficient capacity to understand in a reasonable manner the nature and effect of the act which he is doing. 13 Cyc. 573; Words & Phrases, 5, 4475.

2. Bragg did not overreach Hartney or practice any fraud to induce him to make the contract against his will.

3. The heirs of Hartney have no greater rights than he would have if alive.

M. P. Huddleston and *Johnson & Burr,* for appellees.

1. The overwhelming weight of the testimony shows that Hartney was incapacitated to make binding contracts, and that he was overreached and defrauded by Bragg. The chancellor so found, and this court will not reverse. 67 Ark. 200; 73 *Id.* 489.

2. The sale and confirmation were void. There was no judge and no court. 1 A. & E. Enc. Pl. & Pr. p. 240; 2 Ark. 229; 24 *Id.* 479; 27 *Id.* 349; 115 N. Y. 185; 21 N. E. 1039; 39 Am. St. 327; 39 Ill. 554; 20 Ark. 76; 38 Ark. 78.

3. Hartney paid the whole purchase price for the land, and Bragg held the legal title in trust for Hartney. 15 Am. & Eng. Enc. of Law (2 ed.), 1132-1135.

HART, J. This is a suit in equity instituted in the Clay Chancery Court for the Eastern District by appellees, Martin Hartney and Mary Meschal, against the appellant, J. L. Bragg.

The abstract of appellees correctly states the substance of the pleadings and the findings and decree of the court, as follows:

"Appellees, as sole heirs at law of T. J. Hartney, deceased, filed their amended complaint against J. L. Bragg, the appellant, and F. Linke, alleging therein that Bragg and T. J. Hartney in his lifetime bought a farm of 240 acres of R. Liddell for the agreed price of $5,000; $3,000 was paid in cash by Hartney at the time of the foreclosure, and $2,000 was secured by two notes of Hartney and Bragg, who afterward made a mutual partition of the land by exchange of deeds. Hartney died before any part of either notes had been paid. Bragg procured an administrator of Hartney's estate to be appointed by the probate court of the Eastern District of Clay County, Arkansas, procured both land notes to be allowed and proved as debts against the Hartney estate, and caused Hartney's land to be sold by the administrator to pay said notes, at which sale Bragg was the purchaser at the price of $1,000. F. Linke, the assignee of said $2,000 of land notes, took a mortgage on the entire 240 acres for $2,000 from Bragg on the day of the administrator's sale. Said $2,000 and interest constitute a lien on all said lands in favor of said Linke, and is unpaid.

Appellees further allege that T. J. Hartney was, at the time of the purchase of the land from Liddell, the payment of the purchase price thereof, the division of the land and the execution of the deed to Bragg in consummation thereof, a weak-minded person, wholly incapable of making or entering into contracts, or executing deeds, or dividing lands, or transacting any other business. Hartney paid all the $3,000 cash payment for the land, and Bragg paid no part thereof. Bragg, through overreaching, undue influence and fraud practiced upon Hartney, procured the deed for the land to be made to himself and Hartney, procured an unjust division of the land to be made and Hartney's deed pursuant thereto. Through fraud Bragg procured the allowance of the whole of the $2,000 of purchase money notes to be proved as debts against Hartney's estate and the lands standing in Hartney's name to be sold by the administrator to himself for $1,000, by means whereof Bragg acquired title to the whole 240 acres without having paid a cent of the purchase price thereof.

Appellees further averred that because of Bragg's fraud all deeds by which Bragg got any title to said lands are null and void, that the pretended sale by the administrator is likewise null

and void, and that all said deeds ought to be canceled and held for naught. Appellees offer to pay to Linke the amount of the $2,000 of unpaid purchase money, with interest, and prayed the court to cancel all deeds by which Bragg took any title to said lands and to divest all title thereto out of Bragg and invest the title in appellees, subject to Linke's claim and for all proper relief.

Bragg filed his separate answer in the suit, wherein he admits the purchase of the lands from Liddell, taking the deed for the same to himself and Hartney, the division of said lands, the death of Hartney and the purchase of that interest by himself at the administrator's sale; but he avers that he paid to Hartney the half of the cash payment, denies all averments of fraud, and claimed to be the owner of all said lands. Upon the trial of the cause the chancellor found all the issues in favor of appellees and against Bragg, and by the final decree canceled all deeds by which Bragg claimed title to said lands, and divested all his interest therein, and vested the same in appellees, and charged a lien on said lands in favor of Linke for $2,945.44, the amount of unpaid purchase money and interest. Bragg alone appeals from this decree.

Prior to coming to the State of Arkansas, appellant J. L. Bragg and T. J. Hartney had lived in Hickman County, Kentucky. Bragg was the older, and had known T. J. Hartney from his birth. A preponderance of the testimony shows that from childhood Hartney had been mentally weak and almost an imbecile. His father died leaving a will, by the terms of which the lands devised to T. J. Hartney could not be sold until he reached the age of 30 years. As soon as he came into possession of his lands and personal property, Hartney began to dispose of it for a nominal price. Appellant Bragg and one Houston got some of it. Proceedings were instituted by his friends in Kentucky to have him declared of unsound mind, and a committee appointed to take care of his estate. The order was made, but no one could be found who would act. Soon afterwards, in January, 1903, Bragg came to Arkansas. T. J. Hartney sold his lands in Kentucky for $3,995. He received a draft for $3,000 and the remainder in cash.

The land in controversy was sold to Bragg and Hartney for

$5,000. Three thousand dollars of the purchase money was paid with the above-mentioned draft of T. J. Hartney, and the notes of Bragg and Hartney were given for the deferred payments. The title was taken in the name of Bragg and Hartney.

Hartney came to Arkansas in February, 1903, and moved on the land with Bragg. He was never permitted to exercise any authority over the land, and implicitly obeyed Bragg in all things. Hartney had lived with Bragg before coming to Arkansas. Just a short while before they left Kentucky, Bragg, referring to Hartney, said: "I have got a sucker, and when I turn him loose he won't do any one else any good." He further said: "I have got Tom Hartney on the string now; it is 'old man Bragg' now, and it will be 'Mr. Bragg' next year."

Bragg and Hartney made a division of the land, and Bragg received the more valuable part. Hartney then went back to Kentucky, and died in March, 1904. He was buried at the expense of the county. The notes for $2,000, the balance of the purchase money, were probated against Hartney's estate, and that part of the land, the title to which was in his name, was sold to pay them. Bragg became the purchaser. He told one of his neighbor's that Hartney's father had died in good circumstances, leaving Tom as his only child, and that he, Bragg, had just as well have the estate as any one. Bragg claims to have paid one-half of the $3,000 which was paid when the deed was executed, but a preponderance of the testimony shows that he was insolvent, and that the $3,000 was paid by T. J. Hartney. We are of the opinion, after a thoughtful reading of the record, that Bragg knew that Hartney was weak-minded and utterly incapable mentally of transacting any business; that Hartney was wholly under the control and dominion of Bragg; and that on account of the undue influence exercised by Bragg he was induced to pay the $3,000 in the beginning and let the title be taken in the name of Bragg and himself; that the whole transaction was fraudulent from its inception, and was deliberately planned by Bragg to get possession of the estate left Hartney by his father, without any cost to himself. Appellees are the sole heirs at law of the deceased T. J. Hartney, and as such have succeeded to his rights in the property. The rights of F. Linke were protected by the decree of the chancellor, and he has not appealed.

The general rule on the subject is thus stated in vol. 3 of Pomeroy's Equity Jurisprudence, at page 2033, as follows: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrong-doer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer."

Without going into further details of the testimony of this case, it is sufficient to say that it brings the cause squarely within the principles above announced.

We are of the opinion that the decree of the chancellor is correct, and it, therefore, will stand affirmed .

WESTERN UNION TELEGRAPH COMPANY *v.* ARCHIE.

Opinion delivered October 18, 1909.

TELEGRAPH COMPANIES—NEGLIGENCE—MENTAL ANGUISH.—Where a message sent by a husband to his brother to meet his wife at the train was never delivered, and she reached her destination in the daytime without any one to meet her, the fact that she was disappointed and anxious on that account will not be ground for recovery by her of damages for mental anguish.

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

STATEMENT BY THE COURT.

C. L. Archie and Maggie Archie brought suit against the Western Union Telegraph Company to recover damages for mental anguish on account of the alleged negligence of the defendant company in failing to transmit and deliver a telegram from C. L. Archie to his brother, requesting him to meet Maggie Archie, the wife of C. L. Archie, at the station at Corinth, Miss., on a certain day.

C. L. and Maggie Archie lived in Bowie County, Texas. Maggie Archie was in ill health, and under the care of a physician. He advised her to leave Texas. Her husband decided to send her to Mississippi, where they had relatives. He accompanied her to Texarkana, Arkansas, and from that place on the 13th day of October, 1906, delivered to the defendant company for transmission to his brother at Corinth, Mississippi, the following telegram:

"To J. W. Archie, Corinth, Miss.

"Meet Maggie on No. 30 tomorrow.

"C. L. Archie."

On October 14, 1906, Maggie Archie, accompanied by her little boy and girl, arrived at Corinth on train No. 30, between one and two o'clock in the daytime. J. W. Archie did not meet her. After waiting at the station for him for ten or fifteen minutes, she started to walk to his house, which was about three-quarters of a mile distant. When she had gone two or three blocks, she met a friend, who conducted her there and carried her bundles. She and the children were so weak and sick that at times they had to stop and rest. When they reached her brother-in-law's, she was so weak and sick that she went to bed. She remained in Corinth about one week, and then went to her father's about twelve miles in the country. For several years prior to going to Texas she had lived within four or five miles of Corinth, but when she came to Corinth, she came in on the opposite side and not by the depot. She was a stranger to that part of the town. Corinth is a place of from seven to ten thousand inhabitants. There was a nice hotel near the depot, and J. W. Archie had a telephone in his house. The company received the message promptly at Corinth, but failed to deliver it.

There was a trial before a jury and a verdict for plaintiffs in

the sum of $500, and the defendant duly prosecuted an appeal to this court.

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

Appellee arrived at her destination, a town where she was well acquainted, in broad daylight. She knew where the home of her brother-in-law was. Could have hired a conveyance there for two dollars, but preferred to walk. After walking two or three blocks, she met a friend who took her bundles and accompanied her the remainder of the distance. She suffered no ill-effects. The verdict was grossly excessive. No ground for recovery of exemplary damages is shown, nor prayer for same in the complaint. 115 S. W. 954; 77 Ark. 110; 78 Ark. 331; 70 Ark. 136; 80 Ark. 260; 89 Ark. 261; 45 Ark. 524; 65 Ark. 182. Nothing to justify recovery for mental anguish. 83 Ark. 476. See also, 81 S. W. 580; 76 Tex. 263; 44 So. 382; 73 Fed. 273; 70 Tex. 244; 81 Mo. App. 233. A good hotel stood near the depot where she could have gone and telephoned her brother-in-law, or she could have called a carriage at a trifling cost. It was appellee's duty to minimize the damages, not to aggravate them. 2 Joyce, Elec. Law, § 972; 38 S. W. 637; 81 S. W. 581; 133 S. W. 1064; 15 S. W. 1048; 51 S. E. 931.

2. No recovery can be had for mental anguish because it is conceded that there was no negligence in this State. If there was any negligence, it occurred in Mississippi. 77 Ark. 535; 2 Joyce, Elec. Law, § 828; 68 Miss. 748; 9 So. 823; 47 So. 552; 85 Ark. 268; 60 S. W. 435.

Webber & Webber, for appellees.

1. Here is a case of a frail woman traveling with two sick children, herself enfeebled by long illness, whose husband had detained her at a hotel in Texarkana for a day to enable him to wire his brother in Corinth to meet her at the train, finding herself alone in a strange city with no one to meet her. We submit that the evidence shows such wilful wrong and gross disregard of appellee's rights as justifies the verdict. 77 Ark. 110; 83 Ark. 267; 85 Ark. 267; 2 Joyce, Elec. Law, § 972.

2. The statute, Kirby's Dig., § 7947, makes a telegraph company liable for negligence in delivering, as well as in sending, a message, and the fact that the message was delivered in Missis-

sippi does not preclude recovery. 2 Joyce, Elec. Law, § 801 b; *Id.* § 822.

HART, J., (after stating the facts.) Counsel for appellant insist that, under the particular facts and circumstances of this case, appellees are not entitled to recover damages for mental anguish. We do not think that there could have been any real mental suffering in this case. The facts are essentially different from those in the case of *Western Union Tel. Co.* v. *Hanley,* 85 Ark. 263, where a recovery was allowed. In that case Mrs. Hanley arrived at Mayfield, Kentucky, at one o'clock at night, and on account of the failure to deliver her message she was compelled to remain at the station for about three-quarters of an hour before she could get a conveyance. It is true that she suffered no insult or physical injury, but the question was what would be the natural effect upon her mind. Her mental anguish consisted in what might have happened to a defenseless woman in the middle of the night in a strange place. The very fact that she arrived at that time of night unattended and with no one to meet her might have caused her to be insulted, or to suffer a worse injury. Here Maggie Archie arrived at her destination in the middle of the day. There was a hotel close to the station. She had relatives in Corinth with telephone connection in their house. She only remained at the station ten or fifteen minutes and met a friend within two or three blocks of there, who went with her to her brother-in-law's. The facts and circumstances as detailed by her show that she was only subjected to disappointment at not being met at the station. There was no real danger from the situation in which she was placed. Her sickness was not caused by mental suffering. At most, she could only have suffered anxiety from an imaginary situation. There could have been no real cause for mental anguish. As held in the cases of *McAllen* v. *Western Union Tel. Co.,* 70 Tex. 243, and *Morrison* v. *Western Union Tel. Co.,* 24 Tex. Civ. App. 347, in order to recover damages under the mental anguish doctrine, it is necessary that the mental anguish suffered be real and with cause, and not merely the result of a too sensitive mind or a morbid imagination.

Having decided that the appellees are not entitled to recover, under the facts of this case, damages for mental anguish, it is not necessary to consider the other assignments of error of the appellant company.

It is conceded that the appellees are entitled to recover the sum of two dollars, and a judgment for that sum will be affirmed.

SPAULDING MANUFACTURING COMPANY *v.* GODBOLD.

Opinion delivered October 18, 1909.

1. JUDGMENT—EFFECT OF TAKING IN NAME OF PARTNERSHIP.—The objection that a judgment was taken in the name of a partnership, instead of in the name of the partners who composed it, is waived where it was not raised either by demurrer or answer, and the judgment became a valid one upon which execution might issue. (Page 65.)
2. DEEDS—CONVEYANCE TO PARTNERSHIP.—While a conveyance of land to a partnership by its firm name, which does not include the name of any of the partners, does not vest the title at law, the rule is otherwise in equity, which treats that as done which ought to be done. (Page 65.)
3. REFORMATION OF EXECUTION DEED—MISTAKE.—Where an execution deed by mistake conveyed land to a partnership by its name, which did not include the name of any of the partners, the mistake may be corrected in equity in a suit to which the sheriff or his successor in office is a party. (Page 66.)

Appeal from Columbia Chancery Court; *E. O. Mahoney,* Chancellor; reversed.

Stevens & Stevens, for appellant.

1. The sheriff's deed conveyed the legal title. 28 Ark. 76-79. In 1 L. R. A. (N. S.) 161, it is said only an equitable title passes. The better view is that such a deed is a *latent* ambiguity, and open to explanation by which the real party is disclosed and the deed treated as if the names were inserted. 68 Ark. 151. The following cases hold that the parties take an equitable title when the grantee is a firm name. 71 N. C. 492; George on Partnership, p. 112; 36 Ark. 456; 68 Ark. 157; 1 L. R. A. (N. S.) 157; 16 Pac. 43.

2. A sheriff's deed may be reformed. 28 Ark. 372; 60 *Id.* 487. The deed recites all the statutory requirements, and the mistake was that of the draftsman. 67 Ark. 80; 85 *Id.* 25; 71 Ark. 487.

C. W. McKay and *J. G. Lile,* for appellee.

1. The demurrer was properly sustained, as the deed was void. 36 Ark. 456.

2. The chancery court had no jurisdiction to reform the sheriff's deed. 73 Ala. 562; 55 Mo. 500; 11 Barb. 173; 75 Ark. 6; 60 *Id.* 487; 67 *Id.* 80.

3. Appellants by their amended complaint admit they have no valid legal title, and to maintain this suit such a title is necessary. 15 Cyc. 17; Kirby's Digest, § 2737; 36 Ark. 456; 56 *Id.* 391.

HART, J. The controversy in this case is about the title to certain lands in Columbia County, Arkansas. An action in ejectment therefor was commenced by the Spaulding Manufacturing Company against S. A. Godbold in the Columbia Circuit Court.

The complaint alleges that the Spaulding Manufacturing Company is a partnership, composed of H. W. Spaulding, F. E. Spaulding and E. H. Spaulding. The deed relied upon to support the action is a sheriff's deed under execution, and is made an exhibit to the complaint. The deed recites that the execution was issued and came to the hands of the sheriff on the 27th day of July, 1905; that the Spaulding Manufacturing Company obtained a judgment against G. A. Godbold, and that the execution was issued on that judgment; that the levy and sale was made under the execution, and that the Spaulding Manufacturing Company became the purchaser; that the grantee named in the deed was the Spaulding Manufacturing Company. The defendant Godbold excepted to the deed for the reason that there was no grantee named in the deed. The circuit court sutained the exception, and ordered that the deed be stricken from the record for the reason that it was not entitled to be used as evidence on the trial of the cause.

The plaintiff then moved that the cause be transferred to equity, and as grounds stated that the land was purchased by the individual partners at the execution sale, and that by mistake of the draftsman the firm name, instead of the names of the partners, was written in the deed as grantee. They asked that the deed be reformed, and that when so reformed or a new deed executed the possession of the land be given to them. The court granted the motion, and transferred the cause to the chancery court. On motion of the plaintiff, the chancery court ordered that the motion to transfer the cause to the chancery court be made

an amendment to the complaint. Whereupon the defendant demurred to the complaint. The court sustained the demurrer and dismissed the action. The plaintiffs have appealed to this court.

It is contended by counsel for appellee that the judgment recited in the sheriff's deed under execution is void for the reason that it was rendered in the firm name, and not in the names of the individuals composing the firm, and that the deed therefore conveys no title.

It has been expressly held in Missouri that judgments rendered in favor of a firm, by the firm name, are not void. *Davis* v. *Kline,* 76 Mo. 310. See also *Conrades* v. *Spink,* 38 Mo. App. 309.

In the case of *Frisk* v. *Reigelman,* 75 Wis. 499, the court said: "Bringing the action in the firm name does not render the judgment void, but is a mere defect or irregularity, which is waived unless due objection be made thereto before judgment." See also 15 Ency. of Pleading & Practice, p. 840 and 841.

Section 6093 of Kirby's Digest provides that the defendant may demur to the complaint where it appears on its face that the plaintiff has not legal capacity to sue.

In construing this section in the case of *Pettigrew* v. *Washington County,* 43 Ark. 33, the court held that the judgment should have been favor of the State, the obligee in the collector's bond, or of the county treasurer, the real party in interest. The judgment in fact was rendered in the name of the county. The court said: "This was a matter of form, rather than of substance, and since the objection to the plaintiff's capacity to sue for this demand was not taken either by demurrer or answer it must be deemed to have been waived." From which we deduce that, no objection having been made to the judgment being taken in the name of Spaulding Manufacturing Company in the original suit, the defect of parties was waived, and the judgment became a valid one, upon which execution might issue.

It is next objected that the naming of the Spaulding Manufacturing Company as the grantee in the sheriff's deed under execution renders the deed void. This is not a case like that of *Percifull* v. *Platt,* 36 Ark. 456, and *Cooper* v. *Newton,* 68 Ark. 157, where the style of the firm includes the names of one of the partners, and the court held that the legal title was conveyed to

such partner, and that he became in equity a trustee for the other partners to the extent of their interest. In the present case the firm name includes the name of no person.

It is the general rule that a conveyance to a partnership by its firm name, which does not include the name of any of the partners, does not vest in it any legal title because the partnership is not recognized in law as a person. Because the deed is void at law, it by no means follows that the same rule applies in equity. The appellees allege in their amended complaint that the individual members of the firm were the purchasers of the land at the execution sale, and that by mistake of the draftsman the name of the firm, instead of the names of the persons who composed the firm, was written in the deed. It is a fundamental principle of equity that it regards and treats that as done which in good conscience ought to be done, and, as said by Mr. Pomeroy, "it is only by looking at the intent, rather than at the form, that equity is able to treat that as done which in good conscience ought to be done."

Again, it is contended that a court of equity will refuse to aid the defective execution of statutory powers, and the cases of *Tatum* v. *Croom,* 60 Ark. 487, and *Landon* v. *Morris,* 75 Ark. 6, are cited to support that contention. In those cases the mistake was not only in the execution of the deed, but in the proceedings anterior to that, and upon which the sale was based. But in the present case it will be observed that there was no irregularity or defect in the execution, or the proceedings thereunder, as was the case in *Tatum* v. *Croom* and *Landon* v. *Morris, supra,* but under the allegations of the complaint the execution and the proceedings under it were regular in all respects, and the only mistake was in the execution of the deed itself. The individuals who composed the the firm are alleged to have purchased the lands in question, and the primary object of the action as it now stands under the pleadings is merely to correct the deed by inserting therein the true names of the grantees. The interest in the land of Godbold, the execution debtor, was divested out of him by the sale under the execution and his subsequent failure to redeem within the statutory period; and it would be inequitable to deny appellees the relief prayed for. The sheriff who made the sale or his successor in office would be a necessary party to obtain the relief prayed.

The decree is therefore reversed, and the cause remanded with leave to appellees to make such new parties as they are advised it is necessary to do.

HOGINS v. BULLOCK.

Opinion delivered October 18, 1909.

1. MUNICIPAL OFFICES—VACANCIES—MODE OF FILLING.—Under Kirby's Digest, § 5433, providing that "special elections of the members of the city council shall be held at such time and place as the mayor by proclamation shall direct, so that at least ten days' notice thereof shall be given," a vacancy in the office of mayor should be filled by a special election, there being no express constitutional or statutory authority for the Governor to make such appointment. (Page 69.)
2. MUNICIPAL ELECTIONS—IRREGULARITIES—EFFECT.—If the provisions of the general election laws as to the certification of nominations, priming of ballots and forbidding the printing thereon of the name of any candidate not certified and filed in the time prescribed, apply to special elections for mayor, such irregularities will not avoid such an election at the instance of one who holds the office of mayor without authority and was not a candidate at such special election. (Page 70.)

Appeal from Pope Circuit Court; *Hugh Basham,* Judge; affirmed.

STATEMENT BY THE COURT.

On the 4th day of February, 1909, the mayor of Russellville, a city of the second class, resigned. A special election was ordered for February 16, 1909, to fill the vacancy. Appellee was elected at the election held on that day, and February 23, 1909, was commissioned by the Governor. In the meantime on the 8th of February, 1909, appellant was appointed mayor by the Governor for the unexpired term prescribed by law, had received his commission, and had duly entered upon the discharge of the duties of mayor.

Appellee, after receiving his commission, qualified as mayor by taking the oath of office and filing bond with the recorder of the city. He demanded of appellant the office and records of same, and upon appellant's refusal to surrender them brought this

suit against appellant to oust him from the office. The evidence showed that a proclamation by the acting mayor of the city was made and published February 8, 9, and 12, in a newspaper published and having a general circulation in Russellville. The notice of election was given eight days. It was the usual notice given for special elections. There was no primary election to nominate candidates for mayor to be elected at the special election to be held on the 16th of February, 1909. The name of appellee was printed on tickets by the election commissioners. No other names were printed on the tickets. There were no other avowed candidates, but blank places and lines were left on the printed tickets so voters could write other names if they wished. Appellee received all the votes cast at the election, to-wit, 203 votes. Appellant voted for appellee. The election commissioners certified to the election of appellee, and he was commissioned as above stated by the Governor.

Dan B. Granger and *Brooks, Hays & Martin,* for appellant.

When a vacancy occurs in any office, and no mode is provided by the Constitution and laws for filling the same, the Governor shall fill the same by appointment. Const. 1874, art. 6, sec. 23. The special election under which appellee claims is invalid, because not ordered, held or conducted in accordance with the law. Kirby's Dig. § 5433. The law requiring the city council to fix the time and place for special elections, as well as requiring notice by the mayor, is mandatory, and failure to observe it is fatal. 68 Ark. 338. So is the law requiring one of the judges to indorse his name on the ballot. 69 Ark. 501. Where failure to observe the directions of a statute may prejudice the rights of some one, they are mandatory. 79 Ark. 236.

R. B. Wilson, for appellee.

The Legislature has provided for the appointment of a mayor only in one contingency, and that is when the office has become vacant by removal for malfeasance or nonfeasance. Kirby's Dig., § § 5492, 5493. The right to make appointments to office is not inherent in the executive. The municipal corporation itself has authority to fill vacancies in office unless the officer has been removed for malfeasance or nonfeasance. 64 Ark. 201. Section 101 of act of January 23, 1875, provides that the election

of all officers required to be elected shall be governed by this act unless otherwise provided. Kirby's Dig. § 2891. The provisions of the law not affecting the merits of the election are only directory. 69 Ark. 501; 32 Ark. 553. The giving of notice is not essential. 50 Ark. 266; 68 Tex. 30; 83 Cal. 70.

WOOD, J., (after stating facts). 1. The only question is who was entitled to the office of mayor of the city of Russellville, when appellee instituted this suit? The Constitution makes no provision for filling the office of mayor.

The framers of the Constitution left the entire matter of the organization of cities to the Legislature, Art. 12, sec. 3. By section 5433 of Kirby's Digest it is provided that: "Special elections of the members of the city council of all cities shall be held at such time and place as the mayor by proclamation shall direct, so that at least ten days' notice thereof shall be given." The mayor, under the law, is a member of the city council. See section 5589, Kirby's Dig., in connection with sections 5432 and 5581.

By these provisions it is clear that the only mode for filling a vacancy in the office of mayor is by special election, and not by appointment. In the absence of express constitutional statutory authority authorizing the Governor to appoint, he has no such power. "The right to make appointments to office is not inherently an executive prerogative." 23 Am. & Eng. Ency. Law, p. 343, and cases cited.

But this court has held that the authority to fill vacancies in municipal offices does come within the purview of the general powers conferred by statute on municipalities in this State. *Payne* v. *Rittman*, 66 Ark. 201. Our conclusion on this point is that neither the Constitution nor the statute confers upon the Governor the power to fill vacancies in the office of mayor by appointment. Section 23 of art. 6 of the Constitution, providing that when any vacancy occurs in any office and no mode is provided by the Constitution and laws for filling same, the Governor shall fill the same by appointment, etc., has no application to a vacancy occurring in the office of mayor. A mode is provided by statute for filling vacancies in the office of mayor. See section of the Digest *supra* and § 5612. Section 23, art. 6, of the Constitution refers to other than municipal officers.

2. Appellant urges that, even if election was the only mode of filling the vacancy, such election in this case was invalid because the provisions of the general election laws as to the certification of nominations, printing of ballots, and forbidding the printing thereon of the name of any candidate not certified and filed in the time prescribed, apply likewise to special elections for mayor. See sections 2777-80, 2788, 2790, Kirby's Dig.

We need not decide whether these provisions apply to the special election of mayor. For, conceding that they do, appellant is in no position to complain of a failure to observe the requirements of the law. He held the office without legal authority, and was not the victim of any unfair treatment in the election. He was not a candidate, and voted for the appellee, who was the only candidate at the very election which he now calls in question. It is not pretended that any fraud was perpetrated on him by the appellee or the election commissioners. The statute does not declare that the election shall be void at which ballots are used containing the name of a person who has not been certified as a nominee. The failure to comply with the letter of the law by election officers, especially in matters over which neither the candidate nor the voter has control, and in which no fraud is perpetrated, will not as a general rule render an election void, unless the statute expressly makes it so. McCrary on Elections, § 403. Says the Supreme Court of Indiana: "All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result; or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void." *Jones* v. *State,* 153 Ind. 440, 55 N. E. 229.

The same principle is recognized in *Rhodes* v. *Driver,* 69 Ark. 501. See also *Wheat* v. *Smith,* 50 Ark. 266; *Govan* v. *Jackson,* 32 Ark. 553, and other cases cited in appellee's brief.

The election in this case was regularly called, notice was given, and appellee was the unanimous choice of untrammelled voters.

Affirmed.

JACKSON *v.* STATE.

Opinion delivered October 25, 1909.

1. RAPE—EVIDENCE—IMMORAL CHARACTER OF PROSECUTRIX.—In a prosecution for rape it was not error to refuse to charge that proof of the immoral character of the prosecutrix may be considered as going to her credibility, such proof being admissible only upon the issue whether she consented to the intercourse. (Page 72.)
2. INSTRUCTIONS—DUTY TO ASK CORRECT INSTRUCTION.—A party who asks an instruction which is correct only in part cannot complain if it is refused, as it is his duty to ask an instruction wholly correct. (Page 73.)
3. RAPE—FAILURE OF PROSECUTRIX TO MAKE OUTCRY.—It was not error in a rape case to refuse to instruct the jury that it was the duty of the prosecutrix, "when she thought a rape was about to be committed on her, to make an outcry," though, if requested, the court should have told the jury that her failure to make an outcry might be considered, in connection with the other facts and circumstances adduced in evidence, as tending to show want of resistance. (Page 73.)
4. SAME—FAILURE OF PROSECUTRIX TO MAKE COMPLAINT.—Where the defendant in a rape case testified that he had intercourse with the prosecutrix by her consent, it was error to refuse to instruct the jury that if they found that she failed to make complaint immediately after the commission of the alleged rape they should consider this fact in determining whether she gave her consent to the intercourse. Page 74.)

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

H. A. Parker, for appellant.

1. When the prosecutrix in a rape case is a woman of immoral or unchaste character, the jury should consider this fact for two purposes: (1) It goes to her credibility, and (2) the jury may consider it as tending to show consent. 66 Ark. 523; 12 L. R. A. (N. S.) 1153; 1 Wigmore on Ev., § § 199-200; 3 Rice on Ev., p. 605; 5 A. & E. Enc. L. 871, 851-C. 853; 40 Tex. 486; 17 Tex. App. 301, 532; 20 *Id.* 155; 3 Hill N. Y. 309; 36 Cal. 522; 40 Ark. 486-7; 27 Mich. 134.

2. It was error to refuse the seventh and eighth prayers of defendant. It was the duty of the prosecutrix to make an outcry. 23 A. & E. Enc. L. 862; 65 Am. Dec. 516; 1 Col. App. 232; 1 Hale, P. C. 635; 77 Ga. 705; 71 Ind. 49; 11 Iowa 401; 46 N. C. 18; 79 S. W. 558; 87 *Id.* 350.

3. When a woman is of bad character as to chastity, resistance, force, consent and *complaint in proper time* is extremely

essential, and the jury should be properly charged on these lines. 23 A. & E. Enc. L., 860, 861 and 100 cases cited.

4. The friendly relations afterward should have been considered. *Ib.*

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. Proof of the immoral character of the prosecutrix is not admissible to affect the credibility of the witness, but only on the question of consent. 66 Ark. 523; 3 Rice on Ev., art. 820-1.

2. The sixth instruction as to outcry was properly refused, 73 Ark. 407.

3. The seventh and eighth prayers by defendant, while perhaps good as a general proposition, are unwarranted by the testimony.

HART, J. Sam Jackson was indicted, tried before a jury, and convicted of the crime of rape in the Monroe Circuit Court. The case is here on appeal.

Counsel for appellant assigns as error the refusal of the court to give the following instruction:

"The court instructs the jury that if they find from the testimony that the victim or prosecutrix is a woman of immoral character the jury should consider this fact for two purposes: (1.) It goes to her credibility as a witness. (2.) The jury may consider it upon the question of consent."

This instruction was based upon the evidence adduced at the trial tending to show that the prosecutrix was a woman of unchaste character. The instruction was properly refused in the form in which it was presented. Her reputation for chastity may not be put in issue to shake her credit as a witness, but only to show her consent, and so no rape. Her credit as a witness may be impeached by evidence that her general reputation for truth or immorality renders her unworthy of belief, but not by evidence of particular wrongful acts. The reason for admitting evidence concerning her chastity is that a jury might more readily infer assent to the intercourse in an unchaste woman than in a virtuous one. Hence the instruction was not correct in the form in which it was presented. *Maxey* v. *State,* 66 Ark. 523; *State* v. *Stimpson* (Vt.), 1 L. R. A. (N.

S.) 1153; 1 Wigmore on Evidence, § § 199 and 200; 3 Rice on Evidence, p. 605.

Appellant under the authorities *supra* was entitled to an instruction on the bad reputation of the prosecutrix for chastity as affecting the question of her consent. But it was the duty of appellant to ask a correct instruction. *Mabry v. State,* 80 Ark. 345; *Allison* v. *State,* 74 Ark. 454 and cases cited; *Snyder* v. *State,* 86 Ark. 456; *Western Coal & Mining Co.* v. *Burns,* 84 Ark. 74.

Counsel for appellant urges upon us a reversal because the court refused to give the following instruction: "The court instructs the jury that it was the duty of Estella Williams, when she thought a rape was about to be committed on her, to make an outcry. And that if she failed to do so the jury can consider this fact as showing want of resistance." The court properly refused the instruction in the form in which it was presented. The prosecutrix testified that the rape occurred in the night time at a place she believed to be remote from human habitation, and that her resistance was overcome through fear. Appellant testified that the intercourse was voluntary. Hence it can not be said that it was the duty of the prosecutrix to make an outcry; for this would have invaded the province of the jury in expressing an opinion on the evidence. If a proper instruction on the question had been asked, the court should have told the jury that the failure to make an outcry might be considered by the jury, in connection with the other facts and circumstances adduced in evidence, as tending to show want of resistance.

Counsel for appellant also complains that the court refused to instruct the jury as follows:

"7. The court instructs the jury that if they find from the evidence that Estella Williams failed to make complaint immediately after the alleged commission of said offense, the jury may consider this upon the matter as to whether she gave her consent or not.

"8. The court instructs the jury that, if they find from the evidence in this case that the defendant and the prosecutrix remained friendly for some time after the alleged outrage, this can be considered whether the sexual intercourse was by consent or not."

These instructions, or one of similar import, should have been given. 23 Am. & Eng. Ency. of Law (2d Ed.), pp. 862 and 863, and cases cited.

Appellant testified that, after he had sexual intercouse with the prosecutrix, he carried her to a neighbor's house, and that, after sitting around the fireside for sometime, she went to bed without making any complaint; that he met her on two different occasions after this before a charge of rape was preferred against him, and that her manner toward him was friendly and cordial.

It is the natural instinct of a woman to complain of an outrage of this kind at the first opportunity and to have a feeling of aversion against the perpetrator of it. The theory of the State was that she was overcome by fear of appellant. This view was presented to the jury by the court by a proper instruction. Appellant's theory was that his intercourse with the prosecutrix was by her consent. He was entitled to have this view presented to the jury.

The State relied mainly upon the testimony of the prosecutrix for a conviction. The testimony of the appellant was in direct conflict with her testimony. Hence the refusal to give the instructions was prejudicial to the appellant. *Hamilton-Brown Shoe Co.* v. *Choctaw Mercantile Co.,* 80 Ark. 438; *Little Rock Ry. & Elec. Co.* v. *Goerner,* 80 Ark. 158; *Smith* v. *State,* 50 Ark. 545; *Taylor* v. *McClintock,* 87 Ark. 281.

Other assignments of error are pressed for our determination; but, as they relate to matters that will not likely arise upon a new trial of the case, they need not be considered.

For the error in refusing to give instructions numbered 7 and 8, requested by appellant, the judgment is reversed, and the cause remanded for a new trial.

STATE *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Opinion delivered July 12, 1909.

1. RAILROADS—FAILURE TO KEEP WATER AT STATION.—Kirby's Digest, § 6634, requiring railroad companies to keep their waiting rooms at stations supplied with wholesome drinking water, is not invalid be-

cause it inflicts penalties both upon the corporation and the particular agent who neglects or refuses to perform the required acts. (Page 76.)

2. SAME—DISCRIMINATORY EFFECT OF STATUTE.—Kirby's Digest, § 6634, requiring that wholesome water be kept in waiting rooms at railroad stations, is not invalid because it imposes a larger fine upon the railroad corporation than upon the agent who is guilty of the negligent omission. (Page 77.)

3. APPEAL AND ERROR—LIMITATION—CONSTRUCTION OF STATUTE.—The act of 1909 regulating the time for suing out appeals and writs of error is prospective, and does not apply to judgments rendered prior to its passage. (Page 78.)

Appeal from Lawrence Circuit Court, Western District; *Charles Coffin,* Judge; reversed.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellant.

1. The indictment follows the language of the statute. It charges all the necessary facts. Kirby's Dig. § § 6622, 6634-6; 18 Ark. 363; 19 *Id.* 171, 587; 33 *Id.* 140; 39 *Id.* 216; 45 *Id.* 173; 47 *Id.* 188; 71 *Id.* 80; 72 *Id.* 382; *Ib.* 586; 73 *Id.* 139.

2. Under the act both the agent and the company are liable to the penalty, under the police power of the State. 32 Fed. 722; 15 S. W. 43; 66 N. H. 342; 97 Ky. 207; 83 Ark. 249; 63 *Id.* 576; 67 *Id.* 566; 69 *Id.* 376, 378; 76 *Id.* 303: 65 *Id.* 521, 532; 71 *Id.* 556, 561; 74 *Id.* 303.

W. F. Evans and *W. J. Orr,* for appellee.

The act under consideration prescribes one penalty for the railroad company and another for the agent. This violates the 14th Amendment to the Constitution of thet United States. Equality of protection under the law implies that one person shall not be subjected for the same offense to any greater or different punishment than another. 106 U. S. 85; 159 U. S. 678; 113 U. S. 27. A railroad company is a person within the meaning of the 14th Amendment. 118 U. S. 394; 125 U. S. 181; 129 U. S. 26; 124 U. S. 386; 146 U. S. 649; 164 U. S. 592; 173 U. S. 690; 169 U. S. 518.

MCCULLOCH, C. J. The grand jury of the western district of Lawrence County returned against appellee the following indictment (omitting caption):

"On the 13th day of August, 1908, the St. Louis & San Francisco Railroad Company, being a railroad corporation, op-

erating a line of railroad in this State, said company operating a line of railroad in and through the western district of said county, and passing through and by the town of Black Rock in said district and county, and said company then and there having and maintaining a station and depot at said place of Black Rock, and maintaining and having waiting rooms for passengers at said station and depot, and a waiting room for persons of the white race being situated in the said depot building near the ticket office of said defendant company, and being then and there used by the defendant company as a waiting room for white passengers, and such passengers being then and there in said waiting room, the said defendant, the St. Louis & San Francisco Railroad Company, in said county, district and State, did then and there unlawfully fail, neglect and refuse to supply said waiting room with wholesome drinking water, and did then and there fail, neglect and refuse to provide and supply, and to have and keep provided and supplied, said waiting room with any drinking water whatever, against the peace and dignity of the State of Arkansas."

The court sustained a demurrer on the following grounds:

"1. The said indictment does not charge any offense under the laws of the State of Arkansas against this defendant

"2. That the acts complained of are acts personal to the agent, and not to this defendant, and the duties herein imposed rest upon the said agent, and not upon this defendant."

It will be seen that the indictment charges appellee, a railroad corporation, with having refused and neglected to supply with drinking water one of the waiting rooms in the station at Black Rock, Arkansas. The indictment follows closely the language of the statute, and we think that it fully states facts constituting a violation of the statute, which reads as follows:

"All persons who own or operate any line or lines of railroad in this State shall keep separate waiting rooms now provided for in section 6622 in all depot buildings now erected or that may hereafter be erected, for the accommodation of their passengers, open both day and night for the free and unrestricted use of their said passengers. And that said waiting rooms shall at all proper times and seasons be comfortably

heated and at all times supplied with wholesome drinking water, and shall in all other respects be kept and maintained in a sanitary and clean manner." Kirby's Digest, § 6634.

The second ground of the demurrer is equally untenable. The statute in express terms makes both the railway company and the particular agent who neglects or refuses to perform the required acts guilty of a misdemeanor, and subject to a fine. A railroad corporation can act only through agents, and it is within the power of the Legislature to inflict penalties upon corporations for the conduct of their agents in failing to perform statutory duties.

In *State* v. *St. Louis & S. F. Rd. Co.*, 83 Ark. 254, this court held that the statute in question is not violative of the 14th Amendment to the Constitution of the United States. It is now pointed out by counsel for appellee in their brief that the court in the opinion in that case did not state the reasons for the decision, and they insist that the reasons must have been that the court deemed that part of the statute which requires that waiting rooms be comfortably heated, and at all times supplied with drinking water, to be applicable only to the particular agent of the railway company who fails to comply with its provisions. Such a conclusion cannot be drawn from the opinion in that case, for it involves an indictment against the company itself for failure to keep the waiting room comfortably heated and supplied with drinking water. The court decided that the indictment was void for uncertainty and duplicity, but that the statute was valid in its application to railroad corporations for failure to perform the specified acts. That is the only reasonable conclusion to be drawn from the decision.

It is argued that, if these provisions of the statute be construed to apply both to the railroad corporation and the particular agent who is guilty of the negligent omission, it is void on the ground of its discriminatory effect in imposing a larger fine upon the railroad corporation than upon the offending agent. It does not at all follow that this is an improper discrimination. The aim of the statute is to punish both the principal and the agent, visiting the greater punishment upon the principal. We are clearly of the opinion that this is permissible, and that it does not constitute an unjust and unreasonable discrimination.

The two classes of offenders occupy different attitudes; it is within the province of the lawmakers to determine which class shall suffer the greater punishment. In other words, neither the railroad corporation nor any other class of employers is denied the equal protection of the laws by a statute inflicting a severer punishment upon the principal than upon the agent.

In *Hayes* v. *Missouri,* 120 U. S. 68, Mr. Justice Field, delivering the opinion of the court, said: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

And in *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181. the same learned judge said: "The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

Mr. Justice Bradley, in *Missouri* v. *Lewis,* 101 U. S. 22, in referring to this provision of the Fourteenth Amendment, said: "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in the same class or under like circumstances."

Counsel insist that the writ of error should be dismissed because it was not sued out within the time prescribed by the act of May 6, 1909. (Acts 1909, p. 636.) The judgment in this case was rendered prior to the passage of that act, and it is not applicable. *Rankin* v. *Schofield,* 70 Ark. 83.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer and to proceed further.

CAMPBELL *v.* SAMPLES.

Opinion delivered October 25, 1909.

ELECTIONS—IMPLIED—REPEAL OF STATUTE.—Under the general rule that where the later of two statutes covers the whole subject-matter of the earlier, and it is evident that the Legislature intends it as a substitute, the earlier statute will be held to have been repealed, Kirby's Digest, § 1667, providing for the punishment of election officers in certain cases, was repealed by the later act of March 4, 1891.

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

Sam R. Chew, for appellants.

The acts of 1875 and 1891 cover the same general subject; the latter act is so at war with the former that the former cannot stand. Section 1667 of Kirby's Digest is repealed by act 1891, p. 32. 10 Ark. 588; 27 Ark. 421; 47 *Id.* 488; 31 *Id.* 17; 11 Wall. 88; 43 Ark. 425.

C. A. Starbird, for appellee.

The act of 1875 (§ 1667, Kirby's Dig.) is not repealed by act March 4, 1891. 79 Ark. 213.

McCULLOCH, C. J. Plaintiff, Ben Samples, who claimed to be a citizen and qualified elector of a certain township in Crawford County, Arkansas, instituted separate actions in the circuit court of that county against the defendants, C. J. Campbell and Jack Moore, who were judges of election at the general election held on September 14, 1908, to recover the penalty of $200 prescribed by the following statute:

"If any judge or clerk of any election, or any other person concerned in the conducting of any election, shall neglect, improperly delay or refuse to perform any of the duties required by law, having undertaken to do so, or shall be guilty of corruption, partiality or manifest misbehavior in any matter or thing appertaining to such election, or shall unduly attempt to influence the election, he shall forfeit and pay the sum of two hundred dollars, to be recovered by indictment, or by action of debt, in the name of any person who may sue for the same" (Sec. 1667, Kirby's Digest.)

This statute is a section of the general election law enacted January 23, 1875, entitled, "An Act providing a general election law."

The General Assembly enacted another election law, which was approved on March 4, 1891, and was entitled "An act to regulate elections in the State of Arkansas." It provides, as the title of the act implies, a method of conducting elections, and contains the following sections prescribing penalties:

"Sec. 38. Every public officer, upon whom any duty is imposed by this act, who shall wilfully neglect or omit to perform such duty, or who shall do anything which is by this act forbidden, other than the things specifically enumerated in sections 37 and 43 hereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by removal from office and imprisonment in the county jail not less than six months nor more than twelve months, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment."

"Sec. 43. Any election officer or other person whomsoever who shall wilfully make a false count of any election ballots, or falsely or fraudulently certify the returns of any election, or steal, destroy, secrete or otherwise make way with any election ballot, tally sheet, certificate or ballot box, either before or after the closing of the polls, shall be deemed guilty of a felony, and, on conviction thereof, punished by imprisonment at hard labor in the penitentiary not less than two years nor more than seven years.

"Sec. 44. Any violation of this act by any election officer, or other person whomsoever, except a State or county officer, for which no punishment is elsewhere specifically prescribed in this act, shall be deemed guilty of a misdemeanor, and punishable as in this act provided for misdemeanors." Acts of 1891, p. 32.

The two cases were consolidated, and the trial resulted in favor of plaintiff against the defendants for a recovery of the penalties sued for. On appeal to this court, the contention of the defendants is that the above-quoted sections of the act of March 4, 1891, repealed by implication section 1667, quoted above, and taken from the act of January 23, 1875.

The case of *Brown* v. *Haselman,* 79 Ark. 213, was a suit brought against the officers of a school election to recover the penalty under section 1667. The argument was made there, as

in this case, that the statute had been repealed by the later enactment. We considered it unnecessary then to pass upon the question, as we held that that section did not apply to school elections. We are convinced, however, that the judgment in that case should have been affirmed, not only on the grounds stated in the opinion, but also on the further ground that the statute had been impliedly repealed by the act of March 4, 1891. Now that the question is squarely presented, we so hold. This court has a number of times decided that, while repeals by implication are not favored, still "where the later of the two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intends it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not in the new." *St. Louis & S. F. Rd. Co.* v. *Bowman*, 76 Ark. 32, and cases cited.

Now, applying this rule to the question presented, it is evident that the sections quoted above from the act of March 4, 1891, cover fully the ground covered by section 1667, Kirby's Digest, and it is not reasonable to presume that the Legislature intended to leave that act in force.

We do not mean to hold that the act of 1891 repeals all the provisions of the act of January 23, 1875, on the subject of general elections. The later act contains no express repeal, but on the contrary it expressly leaves in force some of the provisions of the old law. We have no doubt, however, that the section upon which this act is based was repealed.

The judgment rendered against the two defendants is therefore reversed, and the two action against them are dismissed.

MABRY v. KETTERING.

Opinion delivered October 25, 1909.

1. APPEAL AND ERROR—DETERMINATION OF MOOT QUESTION.—The court will not determine whether one accused of crime is entitled to an injunction to prevent another from developing certain plates into photo-

graphs where it appears that the plates have already been developed and photographs been printed from them. (Page 83.)

2. INJUNCTION—USE OF PHOTOGRAPH OF ACCUSED.—A complaint in equity which asks that defendants, officers charged with the enforcement of the criminal laws, be restrained from developing and publishing photographs of plaintiffs, who are accused of crime, alleging that the photographs were taken by the defendants for the avowed purpose of developing said plates into photographs, as these plaintiffs believe and allege, for the purpose of having said photographs placed in what is known as the "Rogues' Gallery," without stating what the "Rogues' Gallery" consists of, fails to state a cause of action. (Page 84.)

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; affirmed.

Bradshaw, Rhoton & Helm, for appellants.

There is a right in equity to protect a person from an invasion of private rights. Chancery courts have jurisdiction to protect the rights of privacy and private rights. 1 L. R. A. (N. S.) 1147; 4 Duer 379; 39 L. R. A. 240; 59 *Id.* 478; 6 Pom. Eq., § 632; 1 Beach, Inj., § 50; 40 N. Y. St. 289; 31 L. R. A. 286; 40 Ch. Div. 345; 1 McN. & G. 25; 51 N. Y. 300; 19 N. Y. Sup. 583; 64 Fed. 280; 31 L. R. A. 283, 286, 291; 50 S. W. 933; 37 L. R. A. 783; 82 N. Y. Sup. 248; 154 Ind. 599; 121 Mich. 372. See 89 Ark. 551; 2 A. & E. Ann. Cas. 561.

Wm. G. Whipple and *Powell Clayton,* for appellees.

1. Public officers may use photographs for the purpose of identifying criminals. 89 Ark. 551; 117 S. W. 746; 24 App. D. C. 417; 154 Ind. 599; 57 N. E. 541; 73 Atl. 653.

2. No right of privacy is recognized by the law, where no property rights are involved. 67 Ark. 123; 64 *Id.* 538; 33 *Id.* 350; 64 *Id.* 538-545; 171 N. Y. 538; 59 L. R. A. 478-481; 22 A. & E. Enc. L. (2 Ed.) 77; 121 Mich. 372; 46 L. R. A. 220-223; 82 N. Y. Sup. 248; 57 Fed. 435; 31 L. R. A. 282; 122 Ga. 190; 73 Ark. 97; 57 Fed. 435; High on Inj. (4 Ed.), § 20 b, p. 34; 124 U. S. 200, 210; Kerr on Inj. (2 Ed.), 1, 2.

2. Conceding that the publication of the photographs *might be* a libel, chancery courts have no jurisdiction to enjoin such publication. 6 Pom. Eq., § 629, p. 1055; Kerr on Inj. (2 Ed.) 1, 2; 1 Beach on Inj., p. 73; Odgers on Libel & Slander, § 13; Newell on Slander & Libel (2 Ed.), p. 246 a; 118 U. S. 385;

128 Fed. 957; 22 Cyc. 900; 6 Pom. Eq. Jur., § 629; Kerr on Inj. (2 Ed.), 2, and many other cases.

McCULLOCH, C. J. Mabry and others instituted this suit in chancery against Kettering and others, praying for an injunction restraining the latter from developing plates of the photographs of the plaintiffs, who were then confined in jail under criminal charges, and from "publishing or uttering, or causing to be uttered or published, said photographs or any photographs of these plaintiffs." The question involved is fully set forth in the opinion of this court delivered on the motion to dissolve the temporary injuction. *Mabry* v. *Kettering,* 89 Ark. 551.

A demurrer was sustained by the chancellor to the complaint, and the plaintiffs have appealed to this court.

In our former opinion we said that "the complaint, when it comes to be considered by this court on final hearing of the cause, will present an interesting question concerning what is now termed by modern authorities the right of privacy, or the right of an individual to invoke the jurisdiction of a chancery court to restrain an improper use of his photograph without his consent." We were probably too hasty in stating that this question would arise on the final hearing of the case here, for on further consideration we do not find it necessary to a decision of this case for us to go into the question referred to.

The plaintiffs only asked that the defendants be restrained from developing the plates and from publishing or using the photographs. Now, they admit in their brief that this has been done. So the case only presents a moot question, so far as the rights of the parties are concerned. Moreover, the plaintiffs allege in their complaint that they are confined in jail on a criminal charge; and, as we held in the former opinion that the officers had a right to use the photographs for the purpose of identification, the prayer of the complaint asked for too much in asking that they be restrained from using the plates altogether. The complaint does not point out specifically any improper use to be made of the photographs. Therefore, the defendants having the right to use them for a legitimate purpose, and having already done so, the plaintiffs have no right to restrain them without showing specifically that the photographs are to be used improperly.

It is true that it is alleged in the complaint that the photographs were taken by the defendants "for the avowed purpose of developing said plates into photographs, as these plaintiffs believe and allege, for the purpose of having said photographs placed in what is known as the Rogues' Gallery;" but they fail to state what the Rogues' Gallery consists of, and we cannot take judicial cognizance thereof. For aught we know to the contrary, it may be some legitimate method of identification of criminals or those charged with crime; and we have held that the photographs of accused persons may be used for such purpose.

We conclude, therefore, that the plaintiffs are entitled to no relief on the showing made, and the decree is therefore affirmed.

MANEY v. BURKE.

Opinion delivered October 25, 1909.

1. PUBLIC LANDS—PRESUMPTION.—A deed of the Commissioner of State Lands purporting to convey lands is *prima facie* evidence of title. (Page 87.)
2. EJECTMENT—TITLE OF PLAINTIFF.—A plaintiff in ejectment must rely upon the strength of his own title, and not upon the weakness of his adversary's. (Page 87.)
3. SAME—OWNERSHIP—PAYMENT OF TAXES.—Proof that certain land was assessed for a particular year and the taxes paid in the name of a certain person is insufficient to prove that such person owned the land. (Page 87.)

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

R. W. Nicholls and *W. G. Dinning*, for appellant.

1. The court erred in directing a verdict for plaintiff. In ejectment against a defendant in possession under a donation deed, plaintiff must prove perfect title in himself, thus overcoming the *prima facie* title in defendant. 40 L. R. A. 825; 28 *Id.* 612; 38 Ark. 181.

2. A decree in a personal action binds only parties to the suit. 77 Ark. 477; Kirby's Dig., § 6321; 38 Ark. 192; 35 *Id.*

450; 61 *Id.* 464; 66 *Id.* 305; 60 *Id.* 374; 17 A. & E. Enc. Law 1010; 75 Ark. 1; 130 U. S. 493; 60 Ark. 364; 28 S. W. 332.

3. Plaintiff must recover on the strength of his own title. 47 Ark. 413; 77 Ark. 244; 80 Ark. 31.

4. Payment of taxes on and assessment of the land in a person's name is no evidence of title.

Bevens & Mundt, and *James H. Stevenson,* for appellee.

1. Only an undivided half interest in the land passed to appellee under the commissioner's deed; the other half remaining in appellee.

2. The parties deraign title from a common source, and it was unnecessary to deraign title further back than was shown. 41 Ark. 17; 44 *Id.* 517.

3. The State, in the overdue tax suit, took simply the title of the owner of the land forfeited. Jackson & Company preserved their title intact until 1890, when Cage purchased their title and conveyed to appellee.

HART, J. Luke Maney is in possession of a certain tract of land in Phillips County, Arkansas, under a deed from the State Land Commissioner for the nonpayment of taxes. His deed is dated October 14, 1899. He has been in possession of the land since his deed was executed, and has cleared a part of it, and placed valuable improvements on it.

R. C. Burke brought suit in ejectment against him in the Phillips Circuit Court to recover the land. The suit was commenced October 3, 1901. The statement of facts is as follows:

In 1889 the Cotton Belt Levee District instituted suit in the Phillips Chancery Court against the Jacks Real Estate Company for the purpose of enforcing its lien for unpaid levee taxes, and obtained judgment against it upon personal service for the amount of the unpaid levee taxes. In default of the payment thereof the commissioner of the chancery court was directed to sell among other lands the undivided one-half of the southwest quarter of section 29, township 3 south, range 4 east, in Phillips County, Arkansas, for the purpose of satisfying said indebtedness. Pursuant to the directions of said decree the lands were sold, and H. H. Cage became the purchaser. The sale was duly reported and confirmed by the court at its November term, 1889. On July 10, 1897, Cage conveyed the lands to R. C.

Burke. The record shows that the undivided one-half of said section 29 was sold to the State of Arkansas on January 29, 1883, under a decree of the Phillips Chancery Court in what is generally known as the overdue tax proceedings.

The record also shows that the undivided one-half of said section 29 was sold at delinquent tax sale on April 14, 1884, to the State for the nonpayment of the taxes for 1883. The record also shows that on the 14th day of October, 1899, the Commissioner of State Lands executed a deed to Luke Maney to lands described as follows:

"Parts of section, und. half southwest quarter, section 29, township 3 south, range 4 east, 80 acres, year forfeited, 1883.

"Parts of section, und. half southwest quarter, section 29, township 3 south, range 4 east, 80 acres, sold to State at overdue tax sale January 29, 1883."

The tax records for 1883 shows that the whole of the southwest quarter of said section 29 was assessed in the name of Jacks & Company, and that in the margin where is usually marked paid, was marked "und. ½." The tax books for 1886 shows an undivided one-half paid on by Jacks & Company, and one-half undivided left to the State. It is the same for the years 1887-88-89 and 1890, except it was paid on by the Jacks Real Estate Company.

The court instructed the jury that the title to the lands in controversy was in the plaintiff Burke, and directed a verdict for him for the recovery of the land, which was accordingly done. The case is here on appeal, and counsel for Maney predicates error upon the action of the court in giving a peremptory instruction in favor of Burke.

The deed of the Commissioner of State Lands conveyed the whole of the southwest quarter of section 29 to Maney. The description as given in the deed is copied in the statement of facts. It shows that an undivided one-half of the southwest quarter of said section 29 was sold to the State at overdue tax sale on January 29, 1883, and an undivided one-half of the southwest quarter of said section 29 was forfeited to the State for the nonpayment of the taxes of 1883. The description contained in the deed shows that the forfeiture for nonpayment of taxes occurred in different years. That being so, *prima facie* the title to the whole

quarter section passed to the State, and the deed of the Land Commissioner in like manner conveyed the whole quarter section to Maney. The deed of the Land Commissioner, describing an undivided one-half as forfeited for the nonpayment of taxes for 1883 and an undivided one-half as sold to the State under overdue tax proceedings for a different year, shows that the whole of the southwest quarter of said section 29, and not an undivided half thereof, was intended to be conveyed.

The deed of the Commissioner of State Lands to Maney was *prima facie* evidence of title in him. *Allen* v. *Phillips,* 87 Ark. 185; *Cracraft* v. *Meyer,* 76 Ark. 450; *Doniphan Lumber Co.* v. *Reed,* 82 Ark. 31. It is well settled in this State that a plaintiff in ejectment must rely upon his own title. *Allen* v. *Phillips, supra.* This rule has been announced so frequently by this court that there is no need for a further citation of authority to support it. Hence Burke to recover must not only overcome this *prima facie* title in Maney but must show title in himself.

The levee foreclosure, under which he claims title, as far as the record of that proceeding is shown herein, was not a proceeding *in rem* against the land, but was an adversary proceeding against the Jacks Real Estate Company to recover the levee taxes, and in default of their payment to have a lien therefor declared upon the land. It is contended by counsel for Burke that the forfeiture to the State at delinquent tax sale in 1884 for the nonpayment of the taxes of 1883 was void because the land was assessed in the name of Jacks & Company or the Jacks Real Estate Company, and that the taxes were paid by that company. Proof that the lands were assessed for taxes, and that the taxes were paid by that company for 1883, is not sufficient to establish ownership in that company at the time of the forfeiture, upon which to sustain an action for the recovery of the land against one who holds the *prima facie* legal title and is in possession of the land. Taxes for general purposes are a charge upon the land, and are not against the owner. It is a matter of common knowledge that land is frequently assessed and the taxes paid in the name of another person than the owner. Hence it would be strange, indeed, to hold that proof that the land was assessed and the taxes paid in the name of one person

would be sufficient proof upon which he might base an action for the recovery of the land against one who holds the *prima facie* legal title.

We are of the opinion that the court erred in instructing the jury that the title to the land was in the plaintiff Burke, and that they should return a verdict in his favor for the recovery of the land; and for this error the judgment will be reversed and the cause remanded for a new trial.

KING v. BYRNE.

Opinion delivered October 25, 1909.

WILLS—OMISSION TO NAME HEIR.—Under Kirby's Digest, § 8020, providing that "when any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person shall be deemed to have died intestate," etc., the great grandchild of a testatrix cannot recover upon the ground that she was not mentioned in the will of her ancestress if she was not living at the time the will was made, or if her mother was then living and was named by class as a grandchild.

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

D. L. King, for appellant.

1. Under the will of Alexander Byrne, Francis Byrne took a life estate. Irene Lewis, mother of appellant, took one-fifth remainder and Blanche King, her only child, is the owner of said one-fifth of Alex. Byrne's estate. 22 Ark. 567.

2. As to Blanche King, under section 8020, Kirby's Digest, Francis Byrne died intestate, there being no mention of her other heirs. 23 Ark. 569; 31 *Id.* 145; 87 Ark. 204-7; 86 Ark. 368.

3. The paragraph declaring her wish that her sons contribute to her grandchildren is advisory merely, not binding. 14 L. R. A. 33.

L. A. Byrne, for appellees.

The will provided for all the children, and was effective as to the grandchildren, they being named as a class. 86 Ark. 369.

BATTLE, J. This suit was brought by Blanche King in the Lafayette Chancery Court against Lawrence A. Byrne, C. L. Byrne, J. V. Brame and Henry Moore, for the recovery of lands. She alleged in her complaint that Alexander Byrne died seized and possessed of personal and real property, and left a last will and testament, and thereby devised and bequeathed to his wife, Francis Byrne, all his property for and during her natural life and one-fifth of his estate remaining at the death of Francis Byrne to his granddaughter, Irene Lewis, who died leaving the plaintiff, Blanche King, her only child and heir surviving; and alleged that Irene Lewis was the granddaughter of Francis Byrne, and that she (Lewis) died leaving plaintiff, her only child and heir surviving as before stated; that Francis Byrne made a will on the 4th day of September, 1888, without naming plaintiff or providing for her therein, which was duly probated and admitted to record, and that Francis Byrne died seized and possessed of certain real estate. She did not allege that any of the estate of Alexander Byrne remained after the payment of his lawful debts, or that she (plaintiff) was living at the time Francis Byrne executed her last will and testament. She asked for a decree for one-fifth of the real estate of which Alexander and Francis Byrne severally died seized and possessed.

The defendants answered and denied that any of the estate of Alexaner Byrne remained after the payment of his lawful debts, and that plaintiff was living at the time Francis Byrne executed her last will and testament.

Upon the final hearing of the cause, the court dismissed plaintiff's complaint for want of equity; and she appealed to this court.

It was not claimed or shown that any of the estate of Alexander Byrne, deceased, remained after the administration of his estate and the payment of his debts. We take that fact as conceded. It is not alleged or shown that plaintiff was living when Francis Byrne made her will. She claims that she is entitled to share in the property of Francis Byrne, deceased, on the theory that she died intestate as to her, Mrs. Byrne not having named or provided for her in the will, which, so far as it affects this cause, is as follows:

"3d. After all of my funeral expenses and debts have been fully discharged, then all of the remainder of my property, personal and real, moneys, credits, choses in action, of whatever name, nature or description, which may come to my ownership, by bequest, devise or purchase, I hereby bequeath and devise absolutely unto my two sons, Lawrence A. and Cassius L. Byrne, to be shared in by them equally, and to be taken by them absolutely, at my death.

"While I have bequeathed and devised all my property absolutely to my said two sons, it is my wish that they shall, from time to time, contribute out of my said estate such sums of money or property to my grandchildren as they may require or need to relieve their wants, leaving my said two sons to use their own discretion as to the time and manner of such contributions, believing that they will do what is right and equitable in the premises."

The following is the statute upon which appellant bases her claim: "When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate, etc." Kirby's Digest, § 8020.

Appellant cannot recover under this statute, because it is not shown that she was living at the time the will was made. If her mother, Irene, was living then, she could not recover because the latter was mentioned by class (grandchildren) in the will. *Brown* v. *Nelms*, 86 Ark. 368. It is alleged by plaintiff and not denied by the defendants that appellant's grandmother, Mary Lewis, born Byrne, the daughter of Alexander and Francis Byrne, is dead, but it is not alleged or shown when she died.

The burden was upon the plaintiff to show that she was entitled to recover, and she has failed to do so.

Decree affirmed.

BAKER *v.* NANNY.

Opinion delivered October 25, 1909.

MALICIOUS MISCHIEF—DAMAGES TO OWNER—PAYMENT.—Under Kirby's Digest, § § 1892-3, providing that if any person shall maliciously kill, maim or wound another's animal, the jury "shall assess the amount of damages, if any actual damage has occurred, * * * and the court shall render judgment in favor of the party for three-fold the amount so assessed by the jury," the judgment in favor of the owner of an animal so killed or wounded is intended as compensation to such owner, and is not payable into the county treasury nor in county warrants.

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

W. S. Chastain, for appellant.

1. Mandamus was the proper remedy. 31 Ark. 263; Kirby's Dig., § § 1174, 7184; 48 Ark. 238.

2. The "mulct" or penalty is part of the fine, and payable in county warrants. 54 Ark. 364; 31 Ark. 46; Kirby's Dig., § 1174; 18 Ark. 238.

3. It was error to impose a jail sentence. Kirby's Dig., § 248.

S. W. Woods, for appellee.

1. The prosecution is under sections 1892-3, Kirby's Dig., and the damages are part of the punishment for the crime. 19 Ark. 176. The conclusions of the court in 54 Ark. 364 as to the law were correct, but the expressions of the learned judges were inaccurate.

2. County warrants are not receivable. Neither the county nor State has any interest in the damages. 32 Ark. 202; 61 Ark. 21.

BATTLE, J. E. C. Baker was convicted in the Marion Circuit Court of malicious mischief, committed by killing one mule and wounding another, the property of J. F. Dudley, and was fined $50, and judgment was rendered for that amount and costs of prosecution in favor of the State of Arkansas, and in the same prosecution upon the same conviction, the damages of Dudley was assessed and judgment was rendered against the defendant in favor of Dudley for $180 damages to the mules. Execution was issued upon the judgment in favor of Dudley and placed in the hands of John Nanny, the sheriff. The defendant

tendered him (sheriff) the warrants of the county of Marion in payment of the amount due for damages, and he refused to accept them. He (Baker) thereupon applied to the Marion Circuit Court for a writ of mandamus to compel the sheriff to accept, and the court refused to grant it, and he appealed.

The judgment rendered against Baker for damages in the prosecution for malicious mischief was based upon the following statutes, which, so far as applicable, are as follows: "If any person shall wilfully, maliciously or wantonly, by any means whatsoever, kill, maim or wound any animal of another with or without malice toward the owner of the animal, which it is made larceny to steal, he shall, on conviction, be punished by a fine of not less than twenty nor more than one hundred dollars, or by imprisonment in the county jail for a period of not less than ten nor more than sixty days, or by a period of not less than ten nor more than sixty days, or by both such fine and imprisonment, and shall, moreover, be liable to damages to the owner of the animal so killed, maimed or wounded, as in the preceding section provided," which is as follows: "and the jury who shall try such case shall assess the amount of damages if any actual damages has occurred, * * * * and the court shall render judgment in favor of the party for threefold the amount so assessed by the jury." Kirby's Digest, § § 1892, 1893.

Under these statutes the judgment for the damages to the animal killed or wounded is rendered in favor of the owner. It is for compensation to the owner as well as punishment to the accused. The judgment is not due and payable to the county, and is not to be paid as a fine into the county treasury for the benefit of the county; the statute upon that subject providing: "All fines, penalties and forfeitures imposed by any court or board of officers whatsoever, except those imposed by mayor's or police courts in any city or town, shall be paid into the county treasury for county purposes." Hence, as the judgment in favor of the owner is not payable into the county treasury, and is not a debt due the county, and is intended as compensation for damages suffered by the owner, it is not payable in county warrants. We cannot see upon what principle it should be so payable, there being no statute requiring it.

Judgment affirmed.

PARKVIEW LAND COMPANY *v.* ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered October 25, 1909.

ROADS AND HIGHWAYS—IMPROVEMENT DISTRICTS—STATUTE UNCONSTITUTIONAL IN PART.—Acts 1907, c. 247, authorizing the formation of improvement districts in Jefferson County, is unconstitutional in so far as it authorizes the formation of the entire county into one district and the building and construction of new roads, but such provisions may be stricken out and the remainder of the act left in force.

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

Daniel Taylor, for appellant.

The act No. 247, of Acts 1907, is unconstitutional, being a conflict with section 28, article 7, of the Constitution of Arkansas, which confers exclusive original jurisdiction in all matters relating to county roads, etc., upon the county court. See sections 1, 2, 8, 9, 27, 28 of the act. These sections are so repugnant to the Constitution that they should not stand, and with them eliminated the whole act must fall.

Taylor & Jones and *W. F. Coleman,* for appellee.

The act is not so repugnant as a whole to the Constitution that the unobjectionable purpose of the act to provide for the improvement of an old county road must necessarily fall with those provisions contemplating the laying out of new roads. 26 Am. & Eng. Enc. of L., 2d Ed. 570; Suth. Stat. Con., § 170; 70 Ark. 94; 66 Ark. 36; 105 U. S. 305; 8 Cyc. 1140. It is not in conflict with the provisions of the Constitution giving to county courts exclusive original jurisdiction in matters relating to county roads. The word "exclusive" means exclusive of other courts, and the word "original," as employed, means as distinguished from appellate jurisdiction. As to "jurisdiction," see 17 Am. & Eng. Enc. of L., 2d Ed. 1041, and cases cited; 34 Ark. 105.

BATTLE, J. The Parkview Land Company brought suit in the Jefferson Chancery Court against Road Improvement District No. 1 of Jefferson County, the directors thereof, and Citizens' Bank. It alleged in its complaint as follows: That it is the owner of certain lands in Jefferson County, and that the same are

situate within the boundaries of Road Improvement District No. 1, "which was formed under act No. 247 of the Acts of 1907, and in conformity with the provisions thereof, for the purpose of constructing about eight miles of macadam and gravel road within the district, assessing the cost thereof against the real property benefited in the district.

"That A. Brewster, P. P. Byrd and J. A. Clement are the duly appointed directors of said district, and that through them, as directors, the district has constructed about eight miles of road in Jefferson County, known as the 'Star City and Cornerville Road,' by grading, ditching and macadamizing same with crushed rock and gravel at a cost of about $30,000, for which bonds have been issued and sold, and pursuant to a resolution of the said board of directors are declared a lien upon the lands embraced in the district.

"That against plaintiff's land there is assessed a total betterment of sixteen dollars, upon which an annual tax of six per centum has been levied by the directors, which, by the terms of the act, is made a lien against all the lands of the district for which it is provided by said act plaintiff's land may be sold, if it be not paid.

"That act No. 247, together with the bonds aforesaid, the assessment of betterments and levy of annual taxes thereon purporting to be a lien against the lands, are invalid, because the act under which the district was formed is in conflict with the provisions of the Constitution of Arkansas vesting exclusive jurisdiction over roads in the county courts.

"That the bonds of the district, together with the assessment of betterments against the lands and levy of the annual tax of six per centum on the betterments provided by the act and claimed to be a lien against the lands, constitute a cloud upon the title of plaintiff to the lands. Unless restrained, the district will annoy plaintiff with numerous suits for the collection of the annual taxes. That the Citizens' Bank is the purchaser and holder of the bonds.

"Plaintiff prayed that the bonds, together with the resolution, contract and all acts of the board of directors in declaring the bonds to be a lien upon the lands of the plaintiff, be cancelled and held for naught; that the assess-

ment of betterments against the lands and levy of the annual tax before mentioned be cancelled and held for naught, and that the district be enjoined from assessing any betterments against the lands of plaintiff or levying any annual or other tax on such betterments for the purpose of paying the cost of said improvement or reducing the bonds or any thereof, and that plaintiff's title be quieted in it free of such lien."

The defendants answered and denied "that the act conflicts with the provisions of the Constitution. They stated that the improvement contemplated and as actually made was for the purpose of improving a county road in Jefferson County, already in existence, by the construction of what is known as a macadam or gravel road over, upon and along such county road as mentioned in the complaint, for a distance of about eight miles between the terminal points of the county road as stated; that no part of the road is a new road, nor was it contemplated that any portion of such improvement should involve the laying out or establishing of any new public road or any portion thereof whatsoever. They denied that the bonds, assessment of betterments and levy of taxes now claimed and purporting to be a lien on plaintiff's lands are invalid."

The court found that "the improvements contemplated by the formation of Road Improvement District No. 1, and as actually made thereunder, were solely for the purpose of improving a county road in Jefferson County, Arkansas, already in existence, and which county road is an old and established county road of the county, and has been for many years, and that the road so improved is in no part a new road, nor was it contemplated that any portion of such improvement should involve the laying out or establishing of any new public road, or any portion thereof whatsoever," and dismissed the complaint for want of equity. The evidence sustained the findings of the court. Plaintiff appealed.

Appellant contends that act No. 247 of the Acts of General Assembly of 1907, under which Improvement District No. 1 was formed, is unconstitutional, because it is in conflict with section 28 of article 7 of the Constitution, which is as follows: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries,

paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. * * * *"

The act No. 247 is, in part, as follows: "Section 1. Whenever a majority in value of the owners of real property in a county or any part of a county (such majority in value to be determined by the assessment for purposes of general taxation in force at the time) shall present a petition to the county court of any county in this State, praying for the formation of a road improvement district, the said county court shall, after having given public notice for twenty days by printed copies in ten places in said county or part thereof, one of which shall be posted on the principal door of the courthouse of said county, or by publication in some newspaper published in said county, determine the fact that such petition is so signed by such majority in value of said landowners. * * * *

"After such hearing, or opportunity to be heard, the said county court shall determine, and so enter upon the records, the fact of existence or non-existence of the assent of the said majority in value to the prayer of said petition. If the said county court shall make an order declaring that the said petition contains a minority in value of the landowners within the territory described in said petition and accompanying map, then the said finding shall be entered of record, and shall not thereafter be questioned except for fraud in the making thereof. Upon ascertaining, as aforesaid, that the necessary majority in value of the landowners have requested the formation of said district, the said county court shall make an order declaring the same to be and exist under the name and style of 'Road Improvement District No. .... of the County of .....' That the said district shall be and become a body politic and corporate by said name and may sue and be sued, implead and be impleaded, and have perpetual succession for the purpose of building, constructing, repairing and maintaining, within the territory described in said petition and order, such public roads as may be mentioned in said petition. * * * *

"Section 3. In the order declaring said road improvement district to exist the court shall appoint three persons, owners

of real property therein, who shall compose a board of directors for the district. * * * *

"Section 9. The said board of directors shall have, and they are hereby vested with, power and authority, and it is hereby made their duty, to build, construct, maintain, and repair such road or roads within their respective districts as provided in the petition as may be deemed necessary to carry out the improvement contemplated, and in doing so shall expend sums of money authorized to be levied and collected under authority of this act. * * * *

"Section 12. As soon as said board of directors shall have formed the plan of improvement, and shall have ascertained the cost thereof, it shall report the same to the county judge, who shall appoint three electors of the county, who shall constitute a board of assessment of the benefits to be received by the several and particular tracts of lands, or other subdivision of land within said district, by reason of the proposed local improvement. * * * *

"Section 23. Annually during the month of September all road improvement districts created under this act shall file with the clerk of the county in which such improvement district is formed a settlement showing all collections and moneys received and paid out, with proper vouchers for all such payments, which settlement shall lie over for one month for examination and adjustment, during which time any taxpayer of such district may file exceptions to such settlement.

"Section 24. Whether any such exceptions are filed or not, the county court shall proceed to examine such settlement, and shall disallow all unjust charges and credits, if any there be, and shall re-adjust such settlement wherever an improper item may be included in it, which adjustment shall be finally subject to re-examination in a court of chancery for error or mistake, upon suit brought by such board or by any tax payer of such district. * * * *

"Section 28. All roads built, constructed, maintained and repaired under authority of this act shall be public roads, and, after the roads shall have been built, constructed, maintained and repaired, the same shall be and constitute a part of the general highways of the county, to be thereafter cared for and

maintained by the county court out of the general revenues and special road tax authorized by the Constitution and laws of the State of Arkansas. And in building, constructing, maintaining, or repairing said roads it shall be lawful for the county court, from time to time, to supplement, by specific allowances out of the general revenues and special road tax aforesaid, the revenues raised under the authority of this act for the purposes thereof, to the end that the tax levied under the authority of said general laws shall be equitably and fairly apportioned to the several localities in the county, including therein the districts formed under authority of this act."

The act provides that it shall apply only to Jefferson County.

It (act) is not in conflict with the Constitution of this State. Section 28 of article 7 of the Constitution, which defines the jurisdiction of county courts does not specify or indicate in what manner the jurisdiction shall be exercised. In the absence of such specifications, the Legislature has the power to prescribe by appropriate legislation not inconsistent with the Constitution how it shall be exercised. Cooley's Constitutional Limitations (7th Ed.) 126, 236, 242. In the exercise of this power it has from time to time specifically, and without question, prescribed on what conditions and in what manner public roads and highways shall be laid out, opened and repaired, the failure of the county court to comply with the mandatory provisions of which renders the orders and judgment of the court invalid (Kirby's Digest, § § 2992-3016); and in the same manner has prescribed how and by what agencies or instrumentalities such roads and highways shall be repaired and maintained (Kirby's Digest, § § 7223-7358); and without such legislation the court can do and has done nothing.

Act No. 247 does not usurp the jurisdiction of the county court. It was passed to aid the court in the accomplishment of its object. For that purpose it authorizes the county court to form road improvement districts, to appoint their boards of directors and of assessment of benefits, and requires the directors to annually account to it for moneys received by them, and authorizes the court to aid them (improvement districts) by specific allowances out of the revenues at its disposal for the construc-

tion, repair, and maintenance of roads; and provides that, after "the roads shall have been built, constructed, maintained and repaired, the same shall be and constitute a part of the general highways of the county, to be thereafter cared for and maintained by the county court." When the roads are in the condition the improvement districts were formed to place them, the districts cease to exist, and the roads become subject to the care and control of the county court as they were before the formation of the districts, they (districts) being temporary expedients adopted to assist the county court in doing the work imposed upon it; and not usurpers, but friends and allies of the county court, created by it by authority of the act for the accomplishment of one of its duties—instrumentalities of the county court for that purpose.

If it be true, as contended, that the Legislature cannot authorize the formation of the county into one road improvement district for the purpose of constructing new roads, it can so form a part of the county for the purpose of repairing and improving public roads already in existence, as held in *Road Improvement District No. 1* v. *Glover,* 89 Ark. 513, and to that extent act No. 247 is valid. It comes within the rule to the effect that "where a statute is divisible and a portion of it is repugnant to the Constitution, so much of the statute is to be upheld as does not conflict with the Constitution and the enactment sustained by rejecting the objectionable part."

As to when a statute is divisible, Judge Cooley in his work on Constitutional Limitations says: "When, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together with the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may be even contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when

the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley's Constitutional Limitations (7th Ed.), 246-248. See *Little Rock & Ft Smith Ry. Co.* v. *Worthen.* 46 Ark. 312, 328, 329; Ex parte *Deeds,* 75 Ark. 542; *Gray* v. *Matheny,* 66 Ark. 36; *State* v. *Marsh,* 37 Ark. 357; *State* v. *Deschamp,* 53 Ark. 490; *Cribbs* v. *Benedict,* 64 Ark. 555.

The act 247 authorizes the county court of Jefferson County to form the whole of that county, or any part of it, upon a petition of the majority in value of the owners of real property in the territory formed into a road improvement district "for the purpose of building, constructing, repairing and maintaining" public roads within such district. It is obvious that the act is divisible according to the rule as stated by Judge Cooley, and that so much of the act as authorizes the formation of the whole county into one district and authorizes the building and constructing of new roads can be stricken out, and that so much as authorizes the formation of a part of the county into road improvement districts for the repairing, maintaining and improving roads in existence is complete within itself and can be executed in accordance with the apparent legislative intent, without the aid of the part so stricken out and wholly independent of it; and is therefore sustained, and the remainder of the act is re-

jected and declared void. *Road Improvement District No. 1* v. *Glover,* 89 Ark. 513.

Having decided the only questions submitted for our consideration, the decree of the chancery court is affirmed.

BLUM *v.* PULASKI COUNTY.

Opinion delivered October 25, 1909.

APPEAL AND ERROR—FINAL JUDGMENT.—An order reviving a cause against the executor of a deceased defendant is not a final judgment, and an appeal cannot be prosecuted until a final decree is entered.

Appeal from Pulaski Chancery Court; *Joseph E. Martineau,* Chancellor; appeal dismissed.

J. W. House, and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Jones & Hamiter, and *Carmichael, Brooks & Powers,* for appellee.

PER CURIAM. An action was instituted on behalf of the county of Pulaski in the chancery court of that county against R. A. Furth and another. Furth died during the pendency of the action, and appellant Blum qualified as executor. On motion of appellee, the chancery court entered an order reviving the cause as to the estate of Furth in the name of appellant as executor, and he took an appeal to this court. He contends that the order of revivor was entered after the time within which the statute authorizes the same, and that the court erred in so doing. Appellee now moves the court to dismiss the appeal on the ground that the order of revivor was not final, the action being still pending, and that the appeal is premature. The statutes relating to the subject are as follows:

"Sec. 6312. An order to revive an action against the personal representatives of a defendant, or against him and the heirs or devisees of the defendant, can not be made, unless by consent, until after six months from the qualification of the personal representatives.

"Sec. 6313. An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made. * * *

"Sec. 6315. When it appears to the court by affidavit that either party to an action has been dead, or, where he sues or is sued as a personal representative, that his powers have ceased for a period so long that the action cannot be revived in the names of his representatives or successor without the consent of both parties, it shall order the action to be stricken from the docket." Kirby's Digest.

The court is of the opinion that the order is not final in the sense that it concludes the rights of the parties to the action, and that the appeal in this case is premature. The order does not end the action, even if it be erroneous, for the action is still pending. The error of reviving the action, if error it be, is like any other erroneous ruling of the court, to be reviewed on appeal from the final decree in the cause. In *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 160, we held that an order of court vacating a judgment rendered at a former term of the court was a final one, and was appealable. This upon the ground that it concluded the rights of the parties in the former judgment, which had become final at the lapse of the term, and that the party in whose favor it was rendered had the right to appeal from the subsequent judgment and order disturbing his rights therein. A different question is presented in this case, for here no judgment has ever been rendered which finally concludes the rights of the parties. The action is still pending, and any error committed by the court during the progress of the proceedings may be corrected on appeal taken when the final decree is entered.

So the appeal is dismissed.

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

Opinion delivered October 25, 1909.

1. DEATH—ACTION FOR CAUSING—VENUE.—An action to recover damages for a negligent killing is transitory, and can be maintained in this State, though the killing took place elsewhere, but the rights of the

parties must be determined in accordance with the laws of the place where the killing occurred. (Page 107.)

2. SAME—PARTIES.—Where there were no personal representatives of a deceased person, an action to recover damages for his negligent killing in the Indian Territory could be brought in this State by his widow and children without joining his administrator under Kirby's Digest, § 6289, which was in force in that Territory. (Page 107.)

3. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—In a suit against a railway company for negligently causing the death of an employee, proof that defendant kept empty cars upon a storage track having a descending grade toward the main track, that these cars were not blocked and their brakes were out of order, that there was no derailing device to prevent the cars from rolling upon the main track, and that certain cars were negligently started, and ran upon the main track, and caused the death of plaintiff's intestate, was sufficient to justify a finding that defendant was negligent. (Page 107.)

4. SAME—ASSUMPTION OF RISK.—While an employee, by his contract of service, impliedly agrees to assume and bear the risk of all dangers from the ordinary incidents of the service, he does not assume the risk arising from negligent acts of the employer unless, after he becomes aware of such negligence and appreciates the danger arising therefrom, he exposes himself to it by continuing in the service. (Page 108.)

5. SAME—ASSUMED RISK.—When one enters into a contract to perform service for another, he agrees to work at the place expressly or impliedly designated in the contract and with the tools and appliances regularly furnished by the master for use, so far as these things are open and readily ascertainable upon inquiry. (Page 109.)

6. SAME.—While a railroad employee is bound to take notice of the general plan of construction adopted in building the roadbed of such railroad, he is not bound to assume that a device especially needed at a particularly dangerous place had not been installed; it being a question for the jury in such case whether he knew that the particular device was not in use at the particular place. (Page 110.)

7. SAME—CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.—A servant is entitled to recover for the negligence of the master, even though the negligence of fellow servants concurred therein, if the injury would not have occurred but for the master's negligence. (Page 111.)

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

STATEMENT BY THE COURT.

Murray L. Corman was a brakeman in the employ of the defendant railway company, and was killed by the derailment

of an engine on which he was riding, in the discharge of his duties, on August 9, 1907, at Wagoner, I. T. The engine was pulling a local freight train, and was approaching Wagoner, and was within the yard limits. Corman was on the running board of the engine, preparing to go down on the pilot for the purpose of operating a switch for the train to go in upon a siding. There was another track used as a passing and storage track —principally the latter—and a few minutes before Corman's engine reached the north end of the track some ballast cars standing on this track were struck and put in motion by other cars handled by the crew of another train. These cars rolled down the descending grade of the storage track to the end and out upon the main track, and collided with Corman's engine, while he was on it, overturning the engine and crushing him to death.

This passing and storage track was about 2,500 feet long, and had a decided grade in each direction, the summit of the grade being about in the middle. The grade each way was steep enough that cars when once put in motion would roll to the end. There was no derailing device of any kind at the end of this track to prevent cars from rolling upon the main track. There were fifteen or twenty or twenty-five of the ballast cars standing on the storage track, and the brakes on them were not in working order. When they were put in motion, a brakeman who was a member of the other train crew mounted the string of cars and tried to put on brakes so as to stop them, but on account of the brakes not working he failed to accomplish this. It is shown that in loading the ballast cars with a steam shovel gravel would get in the ratchets of the brakes, thereby preventing their use. It is also shown that the brakes on some of them were out of working order in other respects.

The present action was instituted in the circuit court of Crawford County by Emma Corman, the widow, and Murray Corman, an infant child and sole heir-at-law of Murray L. Corman, deceased, to recover damages sustained by them as such widow and next of kin on account of the death of said decedent. There was no administration upon the estate.

The complaint sets forth two charges of negligence against the defendant which are alleged to have been the proximate cause of Corman's death: one, that the defendant was guilty of neg-

ligence in failing to have a derailing device at the end of the storage track so as to prevent cars from rolling down the grade from that track upon the main track; and the other, that the defendant was negligent in permitting cars on which the brakes were out of repair to be left on the storage track.

The defendant in its answer denied the charges of negligence, and pleaded that Corman was guilty of contributory negligence, and also that he had assumed the risk.

The jury returned a verdict in favor of the plaintiff, assessing the damages at $10,000. Judgment was rendered accordingly, and the defendant appealed. Other facts tending to explain the points at issue will be stated in the opinion.

Lovick P. Miles, for appellant.

1. Under the evidence, and the rule in 79 Ark. 62, this action could not be maintained in the absence of an administration, or the joinder of all persons related who might have a cause of action. 76 Ark. 555; 51 *Id.* 509.

2. No negligence was shown upon which, under the law of the Indian Territory, a recovery could be sustained, and instructions 3 and 6 asked by defendant should have been given. 87 Ark. 471; 77 *Id.* 109; *Ib.* 261; 85 Ark. 532; 79 *Id.* 225. There was no question of the master's negligence to be submitted to the jury.

3. The risk of the absence of a derailing device was assumed by defendant. 82 Ark. 11; 54 *Id.* 389; 48 *Id.* 333; 60 *Id.* 438; 65 *Id.* 98; 77 *Id.* 367, 458; 1 Labatt, Master & Serv., § 388-404; Dresser on Employers' Liability, § § 92, 95; 77 Ill. 365; 168 Mass. 517; 161 Mass. 153; 108 Mich. 690; 97 *Id.* 265; 63 Iowa 562; 132 N. Y. 228.

4. It was the omission of fellow-servants which caused the injury. 42 Ark. 417; 82 *Id.* 334.

Robert J. White, for appellee.

1. The father and mother were not necessary parties, and should not have been plaintiffs. Kirby's Dig., § § 6289, 6290. The widow and sole heirs were the only necessary parties. *Id.* § 2636; 10 N. E. 75; 79 Ark. 65; 95 N. Y. 17-24; 47 Ark. 1; 28 W. Va. 412-465; 39 Oh. St. 368-374; 5 Cal. 63; 56 N. J. L. 309; 28 How. Pr. (N. Y.) 417; 132 N. C. 115.

2. Negligence was shown, and the fellow-servant rule does not apply to this case. Buswell on Pers. Inj., pp. 314-15; 87 Ark. 219; 79 *Id.* 437. The duty rests on the master to furnish a safe place to work, and this duty cannot be delegated. 87 Ark. 324; 54 *Id.* 289; 81 *Id.* 324; 79 *Id.* 20; Bish., Non-Cont. Law, § § 652, 647-657.

3. Deceased did not assume the risk. 82 Ark. 11; 77 Ark. 367; 67 Ark. 217. In this case it was a question for the jury. 87 Ark. 444.

4. On the question of liability for undertaking to require conductors and brakemen to perform non-assignable master's duties, see 67 Ark. 377; *Ib.* 209; 87 Ark. 321; *Ib.* 271, 306; 77 *Ib.* 1; *Ib.* 367.

MCCULLOCH, C. J., (after stating the facts). It is contended that the plaintiff cannot maintain this action, and that it can be maintained only by an administrator of the decedent's estate. This question was attempted to be raised by a demurrer to the complaint on the alleged ground that the plaintiff was without legal capacity to sue. It was also shown by evidence that the parents of said decedent were living, and the contention is made that they might, as such parents, claim damages by reason of the death of their son, and that the suit should therefore have been brought by an administrator.

The statutes of Arkansas (secs. 6289-6290, Kirby's Digest), embodying the principles of the English statute known as Lord Campbell's Act, were in force in the Indian Territory when the injury in question occurred. One section of this statute reads as follows:

"Every such action shall be brought by, and in the name of, the personal representative of such deceased person, and, if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary

injuries resulting from such death, to the wife and next of kin of such deceased person. Provided, every such action shall be commenced within two years after the death of such person." (Public Acts, First Session of 51st Congress, p. 94, § 31.)

This statute creates two causes of action—one for the benefit of the estate, to recover damages which the decedent could have recovered had he survived the accident, and the other for the benefit of the widow and next of kin, for the damages which they sustained by reason of the death. *Davis* v. *Railway Co.,* 53 Ark. 117. The present action falls within the last-named class. It is a transitory action, and can be maintained in this State, but the rights of the parties must be determined in accordance with the law of the place where the injury occurred. *St. Louis, I. M. & S. Ry. Co.* v. *Haist,* 71 Ark. 258.

Now, the statute provides that, "if there be no personal representatives, then the action may be brought by the heirs at law of such deceased person." Who, then, constitute the heirs at law? The widow is one within the meaning of the statute, for she receives a distributive portion of the recovery. *McBride* v. *Berman,* 79 Ark. 62. The child is the only other heir at law, and by the plain letter of the statute is the only other person who is a necessary party to the action.

Nothing is found in the decision in the case of *McBride* v. *Berman, supra,* which militates against this conclusion. The action in that case was instituted by the widow alone, without joining the collateral heirs at law, there being no children of the decedent.

Was the defendant company guilty of negligence in failing to install a derailing device so as to keep the cars from rolling off the storage track, and, if so, did Corman assume the risk of the danger to which he was exposed by reason thereof?

In considering the question of negligence, all the facts must be kept in mind. This was a track used not only for trains to pass, but it was used mainly for the storage of cars. On it a large number of cars were stored daily, and among them was a considerable number of empty ballast cars with brakes out of order. It was the custom to store these cars there, and the ordinary use of them in loading them with dirt and gravel for ballast necessarily put the handbrakes out of service on account

of gravel lodging in the ratchets of the brakes. These cars were habitually left on the track in bunches, and on a steep grade which would cause them, when once put in motion, to roll to the end of the storage track and on the main track, unless brakes were put on. The ordinary condition in which the brakes were left made it impossible for cars to be stopped when once put in motion, for it appears from the evidence that on the particular occasion in question a brakeman of the other train crew made every effort to stop the cars, but failed because the hand brakes could not be worked.

We are clearly of the opinion that these facts presented a situation which warranted the jury in finding that defendant was guilty of negligence in failing to exercise reasonable care to furnish a safe place to its employees at which to do their accustomed work. The situation thus described was a dangerous one —at least the jury was warranted in finding that to be so—and defendant did not discharge its full duty to its employees merely by providing a system of rules requiring trainmen, when they stored cars on the track, to see that the brakes on them were set or that the wheels were blocked. Some device ought to have been installed to prevent the escape of these cars from the storage track, if they should be put in motion, for it was obvious to any one that when once started down the grade they would roll to the end and go out on the main track, where they would be likely to collide with trains. This is precisely what occurred when Corman was killed, and it was a catastrophe which could have been anticipated by an employer who was exercising the care of a reasonably prudent person for the safety of employees.

Nor can we hold, as a matter of law, which learned counsel for appellant insist we should hold, that under the circumstances of this case Corman assumed the risk. That was a question of fact for the jury to determine, instead of a question of law for the court to decide, as the evidence presented a condition of affairs from which different minds might reach different conclusions. An employee, by his contract of service, impliedly agrees to assume and bear the risk of all dangers from the ordinary incidents of the service, but these do not include the dangers arising from negligent acts of his employer, unless, after he becomes aware of such negligence and appreciates the danger arising therefrom, he exposes himself to it by continuing in the

service. Of course, if a person of ordinary intelligence is aware of a danger, he is presumed to appreciate it; but it does not necessarily follow that because one becomes aware of a negligent act he appreciates the danger arising therefrom. This may, under some circumstances, be a question of fact to be determined by a trial jury, unless the danger is obvious, in which case a person of average experience and intelligence, being shown to be aware of the negligent act, is presumed to appreciate an obvious danger arising therefrom. But it is not correct to say that an employee assumes the risk of danger arising from negligent acts of his employer merely because he could, by the exercise of ordinary care, have discovered the defect brought about by such negligence. This might constitute contributory negligence of an employee in failing to discover a defect, but it would not be an assumption of risk, for the doctrine of assumed risk is based upon and grows out of contract; and, before it can be said that the employee has assumed the risk of danger caused by his employer's negligence, it must appear that he was aware of the negligence and appreciated the danger. *St. Louis, I. M. & S. Ry. Co.* v. *Birch,* 89 Ark. 424; *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark 367.

We are not now speaking of the ordinary conditions of the service as existing when the employee took service, for of these he must take notice. When he enters into a contract to perform service for his employer, he agrees to work at the place expressly or impliedly designated in the contract, and with the tools and appliances regularly furnished by the master for use, "so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." *Rooney* v. *Sewall & Day Cordage Co.,* 161 Mass. 153; *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11.

A familiar illustration of this is the general use of or failure to use unblocked frogs in the operation of railroads. It is obvious to any employee whether or not the plan of blocking frogs at switches has been adopted, and one who takes service for the purpose of engaging in the operation of trains must take notice of that which is obvious to all.

Learned counsel insist that, because we have held in *Choctaw, O. & G. Rd. Co.* v. *Thompson, supra,* and in other cases, that a railroad employee must take notice of the use of unblocked frogs, we should hold, in necessary consequence, that he must take notice of the failure to use a derailing device on each side track along the entire line of road where they work. This does not follow, for we think it would be unreasonable and unjust to say, as a matter of law, that railroad trainmen must take notice and be deemed to have contracted to assume the risk of every defect existing along the entire line of road which is obvious to one working at the particular place where it exists. To illustrate: To a switchman working daily in a certain yard the defective condition of a certain switch would be obvious; but not so to a brakeman who passes through the yard on his regular trip without using this particular switch.

Nor is the failure, generally, as a plan of operation, to use derailing devices comparable with the use of unblocked frogs. If the unblocking of frogs is due to the general plan of construction which is adopted along the line of the road, an employee would have to take notice of the fact of the general plan of construction adopted; but the exercise of ordinary care might require the use of a derailing device at some particular dangerous place, even though the general plan of construction did not include the use of any such device, and an employee, who is bound to take notice of the general plan of construction would not necessarily be bound to assume that a device especially needed at a particularly dangerous place had not been installed. It would be a question of fact for the determination of a jury, under all the circumstances of the case, whether or not the employee knew that the device was not used at the particular place.

But it does not even appear in this case, from the evidence, that derailing devices were not adopted at all on the line of road along which Corman worked. On the contrary, it affirmatively appears that they were used at some places along the line. It is true that the evidence shows that they were not used generally at side tracks; but this track was used mainly for storage of cars, and the grade was exceptionally steep. It was an extraordinarily dangerous place, a place of unusual peril to crews of passing trains, on account of the circumstances described.

Whether Corman knew that no derailing device was in use at this place, or whether he should have inferred from the fact that they were not used at other passing tracks that none was used at that place, was peculiarly a question for the determination of a jury. There was no direct evidence at all that Corman actually knew that no derailer was used there; no evidence that he ever used that track in his work, nor any as to the length of time he had been working along that division of the road. He was not using the track at the time of the injury. We conclude, therefore, that the evidence warranted a finding that Corman did not assume the risk.

We are also of the opinion that there was sufficient evidence to warrant the submission to the jury of the question whether or not the defendant was guilty of negligence in allowing the ballast cars with defective brakes to be habitually left standing on this storage track, where there was no derailer. Even if the negligence of the fellow servants of Corman concurred with that of the master in causing the injury, the latter is responsible, for it is plain that, but for the absence of the derailing device, the injury would not have occurred. *Chicago Mill & Lbr. Co.* v. *Cooper,* 90 Ark. 326.

The giving and refusal of instructions is complained of as error, but it is not necessary to discuss these assignments further than to say that the several rulings of the court and the instructions referred to violate no principle herein announced, and we find no error in them.

Judgment affirmed.

KIRCHMAN v. TUFFLI BROTHERS PIG IRON & COKE COMPANY.

Opinion delivered October 25, 1909.

1. SALES OF CHATTELS—BREACH—RESCISSION.—Where, without default on the vendor's part, the vendee of chattels absolutely refused to carry out his contract, the vendor was thereby absolved from any further duty to tender or ship the chattels, while retaining his right to sue for any damage suffered from the breach of the contract. (Page 115.)

2. SAME—BREACH—RIGHTS OF VENDOR.—Where a vendee of chattels, prior to the time for delivery, notified the vendor that he would not accept

the goods, the vendor was entitled to recover without proving that it had the goods on hand and tendered same, or that it actually sold same for less than the contract price. (Page 115.)

3. DAMAGES—BREACH OF SALE OF CHATTEL.—Upon a breach by the vendee in a contract for the sale of goods, the general rule is that the measure of the vendor's damages is the difference between the contract price fixed by the contract and the market value of the goods at the time and place of the delivery, provided the contract price exceeds such market value. (Page 116.)

4. SALES OF CHATTELS—PLACE OF DELIVERY.—Where goods are sold to be delivered f. o. b. at a certain place, that is the place of delivery, with reference to which the market value is to be determined. (Page 117.)

5. SAME—MARKET VALUE.—In determining the value of goods where there is no market at the place of delivery the value of the goods at the nearest market, plus the cost of transportation to the place of delivery, would be the market value of the goods at such place of delivery. (Page 117.)

6. INSTRUCTIONS—FAILURE TO GIVE SPECIFIC CHARGE.—Appellant cannot complain because instructions given by the trial court were general in their terms if he failed to request specific instructions in that regard. (Page 117.)

7. PLEADING—PERFORMANCE OF CONTRACT.—Under Kirby's Digest, § 6133, providing that "in pleading the performance of a condition in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all conditions on his part," a vendor suing for breach of the contract, who alleges generally that he has performed his part of the contract, need not allege specifically what he did in performance thereof. (Page 118.)

8. SAME—ITEMS OF DAMAGE.—In pleading a breach of a contract of sale it is unnecessary for the complaint to allege the items of damage, as the law fixes the elements and measure of damages. (Page 118.)

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

Sam R. Chew, for appellant.

1. This action was brought, not to recover nominal damages only, but actual damages, and appellant was entitled to be apprised of what items the damages consisted, or in what way appellee had been damaged. The complaint should have been made more specific.

2. It was error to admit proof as to the decline in the market value of coke. There was no allegation in the complaint as to such decline, and this testimony came as a surprise. The

motion for continuance on the ground of surprise should have been sustained. 22 Ark. 227; 3 Ark. 207; 32 Ark. 315; 46 Ark. 96.

E. L. Matlock, for appellee.

1. The complaint was fully sufficient. The motion to make it more specific was properly overruled. 88 Ark. 557.

2. Appellant was not surprised. Appellee had long since called his attention to the decline in the price, and had offered to cancel the balance of the contract if he would pay the difference between the contract price and the market price, which was the true measure of damages; and it was not necessary for appellee to prove that he sold the coke at a reduced market price. 55 Ark. 376; *Id.* 401; 70 Ark. 39; 88 Ark. 557.

FRAUENTHAL, J. This is an action instituted by the appellee against the appellant to recover damages for an alleged breach of contract. The complaint, in substance, alleged that on July 29, 1907, the appellant entered into a contract with appellee for the purchase of "six cars of 72-hour economy foundry coke," to be shipped to appellant between that date and July 1, 1908, as called for, at $8.95 per ton of 2,000 pounds f. o. b. cars at Van Buren, Arkansas; that at the request of appellant one car of said coke was shipped on October 2, 1907, and that thereafter the appellant countermanded the order, and refused to take and receive the remainder of the coke, and repudiated the contract, although the appellee fully complied with its part of the contract. It alleged that it was damaged by reason of the said breach of the contract by appellant in the sum of $250, for which it asked judgment. The appellant made a motion to require the appellee to make the complaint more definite and certain by stating at what time and how many cars the appellee prepared for shipment and the items of the damages. The court overruled this motion. Thereupon appellant filed his answer, in which, in substance, he alleged that on receipt of the first car of coke he discovered that the coke would not answer the purpose for which he had purchased same, and he immediately countermanded the order and directed the appellee not to ship any more coke on the contract.

It appears, from the evidence in the case, that the parties entered into the following written contract on July 29, 1907:

"To Tuffli Bros. Pig Iron & Coke Company, Sales Agents, St. Louis, Mo.

"Dear Sirs:

"Please enter our order as follows:

"Quantity, six car loads.

"Grade, 72 hr. Economy Fdy. Coke.

"Price, $8.95 per ton of 2,000 lbs.

"F. o. b. Van Buren, Arkansas.

"Terms, cash; 30 days.

"Shipment, between now and July 1, 1908, as called for.

"Railroad weights at point of origin to govern settlements.

"All agreements are contingent upon strikes, accidents, car supply, railroad delays or other causes beyond our control.

"The above contract is not subject to any change or cancellation whatsoever without obtaining full consent of the sellers.

"Yours truly,
"The Engineering Works,
"Wm. Kirchman, Prop."

"Accepted:
"Tuffli Bros. Pig Iron & Coke Co., Sales Agents."

In October, thereafter, the appellee shipped to appellant, at his request, one car of coke, which was received and paid for. Not receiving request for further shipment, the appellee wrote to appellant, who, on May 2, 1908, replied as follows:

"Gentlemen:

"We have your favor of the 30th ult. regarding coke shipments, and in view of the fact that business does not pick up as expected, and that we still have a large quantity of coke on hand, we consider it the best policy for all concerned to cancel the balance of this contract, as we are unable to tell at present when we will have capacity to store any more coke.

"Very truly yours,
"The Engineering Works,
"By William Kirchman,
"General Manager."

Further correspondence passed between the parties, when on June 13, 1908, the appellant wrote to appellee as follows:

"Van Buren, Ark., June 13, 1908.

"Tuffli Bros. Pig Iron & Coke Company, St. Louis, Mo.

"Gentlemen: Answering your favor of the 9th, regarding coke still due on contract, will say we affirm our former letter cancelling balance of order. We find that this coke does not come up to our expectations," etc.

The evidence tends to prove that the remaining five cars of coke amounted to 125 tons, and that the market value of said coke declined $1.90 per ton from the said contract price by June 13, 1908. There was no market value of the coke at Van Buren, the place of delivery, but the above market value was at the oven, the nearest place to Van Buren having such market, and, with transportation from such place to Van Buren, the decline in the market value of the coke from the contract price would have amounted to $1.90 at Van Buren. The evidence tended further to prove that the coke named in the contract was of a quality and grade sufficient for the purpose for which it was purchased. The jury returned a verdict in favor of appellee for $237.50.

The questions that are presented by the appellant upon this appeal are determined by the nature of the above contract, its breach and the character of this action. The parties had entered into an executory contract by which the appellant had agreed to purchase the commodity noted in the contract, which was to be shipped by the appellee upon request made therefor by appellant at any time from July 29, 1907, to July 1, 1908. The appellee was to perform the contract on its part by shipping the coke on request of appellant at any time up to July 1. If during said time the appellant had made a request for the shipment of the coke, and the appellee had failed or refused to ship same, then appellant could have recovered from appellee such damages as he might have suffered by reason of such failure. But the appellant made no request for shipment, and, before the time arrived for the performance of the contract on the part of the appellee, the appellant cancelled the order and, by his letter of June 13, unqualifiedly announced that he would not receive the coke, and would not therefore accept performance of the contract on the part of appellant. The contract was then not rescinded, but broken by the appellant; and by such repudiation of the con-

tract he absolved the appellant from any further duty to tender or ship the coke. 2 Mechem on Sales, § 1087.

The appellee at the time of the repudiation of the contract by the appellant was not in any default, and it did not lie within the power of the appellant to end the contract without the consent of appellee. The appellee had then the right to treat this repudiation as a wrongful putting an end to the contract and to at once bring his action as for a breach of it. In the case of *Roehm* v. *Horst,* 33 C. C. A. 550, it was ruled that a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to a breach of the contract, and that after the renunciation of the agreement by the one party the other party should be at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damage he has suffered from the breach of it. This case was affirmed by the Supreme Court of the United States in the case of *Roehm* v. *Horst,* 178 U. S. 1; and, we think, correctly announces the rights of the parties under such circumstances.

In the case at bar the appellant, by his letter of June 13, absolutely and unqualifiedly cancelled the contract and renounced its performance. The evidence tends to prove that prior to that time the appellee was ready and willing to perform the contract on its part. It was urging the appellant to send his request for the coke so that appellee could ship it to him. But the appellant refused to comply with the provisions of the contract on his part, and repudiated it on the ground, as he then claimed, that the coke did not come up to the requisite quality. That issue was presented to the jury, and it was decided against appellant. The appellee was therefore not in any default; and the appellant then wrongfully breached the contract. The appellee thereupon had the right to treat the breach as complete and to sue for the damage he suffered thereby. It was not necessary then for the appellee to prove that he actually had the coke on hand and tendered same, or that it actually sold the coke for a less price than the contract price. Tiedeman on Sales, § 333; 2 Mechem on Sales, § 1091.

Upon a breach of contract to purchase goods by the buyer the general rule is that the measure of damages is the difference between the price fixed by the contract and the market value of

the goods at the time and place of the delivery, *provided* the contract price exceeds said market value. *Glasscock* v. *Rosengrant,* 55 Ark. 376; *Morris* v. *Cohn,* 55 Ark. 401; *Nelson* v. *Hirschberg,* 70 Ark. 39; 24 Am. & Eng. Ency Law (2d Ed.) 1114.

In this case the court gave an instruction as to the measure of damages conforming with this rule. It is urged by the appellant that "there is no proof where under the terms of the contract the coke was to be delivered." But the contract itself says that the coke was sold "f. o. b. Van Buren," and this, therefore, named the place of delivery. If there was no market value at the place of delivery, then the value of the goods at the nearest market, plus the cost of transportation to the place of delivery, would be the market value of the goods at such place of delivery. Tiedeman on Sales, § 333.

And the evidence in this case sufficiently showed the market value. The instruction given by the court on the measure of damages, we think, is in general terms correct. If the appellant desired that it should have been more specific in any respect, he should have requested an instruction in that regard himself. Failing to do that, he cannot now complain because the instruction, although correct, is too general. *Fordyce* v. *Jackson,* 56 Ark. 595; *White* v. *McCracken,* 60 Ark. 613. The above principles of law governing the facts of the case will also show that the instructions numbered 1 and 2, as requested by the appellant, were rightly refused. One of the instructions, in substance, stated that before the appellee could recover in this case it must show that it actually had the coke on hand; and the other stated that it must actually have sold the coke for a price less than that of the contract before it could recover more than nominal damages.

The appellant complains of the admission of certain testimony on the part of appellee relative to the character and efficacy of 72-hour economy coke. But we think no error was committed by its introduction, because the appellant was claiming that the coke was not suitable for the purposes for which he purchased, and the testimony thus admitted tended to prove that it was.

The appellant, before filing his answer herein, requested by motion that the complaint be made more definite, and says that

error was committed by the trial court in overruling his motion. We have thought it best to consider this contention of appellant after the above statement of the principles governing this case, and which are involved in the cause of action, as set out in the complaint. In as much as by reason of the repudiation of the contract by the appellant before the date of its performance the appellee could treat it as breached and at once sue for its damages without further performance on its part, the appellee did not have to allege in the complaint "how many cars of coke it prepared for shipment to defendant."

Furthermore, the plaintiff in the complaint alleged, in substance, the performance by it of the conditions of the contract. Section 6133 of Kirby's Digest provides: "In pleading the performance of a condition in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part."

And it was not necessary for the complaint to allege the items of damage, as requested by appellant. The law fixes the element and measure of the damage in case of a breach of such a contract as is involved in this case, and, therefore, it was not necessary to be more definite in the allegation of damage.

We have examined the testimony and the instructions, and we find no reversible error in the record.

The judgment is affirmed.

BURNSIDE v. UNION SAWMILL COMPANY.

Opinion delivered October 25, 1909.

INJUNCTION—CUTTING TIMBER—REMEDY AT LAW.—The vendor of standing timber will not be restrained from cutting such timber at vendee's instance, in the absence of any allegation of the former's insolvency, as the remedy at law is adequate.

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

R. L. Floyd, for appellant.

No ground is alleged for equitable relief. No allegation of insolvency is made, and the damage, if any, is recoverable at law.

Gaughan & Sifford, for appellee.

FRAUENTHAL, J. The Union Sawmill Company, which was the plaintiff below, instituted this suit against J. W. Buckner, defendant below, in December, 1908, in the Union Chancery Court, seeking to enjoin the defendant from in any manner interfering with or preventing the plaintiff or its agents from cutting and removing 100,000 feet of standing pine timber. In its complaint it alleged that in 1906 the defendant had, by deed, sold to the George W. Miles Timber & Lumber Company the pine timber, twelve inches in diameter, standing on certain lands, and that the George W. Miles Timber & Lumber Company thereafter sold said timber to the plaintiff; that the timber involved in this suit is standing on the above lands, inside of an enclosed field containing tracts of cleared land, and that defendant claims that he did not sell the timber in such field, and further claims that plaintiff is not entitled to any timber that was less than twelve inches in diameter at the date of the deed, and refuses to permit plaintiff to cut the said timber and remove same. It is further alleged that plaintiff will make profit out of the manufacture of the timber, which, on account of many contingencies, especially a fluctuating market, can not be ascertained in a suit for damages.

The defendant demurred to the complaint upon the grounds that it does not show that plaintiff will suffer irreparable damage, and that it does not allege the insolvency of the defendant; that it is without equity, and does not state a cause of action. The court overruled this demurrer, over defendant's objection. Upon a trial of the case, the court granted the injunction as asked for in the complaint. The defendant has appealed to this court.

Under the allegations of the complaint in this case, the plaintiff had a full, adequate and complete remedy at law; and in such case an injunction should not be granted. 16 Am. & Eng. Ency Law (2d. Ed.) 352.

If the plaintiff became the owner of the property involved in this suit by virtue of a purchase thereof from a grantee of the defendant, and the defendant withheld possession thereof, the plaintiff has the right to sue at law for its possession, or for damages. Where there is a failure to deliver or convey property,

the value of such property is the measure of the damages sustained; and the right to recover such damages in a suit at law would be a full and complete remedy for the wrongful withholding of such property. 13 Cyc. 168.

The complaint does not allege the insolvency of the defendant, and therefore does not show that the mischief sought to be enjoined would be remediless at law. And there was no evidence tending to show that the defendant was not perfectly solvent. This case is in this particular analogous to those cases where it is sought to enjoin the cutting of timber on land. In those cases it has been held that under rights analogous to the rights alleged in the complaint in this case an injunction would not be granted, in the absence of any allegation of the defendant's insolvency. Ex parte *Foster*, 11 Ark. 304; *Myers* v. *Hawkins*, 67 Ark. 413; *Western Tie & Timber Co.* v. *Newport Land Co.*, 75 Ark. 286; *Haggart* v. *Chapman & Dewey Land Co.*, 77 Ark. 527.

The fact that the parties place different constructions on the timber deed in regard to its various provisions would not be ground for equitable relief. A court of law can construe the deed equally as well as a court of equity. And there are no other allegations in the complaint sufficient to show that the plaintiff will suffer irreparable injury if an injunction is not granted.

It follows that the lower court erred in overruling the demurrer to the complaint. The decree of the lower court is reversed, and this cause is remanded, with directions to sustain the demurrer to the complaint, with leave to be given to the plaintiff to amend the same, if he is so advised, and to proceed not inconsistently with this opinion.

FERGUSON v. STATE.

Opinion delivered October 25, 1909.

1. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S VERDICT.—A jury's verdict will not be disturbed on appeal if it is sustained by substantial evidence. (Page 124.)

2. HOMICIDE—MURDER IN FIRST DEGREE—INTENT.—In order to constitute the killing of a human being murder in the first degree, there must be

a specific intent to take life formed in the slayer's mind before the killing, but this intent need not be conceived for any particular length of time beforehand. (Page 124.)

3. TRIAL—ARGUMENT OF COUNSEL—PREJUDICE.—Where evidence of prior contradictory statements of some of the accused's witnesses was introduced, it was not prejudicial error to permit the prosecuting attorney to refer to such contradiction if the court instructed the jury that such contradictory statements could not be considered as tending to establish the guilt or innocence of the accused but only for the purpose of impeaching or discrediting such witnesses. (Page 126.)

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

J. D. Conway and *W. P. Feazel,* for appellant.

1. Words do not justify an assault; and where offensive words are resented with an assault, and in repelling such assault the person using the offensive words kills the other, it is not murder. 75 Ark. 249. There must be deliberation and premeditation to constitute murder. 11 Ark. 455; 36 *Id.* 127; 29 *Id.* 585.

2. The remarks and argument of the State's attorney were highly prejudicial, and should have been excluded from the jury. 76 Ark. 110.

3. The testimony wholly fails to make a case of murder in the first degree.

Hal L. Norwood, Attorney General; *C. A. Cunningham,* Assistant, for appellee; *J. S. Lake* and *George M. Chapline,* of counsel.

1. The verdict is amply sustained by the evidence.

2. A person can not take advantage of a provocation invited and brought about by his own unlawful aggression, in order to reduce the grade of the crime, when he has not in good faith attempted to retire from the encounter. 75 Ark. 248.

3. It is true premeditation to kill must be shown, but it is not necessary to prove this formed design by positive evidence; it may be established by circumstances. 2 Starkie on Ev. 738; 11 Ark. 461; 51 Ark. 189.

4. A witness may be impeached by showing he has made contradictory statements. Kirby's Dig., § 3138. The argument

of counsel was not objectionable, nor at variance with the legitimate scope of argument. The court especially charged the jury that these arguments went only to the impeachment of the credibility of the witnesses.

FRAUENTHAL, J. The defendant, Butler Ferguson, was indicted by the grand jury of Howard County, charged with the crime of murder in the first degree, by killing Pat Henderson, on the 30th day of May, 1909. Upon his trial, he was convicted by a petit jury of that county of the crime of murder in the first degree; and from the judgment rendered upon that verdict he prosecutes this appeal.

The evidence, on the part of the State, establishes the following facts: The deceased, Pat Henderson, was a young man about 24 years old. On the afternoon of Sunday, May 30, in company with two young men of about the same age, young Henderson went to a creek, a short distance south from the town of Center Point for the purpose of swimming. After going along the creek for some distance, they decided they would not go in swimming because the water was too muddy. They then proceeded across a field towards the public road, and young Henderson was somewhat in the lead and got to the road in advance of his companions. In this road Henderson met two small negro boys, whom he began chasing, and the negro boys became frightened and ran down the road for a distance to a negro church house, before which a crowd of colored people were lingering. In the crowd were Grant Whitmore and Tap Clardy, and the defendant was just across the road and within hearing distance from the crowd. To this crowd the negro boys ran and told them about being chased by the deceased. In a short time after this, the defendant, Grant Whitmore and Tap Clardy, went up this road from the negro church towards where the deceased had chased the negro boys. In the meanwhile, young Henderson, after chasing the negro boys, had returned to his two companions, who by that time had come out of the field into the road; and the three young men sat down on the ground, next the side of the road, and engaged in a friendly conversation. When the defendant, in company with the two parties, who had proceeded from the negro church with him, got to a point in the road about fifty or sixty yards from where young Henderson and

his two companions were seated, next the road, the defendant said: "There sits that God damn Pat Henderson, the God damn son of a bitch! If he does anything to me, I will fix him." Henderson arose from where he was seated and walked in the direction of the defendant, and the defendant continued along the road towards the deceased. Henderson was unarmed, and his hands were extended down by his side. When he came within a few steps of the defendant, Henderson spoke to defendant and said: "Did you call me a God damn son of a bitch?" The defendant immediately drew his pistol and began shooting at Henderson, and saying, "I did." He shot three times in rapid succession, and as Henderson was falling he shot twice more; and then the defendant whirled around and ran back towards the negro church. When Henderson walked towards the defendant and spoke to him, he had nothing in his hands, and at the time defendant shot him he was a few steps from the defendant, and was making no demonstration of any kind. There was testimony showing that the deceased and his two companions had drank some diluted alcohol a few hours before the killing, but the young men testified that it was not sufficient to affect them, and that they were not affected thereby.

The defendant and his two friends testified that when the deceased approached he had a stick in his hand and struck defendant with it, and that he was backing when he pulled his pistol and shot the deceased, firing five times. There was testimony showing that the defendant and his two friends did not state that the deceased had a stick or had struck him with a stick, when they first narrated the circumstances of the killing; and there was other testimony contradicting the defendant and his two friends in their statements made upon the trial as to the manner and circumstances of the killing.

But the two young companions of the deceased, who, at the time of the killing were only a few steps distant, testified that the deceased did not have a stick, and that when he was shot his hands were empty and extended by his side, and that the deceased was making no demonstration when he was shot. Before the jury these witnesses appeared, and the jury were the judges of their credibility. The defendant and his two friends gave their testimony before the jury, and in the light of their demeanor on

the stand and in the light of all evidence in the case the jury were the judges to determine whether their statements were true or only made to shield the defendant from a punishment for the perpetration of a great crime. It was peculiarly the province of the jury to determine the facts of this case. And it has been uniformly held by this court that if there is substantial evidence to sustain the findings of the jury as to the questions of fact, its verdict will not be disturbed. *Hubbard* v. *State,* 10 Ark. 378; *Chitwood* v. *State,* 18 Ark. 453; *Floyd* v. *State,* 12 Ark. 43; *Glory* v. *State,* 13 Ark. 236; *Dixon* v. *State,* 22 Ark. 213; *Harris* v. *State,* 31 Ark. 196; *McCoy* v. *State,* 46 Ark. 141; *Holt* v. *State,* 47 Ark. 196; *Williams* v. *State,* 50 Ark. 511. We have carefully examined the testimony in this case, and find that there is ample evidence to sustain the jury in finding the facts of the case to be as they were detailed by the State's witnesses; and it is upon these findings that the verdict of murder in the first degree must necessarily be based.

It is urged by learned counsel for the defendant that the evidence on the part of the State is not sufficient to sustain the verdict of the jury, convicting the defendant of murder in the first degree. The statute of the State provides: Kirby's Dig., § 1766. "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree."

SEC. 1767. "All other murder shall be deemed murder in the second degree."

When the fact of death alone is proved, the presumption is that the crime is murder in the second degree; and, before it can be determined that the crime is murder in the first degre, it is incumbent on the prosecution to prove further, by evidence, that the killing was done with premeditation and deliberation. The premeditation can not be inferred from the fact of death, but there must be evidence of a prior intention to do the act of killing in question. But it has been universally held that it is not necessary that this intention be conceived for any particular period of time. As is said by Judge BATTLE in the case of *Green* v.

State, 51 Ark. 189: "In order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that the intention be conceived for any particular length of time before the killing. It may be formed and deliberately executed in a brief space of time. If it was the conception of a moment, but the result of deliberation and premeditation, reason being on its throne, it would be sufficient. The law fixes no time in which it must be formed, but leaves its existence as a fact to be determined by the jury from the evidence." *Bivens* v. *State,* 11 Ark. 455; *McAdams* v. *State,* 25 Ark. 405; *McKenzie* v. *State,* 26 Ark. 339; *Fitzpatrick* v. *State,* 37 Ark. 256; *Casat* v. *State,* 40 Ark. 524; *King* v. *State,* 68 Ark. 572; Wharton on Homicide (3d Ed.) § 152; Bishop on Criminal Law (7th Ed.) 728; *People* v. *Cornetti,* 92 N. Y. 85. The proof advanced in the case must be sufficient to satisfy the minds of the jury that the killing was wilful, deliberate, malicious and premeditated. But it is not necessary to show a specific motive or even a deep-seated ill-will. The will of man acts under a variety of motives, and varies with the man. One may be actuated by a deep-seated ill-will. Another by a general intent to violate the law, no matter on whom the consequences may fall. Another may labor under a sense of a wrong or some indignity, real or fancied. But if he deliberately kills the person by whom he supposes himself to be aggrieved, or by whom he thinks some indignity has been done to another in whom he may take an interest, he is guilty of murder in the first degree, if the act was done with the premeditated design to kill. The motive may be inadequate or comparatively trivial, or the act may be done through a feeling of resentment, no matter how groundlessly it may be based, still if the killing, by whatever of these motives it may be actuated, is done with deliberation and after premeditation, it is murder in the first degree. 1 Wharton's Criminal Law (10th Ed.) § 121. Whether the defendant was incensed by having just heard that the deceased had chased the two negro boys, in whom he may have felt an interest, or whether he had a resentment against deceased, caused by reason of some fancied grievance, or whether he was bent on doing generally an unlawful act, fall the consequences

where they might, the evidence on the part of the State shows that he did the killing deliberately and after premeditation, and without provocation. Just before reaching the deceased, he spoke to him in a violent manner, applying to his name a vile epithet, and then spoke of "fixing him"—and at the time he was armed with a deadly weapon. Here was evidence of malice and of premeditation, and when in a few moments thereafter the deceased, without making any demonstration, accosted him, the defendant immediately fired at him, with an expression of words, showing his design to kill was fixed; and, although the deceased was several steps away and wholly unarmed, and made no demonstration, the defendant fired several shots and continued to fire after the deceased was falling. The jury was justified, from this evidence, in finding that the killing was wilful, malicious and deliberate.

Where there is substantial evidence to support the verdict, so that it can not be said to be without evidence in any essential ingredient to the finding, the verdict should be permitted to stand. *Bivens* v. *State,* 11 Ark. 455; *Stanton* v. *State,* 13 Ark. 319; *Richardson* v. *State,* 47 Ark. 562; *Dow* v. *State,* 77 Ark. 464; Wharton on Homicide (3d Ed.) 156.

It is urged by counsel for defendant that error was committed by the trial court in permitting certain remarks to be made by the attorney on behalf of the prosecution, in his argument to the jury. The State, by way of rebuttal, had introduced testimony showing that certain witnesses who had testified on behalf of the defendant had made statements different from those which they made on the witness stand. The State's attorney, in his argument, spoke of these contradictory statements made by these witnesses prior to the trial. Upon objection being made to the character of the argument, the court told the jury that such previous statements could only be considered for the purpose of impeaching the credibility of the witnesses, and that all remarks of the attorneys relative to said statements, except that going to impeach the credibility of the witnesses, were excluded. The State's attorney thereupon said to the jury that the remarks in his argument were only made "for the purpose of considering the truthfulness or untruthfulness of the statements of the witnesses." From this the jury fully understood that the previous statements

of the witnesses could not be considered by them as substantive evidence of any fact in the case, but only for the purpose of impeaching the witnesses. Such argument for that purpose was warranted by the law, and with the statement and admonition of the court, made to the jury at the time, we do not think an undue advantage was secured by the argument which has worked a prejudice to the defendant. In addition to this, the court specifically instructed the jury relative to the testimony of these impeaching witnesses, as follows:

"10. You are instructed that the testimony of Jeff Reese and ——— Woodruff as to the statements made to them by the witness Grant Whitmore as to how the killing occurred can only be considered by you for the purpose of impeaching or discrediting the testimony given by said witness on the stand. This testimony can not be considered by you as tending to establish the guilt or innocence of the defendant.

"11. You are instructed that the testimony of Lee Garner and —— Stuart, as to the statements made to them, or either of them, by the witness John Ferguson, as to what he saw or heard of the killing, can only be considered by you for the purpose of impeaching or discrediting the testimony given by said witness while on the stand. His statements to them can not be considered by you as tending to establish the guilt or innocence of the accused."

We do not think, therefore, that the verdict of the jury should be set aside or the punishment reduced by reason of the remarks of the attorney on behalf of the State. *Redd* v. *State,* 65 Ark. 475; *Kansas City Southern Ry. Co.* v. *Murphy,* 74 Ark. 256; *Noble* v. *State,* 75 Ark. 246.

There is no special instruction mentioned by counsel for appellant in their brief which they claim it was error to have given or to have refused. We have carefully examined all the instructions given by the court and all those that were refused, and in none of its rulings relative to these instructions do we find that any error was committed. The court fully and fairly instructed the jury on every phase of the case, and in those instructions presented every privilege and guarded every right that the defendant was entitled to.

The defendant has had the aid of able counsel; he has had a full and fair trial before a jury of the country; that jury has

declared, by its verdict, that he is guilty of the crime of murder in the first degree; and we find that there is ample evidence to sustain that verdict.

The judgment of the Howard Circuit Court herein is affirmed.

CAMPBELL v. HYDE.

Opinion delivered October 25, 1909.

FALSE IMPRISONMENT—ARREST BY VIRTUE OF WRIT.—Imprisonment by virtue of a legal writ in due form, issued by a court of competent jurisdiction and served in a lawful manner, does not constitute false imprisonment, even though it was improvidently or wrongfully issued.

Appeal from Jackson Circuit Court; *Joseph W. Phillips,* Special Judge; reversed.

STATEMENT BY THE COURT.

Appellee sued appellant for false imprisonment, alleging that on or about the 23d day of November, 1907, in the city of Newport, Jackson County, Arkansas, defendant did forcibly, falsely, maliciously and against his will, arrest, without warrant or other legal process, and imprison him and restrain him of his liberties for three days, or thereabout. That, by reason of said false arrest and imprisonment, maliciously committed by appellant against appellee, he suffered great shame, was greatly injured in his good name, reputation and standing, and otherwise suffered great injury, to his damage in the sum of $10,000, for which amount he prayed judgment.

Appellant filed an answer, in which he denied the allegations of the complaint; and for defense set up the following; That he was a police officer of the city of Newport, Arkansas, and as such it was his duty to serve warrants of arrest on persons charged with violating the criminal laws in said city, and with violating the ordinances of said city; that on the 23d day of November, 1907, there was instituted before the mayor of said city a charge against appellee for disturbing the peace by cursing and threatening to fight and being drunk in Aaron Keedy's hotel,

also on the streets of said city, all in said city and on or about the 20th day of November, 1907; that the mayor of said city issued a warrant of arrest for appellee, and placed the same in the hands of appellant for service; that, in pursuance of said warrant and acting thereunder, appellant went to the place where appellee could be found and served said warrant on him, after which time they walked together to the mayor's place of holding court; that at said place appellee was turned over to the marshal of the city of Newport, Arkansas, according to the rules and regulations governing the police department of said city, after which time appellant had nothing further to do with appellee; that the only connection appellant had with said transaction was the serving of said warrant of arrest on appellee; that said warrant was duly and regularly issued before said arrest by said mayor; that appellant did nothing in the premises but what it was his duty to do as an officer; that said warrant was served in a gentlemanly manner; that appellant did not imprison appellee at all, and that all of his acts and doings in relation to said arrest were strictly in pursuance to said warrant and the law, and in due performance of appellant's duties as a peace officer of said city, and that he did not in any manner mistreat appellee; and concluded with a prayer for judgment in his behalf.

Appellee, among other things, testified that on or about the 23d day of November, 1907, appellant arrested him and took him up the streets of Newport and delivered him to Mr. Baird at the Hose House. He did not carry appellee into the mayor's court then. Appellant never said anything about a warrant when he arrested appellee; said: "You will have to go before the mayor." Appellee's friend put up $5 for his first appearance. Then appellee got the money back, thinking he could give bond. Carouthers, the city marshal and chief of police, then said, "I will go with you wherever you ask me to." And appellee replied: "You will have to go to jail then." Carouthers locked appellee up, and in a little while appellee made his bond and was released from custody. Appellee was not shown any warrant by appellant. Appellant, after arresting him, delivered him to Carouthers, and Carouthers for a short time, while appellee was unable to make the bond, put appellee in jail. The appellant was there the morning they took appellee out of the mayor's court and put him

in jail. Appellee admitted that appellant was a police officer of the city of Newport at the time he made the arrest. Various ordinances were introduced showing that appellant had authority to arrest persons for violating the city ordinances, and making appellant a conservator of the peace within the city. An ordinance was introduced showing that it was the duty of appellant, after making arrests, to deliver the persons arrested to the city marshal.

There was testimony on behalf of appellant showing that appellant received information from parties who knew the facts that appellee had violated a peace ordinance of the city of Newport; that appellant upon this information made affidavit before the mayor for a warrant of arrest charging appellee with disturbing the peace contrary to the ordinances of the city. Thereupon the mayor issued the warrant for the arrest of appellee, and appellant arrested appellee upon this warrant. The appellant, among others, presented the following prayers for instructions:

"5. The defendant was an officer of the city of Newport at the time of the alleged arrest, and as such had full power and authority to make the arrest in question.

"6. You are instructed that the mayor had jurisdiction to issue the warrant in question, and further instructed that an officer is fully protected in serving a warrant that is fair on its face.

"7. Before you can find for the plaintiff, you must believe and find from the evidence that the defendant arrested the plaintiff without any warrant and that the defendant imprisoned the plaintiff.

"8. The defendant was fully justified in serving the warrant on the plaintiff, if he had such warrant; and this is true, although you may believe that the plaintiff may have previously been arrested on a warrant issued by a justice of the peace.

"9. If the defendant had a warrant fair on its face issued by competent authority at the time he arrested the defendant, he was fully justified in making such arrest, and your verdict should be for the defendant.

"12. If the defendant, W. W. Campbell, upon information received from credible persons of such a nature a person would ordinarily believe to be true, made an affidavit charging the of-

fense of disturbing the peace, and if defendant believed in good faith and without any carelessness on his part that the plaintiff Hyde had committed such offense, and a warrant fair upon its face was thereupon issued by the mayor, then the defendant, W. W. Campbell, would be protected in acting under such warrant as if the affidavit upon which the warrant was issued had been made by some other person in good faith.

"13. You are instructed that under the evidence in this case the defendant, W. W. Campbell, was authorized to make the affidavit to procure the issuance of the warrant in question."

The above prayers were refused, and appellant duly objected and excepted to the court's ruling.

The court gave the following:

"1. Gentlemen of the jury: In this case I instruct you under the testimony that you must find a verdict for the plaintiff.

"2. You are instructed that one who causes, instigates, participates in or sets in motion a wrong is liable for the damages resulting therefrom, and it is not a justification or excuse that others were likewise connected with the wrong.

"3. Your verdict being for the plaintiff, you will assess such damages as will fully compensate plaintiff for his loss of time, for the shame and humiliation sustained by him, for the disgrace and injury to his reputation and standing in the community caused by such arrest and imprisonment, considering all the surrounding circumstances. All these matters should be considered by you in arriving at the amount of damages to which plaintiff is entitled.

"4. The plaintiff having been unlawfully arrested by the defendant, you are instructed that he thereby became liable for all damages growing out of such unlawful arrest, whether committed by him or by any other officer until he was discharged."

The damages that the plaintiff is entitled to are just actual damages.

The jury returned a verdict for the plaintiff, appellee, fixing his damages at $100. Judgment was rendered for that sum, which appellant seeks to reverse by this appeal.

Jeffrey & Grant and *Campbell & Suits,* for appellant.

1. The court erred in directing a verdict for plaintiff. Process fair on its face, though not in all respects regular, will pro-

tect an officer serving it. 34 Ark. 106; 78 Fed. 436; 71 *Id.* 264; 98 *Id.* 570; 144 *Id.* 389; 24 Am. St. Rep. 137; 71 Fed. 264.

2. The court erred in excluding the evidence offered by defendant, and in its charge to the jury. The mayor had authority to issue the warrant. Kirby's Dig., § 5590.

No brief for appellee.

WOOD, J., (after stating the facts). The court erred in instructing the jury to return a verdict in favor of appellee and in the instruction given. The court also erred in refusing appellant's prayers for instructions. This court in *Trammell* v. *Russellville,* 34 Ark. 106, said: "It is established doctrine that process, fair on its face, will protect from liability the officer executing it. It is not meant that it shall in all respects be regular; but that it shall appear to have been lawfully issued, and such as the officer might lawfully serve. That process may be said to be fair on its face which proceeds from a court or magistrate or body having authority by law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it. That the marshal and his deputy were protected from liability by the warrants, we think, is clear."

Judge Caldwell, speaking for the Circuit Court of Appeals in *Carman* v. *Emerson,* 71 Fed. 264, announced the following:

"The writ was in due form, and served within the territorial jurisdiction of the court in a lawful manner by an officer authorized by law to serve it. The rule has long been settled that no imprisonment by virtue of a legal writ in due form, issued by a court of competent jurisdiction, and served in a lawful manner, is false imprisonment. It matters not that upon a presentation of all the facts it appears that the writ was improvidently or wrongfully issued. The existence of such facts does not make the writ void or illegal or impair its efficacy as a complete defense to an action for false imprisoment brought against the officer serving it or the party who procured it to be issued and instigated its service. In such cases, if the party procuring the issuance of the writ acts maliciously and without probable

cause, he may be liable to an action for malicious prosecution, but he is not liable to an action for false imprisonment."

It follows that upon the undisputed fact of this record the appellant is not liable for false imprisonment. The court erred in so holding, and for the errors indicated the judgment must be reversed, and the cause is dismissed.

WESTERN UNION TELEGRAPH COMPANY *v.* ASKEW.

Opinion delivered October 25, 1909.

1. TELEGRAPH COMPANIES—NEGLIGENCE IN TRANSMITTING MESSAGE—LIABILITY.—Where a message offered to a telegraph company for transmission discloses upon its face that it relates to a business transaction of importance and value to the sender, the company has notice of any direct or actual damages that may result from its negligence in the transmission of the message, and is liable therefor. (Page 135.)
2. SAME—MEASURE OF DAMAGES.—The measure of damages for negligence of a telegraph company in failing to transmit a message on its face accepting an offer to sell merchandise at a certain price is the difference between the price that the sender of the message agreed to pay for the merchandise, had the telegram been seasonably delivered, and the sum which he would have been compelled to pay at the same place, in order, after notice of the telegraph company's negligence, to purchase merchandise of same quality and quantity. (Page 136.)

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

STATEMENT BY THE COURT.

The plaintiff, appellee, was conducting a general mercantile establishment at Waldo, Arkansas, when on or about the first day of October, 1906, he received by letter from the Roswell Trading Company of Roswell, New Mexico, an offer to ship him two cars of choice alfalfa hay at $15 a ton, delivered at Texarkana. This offer was still open and unrevoked on the third day of October, 1906, when during the regular hours for receiving messages the plaintiff delivered to the agent of the appellant company at Waldo, Arkansas, a message accepting the offer. The

message was signed, "J. H. Askew." It was transmitted as if signed by G. H. Arnold, instead of J. H. Askew, the sender.

Relying on the accuracy and promptness of the telegram, the plaintiff, appellee, waited for notice of the arrival of the hay at Texarkana, until November 6, 1906, the time when the hay ought to have been at Texarkana. His first information of the error was in reply to his letter of inquiry as to why the hay had not been delivered. In the meantime the price of this grade of hay had advanced materially, and the appellee seeks to recover damages for the failure to properly and promptly transmit the message of acceptance as measured by the difference between the offered price and the market price of the same grade of hay on the day on which the error was first discovered.

In addition plaintiff's complaint prayed for damages suffered by the loss of anticipated profits in the sale of this hay in the regular course of business. The proof did not sustain this allegation. The court below expressly found against prospective damages. The plaintiff does not appeal from the judgment of the court, and abandons this portion of the complaint.

The case was submitted to the court sitting as a jury, which found that the plaintiff suffered no damage by loss of anticipated profits, but that he suffered actual damages to the amount of $66, for which judgment was rendered.

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

1. There was no notice to defendant that non-delivery of the message would cause special damages, and the message did not give such knowledge. *Hadley* v. *Baxendale,* 9 Exch.; 2 Joyce, Electric Law, § 952; Jones, T. & T. Cases, § § 516-17.

2. The damages are too remote, speculative, contingent and uncertain. 68 Ark. 539; 73 Ark. 205; 58 *Id.* 29; 2 Joyce, Elec. Law, § 959; Jones, Tel. & T. Cases, § 530; 124 U. S. 444; 48 Fed. 810; 128 Fed. 693; 55 S. E. 777; 51 S. E. 290; 106 N. W. 13; 29 So. 787; 19 S. E. 366; 35 Pac. 75; 2 Atl. 847; 105 Ga. 275; 124 U. S. 144; 44 S. E. 309; 83 Ky. 114; 53 Pac. 252, and others.

W. H. Askew, for appellee.

1. The message on its face gives a clear intimation that it is of a business character relating to a special contract to sell and important, and that loss would result from failure to promptly transmit and deliver correctly. 11 Am. Rep. 156; 60 Me. 9; 19 Am. St. 55; 45 Am. Rep. 480; 22 Fla. 637; 1 Am. St. 222; 81 Am. Dec. 607; 18 Md. 607.

2. Damages in the loss between the offered price and the market price on the date of the discovery of the error is sufficient to sustain the verdict, and such damage is not uncertain nor contingent. 16 N. Y. 489; 69 Am. Dec. 718; 42 Am. Dec. 38, 42; 124 U. S. 479.

3. The measure of damage is the difference between the contract price and the value of the goods at the time of appointment for delivery. 24 Am. Dec. 137; 29 Am. St. 723; 25 Am. Rep. 203; 11 *Id.* 156, 163, 167; 93 Am. Dec. 157, 161; 73 Ark. 205, 210.

WOOD, J., (after stating the facts). The judgment of the court eliminated all claim for damages by reason of the loss of anticipated profits set up in the complaint. The message—"Roswell Trading Company, Roswell, N. M. Ship two cars choice alfalfa, fifteen dollars, delivered at Texarkana. J. H. Askew"—on its face showed that it related to a commercial business transaction between the sender and sendee of importance and value to each. Where such is the case, the telegraph company has notice of any direct or actual damages that may result from its negligence in failing to transmit the message promptly, and is liable therefor. *True* v. *International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Postal Tel. Co.* v. *Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55; *Western Union Tel. Co.* v. *Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western Union Tel. Co.* v. *Hyer Brothers*, 22 Fla. 637. Cases are cited giving examples of messages calling for application of the above rule in *Postal Tel. Co.* v. *Lathrop*, *supra*.

The measure of damages in such cases is the difference between the price that the sender of the message agreed to pay for the merchandise, had the telegram been seasonably delivered, and the sum which he would have been compelled to pay at the same place, in order, by the use of due diligence after notice of the failure of the telegram, to have purchased the like quan-

tity and quality of the same species of merchandise. *Squire* v. *West. Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 161; *True* v. *International Tel. Co., supra,* and cases there cited.

Without discussing the evidence in detail, it suffices to say that it warranted a finding by the court that the Roswell Trading Company made appellee an offer to sell two cars of choice alfalfa hay on October 3, 1906, which offer appellee duly accepted on that day by his telegram delivered to appellant for transmission; that by appellant's failure to transmit the telegram appellee lost the bargain and the benefit of the contract with the Roswell Trading Company, which the prompt delivery of his telegram would have closed and secured to him; that appellee by the course of trade and prior dealings between himself and the Roswell Trading Company could not be charged with negligence in having failed to discover the mistake of the telegraph company before November 12, 1906, the day when he discovered the error; that on November 12, 1906, the price of alfalfa hay was $18 per ton, or three dollars more than appellee would have had to pay for the hay delivered at Texarkana on the day the contract (except for the negligence of appellant) would have been closed. Appellee began buying hay as soon as he discovered that his telegram had not been correctly transmitted, but did not remember what it had cost him delivered. It appears that through appellant's negligence appellee, as we have stated, lost the contract that he would have made with the Roswell Trading Company on October 3, 1906, and the measure of damages is as above announced.

This rule for the measure of damages in such cases is recognized in *Western Union Telegraph Co.* v. *Hall,* 124 U. S. 444. The rule has its analogy in cases where there is a breach of contract on the part of the vendor in not delivering goods according to his contract of sale. The rule in such cases is: "That where the vendor is in default for not delivering goods or chattels in pursuance of the contract of sale, and no money has been advanced by the vendee, the true measure of damages is the difference between the contract price and the value at the time the article should have been delivered; and the reason of the rule is conclusive, towit, that such damages, added to the contract price which the vendee has not parted with, will enable him to buy the

article in the market." *Dey* v. *Dox,* 9 Wend. 127. See also *Griffin* v. *Colver,* 16 N. Y. 489 and other cases cited in appellee's brief.

There is nothing in *Western Union Telegraph Co.* v. *Fellner,* 58 Ark. 29, *Brewster* v. *Western Union Tel. Co.,* 65 Ark. 539, and *Western Union Tel. Co.* v. *Love-Banks Co.,* 73 Ark. 205, in conflict with the rule above announced as to the measure of damages. In those cases the facts were different from the facts of the case at bar, and the rule for the measure of damages therein announced was the correct one for the facts of those cases. But the cases show that, upon a state of facts parallel to those at bar, the rule would be as we have stated in this case. In *Western Union Tel. Co.* v. *Love-Banks Co., supra,* it is held, quoting syllabus: "The measure of damages for the negligent failure of a telegraph company to deliver a message offering a price for a commodity held for sale is the difference between such price and the sum for which the commodity could have been sold for at the time the message should have been delivered." In *Brewster* v. *Western Union Tel. Co., supra,* at page 540, Judge RIDDICK, speaking for the court, says: "The law requires that a party should exercise due diligence to avoid injury to himself, and the measure of damages in such a case is the difference between the contract price of the cattle and that which plaintiffs would have been compelled to pay at the same place in order by due diligence, after delivery of the telegram or notice of the failure to deliver it, to purchase the same number and grade of cattle."

Although appellee designated the damages which he sustained as the "loss of profits" and sued for the "loss of said profits," yet his complaint sets forth the facts, and among other allegations are these that: "Said Roswell Trading Company would have filled said order if said telegram had been properly transmitted and delivered to said Roswell Trading Company. The market price of choice alfalfa hay at Roswell, N. M., on November 15, 1906, was twenty dollars per ton delivered at Texarkana. The prayer is for damages in the sum of $175 and for "other proper relief." Under all the allegations of the complaint and the proof taken without objection, we are of the opinion that the

judgment of the court in favor of appellee for actual damages in the sum of $66 is not "without the issue."

The judgment is therefore affirmed.

ARKANSAS SMOKELESS COAL COMPANY *v.* PIPPINS.

Opinion delivered October 25, 1909.

1. MASTER AND SERVANT—FURNISHING VICIOUS ANIMAL TO WORK.—If a master furnishes for his servant's use an animal of such a vicious nature that the servant is liable to be injured, the master will be liable for his injuries if he knew, or in the exercise of ordinary care should have known, of the vicious propensities of the animal, unless the servant knows that the animal is dangerous and continues to use it, in which case he assumes the risk of injury from it. (Page 141.)
2. SAME—HOW MASTER'S KNOWLEDGE OF ANIMAL'S VICIOUS NATURE PROVED.—A corporation employing plaintiff and furnishing a vicious mule for him to use is not liable if the only proof of the master's knowledge of the animal's viciousness consisted in the testimony of one of his employees from which the jury might have inferred that the mule was vicious, if such employee is not shown to have been the keeper of the mule or to have been in such position that his knowledge was attributable to the master. (Page 141.)
3. SAME—PROXIMATE CAUSE.—Where an employee, engaged in driving a mule car in a coal mine, was kicked from the car by the mule and thrown against the walls of a narrow entry and crushed, the fact that the master built the entry walls narrow was not the proximate cause of the employee's injuries, as it could not reasonably be anticipated by the master that employees would be injured by being kicked or falling between the cars and the walls of the entry. (Page 142.)
4. SAME—DUTY AS TO APPLIANCES.—A master is not bound to furnish absolutely safe appliances, but only to exercise reasonable care to furnish such appliances as are suitable for the purposes for which they are intended, and to exercise ordinary care to see that they are kept in such condition. (Page 143.)

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

STATEMENT BY THE COURT.

J. J. Pippins instituted this action to recover damages for personal injuries of a permanent nature, sustained by him while

in the service of the Smokeless Coal Company, in consequence of the alleged negligence of the defendant company.

J. J. Pippins was employed by the coal company on the 14th day of January, 1908. He first worked for the defendant company as a digger of coal. Then he was put to work as a driver. When the coal is mined, it is hauled on a small car on a track. The tracks lead from the room into the entry, and from there to what is called the parting. The cars are carried along the track just as coal cars are carried on a railroad track, the motive power being a mule. It is the duty of the driver to hitch the mule to the car or cars and drive to the parting, where the cars are hoisted from the mine. He then unhitches the mule from the loaded cars, and hitches him to empty cars to carry back to the room. It is a part of his duty to "sprag" the cars. This consists in putting iron or wooden stakes about one and one-half feet long between the spokes of the wheel and the body of the car to check the speed of the car, while going down grade. In other words, spragging is the act of applying brakes to the coal cars. On the day Pippins was injured, he had been engaged in driving for about two hours, and was making his third trip. The mule was hauling two cars, and Pippins was seated on the front end next to the mule. The cars were going down a steep grade in the west third entry or passageway. Pippins looked to see if his "buddy" was behind him. He then looked around at the mule. Being afraid that the cars would run on the mule, he hallooed at him. When he did this, the mule kicked him with both feet, knocking him off the car and between it and the walls of the entry. The wall of the entry was about one foot from the car track. Pippins's body was so badly crushed that the lower part of it became wholly paralyzed. His physician says that he will never be able to do any kind of physical work, and will not likely live many years longer. Pippins was 34 years old at the time he was injured. He predicates his right of recovery on the alleged negligence of the coal company in furnishing him with a vicious mule to work and in the defective conditions of the entry.

Pippins recovered judgment against the coal company for $2,000, and the case is here on appeal.

Jesse A. Harp and *George W. Dodd,* for appellant.

1. The evidence does not sustain the verdict. Aside from the fact that the mule kicked appellee, there is no evidence that it was a vicious, dangerous animal, and especially no such knowledge brought home to the appellant or which by the exercise of ordinary care could have been known.

2. Where, in an occupation involving risk to the employee, two ways of performing a duty to the master is presented, one of which is safe and the other is hazardous, if the employee, being a man of mature years and experience in the work, choose the hazardous way, he assumes the risk. It is also the law that where one has sufficient knowledge and intelligence to see and appreciate the dangers incident to his occupying a particular place set apart for him by the master, and knowingly assents to taking such position, he assumes the risk. 56 Ark. 232; 81 Ark. 343; 41 Ark. 542; 54 Ark. 389; 56 Ark. 206; 57 Ark. 76; 80 Wis. 350; 1 Labatt, Master & Servant, § 266 *et seq.* It is not shown that it was *necessary* for the driver to occupy the front of the car, and the fact that he could "sprag" the car from that end with less trouble than from the rear, where he could have ridden in safety, does not detract from his duty to select the safer position. 20 Am. & Eng. Enc. of L., 146.

3. If, seeing and knowing the condition of the entry, appellant voluntarily accepted the employment as driver therein, he assumed the risk incident to such condition of the entry. 48 Ark. 333. The court erred in holding that the condition of the entry was the proximate cause of the injury, and testimony as to its condition was inadmissible and prejudicial. 21 Am. & Eng. Enc. of L., 2d Ed. 485; 29 Cyc. 488; 2 Labatt on Master & Servant, § 803. It must appear that the particular neglect in question was the proximate cause of the injury. 21 Am. & Eng. Enc. of L., 2d Ed., 483; *Id.* 484-5.

4. Where the possibility of a particular occurrence is demonstrated only by its happening, there is no liability in negligence. 21 Am. & Eng. Enc. of L., 2d Ed. 400. Where an appliance has been used for a considerable length of time, and been found to answer the purpose for which it was intended, it is not negligence to continue its use. 56 N. Y. 656; 38 Am. Rep. 533; 106 N. Y. 136; 47 Hun (N. Y.) 562; 81 Hun (N. Y.) 544; 4 Am. St. Rep. 613.

5. The greater part of the miners were diggers, not mule drivers. Very few, in fact, were of the latter class. Testimony as to the general reputation of the mule for viciousness was mere hearsay and incompetent.

A. J. Koenigstein, for appellee.

Knowledge of the unsafe condition of the entry and of the vicious propensities of the mule is brought home to the master in this case, as appears by the evidence, which is a question of fact settled by the jury's verdict. 68 Ark. 314; 75 Ark. 52; 68 Ark. 134. And appellant has failed to meet the burden of showing contributory negligence.

HART, J., (after stating the facts). Counsel for appellant insist that the court erred in not directing a verdict in favor of appellant. The law in regard to the negligence of the master in furnishing his servant with a vicious animal to work stands on the same footing as furnishing him a dangerous appliance. The rule is aptly stated by Mr. Thompson as follows: "But if a master furnishes for the use of the servant a horse or other animal of such a vicious nature that the servant is liable to be injured in consequence of its viciousness, the master will be liable if he knew, or by the exercise of ordinary care could have known, of the vicious propensities of the animal, unless the servant knew that the animal is dangerous, but nevertheless continues to use it, in which case he assumes the risk of injury from it." 4 Thompson on Negligence, § 4041. To the same effect, see 26 Cyc. 113, and cases cited in note 80; 1 Labatt on Master & Servant, § 206.

In the case at bar there was sufficient evidence adduced at the trial on the part of the appellee from which the jury might infer that the animal was of a vicious nature, and that that fact was not known to appellee; but there is no evidence which would warrant the jury in finding that the coal company knew that the mule was vicious, or by the exercise of ordinary care could have known it. All the employees of the company who testified on the subject, except one, said that the mule was not vicious. One of the employees testified as above stated to facts from which the jury might have inferred that the mule was vicious, but he was not shown to have been the keeper of the mule, or to have been in such position that it could be said that his knowledge was the master's knowledge.

2. On the question of the defective condition of the entry, we are of the opinion that under the facts disclosed by the record the appellee is not entitled to recover, and that this case in that respect is controlled by the principles announced in the case of *St. Louis, & San Francisco Rd. Co.* v. *Hill,* 79 Ark. 76. In that case a train was passing over a bridge of the railroad company, and the bridge gave way and wrecked the train. A brakeman on the train was killed. The engine was derailed before it reached the bridge, and there was evidence tending to show that the bridge was sufficient to sustain the train, had it remained upon the track, and that the derailment of the train caused the the bridge to give way. The court said: "The bridge in question was constructed solely for the passage of defendant's trains on the track over Crowder Creek. There was evidence tending to prove that it was sufficient for that purpose. There is no evidence to show, and plaintiff does not contend, that the derailment of the train was owing to defects of the bridge. That being true, the derailment did not prove that the defendant was negligent in the construction or maintenance of the same."

So, in the case at bar it may be said that the entry was sufficiently wide to permit the passage in safety of the mine cars, and it could not be reasonably anticipated by the coal company that its employees would be injured by being kicked or otherwise falling between its cars and the walls of the entry.

The case at bar does not come within the rule announced in *McNamara* v. *Logan,* 100 Ala. 187, 14 So. 175. There the servant was injured while engaged in spragging the cars. The testimony showed that it was his duty to walk along beside the cars and to sprag them when they started down a steep grade. The entry was too narrow for that purpose at the place where the servant was injured while engaged in the performance of his duties of spragging or blocking the cars, and the court held that, the evidence being in conflict as to whether the entry was dangerously narrow, or the cars dangerously near the wall at that point, the question of negligence was for the jury. In the present case, there was no testimony to show that it was the duty of the driver to alight from the cars to sprag them. On the contrary, the uncontradicted testimony shows that the drivers always rode on the cars while engaged in the performance of their duties.

Under the testimony in the case at bar there was no necessity for sufficient room betweeen the sides of the car and the walls of the entry for the use of the driver in spragging, and consequently there was no defect in the condition of the entry where the injury occurred. A master is not bound to furnish absolutely safe appliances, but only to exercise reasonable care to furnish such appliances as are suitable for the purposes for which they are intended, and to exercise ordinary care to see that they are kept in such condition.

There is no presumption of negligence in a case like this. The burden of showing that the appellant was negligent in regard to the matters alleged in appellee's complaint was upon him. Having failed to establish negligence in regard to either of the allegations of his complaint, the verdict of the jury is without evidence to support it.

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

SMITH v. SCOTT.

Opinion delivered November 1, 1909.

1. HOMESTEAD—WIDOW'S ABANDONMENT—RIGHTS OF MINOR CHILDREN.—Where one owning a homestead dies, leaving a widow and minor children, the right of such minors to the homestead will not be affected by the widow's abandonment of the homestead and establishment of another home. (Page 145.)
2. SAME—AUTHORITY OF PROBATE COURT.—The probate court has no authority to make an order vesting the homestead of a decedent in his widow and minor children. (Page 145.)
3. LIMITATION OF ACTIONS—AMENDMENT—NEW SUIT.—Amending a complaint in ejectment by striking out certain lands and omitting certain parties originally named therein is not equivalent to bringing a new suit, nor changing the cause of action, for the purposes of the statute of limitations. (Page 146.)
4. SAME—HOMESTEAD.—As the right of an adult child to enter upon the homestead of his parent does not accrue until the homestead right of the youngest child has ceased on his coming of age, the statute of limitations will not run until that time. (Page 147.)

5. APPEAL AND ERROR—PRESUMPTION FROM INCOMPLETENESS OF ABSTRACT.—Where the evidence heard in the lower court is not set out in appellant's abstract, it will be presumed that the instructions were based upon the evidence, and that there was sufficient evidence to warrant the jury's findings. (Page 147.)

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

STATEMENT BY THE COURT.

This is an ejectment suit instituted on the 9th day of August, 1906, in the Columbia Circuit Court by the appellees, Dan Scott *et al.,* against the appellant, A. W. Smith, to recover possession of certain lands in Columbia County, Arkansas. The appellees claim title to this land through their father, William Scott, who died the owner and occupying same as his homestead in October, 1883. At the time of his death appellees were minors. Soon after their father's death, their mother, Fannie R. Scott, moved to Louisiana, and acquired land, and established a home for herself and children there. She moved to Louisiana with no intention of returning to Arkansas to live.

On the 11th day of November, 1885, the probate court of Columbia County, Arkansas, made an order vesting title to the land in controversy (which was the land occupied as a homestead by William Scott at the time of his death) in his widow, Fannie R., and minor children. Fannie R. Scott deeded the land to J. C. Green on March 13, 1886, and Green deeded the land to appellant, Smith, on the 25th of April, 1894. Appellant claims title through his deed from Green deraigned as above.

Stevens & Stevens and *J. E. Hawkins,,* for appellant.

A mother may, after the death of her husband, change the domicil of her minor children. 86 S. W. 520; 112 U. S. 230; 80 Ark. 358; Woerner on Guardianship, 81. By change of domicil the mother and minors lose their right to the homestead. 102 Am. St. R. 410; 99 *Id.* 220; 69 N. E. 863; 42 S. W. 185; 34 S. W. 4; 3 S. W. 840. Minor children have no vested right in their deceased father's homestead until the death of their mother. 53 Ark. 400. Two homesteads cannot be enjoyed at one and the same time. 73 Ark. 266. The order vesting title in the widow was valid unless the children at that time had a vested home-

stead interest. 51 Ark. 433. Seven years having elapsed since this cause of action accrued, and three of these free from disability, the right of action is tolled. 44 Ark. 479. This suit was begun when the amended complaint was filed.

C. W. McKay and *J. G. Lile,* for appellees.

The order of the court vesting title in the widow was void. 51 Ark. 429; 33 Ark. 827. An order that the homestead of a deceased be sold for the payment of his debts, subject to the homestead rights therein of the widow or minor children, is void. 79 Ark. 408; 47 Ark. 445; 50 Ark. 329; 49 Ark. 75; 56 Ark. 563. This action was not barred by the statute of limitations. 83 Ark. 196; 87 Ark. 428. The suit could have been brought at any time within seven years after the youngest child reached its majority. 53 Ark. 400. A minor cannot abandon his homestead right, neither can any one for him. 29 Ark. 280; 21 Ill. 178; 29 Ark. 633; 73 Ark. 266. The mother who acquired a homestead in Louisiana is still living, so these appellees have never had any homestead there. 77 Ark. 266.

WOOD, J., (after stating the facts). Under sections 6 and 10, art. 9, of the Constitution appellees, at the death of their father, acquired homestead rights in the land in controversy of which their mother, the widow, could not deprive them by establishing another home, and by selling the one occupied by the husband and father at the time of his death. The homestead of the minors in the land in controversy inured to them through the death of their father. Sec. 10, art. 9, *supra.* The abandonment by the widow and mother of the interest which she acquired in the same homestead by the death of her husband in no manner affected the rights of the appellees, the minor children. The right to share it equally and to one-half of the rents and profits thereon became a vested interest in the children upon the death of their father.

During minority the widow and mother could share it equally with the children. But she had no absolute control or dominion over it. At the time the probate court declared the widow the owner of the land in controversy, and at the time she conveyed same to Green, the appellee had no homestead rights in the home of their mother in Louisiana. Their homestead in that land could only inure at the death of their mother. So the question of in-

consistent homestead rights is not before us. The only homestead rights they had at the time the order of the probate court was made were in the land in controversy. Having homestead rights in this land at the time of such order, it follows that the same was void, and appellant therefore acquired no title. *Sansom* v. *Harrell,* 51 Ark. 429; *Harrison* v. *Lamar,* 33 Ark. 827. See also *Grimes* v. *Luster,* 73 Ark. 266, for review of homestead cases and discussion of inconsistent rights of homestead.

Second. Appellant pleads the statutes of limitations of three and seven years. The youngest child of William Scott was twenty-one years of age April 21, 1904. This suit was instituted August 9, 1906, against appellant and others for the recovery of the land in controversy and other lands, and for $1,500 damages for the detention thereof. January 10, 1908, appellees amended their complaint, dismissing the action as to all the defendants except appellant, and as to all the lands except the land in controversy, and praying for the possession of this and for damages for the detention thereof in the sum of $1,500.

Appellant contends that the amendment to the complaint was tantamount to the bringing of a new suit against appellant, and that therefore the suit should date from the filing of the amendment, January 10, 1908. But we are of the opinion that the amendment did not change the cause of action. The suit still remained a suit by appellees against appellant for the land in controversy. The original complaint, although it included other lands and was against other parties, also included the tract in controversy, and was against appellant. The amendment did not allege that appellant held by any other or different title than that set up in the complaint before it was amended.

The complaint before amendment was not a suit "for several distinct parcels of land in possession of several defendants, each claiming for himself," as appellant contends. The complaint before amendment was simply a suit in ejectment against several defendants, including appellant, for the tract of land in controversy, and other lands, alleging that the appellees were the owners of all the land including the tract in controversy and that the defendants, including appellant, were in the unlawful possession thereof. A mistake as to the other tracts of land and as to other defendants being in possession of the tract in controversy did

not alter the case as to the tract in suit, and as to appellant being in possession of that tract. Correcting the mistake by an amendment to the complaint eliminating the defendants and the lands that should not have been embraced in the complaint in the first place did not change the cause of action as to the tract that was sued for and the party who was really in possession thereof. The allegations of the original complaint as to the tract in suit and as to the appellant being in the unlawful possession thereof were not changed by the amendment. The suit as to the tract in controversy was therefore brought within three years after the youngest child became of age.

As to the appellees who were adults at the time the youngest child became of age, the statute of limitation of seven years does not bar them. For this statute did not begin to run against them until the termination of the homestead of the youngest child. Their right of entry to the land in controversy did not accrue till the homestead right of the youngest child ceased. *Kessinger* v. *Wilson,* 53 Ark. 400; *Gannon* v. *Moore,* 83 Ark. 196; *Harris* v. *Brady,* 87 Ark. 428.

The homestead of the widow in the land in controversy terminated upon her abandonment thereof soon after her husband's death. Appellees therefore are not barred by any statutes of limitation.

Third. The court submitted the question of betterments, rents and taxes upon correct instructions. Appellant does not abstract the evidence on these questions. In the absence of an abstract setting forth the evidence pro and con, we must assume that there was evidence sufficient to uphold the verdict.

Appellant sets forth in his brief a statement of the improvement as to what the rental value of the land was for three years the value of the rents since the filing of the complaint; but he does not cite us to the page of the transcript where the evidence supporting this statement is to be found, and he makes no statement as to what the rental value of the land was for three years next before the commencement of the suit. The court correctly instructed the jury to consider this. *Brown* v. *Nelms,* 86 Ark. 386; *McDonald* v. *Rankin, post* p. 173. In the absence of an abstract of the evidence showing to the contrary, we must presume

that the instructions were based upon the evidence, and that the verdict had sufficient evidence to warrant the jury in its finding.

There is no error.

Affirmed.

WALKER v. NOLL.

Opinion delivered November 1, 1909.

1. APPEAL AND ERROR—SUFFICIENCY OF BILL OF EXCEPTIONS.—The requirement that the bill of exceptions contain all of the testimony in a case is sufficiently complied with if it appears inferentially that all the evidence is brought up. (Page 150.)
2. WITNESSES—NECESSITY OF OATH.—It was error to permit an unsworn witness to make a statement to the jury. (Page 150.)
3. APPEAL FROM PROBATE COURT—AFFIDAVIT.—Where the attorney of a claimant in the probate court filed with the clerk a statement reciting that such claimant prayed for an appeal, and that it was not taken for delay, etc., and said: "I will swear to this," but the paper contained no jurat, the paper was not sufficient as an affidavit for appeal. (Page 150.)
4. APPEAL FROM PROBATE COURT—NECESSITY OF AFFIDAVIT.—Under Kirby's Digest, § 1348, providing that appeals may be taken from final judgments of the probate court by the party aggrieved filing an affidavit and prayer for appeal within 12 months after rendition thereof, and that upon the filing of such affidavit the court shall order an appeal, the filing of such affidavit is a prerequisite to the granting of an appeal. (Page 151.)
5. JUDGMENTS—PRESUMPTION.—The presumption in favor of the judgment of a superior court that all the prerequisites of the law have been complied with, which applies in case of a collateral attack on the judgment, does not apply in case of a direct attack on the judgment, as in case of an appeal therefrom. (Page 152.)

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

T. C. Trimble, Joe T. Robinson, T. C. Trimble, Jr., and *Jas. B. Gray,* for appellant.

In the absence of the jurat of the officer before whom the affidavit was made, the fact that it was sworn to must be estab-

lished by evidence *aliunde*. 43 Neb. 794. The evidence in the record is not sufficient to establish the fact that an affidavit for appeal was made. 68 Miss. 243; 94 Ga. 461; 52 Pac. 756; 4 Heisk. 532. No jurisdiction is acquired on appeal unless an affidavit is made. 24 Ark. 282; 25 Ark. 275; 21 Ark. 93; 65 Ark. 419; 27 Ark. 599. An affidavit for appeal must be presented to the court during some term within twelve months after the judgment was rendered. 65 Ark. 419; 27 Ark. 599.

George M. Chapline, for appellee.

It is the judgment of the probate court that an appeal was prayed and granted that gives jurisdiction. 65 Ark. 421. The order of a court of record granting an appeal cannot be attacked collaterally. 11 Ark. 519. If the record of the probate court were not true, it should have been corrected by certiorari. 38 Ark. 391.

FRAUENTHAL, J. At the April term, 1907, of the Lonoke Probate Court the appellee presented her claim against the estate of R. O. Walker, deceased. In that court the appellant as administrator of said estate filed an answer to the pleading seeking an allowance of the claim. Upon a trial of the matter the probate court allowed a portion of the claim, and disallowed the remainder, and rendered judgment accordingly; and in the order it is recited: "Whereupon counsel for plaintiff prayed an appeal to the circuit court, which was granted."

In the circuit court the appellant filed a motion to dismiss the appeal from the probate court upon the ground that no affidavit for appeal was made in the time or manner required by law, and at no step in the proceeding was this affidavit waived by the appellant, nor the necessity of making it dispensed with. The circuit court denied the motion to dismiss the appeal over the objection of appellant and rendered judgment for the full amount of the claim. From that judgment the appellant prosecutes this appeal.

It would appear that the judgment of the probate court was rendered on April 22, 1907, and that no affidavit for appeal from that judgment was then made or filed. On May 14, 1907, and in vacation, the attorney of appellee presented to the clerk of the probate court an instrument purporting to be an affidavit as follows:

"Comes George M. Chapline, as agent and attorney in fact for the plaintiff herein, and states that the said plaintiff, M. Noll, is a non-resident of the State of Arkansas, and states that this appeal, prayed for and granted, is not taken for delay, but that justice may be done."

(Signed) "Geo. M. Chapline,
"Agt. and Atty. for Plaintiff."

—with the remark: "I will swear to this," and without further formality left the office. The paper was filed by the clerk, but no jurat was attached thereto, nor was the purported affidavit ever presented to or acted upon by the probate court. In the trial upon this motion to dismiss in the circuit court the clerk of the probate court was allowed to make the above statement relative to the purported affidavit without being sworn as a witness, over the objection of appellant duly made at the time. It appears from the bill of exceptions that this was all the alleged testimony that was introduced upon the hearing of the motion to dismiss the appeal. It is urged by counsel for appellee that, in as much as the bill of exceptions does not state specifically that this was all the testimony heard in the matter, the finding and decision of the circuit court should be presumed to be correct. But it does sufficiently appear from the bill of exceptions that it contains all the testimony heard on the trial of the matter by the circuit court, and negatives the idea that any other testimony was heard; and the bill of exceptions is sufficient if it appears inferentially that all the evidence is brought up. *Thomas* v. *Hinkle,* 35 Ark. 450; *Leggett* v. *Grimmett,* 36 Ark. 496; *Overman* v. *State,* 49 Ark. 364.

We are of the opinion that it was error for the trial court to hear the statement of the probate clerk without actually first swearing him as a witness, when the appellant was at the time objecting to his statement being received as evidence without his first being sworn. There was therefore no legal evidence that the instrument purporting to be an affidavit was actually sworn to. As a matter of fact, under the statement of the clerk, the instrument was not formally sworn to. It was only handed to the clerk with the remark that "I will swear to this." While there is no particular formality required either in the use of the words or the manner of administering an oath in making an affidavit,

nevertheless the actual swearing by the affiant must be done before a proper officer, and the requirements of the law as to the manner of administering the oath must be substantially complied with. It is not necessary to determine whether this was done in this case for the reason that we do not think that the purported affidavit was made or filed within the time or manner prescribed by law, so that the circuit court could acquire jurisdiction of the matter.

It is provided by article 7, section 35, of the Constitution that "appeals may be taken from judgments and orders of the probate court under such regulations as may be prescribed by law."

In order to obtain an appeal from an order or judgment of the probate court, it is prescribed by Kirby's Digest, § 1348, as follows:

"Appeals may be taken to the circuit court from all final orders and judgments of the probate court at any time within twelve months after the rendition thereof by the party aggrieved filing an affidavit and prayer for appeal with the clerk of the probate court; and upon the filing of such affidavit the court shall order an appeal at the term at which such judgment or order shall be rendered, or at any term held within twelve months thereafter. The party aggrieved, his agent, or attorney, shall swear in said affidavit that the appeal is taken because he verily believes he is aggrieved and is not taken for the purpose of vexation or delay."

It will be seen from this that the probate court must grant the appeal at a term of the court, and that as a prerequisite to the granting of such appeal it is necessary that an affidavit for appeal must be filed. It is essential that the affidavit for appeal be made and filed before the probate court can grant the appeal, and that the probate court must itself act on such affidavit and prayer for appeal and grant same by an order.

In the case of *Johnson* v. *Duval*, 27 Ark. 599, it was held that an affidavit for appeal is a prerequisite to obtain such appeal from a judgment of the probate court, if the same is not waived or dispensed with; and further that if the appeal is not taken substantially in the manner and within the time prescribed by law it will be dismissed for the want of jurisdiction.

In the case of *Matthews* v. *Lane,* 65 Ark. 419, it was held that, in order to invest the circuit court with jurisdiction upon appeal from the probate court, it is necessary that it appear that the affidavit and prayer for appeal were presented to the probate court, and that the appeal was granted.

In the case of *Neale* v. *Peay,* 21 Ark. 93, it was held that the affidavit and prayer for appeal from a judgment of the probate court do not invest the circuit court with jurisdiction unless the appeal be granted by an order of the probate court. *Crow* v. *Hardage,* 24 Ark. 282; *Hanna* v. *Pitman,* 25 Ark. 275; *Love* v. *McAlister,* 42 Ark. 183.

In the case at bar the instrument purporting to be an affidavit for appeal was never presented to the probate court, and was never acted upon by that court, and no order granting an appeal was made by that court after the filing of that instrument. It therefore follows that the appeal in this case from the judgment of the probate court was not taken substantially in the manner as prescribed by law.

It is urged by counsel for appellee that, inasmuch as the order of the probate court made on April 22, 1907, stated that "counsel for plaintiff prayed an appeal to the circuit court, which was granted," it must be conclusively presumed that all the necessary conditions and prerequisites of the law had been complied with. And this contention is based on the principle that an order or judgment of the probate court cannot be collaterally attacked. But this proceeding was a direct appeal from the order of the probate court.

The direct matter involved in the hearing of the appeal from this order was whether the appeal was taken in the manner prescribed by law. It was not therefore a collateral attack of that order.

The judgment of the circuit court is reversed, and this cause is remanded with directions to dismiss the appeal.

McCOWN v. WILSON.

Opinion delivered November 1, 1909.

WITNESSES—IMPEACHMENT.—Where a bookkeeper testified to the correctness of the account sued on by plaintiff, it was not admissible to impeach him by proof that he had made a mistake in stating the account of a third person.

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

Thomas, Lee & Smith, for appellant.

The verdict is so clearly against the weight of the evidence as to shock one's sense of justice. 21 Ark. 468; 24 Ark. 224; 13 Ark. 71; 8 Ark. 155; 10 Ark. 309; 26 Ark. 309; 39 Ark. 491; 70 Ark. 136; 75 Ark. 262; 115 S. W. 942.

R. D. Rasco, for appellee.

Incompetent evidence must be objected to when offered, otherwise the objection is waived. 72 Ark. 371. The mortgage secured nothing except the amount due at the date of maturity of the mortgage. 50 Ark. 256. A creditor cannot apply payments elsewhere than according to directions. 54 Ark. 444. The verdict of a jury will not be disturbed when supported by legal testimony. 73 Ark. 377; 75 Ark. 111; 67 Ark. 531; 76 Ark. 326; 67 Ark. 399; 74 Ark. 478; 76 Ark. 115.

WOOD, J. This suit was begun in the justice's court to replevin certain property mortgaged to secure a note executed by appellees to J. H. Merritt & Company, September 9, 1905, for the sum of $253. J. H. Merritt & Company was a partnership composed of J. H. Merritt and W. A. Merritt. The firm was engaged in the mercantile business. The note and mortgage were executed to cover an account that appellees had contracted with J. H. Merritt & Company. The defense was payment, and this presented a question of fact upon which there was a sharp conflict in the evidence. During the progress of the trial a witness, W. P. Ruffin, testified as follows:

"Q. Have you had any business transaction with the firm of J. H. Merritt & Company? A. I guess I have; I have been trading with that house at least about 20 or 22 years. Q. Do you remember about a short time ago, some time within a year, that

Mr. Burnett, in looking through the books, told you that you owed them a certain amount, secured by note and mortgage? A. Yes, sir. Q. If you remember the incident, tell the jury how it was? A. In the spring of the year 1907, this spring a year ago, I went to Mr. McCown's store here. I had been dealing with the house there for a long time, and told Mr. McCown that I would like to make arrangements to get supplies last year, and he says: 'Mr. Burnett will fix up the papers,' and we went into a room, and we hadn't been in there but a while, and he got out some papers, but before he got to writing any he said to me, 'What are you going to do with this old J. H. Merritt account' that I owed them? I said that I didn't owe them nothing. He said: 'You do.' And I said: 'No, you are mistaken. I didn't owe them a cent; I paid that off quite a while ago.' and he said: 'Mr. Ruffin, you don't dispute the account, do you?' And I said: 'Yes, I do.' And he said: 'Here it is,' and carried me to the books and showed me where it was on the books charged up thirty-some-odd dollars, and I said I did not owe it, and finally he contended that I did, and it made me a little vexed, and I just pointed my forefinger at him and said, 'Mr. Burnett, I am a poor man, but if you will produce that note and mortgage I will pay it before sundown,' and he went into the desk where he kept a little book of notes and looked through the papers, and he just turned around, and said: 'I guess you have got her.' There have been no words said about it from that day to this."

This evidence was objected to by appellant, and he duly excepted to the ruling of the court in admitting it, and and makes such ruling one of the grounds of his motion for new trial.

The evidence was wholly irrelevant and incompetent. It was likewise prejudicial. It tended to make the jury believe that Burnett, the bookkeeper, who had charge of the settlement of the accounts of J. H. Merritt & Company, had failed to give proper credit to a customer who had paid his account, and after the account had been paid still carried the account on the books as a subsisting obligation. This was the same bookkeeper, too, who was in charge of the books at the time appellees claimed to have paid the account (rather note evidencing same in suit), and who testified that the note in suit had not been paid. The purpose of the testimony was to show that if the bookkeeper had failed

to give proper credit to one customer who had paid his account, such fact would show that he had also failed to give appellees proper credit. Moreover, it tended to prejudice the testimony of the bookkeeper, who was an important witness for appellant, and to impeach his evidence without laying the proper foundation for such impeachment. This is the only error we find in the record; but for this the judgment is reversed, and the cause remanded for new trial.

ROWE v. STATE.

Opinion delivered November 1, 1909.

STOCK LAW—ENFORCEMENT—PENALTY.—Under the rule that when an act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty, that penalty alone can be enforced, *held* that the penalty prescribed by the special stock law of May 23, 1901, applicable to certain counties, is the only punishment which can be administered for a violation of its provisions.

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

Rowe & Rowe, for appellant.

The act does not make it a criminal offense to permit hogs to run at large. The word "unlawful" in the act does not make the violation of it a crime. "Unlawful" signifies contrary to law; but does not necessarily subject the doer to a criminal prosecution. 2 Bish. Crim. Law, § 178. The only punishment prescribed for violating this act is the impounding of the stock and the costs and expenses resulting therefrom.

Hal. L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

The presumption is that the law is constitutional, and all conditions to be complied with before putting the law into execution were complied with. 12 Ark. 321; 28 Ark. 317; 71 Ark. 574; 1 Greenl. Ev. Arts. 479-480. Where a statute prohibits or requires an act and prescribes no punishment therefor, the act

shall be deemed a misdemeanor. Kirby's Digest, § 2247. The punishment for all misdemeanors the punishment for which is not prescribed by some other statute is provided for by section 2248, Kirby's Dig. The burden is on defendant to prove that the statute was not properly passed. 27 Ark. 500; 31 Ark. 609; 43 Ark. 257; 53 Ark. 368; 56 Ark. 350; 68 Ark. 376.

McCULLOCH, C. J. Appellant R. A. Rowe appeals from a judgment of conviction under an indictment charging him with a violation of the terms of a special stock law, approved May 23, 1901, which is applicable to certain counties. The statute provides for an election to be held, either at the next succeeding general election or at a special election in any of the counties therein named, for the purpose of determining whether or not the provisions of the statute should be put in force in the particular counties. It further provides that if, at said election, a majority of the votes cast on the question should be in favor of the law, it shall be the duty of the county court, or the judge thereof in vacation, to make an order prohibiting the running at large of hogs, sheep, geese and goats within such territory; that a copy of said order shall be published, and that, after the adoption of the law in the given territory, "it shall be unlawful to permit any hog, sheep, goose, or goat to run at large in said territory; provided, the prohibition of such stock running at large apply only to those living in such territory." Then follow other sections, viz:

"Section 3. If any hog, sheep, goose or goat shall enter the cultivated or meadow lands of another in said counties, the owner, lessee or person in lawful possession of such land may impound such animals and detain them until his fee, and all damages caused by such animals, are paid. Provided, such stock be the property of or in control of any resident of any territory adopting said fence law.

"Section 4. Whenever any stock is impounded under the provisions of this act, notice in writing shall be given to the owner thereof, if known, upon payment or tender of the fees, costs or damages.

"Section 5. Any person impounding stock under the provisions of this act shall be entitled to ten cents a day for hogs, and five cents a day for each sheep, goose or goat. The dam-

ages done by such stock may be ascertained by any three disinterested householders in the territory chosen by the person interested, or by some justice of the peace, who shall take an oath to assess such damages fairly and honestly, and their assessment shall be final.

"Section 6. If the owner or agent of such impounded stock, after having received notice, shall neglect to pay fees and damages, the person impounding such stock may sell the same at public auction to the highest bidder for cash, after first giving five days' notice of the time, place and terms of said sale, by written or printed notices, posted in three public places in the territory, and by delivering a copy to the owner of such stock, if known, and apply the proceeds, after deducting the cost of sale, to the satisfaction of his fees, and damages, and pay the remainder to the owner of the stock, if known. If the owner cannot be found within ten days, the overplus shall be paid into the country treasury, and be disbursed as in cases of estrays, but the county court may make an order directing the same to be returned to the owner of said stock within six months on satisfactory proof." (Acts of 1901, p. 305.)

It will be noticed that the act in question provides no penalty except that prescribed in the sections quoted above. The question then arises whether or not the appellant could be indicted for a violation of any of the terms of the statute. It is insisted on behalf of the State that the following statutes of this State authorize the indictment and conviction of appellant:

"Where the performance of any act is prohibited, or the performance of any act is required by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or requiring such act or duty, or in any other section or statute, the doing of such prohibited act or the neglect of such required act by duty shall be deemed a misdemeanor.

"Every person who shall be convicted of any misdemeanor, the punishment of which is not defined in this or some other statute, shall be punished by imprisonment not exceeding one year, or by fine not exceeding two hundred and fifty dollars, or by fine and imprisonment both." Sections 2447, 2448, Kirby's Digest.

Now, the first inquiry is whether or not the special statute in question prescribes a penalty for the violation of its terms; for, if it does, the sections of the Digest quoted above have no application.

The authorities sustain the rule that when an act "creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty and mode of procedure, that penalty alone can be enforced." McClain on Criminal Law, § 8; *People* v. *Hislop,* 77 N. Y. 331; *Com.* v. *Evan,* 13 Serg. & Rawle, (Pa.), 426; *McElhiney* v. *Com.* 22 Pa. St. 365.

It is really unnecessary to invoke that rule here, though it is undoubtedly applicable, as the general statute quoted above by its express terms limits its application to prohibited acts for the doing of which no penalty is prescribed. Therefore, if it can be said that the special statute in question prescribes a penalty at all, then the general statute is not applicable. We are of the opinion that the special stock law does prescribe a penalty. It authorizes the impounding of stock found trespassing upon the cultivated or meadow land of another, and mulcts the owner of the stock in damages caused by the depredation of the stock, and for the costs and expenses arbitrarily fixed by the statute, and provides for the sale of the stock in a summary manner for the purpose of paying same. This arbitrary provision can only be justified as a penalty imposed upon the owner for allowing his stock to run at large in violation of the terms of the statute. It is confiscatory, unless justifiable as a penalty.

It is insisted by the Attorney General in argument that, if this be regarded as a penalty at all, it has no application to the mere running at large of the stock, and is only applicable where the stock is found trespassing upon the cultivated or meadow lands of another person. This is true. But the Legislature deemed that to be sufficient penalty, and the courts are not justified in reading anything else into the act, and thereby imposing a penalty which the lawmakers did not intend to inflict.

We are therefore of the opinion that the Legislature has not imposed a fine for the violation of the special statute, and the indictment of the appellant was therefore unauthorized.

Judgment is reversed and the cause dismissed.

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

Opinion delivered November 1, 1909.

1. WITNESSES—IMPEACHMENT—FOUNDATION.—It is error to permit a witness to be impeached by proof of contradictory statements, without first laying a foundation by inquiring of him whether he made them. (Page 162.)
2. EVIDENCE—ADMISSIONS OF ONE NOT IN PRIVITY.—In a suit by the administrator of a deceased person to recover damages on account of his killing for the benefit of his mother or his next of kin, it was error to permit the defendant to offer in evidence a written statement made by deceased in his lifetime to the effect that his mother was dead, as there was no privity between the next of kin and the deceased. (Page 162.)
3. SAME—ADMISSIONS OF ATTORNEY.—Interrogatories prepared by plaintiff's counsel and submitted to defendant's counsel, but subsequently abandoned by plaintiff without being propounded to the intended witness, are not admissible, either as testimony or as admissions of plaintiff's counsel. (Page 164.)

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

T. G. Malloy and *Palmer Danaher,* for appellant.

Deceased did not assume the risk of dangers arising from failure of defendant to perform its duty. 48 Ark. 333; 70 Ark. 299. The defense that deceased was drinking at the time of the injury cannot avail here, when not set up in the answer nor presented to the jury by instruction. 71 Ark. 427. Verdicts must have evidence to support them, and juries are not justified in inferring, from mere possibilities, the existence of facts. 2 L. R. A. (N. S.), 908. It is error to admit a complaint or answer to be read in evidence after the same has been withdrawn. 33 Ark. 251; 58 Ark. 491; Greenl. Ev. § 171. A witness cannot be contradicted without first having laid the foundation therefor. 15 Ark. 359; 24 Ark. 620; 52 Ark. 303; 69 Ark. 648.

Kinsworthy & Rhoton and *James H. Stevenson,* for appellee.

The master's duty is performed when he uses due care and diligence to provide his employees with suitable and safe machinery with which to work. 44 Ark. 529. When one enters the employment of another, he assumes all the hazards and risks or-

dinarily incident to the employment. 35 Ark. 613. The master only bound to exercise reasonable care and diligence to provide the servant with a safe place to work. 48 Ark. 333; 46 Ark. 555; 48 Ark. 460; 51 Ark. 467; 77 Ark. 1. The master is not required to use all means in his power to accomplish this end. 59 Ark. 98.

FRAUENTHAL, J. John H. Downey was a switchman in the employ of the St. Louis, Iron Mountain & Southern Railway Company, the defendant below, and on the night of November 18, 1907, he was killed in the yards of the defendant at Baring Cross, Arkansas, while engaged in the performance of the duties as such switchman. The administrator of his estate instituted this suit for the benefit of the next of kin of said decedent, who was his mother, Mrs. Katherine Downey; and in the complaint alleged that the death was due to negligence of the defendant. The defendant denied each allegation of the complaint, and claimed that the injury was due to deceased's contributory negligence, and that same was a part of the assumed risk of his employment.

The testimony on the part of the plaintiff tended to prove the following facts: A crew of four switchmen were engaged in pulling out of the track called "Rip 4" eighteen cars, and deceased was one of this crew. The engine was pulling the cars towards the switch where a number of tracks converged. The deceased was at the time on a box car which was the third car from the end, and a switchman named Sangster was on the rear car, and a switchman named Barnett was on the car next to the rear car of the train. Between the track called "Rip 4" and the track next to it, called "Rip 5," there was a trestle about seven or eight feet high, which was used in this yard by carpenters in the performance of their duties in repairing cars. This trestle was located in close proximity to this track 4. The deceased was on the top rounds of a ladder attached to the side of the box car, in readiness to go down this ladder to leave the car in performing his duties. On account of the proximity of the trestle to this track the deceased was struck by the trestle in the back as the train of cars was thus pulling out the track, and was knocked down and run over by the cars. The trestle and deceased were dragged along by the train of cars for a distance of 70 to 75 feet before the train was stopped. The plaintiff introduced as

witnesses in his behalf the switchmen, Sangster and Barnett, who testified in substance to the above as the manner in which Downey was injured.

The testimony on behalf of the defendant tended to prove that the said two switchmen and the deceased were drinking on this night of the injury, and that the two switchmen showed signs of drunkenness immediately after the occurrence. A number of witnesses testified to the circumstances and the condition of the ground next this track 4, indicating that no trestle was dragged along near this track, and that the deceased fell off the car at the place where he was found; that the only trestle at this portion of the yard was between tracks numbers 5 and 6, and that there was no trestle next or near the track number 4 upon which the deceased was working at the time of the injury; and the defendant contended that the deceased fell from the car without any fault or negligence on its part.

The jury returned a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff prosecutes this appeal.

Upon the trial of the cause the defendant introduced as a witness one W. T. Edwards, who testified in answer to questions propounded by defendant's attorney that he had had a conversation some time after the injury with the above witness of plaintiff, Sangster, and that said Sangster had stated that he did not know whether the deceased, Downey, fell off or was knocked off the car. The witness Sangster had not been asked whether he had had the above conversation with said Edwards, and no foundation was laid for the introduction of said testimony. The plaintiff duly objected to the introduction of this testimony, and duly saved his exceptions thereto. The purpose of the introduction of this testimony was to impeach the witness Sangster, by these alleged contradictory statements. Section 3139 of Kirby's Digest provides: "Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning the same with the circumstances of time and persons present, as correctly as the examining party can present them; and, if it is in writing, it must be shown to the witness, and he be allowed to explain it."

The direct tendency of the testimony of alleged contradictory statements made by the witness is to impeach his veracity; and it is but just to the witness and fair to the side introducing him that his attention be first called to these alleged statements, and the witness given an opportunity to recollect the facts and to explain the nature of what it is claimed he said and the meaning and design of the statements it is alleged he made. It may be that a word may have been imperfectly heard by the contradicting witness, or a word omitted or forgotten which might change the entire meaning of the alleged statement, or that an explanation might be made by him of the circumstances which would remove all seeming inconsistency in the statements; so that the witness would not be discredited by the jury. This rule of what is called laying a foundation by inquiring of the witness concerning the different statements alleged to have been made by him before introducing testimony as to such alleged contradictory statements is recognized in all but a few jurisdictions, and is enforced as an inflexible one. *Drennen* v. *Lindsey,* 15 Ark. 359; *Collins* v. *Mack,* 31 Ark. 694; *Griffith* v. *State,* 37 Ark. 324; *Carpenter* v. *State,* 62 Ark. 286; *Ayers* v. *Watson,* 132 U. S. 394; 2 Wigmore on Evidence, § 1028; 1 Greenleaf on Evidence (16th Ed.), § 462.

It was therefore erroneous to permit the introduction of this testimony; and under the circumstances of this case the error was prejudicial. The manner in which the deceased received the injury was the material issue in the case. The plaintiff contended that he was knocked off the ladder of the car by this trestle. The defendant claimed that he fell off the car. The witness Sangster was an eye witness, as he claimed, of the occurrence, and he was therefore a very important witness upon whose credibility rested the strength of plaintiff's cause. If, therefore, there was error in permitting the introduction of this testimony which tended to impeach his veracity, that error was prejudicial to the cause of the plaintiff. The plaintiff objected to the introduction of this testimony; the only ground of his objection was this failure to lay the foundation for the impeaching testimony, and therefore the objection was duly made and saved.

Upon the trial of the cause the defendant introduced in evidence a written application for employment signed by de-

ceased, which contained certain questions and answers, among which were the following:

"Name of mother (if dead, so state). Dead."

"Name and address of all persons to whose support I am contributing are as follows: None."

This was permitted to be introduced in evidence over the objection of plaintiff duly saved.

The only theory upon which this written statement could have been introduced was that it was an admission made by the deceased. But an admission made by the deceased could not affect the rights of the plaintiff in this case. Where an administrator claims property involved in a suit in the right of the decedent, the admissions of such decedent as to the title of such property are admissible because there is a mutual and successive relationship to the same rights of the property which constitutes a privity. But there can be no such privity in the relationship between the plaintiff and the deceased to the cause of action in this case. Upon the death of a person by a wrongful act of the railroad company two causes of action arise; one in favor of the administrator for the benefit of the estate; the other for the benefit of the next of kin; and the actions are prosecuted in different rights and damages are given upon different principles to compensate different injuries. The action in favor of the next of kin is based on the theory that such next of kin has a pecuniary interest in the life of the person killed; and the amount of the recovery is limited to the value of that interest; and the administrator is but the trustee of such next of kin. *Davis* v. *Railway,* 53 Ark. 117; *St. Louis, I. M. & S. Ry. Co.* v. *Sweet,* 63 Ark. 563; 4 Sutherland on Damages, § 1264.

The action for the benefit of the next of kin is therefore an action for an injury to the rights of the next of kin, and there could be no privity existing in those substantive rights of the next of kin between the deceased and the next of kin. So that the admissions of the deceased would not be admissible in an action by the next of kin in such case. 1 Greenleaf on Evidence (16th Ed.), § 189; 2 Wigmore on Evidence, § 1081.

It was therefore error to permit the introduction of the written application signed by deceased. And the introduction of that statement was prejudicial to the rights of the plaintiff. The sole

ground upon which the plaintiff could recover in this case was the fact that the next of kin had suffered a pecuniary loss. But that pecuniary loss was based solely on the contributions which the deceased would make to the next of kin; and therefore founded on the contributions which he was making before his death. This statement tended to prove that he was making no contributions whatever to the next of kin for whose benefit solely this action was brought; and on that account it tended to prove that the plaintiff was not entitled to recover anything in this action, even if the death of decedent had been caused by the wrongful or negligent act of the defendant.

We are also of the opinion that the court committed an error in permitting the introduction in evidence of certain interrogatories which had been prepared by the attorney of the plaintiff to be propounded to Mrs. Braker. These interrogatories were turned over to the attorney of the defendant for the purpose of permitting him to append thereto cross interrogatories. Subsequently, the taking of the deposition of this witness upon these interrogatories was abandoned. The interrogatories were therefore never used in the case or filed. There is no testimony that they were inspired by the plaintiff. They were solely prepared by the attorney who, if he did not ask for their return, entirely abandoned them, and thus withdrew them. They could not be admissible on the theory that they were depositions taken by consent or that they were admissions of an attorney in the course of the progress of the cause; and there is no theory, in our opinion, upon which they were competent as testimony in the case. *Holland* v. *Rogers,* 33 Ark. 251; *Railway Company* v. *Clark,* 58 Ark. 493; *Ong Chair Co.* v. *Cook,* 85 Ark. 300; 1 Greenleaf on Evidence (16th Ed.), § 186.

On account of the errors committed by the lower court in admitting the introduction of the above testimony, the judgment is reversed, and this cause is remanded for a new trial.

POTTS v. STATE.

Opinion delivered November 1, 1909.

CRIMINAL LAW—APPEALS FROM JUSTICES OF THE PEACE—PROCEDURE.—Kirby's Digest, § 4666, requiring persons appealing from a justice of the peace to the circuit court to file an affidavit for appeal, does not apply to criminal cases.

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

George W. Dodd, for appellant.

In the absence of constitutional limitation, the Legislature may prescribe the mode of taking appeals from a lower court to an appellate court for review. 2 Cyc. 507. The Constitution provides that appeals may be taken from final judgment of the justices of the peace to the circuit courts under such regulations as are now, or may be, provided by law. Const. 1874, art. 7, sec. 42. An appeal is a matter of right. 44 Ark. 482. The only requisites for an appeal in a criminal case are that the appeal shall be taken and the transcript with the original papers filed in the office of the circuit court within sixty days. 41 Ark. 194. The statute providing that an affidavit for appeal must be filed with the justice applies only to civil cases.

Hal L. Norwood, Attorney General, *C. A. Cunningham,* Assistant, and *A. A. McDonald,* Prosecuting Attorney, for appellee.

Kirby's Digest, § 4666, providing that an affidavit must be made in order to secure an appeal from a justice of the peace, applies to both civil and criminal cases. 19 Ark. 647.

FRAUENTHAL, J. The appellant was convicted in the court of a justice of the peace of Sebastian County of a misdemeanor; and from that judgment he appealed to the circuit court. The judgment of conviction was entered on June 16, 1909, and on June 24, 1909, he filed with the justice of the peace an appeal bond and made an application for appeal, and thereupon the justice of the peace made the following order: "Bond approved and appeal allowed."

The appellant did not make or file with the justice of the peace an affidavit for appeal; but the transcript of the orders on his docket and the original papers in the case were filed in the circuit court within the time prescribed by law.

Upon motion of the State the circuit court dismissed the appeal because no affidavit for appeal had been made or filed with the justice of the peace. From the judgment of the circuit court thus dismissing his appeal the appellant now presents this appeal to this court.

It is provided by article 7, section 42, of the Constitution of 1874 that: "Appeals may be taken from the final judgments of the justices of the peace to the circuit court under such regulations as are now or may be provided by law."

Unless the Legislature has provided that the filing of an affidavit is a necessary condition or prerequisite to obtaining an appeal from a judgment of conviction in a criminal case in a court of a justice of the peace, such affidavit would not be essential for the circuit court to acquire jurisdiction of such case upon appeal.

By the act of the Legislature which became a law April 11, 1905 (Acts of 1905, page 375), it is provided:

"Any person convicted before any justice court or police, or city court of any crime, misdemeanor, breach of the penal laws of this State, or of violation of any city or town ordinance, may appeal therefrom to the circuit court of the county in which said conviction occurred at any time within sixty days thereafter."

The sections of that act following prescribe the duties of the justice of the peace in regard to sending up transcripts, and also prescribe the time the appeal shall stand for trial in the circuit court and the procedure. But nowhere in the act is it prescribed that an affidavit for appeal shall be made or filed, and in no other provision of the statutes do we find that it is prescribed that an affidavit for appeal must be made or filed in order to obtain an appeal from a judgment of conviction on a trial of a criminal case before a justice of the peace.

It is urged that section 4666 of Kirby's Digest provides that the appellant must make and file with the justice an affidavit as a condition and prerequisite to obtain an appeal to the circuit court from a judgment of a justice of the peace, and that this provision of the statute applies also to judgments of justices of the peace in criminal cases. This provision of the statute and this section of Kirby's Digest is taken from the act of the General Assembly of Arkansas approved April 29, 1873 (Acts of 1873, p. 430).

That is an act entitled "An act to define the jurisdiction and regulate the course of proceedings in the courts of the justices of the peace in civil actions;" and by section 125 of the act it is specifically stated that the provisions of the act apply to the proceedings in civil actions before justices of the peace. Nowhere does the act prescribe that any of its provisions shall apply to proceedings or trials in criminal actions before the courts of the justices of the peace. It follows that the requirement in section 4666 of Kirby's Digest of an affidavit in order to obtain an appeal only applies to civil actions, and does not apply to judgments of conviction entered upon criminal proceedings. Furthermore in the Code of Criminal Procedure there is a subdivision or chapter relating to and regulating the manner of taking appeals from the judgment of justices of the peace in criminal cases; but it is not provided therein that an affidavit for appeal is necessary to obtain such appeal.

The Legislature has not prescribed that it is a requisite or condition of obtaining an appeal from a judgment of conviction of a justice of the peace in a criminal proceeding to make or file an affidavit for appeal. The circuit court therefore erred in dismissing the appeal in this case for the want of an affidavit for appeal.

The judgment of the circuit court is reversed, and this cause is remanded with directions to overrule the motion to dismiss the appeal and proceed with the trial of appellant.

CARUTHERS v. GREER.

Opinion delivered November 1, 1909.

1. TAXATION—INVALID TAX SALE—REIMBURSEMENT OF TAXES.—Under the act of July 23, 1868, § 72, providing, in effect, that if a tax sale proves to be invalid the purchaser is entitled to receive the taxes paid from the proprietor of the land, and later acts to same effect, those who claim under a tax sale adjudged to be invalid are entitled to recover the taxes for which the land was sold and those subsequently paid down to the time the tax sale was adjudged to be void. (Page 169.)
2. SAME—HOW INVALIDITY OF TAX SALE DETERMINED.—Under the act of July 23, 1868, § 72, and later acts, authorizing a tax purchaser to re-

cover taxes paid by him if the tax sale proves to be invalid, the adjudication as to the invalidity of the tax sale may be made in an action brought by the purchaser to recover the amount of taxes paid on the land. (Page 171.)

3. PLEADING—AMENDMENT TO CONFORM TO ORAL ADMISSION.—Where plaintiff sought to recover taxes paid by him under a tax title, but failed to allege in his complaint that the sale was invalid, his oral admission to that effect at the trial will be treated, on appeal, as equivalent to an allegation, and the complaint will be considered as amended accordingly. (Page 171.)

4. APPEAL—HARMLESS ERROR.—In a suit to recover taxes paid on land by a purchaser at tax sale the defendant cannot complain, on appeal, because the plaintiff's complaint failed to allege expressly that the tax sale was void, since, if it was not void, the plaintiff should have recovered the land itself. (Page 172.)

5. LIMITATION OF ACTIONS—ENFORCEMENT OF LIEN FOR TAXES.—Under the statute authorizing the purchaser of land at a tax sale to sue for recovery of the taxes paid if the sale proves invalid (Kirby's Digest, § 7112), the statute of limitation does not begin to run against the right to recover such taxes until the adjudication of the invalidity of the tax sale. (Page 172.)

Appeal from White Chancery Court; *John E. Martineau*, Chancellor; affirmed.

John M. Rose and *Murphy, Coleman & Lewis*, for appellants.

1. In the absence of an express statute affording a remedy, a mere volunteer who pays the taxes on the lands of another can not recover the amount so paid. 17 Wall. (U. S.) 153, 167; 49 Ark. 192; 76 Fed. 673; 99 Fed. 825; 30 Ark. 600; 43 Ark. 521. Appellee does not come within the provisions of § § 2754, 2759, Kirby's Dig., nor even within the provisions of § 7112, *Id.*

2. Appellee cannot recover because there is neither allegation nor proof that the tax sale was invalid. 49 Ark. 192; 37 Ark. 100; 43 Ark. 397; 51 Ark. 397; 30 Ark. 600. He was a mere volunteer. There has been no judicial determination of the invalidity of the tax sale. His claim for taxes paid subsequent to his deed is barred, the last payment having been made more than seven years prior to the commencement of this suit. His remedy, if he had any right to recover, would be an action in the nature of *assumpsit* for money had and received. 47 Ark. 558.

S. Brundidge, Jr., and *H. Neelly*, for appellee.

Appellee and those under whom he claims have paid taxes on the land for more than twenty years under color of title, in good faith believing that they were the owners of the same. Having thus discharged the duty imposed by the State, appellee is subrogated to its lien for the taxes paid. 32 Ark. 539; 41 Ark. 152; 93 U. S. 442; 42 Ark. 92, 77; 55 Ark. 37; 50 Ark. 484; *Id.* 361; 34 Ark. 582; 84 Ark. 593.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of White County against appellants to enforce a lien claimed on a certain tract of land for the amount of taxes paid thereon. He alleges in his complaint that the land in question was sold for taxes of the year 1868 duly assessed against it; that one John A. Cole purchased at the sale, and received a deed therefor; that appellee holds under mesne conveyance from Cole, and that he and those under whom he claims have paid the taxes on the land regularly for each year, with the exception of a few years when he failed to pay by inadvertence, since the said date of sale. The complaint contains the further statement that "the tax sale, under which other lands were sold and bought by Jno. A. Cole at the same time of the purchase of these, has been held by the Supreme Court of Arkansas to be irregular and void, and the plaintiff does not claim title to the lands herein mentioned by reason of said irregularity." The prayer of the complaint is that a lien be declared on the land in favor of the plaintiff for the amount of taxes, aggregating $165, paid as aforesaid by him and those under whom he claims.

The answer of appellants contains a denial of each of the allegations of the complaint except that concerning the adjudication by the Supreme Court of the invalidity of the other tax sales to Cole. Appellants also pleaded the statutes of limitations.

During the progress of the trial, appellee orally admitted in open court "that the tax sale pursuant to which the tax deed was made was void, and that the plaintiff claims no title to the land, and only seeks to recover taxes paid on said land, and to have same declared a lien thereon." This admission was recited in the final decree. Proof was adduced as to the tax sale to Cole, the mesne conveyances from Cole to appellee, and the various payments of taxes made by appellee and those under whom he claims; but no proof was adduced as to the invalidity of the tax sale, fur-

ther than the admission of the appellee as aforesaid made in open court. The court decreed the relief prayed for in the complaint, and an appeal was taken to this court.

Section 72 of the General Revenue Act, approved July 23, 1868, under which the tax sale in question was made, reads as follows: "Upon the sale of any land or town lot for delinquent taxes, the lien which the State has thereon for taxes then due is transferred to the purchaser at such sale; and if such sale proves to be invalid on account of any irregularity in the proceedings of any officer having any duty to perform in relation thereto, the purchaser at such sale is entitled to receive from the proprietor of such land or lot the amount of taxes, penalty and interest legally due thereon, and the amount of taxes paid thereon by the purchaser subsequent to such sale; and such land or lot is bound for the payment thereof." Similar provisions were embraced in the revenue acts of 1871 and 1883 (Kirby's Digest, § 7112), except that the act of 1883 omitted the provision for the recovery of interest and penalty from the specified amounts to be recovered by the purchaser from the proprietor.

In *St. Louis, I. M. & S. Ry. Co.* v. *Alexander,* 49 Ark. 190, the court held that under the act of 1871 the purchaser at a tax sale adjudged to be invalid could, in an action instituted for that purpose, recover a personal judgment against the owner of the land at the time of the sale for the amount of the taxes, penalty, etc., for which the land was sold, and for taxes subsequently paid, and that he was also entitled to a decree against subsequent purchasers condemning the land for the enforcement of the lien. The court said that it was unnecessary to determine whether or not the act of 1883 was retroactive in its operation, inasmuch as the plaintiff's right to recover all that was adjudged to him had vested before the act of 1883 was passed.

It is unimportant to determine that question in the present case, for the reason that if the appellee is entitled, under the act of 1868, which was in force at the time of the sale, to recover the amount of taxes paid prior to the passage of the later acts of 1871 and 1883, he is also entitled to recover under the later statutes the amount of taxes paid since the dates of their respective enactments. The three statutes are similar except as to the recovery of interest, penalty and costs.

It is insisted, however, that these statutes apply only to purchasers at tax sales, and not to vendees of such purchasers. We do not think that the operation of the statutes was intended to be so circumscribed, for that interpretation would, to a considerable extent, defeat their wholesome effect. The word "purchaser" in the statute was used in a broad sense, meaning any one claiming under a purchase at a tax sale. In *Hunt* v. *Curry*, 37 Ark. 100, Chief Justice ENGLISH, speaking of one of these statutes, said that by the word "proprietor" as used therein was meant the defaulting owner or person under obligation to pay the taxes. "It would be a narrow view of the statute, and not warranted by its language, so to construe it as to confine the lien to the time the land or lot remains in the hands of him who was its proprietor at the time of the tax sale, and to hold that the lien may be defeated by a change of owners." He also declared that "the policy of the State is to favor those who pay taxes upon lands for defaulting owners."

We conclude that under a fair construction of the statute those who claim under a purchaser at a tax sale are entitled to recover the taxes assessed against the land for which it was sold, and the taxes subsequently paid thereon up to the time of adjudication of the invalidity of the tax sale. The purchaser's right of action passes under his deed to his vendee and to subsequent vendees.

It is also contended that there was neither allegation nor proof that the tax sale in question was invalid, and that for this reason the appellee failed to make out his claim under the statute for reimbursement. In *St. Louis, I. M. & S. Railway Co.* v. *Alexander, supra,* the court held in effect that an adjudication of the invalidity of a tax sale is a condition precedent to the right to recover the amount of taxes paid on the land. It is there said: "Our statute does not undertake to confer upon the tax-purchaser any remedy for reimbursement until the sale at which he has purchased shall 'prove invalid.' The only method known to the law of proving the invalidity of a sale is by a judicial investigation, and it follows that his cause of action does not accrue until a court of competent jurisdiction has adjudged that the title is bad."

In that case there had been a prior adjudication as to the invalidity of the tax sale, and the court, when using the above

quoted language, was discussing the question of the statute of limitations, which had been pleaded. The adjudication as to the invalidity of a tax sale may be made in an action brought by the purchaser to recover the amount of taxes paid on the land, for two actions between the same parties concerning the same subject-matter are not required where a single one in which all of the rights of the parties may be adjudicated will suffice.

Now, we think that the decree in this case was in effect an adjudication of the invalidity of the tax sale. Appellee's oral admission was of no force as an admission, but was equivalent to an allegation that the sale was invalid; and the chancellor was warranted in so considering it, and in treating the complaint as amended so as to embrace this allegation. Appellants did not attempt to enter a denial of this allegation, but held to their contention that the appellee, not being the purchaser of the land at the tax sale, was a mere volunteer, and not entitled to reimbursement in any event.

Moreover, we are of the opinion that appellants cannot complain, even if the court had adjudged the invalidity of the sale without either allegation or proof. The appellee neither sought nor obtained a personal decree against them for a recovery of the taxes paid; but he asked only for an enforcement of his lien on the land, which the court granted. Now, if the tax sale was invalid, appellee was the owner of the land, and was entitled to more relief than he obtained; that is to say, he should have recovered the land itself, instead of merely enforcing a lien on it for the amount of taxes paid. So the appellants could not posbly be injured by an adjudication, without sufficient proof, that the tax sale was invalid.

St. Louis, I. M. & S. Ry. Co. v. *Alexander, supra,* is decisive of the contention of appellants as to the statute of limitations. The statute, it is held in that case, begins to run from the date of adjudication of the invalidity of the tax sale. As there was no such adjudication prior to the institution of the present case, the statute never began to run against appellee's claim.

Decree affirmed.

McDONALD v. RANKIN.

Opinion delivered June 28, 1909.

1. BETTERMENT STATUTE—RECOVERY OF IMPROVEMENTS.—One who purchased lands at a judicial sale, based upon a decree from which an appeal was subsequently taken, resulting in the reversal and annulment of such decree, may be entitled, under the betterment act (Kirby's Digest, § § 2754-8), to recover the value of improvements placed upon the land before the appeal was taken, if he purchased in good faith and held possession without actual notice that his title was assailed by one claiming a better title. (Page 183.)

2. SAME—HOW RENTAL VALUE OF LAND ASCERTAINED.—The measure of the rents and profits which are recoverable under the betterment act is the fair net rental value of the lands in their improved condition during the period named in the act, towit, three years before commencement of suit, in determining which value the amounts expended for necessary repairs and for such necessary expenses as under the custom of the country have been paid for management and collection of the rents should be deducted from the gross rental value. (Page 186.)

3. SAME—LIABILITY OF HEIRS OF PURCHASER FOR RENTS.—Where the heirs of a purchaser of land at a void judicial sale became entitled to recover the value of improvements placed upon the land by their ancestor, they will be chargeable with the rents upon the land which were received by such ancestor, to the extent of the fund received by them for such improvements. (Page 188.)

4. IMPROVEMENTS—WHEN SET OFF AGAINST PURCHASE MONEY.—While the betterment act limits the recovery of rents from a *bona fide* purchaser to three years from the commencement of the suit to recover the land, all rents received by such purchaser, without restriction, may, in a suit against him in equity, be set off against the claim of such purchaser to reimbursement of the purchase money received by the plaintiff. (Page 188.)

5. JUDICIAL SALE—ANNULMENT—RECOVERY OF PURCHASE MONEY.—Where a judicial sale of a minor's property is set aside, the purchaser is entitled to reimbursement of so much of the purchase money as was received by such minor. (Page 188.)

6. VOID JUDICIAL SALE—RECOVERY OF INSURANCE MONEY.—Where the purchaser of the land at a judicial sale which was subsequently held void insured improvements thereon and collected the insurance money after the property was destroyed by fire, she will not be held to account therefor to the owner of the land, as the insurance contract was a personal one. (Page 189.)

7. DAMAGES—RECOVERY OF RENTS—INTEREST.—Where the plaintiff in a suit to recover land is held entitled to recover rents, he is, in addition, entitled to recover interest thereon from the time the rents were collected. (Page 189.)

8. TAXES—REIMBURSEMENT—INTEREST.—Upon a judicial sale being held void, the purchaser is entitled to recover the taxes paid by him, with interest from the time the taxes were paid. (Page 189.)

9. VOID JUDICIAL SALE—REIMBURSEMENT FOR IMPROVEMENTS.—Where a purchaser of land at a void judicial sale is entitled to reimbursement for improvements placed by him thereon, the value of the improvements are determined as of the time of the recovery. (Page 189.)

10. SAME—HOW VALUE OF IMPROVEMENTS DETERMINED.—In determining the value of improvements on land, the difference in the value of the land without the improvements and the value of the land with the improvements in their present condition is the amount to be allowed, such valuation not to exceed the cost of making or replacing the improvements at the time of the recovery, and in the condition in which they are at that time. (Page 190.)

11. SAME—POSSESSION—PAYMENT OF VALUE OF IMPROVEMENTS.—Under the betterment statute (Kirby's Digest, § 2755) the owner of land in the possession of another claiming it in good faith under color of title is not entitled to recover possession thereof until an accounting of rents and profits and of the value of the improvements and taxes paid has been had and a final determination made. (Page 191.)

12. APPEAL AND ERROR—FINAL ORDER.—An order, in a suit for the recovery of land, directing an accounting of rents and profits, of the value of improvements made by the occupant, and of the taxes paid, and that the plaintiff shall not recover until an accounting is had and a final determination made, is not final or appealable. (Page 191.)

13. SAME—PRACTICE ON REVERSAL.—Where a decree of a lower court involving the title to land is reversed, the cause will be remanded with directions to enter a decree in accordance with this court's opinion. (Page 195.)

Appeal from Woodruff Chancery Court, Northern District; *Josephus C. Marshall,* Special Chancellor.; reversed.

STATEMENT BY THE COURT.

This cause has been before this court several times, and the various questions involved in and decided upon former appeals will be found in the following opinions: *Rankin* v. *Schofield,* 70 Ark. 83; *Rankin* v. *Schofield,* 71 Ark. 168; *Rankin* v. *Schofield,* 81 Ark. 440; *Rankin* v. *Fletcher,* 84 Ark. 156; *Schofield* v. *Rankin,* 86 Ark. 86. The questions which are presented upon the present appeal to this court involve the determination and adjustment of the rights of the parties to the improvements and taxes, and the rents and profits of the lands in litigation.

These lands belonged to J. N. S. Gibson,, who died in 1884, seized and possessed thereof. The original suit herein was instituted in the Woodruff Chancery Court on the 17th day of August, 1886, by the collateral heirs of J. N. S. Gibson, as plaintiffs in that suit, against the administrator of his estate, Bettie Harwell, who was at one time his wife, and Sallie Spott Gibson (now Rankin), the appellee in this appeal, who was his only child, as defendants in that case, for the purpose of partitioning said lands. At the January term, 1889, of that court, a consent decree was rendered directing the sale of the property in controversy. For that purpose a commissioner was appointed, who made a sale of the property in the latter part of the year 1889. At that sale one L. B. McDonald, who was not a party, but a stranger, to the suit, became the purchaser of the property at the bid and price of $14,050. The commissioner made the report of said sale to said chancery court, and at its January term, 1890, that court duly approved and confirmed the sale and directed the commissioner to execute to the said purchaser a deed for said land. The commissioner executed said deed to said McDonald, which was duly approved by and acknowledged in said court in the manner prescribed by law.

L. B. McDonald went into possession of the lands under said deed in 1890, and made permanent improvements upon the lands. In 1896 he conveyed a portion of said lands to his daughter, Antoinette Bond, who is one of the appellants in this appeal; and in 1899 he conveyed the remaining portion of said lands to Cora and Jesse McDonald, who are his daughter-in-law and grandson, and who are the other appellants in this appeal.

In 1889 at the time that said consent decree was entered, Sallie Spott Rankin was a minor of tender years, and she came of age in June, 1899. On February 19, 1900, she prayed an appeal to this court from said consent decree, under which the sale of said lands was made to said McDonald; and on November 15, 1902, that decree was reversed by this court (*Rankin* v. *Schofield*, 71 Ark. 168). On December 20, 1902, Sallie Spott Rankin filed a supplemental complaint in said cause against the said appellants, seeking therein to recover from them the possession of said lands and the rents and profits thereof, and process on said supplemental complaint was served on said appellants on

January 8, 1903. An answer was filed by them, in which they claimed title to the lands under said commissioner's deed executed to said McDonald and the conveyances from McDonald to them. A decree was rendered by the chancery court in their favor, and that decree was reversed by this court. *Rankin* v. *Schofield,* 81 Ark. 440. It was there found that Sallie Spott Rankin was the only child and sole heir of said J. N. S. Gibson, and the owner of said lands; and it was held that the said consent decree of the Woodruff Chancery Court ordering the sale of said lands was void, because it was entered solely by the consent of the parties, and without any consideration or judicial determination, and, said Sallie Spott Rankin being then an infant, her guardian had no authority to consent to such a decree; and also because the consent decree was not authorized by the issues raised in the pleadings. In that opinion this court expressly stated that it did not "undertake to determine the rights of the parties to a return of proceeds of sale of lands received by the appellant (Sallie Spott Rankin), rents of lands and improvements thereon, or other incidents consequent on the recovery of the same."

Upon the cause being remanded to said chancery court, that court entered a decree setting aside the commissioner's conveyance, which had been executed in 1890, to said L. B. McDonald, and decreeing in favor of said Sallie Spott Rankin a recovery of said lands. It appointed a special master to take an account of the value of the improvements and amount of taxes paid on said lands by the appellants and those under whom they claimed; and also an account of the rents and profits of said lands and of the repairs made thereon. It also directed the taking of an account of the purchase money which was paid by said McDonald and received by the parties to the original proceedings. It provided that said accounts be taken and stated separately as to the lands conveyed to and claimed by said Antoinette Bond, and as to the lands conveyed to and claimed by said Cora and Jesse McDonald. That court further decreed:

"It is further ordered that no writ of assistance or other process for the possession of said lands shall issue in favor of plaintiffs in said supplemental proceedings until the value of the aforesaid improvements and taxes shall have been ascertained

and any balance, if any there be, owing to said defendants on account of said improvements, after setting the value and amount of such improvements off against any amount that may be coming to said plaintiffs on account of rents and profits, less the cost of repairs, shall have been paid.

"In taking the account of rents, the master will ascertain the amount commencing with the first year, to-wit: 1890, and ascertain what rents were received by L. B. McDonald for that year, or what he might by the exercise of ordinary diligence, that is, the diligence which a man of reasonable capacity would exercise in his own business, and will charge him with the rents thus received or which he might have received for that year.

"He will next ascertain the cost of all necessary repairs upon said lands for that year, and deduct the amount thereof from the amount of rents in like manner for each year covered by the period aforesaid. In taking the account for improvements, he will ascertain and state specifically each permanent improvement which he finds to have been made and the nature and character thereof, and value such improvements added to said premises. He will also find as separate item what amount such improvement may have added to the rental value of said premises. The master will proceed as early as practicable to take and state such account.

"Whereupon said plaintiffs renewed their motion filed herein, to-wit: On the 3d day of January, 1903, for writ of restitution, which motion is by the court overruled at this time on the ground that the court is of the opinion that the defendants herein are entitled to an accounting for the value of permanent improvements placed upon said premises and taxes, and that no writ of restitution should be issued until the master aforesaid shall make his report, and the same shall have been approved by the court."

A great deal of evidence was taken by the master relative to these matters submited to him, and he made a detailed report of his findings relative thereto. The findings of the master as to the values and amounts of the items submitted to him are well sustained by the evidence; and his work has been done so well and thoroughly in this respect that neither party has made any objection thereto in that regard. Their objections are based solely upon the rights of the respective parties to recover the

respective items. The special chancellor approved these findings, but altered the report of the master by allowing certain items and disallowing others. Upon a final hearing, the special chancellor entered a decree in favor of Antoinette Bond in the sum of $2,095.50, the same being a net balance which he found to be due upon improvements made and taxes paid upon that portion of the lands conveyed to her; and in favor of Sallie Spott Rankin and against Cora and Jesse McDonald in the sum of $4,662.81, the same being a net balance found by him to be due on the mesne profits of that portion of the lands which were conveyed to Cora and Jesse McDonald.

In the above amounts there were not included any rents for the year 1908 on any of said lands. From this decree all the parties have appealed to this court. Sallie Spott Rankin also prayed a separate appeal from that portion of the decree refusing to give to her the immediate possession of all the lands. The two appeals have been consolidated in this court, and the cause is now docketed and will be referred to with Antoinette Bond and Cora and Jesse McDonald as appellants and Sallie Spott Rankin as appellee.

Moore, Smith & Moore, for appellants McDonald and Bond.

1. Cora and Jesse are only liable for rents from 1903 to 1907. For years 1890 to 1892 L. B. McDonald's estate is liable, and W. L. McDonald's estate is liable for the rents from 1893 to 1902, all inclusive. Jesse McDonald, a minor, is not liable for rents at all. The land was in possession of her mother, not as guardian but in her own right. Cora is only liable for rents for 1903 and afterwards. Prior to 1903 her husband received the rents. Antoinette Bond is only liable for rents from 1906.

2. The rents from 1890 to 1899, inclusive, should not have been set off against the purchase money. Appellee is chargeable with the half of the purchase money received that was received by her guardian and the attorneys employed in the litigation, the estate having received the benefit of that entire part of the purchase money. 29 Ark. 47; 50 Ark. 447; 86 *Id.* 368. Appellee's claim for rents prior to 1900 was barred by limitation, which applies to set-offs. Kirby's Dig. § 5092.

3. The allowance for improvements under the rule in 71 Ark. 608 is less than shown by the evidence.

4. Appellants are only chargeable with rents on the improvements on the lands at the time L. B. McDonald purchased in the condition such improvements were in *at that time.* 12 Ark. 218, 292-3; 33 *Id.* 490; 42 *Id.* 456; 46 *Id.* 50; 47 *Id.* 528; 445-457; 50 *Id.* 447-455; 61 *Id.* 363, 112 Fed. 4; 50 C. C. A. 110; 3 Dana 573; 4 *Id.* 565; 44 Tex. 572; 4 Blackf. (Ind.) 424; 41 Pac. 1054; 16 Atl. 534; 69 Ga. 804; Sedgw. & Wait, Trial of Title to Land, par. 678; 10 Am. & E. Law, 546; 48 W. Va. 114.

5. A large allowance should have been made for cost of overseeing and superintendence. Mrs. Bond should have credit for expense of overseeing for years 1900 and 1901. Prior to 1900 in estimating the rents for the purpose of setting them off against the purchase money, allowance should have been made during the entire period. *Bona fide* occupants under color of title are entitled to fair and reasonable compensation for cost of supervision, care and management. 5 S. E. 502.

Rose, Hemingway, Cantrell & Loughborough, Gustave Jones, P. R. Andrews, H. M. Woods and *H. F. Roleson,* for Rankin.

Appellants are not entitled to recover or offset for improvements, either under the "Betterment Act," or otherwise.

1. The general rule is that no one is bound to pay for improvements placed on land without consent. 4 Pet. 1; 44 Tex. 570; 6 Lea 369; 30 Ark. 412.

2. No statute of limitations applies to this case. The decree was void, and left the suit still pending, and the statute never begins to run in favor of a purchaser *pendente lite* until the suit ends. 22 Tex. Civ. App. 469; Freeman on Judg. § § 136, 205; 19 Ark. 574; 12 *Id.* 583; 29 *Id.* 229; 50 *Id.* 551; 57 *Id.* 229; 3 Cyc. 466; 29 Ark. 90, 336; 79 *Id.* 479; 156 Mo. 513; 72 Miss. 966; 75 Kans. 707; 139 U. S. 216; 21 Enc. Law, p. 619.

3. Conceding that the Betterment Act can, under the Constitution, be applied to lands of infants, it should be done only with extreme caution.

4. Appellants have no title on which they can recover for improvements. They hold under a purchaser *pendente lite,* and paid no new consideration. 15 Ark. 692; 105 Ala. 471; 16 Wall. 361; 31 Minn. 495; 2 Dana 204; 132 Mo. 650; 135 N. Y. 40; 44 Conn. 455; 35 Neb. 361; 3 Ill. 499; 28 Ga. 170-3.

5. McDonald had notice that he was making improvements at his own risk. 70 Ark. 417.

6. A party cannot claim under the Betterment Act for improvements made pending the suit. 2 Woods, 349; 4 Fed. Cas. 1158; 71 Ark. 226; 45 S. E. 285; 50 S. E. 913; 10 Gray, 44; 32 N. Y. 95; 35 S. W. 183.

7. A purchaser *pendente lite* occupies the same position as an original party to the record, and cannot claim for improvemade pending the suit. 25 Cyc. p. 1484 C; 1 Freem. Judg. § 205; 29 Ark. 90; 79 *Id.* 479; 57 S. W. 281; 72 Miss. 966; 90 Pac. 290; 16 A. & E. Enc. Law, 88; 92 S. W. 820; 91 *Id.* 472; 66 N. E. 503; 65 S. W. 662; 125 N. C. 76. It does not matter whether he had notice or not. 91 Pac. 573; 92 S. W. 433; 70 Ark. 415; 57 Ark. 107; 31 *Id.* 493; 45 *Id.* 419; 53 *Id.* 571; 48 *Id.* 189; 57 *Id.* 573, 107; 117 Mass. 393. The doctrine of *lis pendens* does not depend on notice but upon public policy. 21 A. & E. Enc. L. 598; 106 U. S. 696; 93 *Id.* 168; 15 Mo. App. 551; 114 N. C. 151; 57 Ark. 107-8; 12 *Id.* 565, and cases *supra;* 60 Tex. 561.

8. McDonald was bound to inquire as to the validity of the title before buying. 1 Wall. 634; 33 Mich. 464; 50 Ark. 322; 70 *Id.* 415; 81 *Id.* 464; 142 U. S. 437; 81 Ark. 464.

9. McDonald had actual notice.

10. On the vacation of a judgment the winning party is entitled to restitution. 3 Cyc. 466. Rents are a mere incident to the recovery of land. 2 Freem. on Judg. § 482. Section 2756 of Kirby's Digest makes no change in the land except in cases where the occupant recovers for improvements. This is not a case of that kind.

11. The fact that McDonald paid full price for the lands is of no importance. He took the risk and must abide the result. 23 Ark. 259, 266. The Betterment Act was only intended for the meritorious. 48 Ark. 187; 72 *Id.* 110.

12. Purchasers under a void decree acquire *no* title, not even *color,* and are entitled to no protection, and acquire no rights. 70 Ark. 417; 79 *Id.* 199; 81 *Id.* 464; 40 So. 348; 62 Tex. 686; 10 Gray 40, and cases *supra;* 76 Ark. 146.

13. Good faith is requisite under the Betterment Act, and there can be no claim for improvements by one with notice of a

fraud affecting his title. 71 Ark. 99. There is no evidence of good faith on the part of McDonald. He took the risk. 20 Cyc. 86; 6 Vesey, 93.

EXCEPTIONS TO MASTER'S REPORT.

1. The amount allowed the overseer with interest is error.

2. The improvements allowed for the years specified in the exceptions are not proper charges, even if the court applies the rule in *Brown* v. *Nelms,* 86 Ark. 368. No improvements should be allowed from the time the appeal was taken, February 19, 1900. 70 Ark. 85. All made since then were made *pendente lite.* A *bona fide* possessor of land is one who not only honestly supposes himself vested with the true title but is ignorant that the title is contested by another claiming a superior right. Sedgw. & Wait, Trial of Title, etc. (2 Ed.), § 694. The items for repairs is not a legal charge under the Betterment Act. It is only permanent repairs and taxes. 71 Ark. 605. The rents from 1890 to 1899 were properly used as a set-off against the purchase money. 112 S. W. 385. That appellee is not barred is settled by 81 Ark. 463-4. Appellants were properly charged with rents on the lands as improved by them. 46 Ark. 109; 12 *Id.* 219 (290-295); 33 *Id.* 490; 46 *Id.* 109-122; 47 *Id.* 528; *Ib.* 445; 50 *Id.* 447; 74 *Id.* 422; 52 *Id.* 381; 55 *Id.* 374; 61 *Id.* 26; 70 *Id.* 484; 61 *Id.* 363. It was error to allow 50 per cent. to the actual value of the improvements. 71 Ark. 605.

Moore, Smith & Moore, in reply.

Mesne profits consist of the value of the rents after deducting the necessary repairs. Sedgw. & W. Trial to Title to Land, 495; 5 N. E. 502; 54 Ark. 242; 10 Enc. Law, 539, 2 and notes; 101 N. Y. 13. Under the betterment act appellants are entitled to allowance for all improvements, whether the decree was void or voidable merely. Kirby's Dig. § § 2754-5-6. The deed was color of title, regular in form and valid on its face. 48 Ark. 186; 70 Ark. 487; 45 *Id.* 412; 51 *Id.* 275; 112 S. W. 373; 53 Ark. 570. A purchaser at a judicial sale not a party nor privy to the suit, a stranger, is not a purchaser *pendente lite.* 76 Ark. 151-3; 49 *Id.* 416; 34 *Id.* 569; 40 *Id.* 48; 20 *Id.* 583; 50 Ark. 455.

FRAUENTHAL, J., (after stating the facts). The matters that are now involved in this case. and which are presented to

us on this appeal for our determination, relate to the respective rights of the parties to a recovery for improvements and taxes upon the one side, and the rents and profits of the land on the other. The determination of these matters depend principally, if not entirely, upon whether or not the betterment act applies to this case. It has been decided that the appellee is, and has been ever since the death of her father, the true owner of all said lands.

According to the common law, the true owner of the land had a right to the land, and that included the right to enter on it when the possession was withheld, and to have and own the improvements placed thereon by any one, which were considered to be but a part of the land itself; and the true owner had also a right to all the rents and profits issuing from the land. No distinction was made between a *bona fide* and *mala fide* possessor. As to the true owner, the possession of the occupying claimant was wrongful, and he could acquire no rights in another's property by his wrongful acts. But it soon became apparent that this rule was harsh and unjust when lasting and permanent improvements, which actually increased the value of the lands, were placed thereon by an innocent and *bona fide* holder and offset the value of the rents and profits. To cure this harsh rule, the courts of equity adopted the doctrine of requiring the value of the permanent improvements in such cases to be offset against the rents and profits whenever the owner of the lands applied to such court of equity for an accounting by the possessor of the rents and profits. This doctrine was applied in pursuance of the great equitable principle that "he who seeks equity must do equity."

The rights thus recognized by the courts of equity were founded upon the principle that the occupant who thus went into possession of the land in ignorance of the invalidity of his title, although technically a possessor in bad faith because he might have discovered such defect, yet was not to be placed in the position of one who fraudulently takes possession without any title and keeps the true and known owner out of possession. But these rights accorded to such an occupant were only of an equitable nature, and his remedies could only be enforced in a court of equity. The reason and justice of recognizing such rights re-

sulted in the enactment of statutes which granted them as substantive rights, which could be enforced in the very courts that determined the title to the land, and also gave to the occupant a recovery for the amount of the value of the improvements in excess of the value of the mesne profits. *Green* v. *Biddle,* 8 Wheat. 1; 3 Pomeroy, Eq. Jur. (3d Ed.) § 1241; 2 Story, Eq. Jur. § 799a, 799b; Warvelle on Ejectment, § § 546, 557; *Jones* v. *Great Southern Fire Proof Hotel Co.,* 30 C. C. A. 108; *New Orleans* v. *Gaines,* 131 U. S. 191; *Byers* v. *Fowler,* 12 Ark. 292; *Cunningham* v. *Ashley,* 16 Ark. 182; *McCloy* v. *Arnett,* 47 Ark. 458.

The Legislature of the State of Arkansas in 1883 enacted the statute commonly known as the "Betterment Act," which is embraced in sections 2754-2757, Kirby's Dig. That statute defines (1) the qualifications of the occupant who is entitled to its benefits; (2) it fixes the value of the improvements and taxes which it grants to such occupant; (3) and the amount of the mesne profits which are recoverable by the owner.

1. It is contended by the counsel for appellee that L. B. McDonald, and the appellants claiming under him, are not such occupants as are described in the betterment act; and they base their contention upon the ground that said McDonald purchased the land during the pendency of this suit under a decree which was declared to be void by this court. The question which is thus presented for determination is, What is the character of the occupancy which the possessor must have in order to fall within the provisions of this statute?

The statute describes such occupant to be "any person, believing himself to be the owner, either in law or equity, under color of title, (who) has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another." It thus appears that the person must occupy the land under color of title and with the honest belief that he has title to the land.

In the case of *Fee* v. *Cowdry,* 45 Ark. 410, the court described such occupant as being "one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is questioned by some one claiming better right to it." In *Beard* v. *Dansby,* 48 Ark. 183, in describing the require-

ments which such occupant should possess, this court said: "Good faith, in its moral sense, as contradistinguished from bad faith, and not in the technical sense in which it is applied to conveyances of title, as when we speak of a *bona fide* purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement that he must believe himself to be the true proprietor. It must be an honest belief and an ignorance that any other person claims a better right to the land."

It was held in *Shepherd* v. *Jernigan,* 51 Ark. 275, that where a party improved lands in good faith, and under the belief that he was the true owner, he is entitled to the benefits of this betterment act, and that such notice as might be gained from the registry of the deed is not sufficient to preclude him from those benefits.

This court, in the case of *Bloom* v. *Strauss,* 70 Ark. 483, held that a *bona fide* occupant who held under a last will which was defective upon its face could claim the benefit of this statute.

In the case of *Brown* v. *Nelms,* 86 Ark. 368, this court held that one who had purchased under a probate sale which was declared void was such an occupant as could claim the benefits of this statute. In that case the purchaser at the judicial sale had been the appraiser of the land that was sold, and upon that account it was held that such sale was fraudulent in law, and on account of such fraud it was void. But the court found that the purchaser acted in good faith and in the honest belief that he would obtain a good title to the land, although he knew the facts which constituted the legal fraud and made the sale invalid. That was a judicial sale, under which a purchase was made, and the parties in interest had a right to appeal therefrom or to institute proceedings to avoid said sale, which they did; so that in that case the occupant was a purchaser during the pendency of the proceedings, under a sale which was afterwards declared void; and this court held that the provisions of the betterment act applied in that case. *Cowling* v. *Nelson,* 76 Ark. 146.

From all these cases it will be seen that the cardinal requisite that the occupant should possess is good faith, and an honest belief in the title under which he occupies the land, and an ignorance of his title being questioned by another who claims a better right, in order for him to be entitled to the benefits of the statute.

He may know the facts which prove the invalidity of his title, yet if, through mistake of the law, he still believes that title good, he can hold in good faith, within the meaning of the betterment act.

The doctrine of *lis pendens* applies to purchasers or others acquiring title from a party to the action, and generally it does not apply to strangers to the suit. But where the decree under which the sale is made is wholly void by reason of some jurisdictional defect, it can confer no title. The purchaser in such instance, although a stranger to the suit, cannot in law be an innocent purchaser so as to acquire the title. But whether this doctrine is founded upon notice, or upon public policy, it only applies to the title itself which is thus acquired, and does not apply to the rights and benefits which are given to the party under the betterment act. The occupant holding under a tax deed which, on account of some jurisdictional defect, is declared void, or holding under a sale made under a decree in some tax proceeding which is declared void, although he knows, or has means of knowing, of these jurisdictional defects in his title, has yet been held to come within the terms of this statute. The constructive notice of the invalidity of the title which will deprive the purchaser at such sale from acquiring the title as an innocent purchaser does not affect the rights of such a purchaser under the betterment act if he obtained the title in good faith and held possession without actual notice that his title was assailed by one claiming a better title.

Ordinarily, there is greater confidence placed in a purchase at a judicial sale than at any other sale, on account of the great confidence reposed by the people in the proceedings of our courts. But if the doctrine of *lis pendens* shall apply to defeat such purchasers of the benefits of the betterment act, they are placed at a greater disadvantage than a purchaser at any other sale. The doctrine of *lis pendens,* it is said, results not so much from notice, but is largely founded upon public policy. And so likewise the provisions of the betterment act, which grant to the *bona fide* possessor of the land a recovery for the value of the improvements made thereon by him, have resulted from public policy. The policy thus advanced by this statute should prevail; and the public policy thus announced by the legislative will would not be

subserved by applying the doctrine of *lis pendens* to those occupying claimants of land who otherwise would be entitled to the benefits of this act.

In this case it is conceded that the purchaser, McDonald, went into possession of the land under color of title, and that title was held to be valid by this court in the first hearing of the cause involving that question. The evidence tends to show that the purchaser believed in the strength of that title; and, until these supplemental preceedings were instituted, and the summons served on them, he and the appellants had no knowledge of any one questioning that title or asserting a better title to the land. The special chancellor found that these occupants held the lands under color of title in good faith and in the honest belief that they had a perfect title to the land, and these findings appear to be well sustained by the evidence. We are of the opinion, therefore, that the facts of this case bring it within the terms of the betterment act.

The appellants are therefore entitled to the value of all improvements made prior to January 8, 1903, the time that the summons was served herein on them, and to all taxes paid by them and those under whom they claim; and the appellee is entitled to recover all mesne profits that shall have accrued within three years next before the commencement of this supplementary suit.

II. Before the passage of the betterment act, the courts adopted various measures for estimating the value of the improvements that should be allowed to the occupant and the mesne profits that should be allowed to the true owner; some allowed the first cost of the improvements, with interest; others fixed their value at the time of the notice received by the occupant of the title of the true owner; while others fixed their value at the time of the recovery. So, likewise, they differed in the amount of the mesne profits that should be recovered by the owner; some allowing the rents only on the lands without the improvements, and others on the lands as they were improved. *Haskins* v. *Spiller,* 3 Dana, 573; *Barnett* v. *Higgins,* 4 Dana, 565; *Evetts* v. *Tendick,* 44 Tex. 570. The betterment act conferred upon the occupant certain substantive rights, and for the true owner it fixed the definite mesne profits which he could

recover. As is said in the case of *Brown* v. *Nelms,* 86 Ark. 368, the betterment act is "one to adjust equities between the owners of the lands and persons who have occupied the same under color of title, believing themselves to be the owners—*bona fide* occupants. * * * In other words, when the occupant holds in good faith under color of title the owner can recover the land and mesne profits for three years, and the occupant can recover the value of his improvements and amount of taxes."

These are the rights of the parties as fixed by this statute. The statute says that the owner shall be allowed the rents of the lands that shall have accrued within three years next before the commencement of the suit. It deprives the true owner of all the mesne profits that accrued prior to that time, but it gives to him the rents on the lands in the exact condition in which they are for the period subsequent to three years next before the commencement of the suit.

It is urged by the appellants that they should not be charged with the rents and profits arising from the improvements made by them, but only for the rents on the lands in the condition in which they were when McDonald took possession. To sustain their contention, counsel for appellants especially rely upon the case of *State* v. *Baxter,* 50 Ark. 447. But that case is but a continuation of the case of *State use of Garland County* v. *Baxter,* 38 Ark. 462, which was a suit instituted in 1881, long prior to the passage of the betterment act. The principles applied in that case were based upon an accounting which allowed rents without restriction. It was an action to set aside a lease obtained by the occupant for a long term, and under which he had made improvements on the land, which lease was subsequently set aside for fraud. It had no application to the terms of the betterment act.

The various rules that have been formulated by courts of equity in attempting to make equitable adjustments of the rights of the occupant, on the one hand, to the value of the improvements and the taxes paid, and, on the other hand, of the owner to the rents and profits, were based upon such principles of equity as in the opinion of those courts were right. In the uncertainty of these decisions, the betterment act was enacted to definitely fix these respective rights, and it fixed as a substantive right

for the owner of the land the rents of the lands for the period therein named, with the improvements which the lands then possessed. The general rule adopted by the courts for the measure of damages in cases for the recovery of mesne profits is the fair rental value of the lands during the period of the withholding. Analogous to that ruling, the measure of rents and profits which are recovered under the betterment act is the fair rental value of the lands in their improved condition during the period named in the betterment act. This means the net rents—that is to say, the amounts expended for necessary repairs and for such necessary expenses as under the custom of the country have been paid for management and collection of the rents should be deducted from the gross rental value. This is on the theory that the owner would have had to have done this. Warvelle on Ejectment, § 543; *Wallace* v. *Berdell,* 101 N. Y. 13; *Hodgkins* v. *Price,* 141 Mass. 162.

It is urged by appellants that Cora and Jesse McDonald should not be charged with the rents for the years of 1900 and 1901, because the rents for those years were actually not collected or received by them but by W. L. McDonald, who has since died, and whose estate is not brought into this restitution suit. But these appellants became entitled to the value of the improvements, for which they are allowed a recovery, which were placed upon the lands, not by them, but by him under whom they claim, and he would be chargeable with these rents. To the extent of the fund so received by them for such improvements, it is but equitable that they should be charged with said rents; and, inasmuch as the value of the improvements exceeds the amount of the rents for those years, they should be charged with the entire rents of those years.

The rents of the lands that accrued prior to December 20, 1899, cannot be recovered by the appellee, by virtue of the betterment act; but upon equitable principles these rents should be set off without restriction against the claim of appellants for reimbursement of the purchase money received by the appellee. The appellants are entitled in equity to recover such portion of the purchase money paid under said invalid sale for said land which was actually received by the appellee, for the reason that appellee now recovers the land, which was the sole consideration

for the money so paid, and it is but equitable that reimbursement should be made therefor. But during the years prior to 1900 those paying the purchase money received the rents and profits from these lands, and therefore, upon equitable principles, those mesne profits for the full period, and without restriction, should be applied on such claim for reimbursement of the purchase money.

It is urged by the appellants that for the years prior to 1900 they should not be charged with the mesne profits from improvements made by them, but only with the profits of the lands in the condition that they were when McDonald took possession. But it is unnecessary to pass upon this contention, for the reason that, according to the value of the rents as found by the master, and which finding is approved, the rents of the lands with only said original improvements would exceed the largest amount of said purchase money that can be claimed to have been received by the appellee; and this is true when the purchase money and the rents are apportioned to the respective tracts occupied by the respective appellants.

Upon the tract of land occupied by appellant Bond a house was burned and rebuilt by the occupant. This house had been insured by the occupant for a number of years for $1,050, and the insurance money was collected by the occupant. This sum was by the master charged to the appellant Bond as a part of the rents, but was disallowed by the special chancellor. The contract of insurance was a personal contract of appellant Bond, and the consideration was paid solely by her. The insurance money, therefore, did not in law arise from the property, but was payable to the appellant Bond by reason of her personal contract with the insurance company. She was therefore not chargeable therewith. *Roesch* v. *Johnson,* 69 Ark. 30; *Langford* v. *Searcy College,* 73 Ark. 211.

The appellee is entitled to recover interest on all rents from the time they were received by appellants and those under whom they claim. 15 Cyc. 208; *Nunn* v. *Lynch* 89 Ark. 41. Likewise the appellants are entitled to recover all taxes and the interest on all taxes paid by them and those under whom they hold the land from the time such taxes were paid.

III. Under the evidence in this case, all the improvements were made prior to the service of the summons in this supple-

mental proceeding, and therefore the occupying claimants must be paid the value of those improvements. The value of the improvements are determined at the time of the recovery, for that is the time they are turned over to, and go into the usable possession of, the holder of the title. In *Summers* v. *Howard,* 33 Ark. 490, this court, in speaking of the time when the value of the improvements should be estimated, said: "Such allowances (for improvements) are made upon the ground that the improvements do in fact pass into the hands of the plaintiff as a new acquisition; and they can only be a new acquisition to him to the extent of their value at the time he recovers or obtains possession of them; and therefore their value at that time is to be allowed, and nothing more." Warvelle on Ejectment, § 558; 15 Cyc. *222*; *Greer* v. *Fontaine,* 71 Ark. 605.

The value thereof is based upon the enhanced value which these improvements at the time of the recovery impart to the land. But such enhanced value of the land should arise solely by reason of the improvements themselves, and should be determined only by the ordinary considerations that would apply to lands that are similarly situated. The condition of the improvements at the time of the recovery should be taken into consideration. The difference between the value of the land without the improvements and the value of the land with the improvements in their then condition would be a just sum to allow therefor. In any event no value that the land might impart to the improvements should be considered in estimating the value of such improvements. The reasonable cost in making the improvements, their deterioration, if any, or the reasonable cost of making them at the time of the recovery in their then condition, may well be taken into consideration in arriving at the value of such improvements.

In determining the value of these improvements, the master found the amount of the cost thereof at the time of the recovery, and then added fifty per cent. thereof to such cost, on the theory that, under the testimony, the value of the land was thus enhanced by these improvements in excess of their cost. This estimate of the value of the improvements was approved by the special chancellor. This is an arbitrary mode of fixing such valuation, rather than one based on the actual value of the bet-

terment and amelioration of these improvements to the land. The value of the improvements should not exceed the cost of making them or replacing them at the time of the recovery and in the condition in which they are at that time. *New Orleans* v. *Gaines*, 15 Wallace, 624.

The special chancellor properly refused to grant to Sallie Spott Rankin the immediate possession of the land at the time of her application. The betterment act is applicable to this case, and that statute provides that "no writ shall issue for the possession of the land 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." Kirby's Dig. § 2755. Until the accounting of these matters was had and a final determination thereof made, the possession of the lands should not have been given to her. Such an order was also on this account not such a final order from which an appeal would lie. Ex parte *Crittenden*, 10 Ark. 33; *Fitzpatrick* v. *Phillips*, 41 Ark. 85; *Davie* v. *Davie*, 52 Ark. 224; *Cohn* v. *Huffman*, 52 Ark. 436; *Hargus* v. *Hayes*, 83 Ark. 186; *Brown* v. *Norvell*, 88 Ark. 590.

In the final decree of the Woodruff Chancery Court, it was ordered and decreed that the appellee recover all the lands; that a writ of restitution issue to her for immediate possession of the lands which were claimed by appellants Cora and Jesse McDonald; and that a writ of restitution should be issued to her for the lands claimed by appellant Antoinette Bond after the payment of said sum, which was the amount of the balance of the value of the improvements made on said lands and found by the court as still due to said appellant.

Under the findings of the chancellor this portion of the decree relative to the possession of the lands was correct. But, as hereinafter directed, a restatement of the accounts of the matters upon which the findings of the court were based will be ordered by this court. And if, as a result of such an accounting, it shall be found that nothing is due to either of the appellants upon the improvements and taxes upon the respective tracts, then immediate writs of restitution will issue to the appellee for such tract or tracts.

The findings of the special chancellor and the decree rendered by him are, in the main, in accord with this opinion; but

in some particulars they do not conform with it. The decree will therefore be reversed.

But we are of the opinion that the findings of the special master of the Woodruff Chancery Court are amply sustained by the evidence as to the values and the amounts of taxes, rents, interest and all other matters submitted to him and set out in his report, except as to the improvements; and as to the improvements we are of opinion that his findings of the actual cost thereof at the time of the recovery will give the true value thereof, with which amounts the appellants should be credited, and that the only error committed in that regard was in adding to such cost the additional sum of fifty per cent. of such cost. We are of the opinion that a restatement of the account as to all matters involved herein and submitted to said special master can be made from the evidence taken by the special master, so that it will conform with this opinion and without taking any additional testimony.

For this reason we do not think it necessary to remand this cause in order to make such a restatement of these accounts; but we deem it advisable that a special master be appointed by this court for the purpose of making a restatement of said accounts from the evidence as appears in the report of the special master (and which is a part of the record of the case) which will conform with this opinion.

To that end therefore a special master will be appointed by this court. Said special master will be directed to take the evidence contained in the report of John G. Haralson, the special master of the Woodruff Chancery Court, and which is a part of the record herein; and from said evidence to make and state an account of the improvements, taxes and mesne profits of the lands, together with interest on the taxes and mesne profits between the respective parties to this suit, and in accordance with this opinion. In making and stating said accounts, he will make and state separate accounts of all the above matters relative to the lands that were in the possession of the appellant Antoinette Bond, and which are called in said special master's report the "Bond" place, and relative to the lands that were in the possession of the appellants Cora and Jesse McDonald, and which are called in said report the "McDonald" place. And this

cause will be continued for further orders of this court after said report of the special master of this court shall be taken, made and filed in this court. And thereupon this cause will be remanded to the Woodruff Chancery Court with directions to enter a decree in accordance with the opinion of this court.

BATTLE, J., and HART, J., dissent from so much of this opinion as allows to appellee rents of lands with improvements made by appellants and those under whom they claim.

ON REHEARING.

Opinion delivered October 25, 1909.

FRAUENTHAL, J. The appellants and appellee respectively filed motions herein for a rehearing. After due consideration of said motions we are of the opinion that the motions should be overruled, except as herein indicated.

By our opinion in this case the findings of the special chancellor were in all things approved, except only as to his finding of the value of the improvements made on the lands by appellants and those under whom they claim. As to the value of those improvements, we held that the sole error in the finding of the special chancellor was in adding to the cost thereof the sum of fifty per cent. of such cost; and we held that "as to the improvements we are of the opinion that his findings of the actual cost thereof at the time of the recovery will give the true amounts thereof, with which amounts the appellants should be credited." The appellee has filed a motion in which she states that according to the finding of the special chancellor the said cost of the improvements made on the land claimed by appellant, Bond, amounted to $5,865, to which the special chancellor added $2,932.50, being fifty per cent. of same, and which latter finding only was disapproved; that if the amount of the final balance found by the special chancellor as due to the appellant, Bond, towit: $2,591.88, should be deducted from this disallowed item of credit of $2,932.50, it would represent the true final amount due to appellee from appellant Bond on the accounting, towit: $340.62. That the said cost of the improvements made on the lands claimed by appellants Cora and Jesse McDonald amounted to $2,520, to which the special chancellor added $1,260

being fifty per cent. of same, and which latter item only was disapproved; that if to the final balance found by the special chancellor as due by the appellants McDonald, towit, $4,662.81, should be added this disallowed item of credit of $1,260, it would represent the true final amount due to appellee from the appelants Cora and Jesse McDonald upon the accounting, towit: $5,922.81; and the appellee asks that the portion of the order in our former opinion which refers the restating of an account to a master be set aside, and that the opinion and the decree be modified as above stated.

Upon further examination of the report of the special master and the findings of the spcial chancellor, we are of the opinion that the above correctly states the cost of the respective improvements at the time of the recovery made on the two tracts, and that in fixing the value of said improvements at said amounts the rights of appellants cannot be prejudiced. The value of said improvements are therefore found as above stated. It follows that, upon said final accounting of the improvements, taxes, and mesne profits, there is due by the appellant Antoinette Bond to the appellee the sum of $340.62, and that there is due by the appellants Cora and Jesse McDonald to the appellee the sum of $5,922.81; and that these should have been the findings of the special chancellor, and a decree rendered in favor of appellee for these respective amounts and a recovery of the lands. The order heretofore made herein for the appointment of a master and the reference to him for a restatement of the account is set aside. The former opinion of this court is modified so as to to conform with this additional opinion.

That portion of the decree of the Woodruff Chancery Court which grants to the appellee the restitution of the land claimed by the appellants Cora and Jesse McDonald and recovery against said appellants of $4,662.81, is modified so that it will decree in favor of the appellee the recovery of said lands claimed by appellants Cora and Jesse McDonald and a recovery against said appellants of the sum of $5,922.81; and the decree of the chancery court as to said appellants Cora and Jesse McDonald, thus modified, is affirmed.

That portion of the decree which finds in favor of the appellant Antoinette Bond, for a balance due on improvements and

postponing the restitution of the lands claimed by said appellant Bond is reversed; and said portion of the cause is remanded to the Woodruff Chancery Court with directions to enter a decree in favor of appellee for immediate recovery of said land claimed by appellant Bond and a recovery against said Bond for the sum of $340.62.

We do not enter a decree in this court in favor of appellee and against the appellant Antoinette Bond in accordance with the above opinion for the reason that the title to land is herein involved, and that portion of the decree is reversed. Where the decree of the lower court involving title to land is reversed, this court thereupon remands the cause to the lower court, with directions to enter a decree in that court in accordance with the order and opinion of this court.

In the McDonald branch of this case the lower court entered a decree in favor of the appellee for the land, and that much of that portion of the decree we have affirmed. We have only modified in that branch of the case the amount of the damages that appellee should recover. Therefore that portion of the decree can be modified, and, as modified, affirmed.

BENEDICT v. GRIFFITH.

Opinion delivered November 8, 1909.

1. LIMITATION OF ACTIONS—VENDOR'S LIEN.—Where a vendor of land reserved in the deed a lien for the purchase money, the lien is an incident to the debt it secures and expires when the debt is barred by limitation. (Page 198.)
2. SAME—NEW PROMISE—DECLARATIONS OF GRANTOR.—Where one who purchased land subject to a vendor's lien for the purchase money conveyed it to another, the former's acts and declarations, done or made after such conveyance, are inadmissible to affect the running of the statute of limitations as to such lien. (Page 198.)

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

Will P. Feazel, for appellant.

The purchaser took the land subject to whatever rights and equities an inspection of the deed would have shown to be in appellant. 18 Ark. 142; 37 Ark. 571; 43 Ark. 467. The plea of limitation is personal to the party entitled to claim it, and he may waive it if he wishes. 36 Ark. 491; 71 Ark. 407; 72 Am. St. R. 835. A third party cannot plead the defense of usury. 66 Ark. 124. Nor the statute of frauds. 71 Ark. 304 But the written promise by Griffith to pay the debt furnishes a new point from which the statute will run. 22 Ark. 217; 66 Ark. 464; 22 Ark. 290. When the debt is barred, the lien is also barred. 43 Ark. 467; 53 Ark. 358; 47 S. W. 812. Whatever will revive the debt will revive the lien. 141 U. S. 28; 82 Am. St. R. 871.

R. W. Robins, for appellee, S. G. Smith.

When a written instrument is to be proved by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the instrument itself. 13 Ark. 496; 1 Pet. 600; 81 Ark. 147; 108 N. C. 441. Appellant has failed to show that he is entitled to recover against Smith, whether the notes are barred by limitation or not. 21 Ark. 202; 84 Ark. 282. The plea of the statute of limitations is generally a personal privilege, but grantees, mortgagees, and others standing in the debtor's place are entitled to its advantages. Wood on Lim. § 41; 72 N. E. 846; 43 Cal. 185; 18 Cal. 482; 4 Ore. 105. Part payment by a co-debtor will not bind a joint debtor. 12 Ark. 762; 20 Ark. 172; *Id.* 293; 13 S. W. 583; 82 Am. Dec. 754; 61 Am. St. R. 927.

BATTLE, J. This suit was instituted by H. H. Benedict against C. A. Griffith and S. G. Smith in the Faulkner Chancery Court to foreclose a vendor's lien on certain lands. He alleged in his complaint that on the 26th day of February, 1895, he sold the lands to Griffith for the sum of $1,000, and that Griffith executed to him for the same his eight promissory notes, as follows: Six for $100 each, due and payable, respectively, on 15th day of November, 1895, 1896, 1897, 1898, 1899 and 1900, and two notes for $200 each, due and payable, respectively, on the 15th day of November, 1902 and 1904, all bearing interest at the rate of ten per cent. from date; that at the time of the sale he conveyed the lands to Griffith and retained in the deed a

lien on the land for the payment of the purchase money; that Griffith, in November, 1902, paid $200 on the notes, and is indebted to him for the lands in the sum of $1,000 with ten per cent. per annum interest thereon from the 26th day of February, 1895, less the sum of $200; and that Griffith, in July, 1907, in a letter to him, acknowledged the justice and correctness of the foregoing claim. He asked for judgment against Griffith for the balance due on the notes, and that such judgment be declared a lien on the lands, and that it be foreclosed, and the lands sold to satisfy the same.

Griffith did not answer the complaint, but made default.

The defendant, Smith, answered and severally denied all the foregoing allegations, and alleged as follows: "The defendant C. A. Griffith was the owner of the lands described in plaintiff's complaint on February 3, 1902, and that he was and had been the owner thereof for more than seven years prior to that date, and the defendant C. A. Griffith continuously for more than seven years prior to February 3, 1902, and from and up until February 3, 1902, had been in the open, notorious and adverse possession of the lands described in the complaint, and during all that time claimed to own the same as his own, free from any lien of any kind; that the defendant Smith, on the 3d day of February, 1902, did believe and understand that C. A. Griffith was the owner of the land free from any liens or incumbrances of any kind, and, so believing, the defendant Smith did on February 3, 1902, purchase the land from C. A. Griffith together with other lands owned by Griffith, and on that day did pay Griffith therefor the sum of $3,500; and that for said sum on that day C. A. Griffith did bargain and sell the lands together with other lands to S. G. Smith, and on said day did execute to him a deed therefor, which deed was duly filed for record in the recorder's office of Faulkner County on February, 25, 1902.

* * * * * * * * *

"The defendant says that the land described in the complaint is a part of and lies adjoining the other lands which this defendant bought from Griffth on said day, and together make and form one farm. And this defendant says that under the purchase and the deed the defendant Griffith did place this defendant in the possession of the land on February 3, 1902,

and that this defendant thereunder has been in the quiet, peaceable, open and notorious possession of the land continuously since said date, claiming to be the owner thereof. This defendant says that at the time he purchased the land as aforesaid from Griffith he did not know or have any information of any debt or claim due plaintiff for the purchase money or otherwise, any right or claim of the plaintiff, and that he did not have such knowledge of such claim, right or interest of plaintiff at any time prior to the purchase, and has had no knowledge or information of any such claim of plaintiff at any time since the purchase until the summons in this case was served upon him. And plaintiff, further answering, says that, in the event C. A. Griffith did purchase from the plaintiff the land and did execute to the plaintiff for the purchase money thereof the notes set out in the complaint, or any notes, then in that event this defendant says that more than five years have elapsed after the maturity of each and all of the notes, and after the maturity of the alleged indebtedness and before the institution of this suit. And this defendant does now specifically plead the statute of limitation of five years against each and all of the alleged notes."

The court, upon final hearing, found that Griffith is indebted to plaintiff, Benedict, in the sum of $2,300, and that plaintiff had no lien on the lands for the indebtedness of Griffith to plaintiff; "said indebtedness, in so far as the lands involved in this suit and the rights of the defendant, S. G. Smith, thereto are concerned, and the alleged vendor's lien, having been barred by the statute of limitation and by laches." Plaintiff appealed.

The deed and notes mentioned in the pleadings have been lost or destroyed. Evidence was adduced to prove their contents, which was based upon the memory of witnesses.

Plaintiff alleged that he retained a lien on the lands for the purchase money in the deed executed by him to Griffith, and that the purchase money was unpaid. This lien was an incident to the debt it secured, and expired when the debt was barred by limitation. *Stephens* v. *Shannon,* 43 Ark. 464; *Chase* v. *Cartright,* 53 Ark. 358.

After Griffith conveyed the lands to Smith, it was beyond his power "to affect the running of the statute of limitation as to such lands," Smith not being liable for the debt secured by

the lien thereon. His declarations and acts after that time are inadmissible for that purpose. The land had passed beyond his power to bind or affect by his liabilities. *Hughes Bros.* v. *Redus,* 90 Ark. 149; *Mayo* v. *Cartwright,* 30 Ark. 407; *George* v. *Butler,* 57 L. R. A. 396; Wood on Limitation (3 Ed.), § 230.

Payments made or letters written by Griffith after he sold and conveyed the land to Smith could not continue the lien beyond the time it was valid and subsisting when the land was sold to Smith. Griffith sold and conveyed the land to Smith on the 3d day of February, 1902. Witnesses differ as to the time when the notes of Griffith to Benedict were executed. They endeavor to fix the time by the death of the wife of Griffith, which was on the 23d day of July, 1894. Benedict, the plaintiff, and Mrs. Dora Adams testified that the land was sold to Smith about two years before the death of Mrs. Griffith. Griffith testified that the sale was after her death. He had previously stated that it was one or two years before her death, but he says that he had refreshed his memory since he made the latter statement and discovered that he was in error, and that the sale was after her death. His memory as to this fact was uncertain.

Witnesses also differ as to when the notes were payable. Benedict, the plaintiff, testified: "My recollection is there were eight notes; the first six were due one year apart; one beginning the 1st day of November, 1895, then one each year up to 1900. The two last notes were for $200 each, due two years apart; one in 1902 and the other in 1904." Griffith testified that the notes matured annually, one every year, until the last one mentioned, so that, if the notes were executed in 1892 or 1893, the first note matured in November, 1892 or 1893, or the first day of January, 1893 or 1894; the second one year after the maturity of the first; the third two years; the fourth three years; the fifth four years; the sixth five years; the seventh six years; and the eighth seven years.

The chancellor evidently found that the notes were executed in 1892 or 1893, and that the first of them matured on or before the first of January, 1894, and the last matured on or before the first of January, 1901, and that this suit was barred, it having been brought on the 10th day of August, 1907, more than five

years since their maturity, the time prescribed by the statute of limitation for the bringing of such suits. After a careful review of the evidence in the case, we cannot say the findings of the chancellor were contrary to the preponderance thereof.

Decree affirmed.

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

QUALLS v. STATE.

Opinion delivered November 8, 1909.

1. BASTARDY—SUFFICIENCY OF TESTIMONY.—As proceedings to affiliate a bastard child are of a civil nature, in the absence of any statute requiring the testimony of the prosecutrix to be corroborated, the jury may find that the accused is the father of the child upon the testimony of the mother alone, if they believe it is credible. (Page 201.)
2. SAME—PERIOD OF GESTATION.—While the period of gestation is usually 280 days, yet, since the birth of a child is liable to be accelerated or delayed by circumstances, the period of gestation in a particular case in a question of fact to be decided upon the evidence, both physical and moral. (Page 202.)

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

George W. Reed and *Grant Green*, for appellant.

A new trial will be granted when the verdict is so clearly against the weight of the evidence as to shock the sense of justice of a reasonable person. 34 Ark. 632; 70 Ark. 385; 65 Ark. 278.

Hal L. Norwood, Attorney General, and *C. A. Cunningham*, Assistant, for appellee.

The jury were the judges of the credibility of the witnesses. 50 Ark. 477; 36 Ark. 653; 19 Ark. 684. Circumstantial evidence is sufficient to corroborate an accomplice. 64 Ark. 247; 76 Ark. 215. The victim of carnal abuse is not an accomplice. 62 Ark. 504. A bastardy proceeding is a civil one; therefore, a preponderance of evidence is sufficient to sustain a conviction. 61 Ark. 407; 45 Ark. 56.

HART, J. This was a proceeding begun in the county court for the purpose of affiliating a bastard child and compelling the father to aid in its support. From a judgment rendered against him there the defendant, William Qualls, appealed to the circuit court. Judgment was rendered against him in the circuit court, and he has appealed to this court.

The sole issue raised by the appeal is, was the evidence sufficient to support the verdict?

Mary Fortner, the mother of the child, testified that the child was born in Cleburne County, Arkansas, on the 30th day of May, 1908, and that the defendant was its father. She said that the defendant had intercourse with her several times in White County just before and after Christmas in 1906. That about the last of August, 1907, she went to the defendant's house in Cleburne County to pick cotton, and that while there the defendant had intercourse with her one time. That no one except Qualls had had intercourse with her since the birth of her first child three years ago.

The defendant, Qualls, testified in his own behalf, and denied that he had ever had sexual intercourse with her. Evidence was adduced in his behalf tending to show that she was pregnant when she came to his house in 1907, and that she came there in October, instead of August. It was also shown that she had made contradictory statements in regard to her intercourse with the defendant, and also stated that he was not the father of the child. A physician testified that he was called to see her in October, 1907, while she was at Qualls's house, and that she told him that her monthly periods had stopped. That he examined her, and found that she was two or three months in pregnancy; that the period of gestation with woman is 280 days.

In this State "proceedings to affiliate a bastard child and compel the reputed father to aid in its support are of a civil and not criminal nature." *Chambers* v. *State,* 45 Ark. 56; *Pearce* v. *State,* 55 Ark. 387; *Land* v. *State,* 84 Ark. 199; *Wimberly* v. *State,* 90 Ark. 514.

Our statutes expressly provide that the mother shall be a competent witness in all cases of bastardy unless she be legally

incompetent in any case. Kirby's Digest, § 492. But they do not require that her testimony should be corroborated.

"In the absence of any statute requiring the testimony of the prosecutrix to be corroborated, the jury may find that the accused is the father of the child upon the testimony of the mother alone, provided they believe it is credible." Underhill on Criminal Evidence, § 529; 5 Cyc. 664 and cases; *State* v. *Nichols*, 29 Minn. 357; *Evans* v. *State*, 2 L. R. A. (N. S.) (Ind.) 619, and cases cited.

"In regard to the period of gestation, no precise time is referred to, as a rule of law, though the term of 280 days * * * * is recognized as the usual period. But, the birth of a child being liable to be accelerated or delayed by circumstances, the gestation is purely a matter of fact, to be decided upon all the evidence, both physical and moral, in the particular case." 2 Greenleaf on Evidence (16 Ed.), § 152.

Tested by these rules of law, we can not say that there is no evidence to support the verdict. The prosecutrix testified unequivocally that she went to the defendant's house in August, 1907, and remained there two or three weeks; that he did have sexual intercourse with her while there, and that no other man had had sexual intercourse with her since her first child was born about three years before the birth of the one in question. It is true that her testimony was weakened by contradictory statements said to have been made by her and by other evidence tending to show that she was pregnant at the time she says conception took place, but this was a matter to be pressed upon the jury as affecting her credit as a witness. We can not disturb a verdict which has legal evidence to support it.

The judgment must therefore be affirmed.

SETTLES v. STATE.

Opinion delivered November 8, 1909.

1. EMBEZZLEMENT BY BAILEE—CONDITIONAL SALE.—A delivery of chattels upon a sale made on condition that the title shall not pass until payment of the purchase money is not a bailment within Kirby's Digest, §

1839, prescribing the punishment where a bailee embezzles goods in his possession. (Page 204.)

2. DEFINITION—"BAILEE."—The term "bailee" in the statute defining larceny by a bailee (Kirby's Digest, § 1839) is used not in its large but in its limited sense, as including simply those bailees who are authorized to keep, transfer or deliver, and who receive the goods *bona fide,* and then fraudulently convert; and where it does not appear that a fiduciary duty is imposed to return the specific goods of which the alleged bailment is composed, a bailment is not constituted. (Page 205.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; reversed.

John D. Shackelford and *Robt. L. Rogers,* for appellant.

In an indictment for embezzlement, the property should be as accurately described as if the charge were larceny. 42 Ark. 517. Unless appellant was to pay over to his vendor the identical money received for the piano, he was not a bailee under the statute. 51 Ark. 125; Schouler on Bailments, § 2. Even where title is retained until paid for, the vendee acquires such an interest in the property that he may sell it. 52 Ark. 168. When the court is requested to put his charge in writing, it is error to give it orally. 72 Ark. 398. The vendee had such interest that he might sell. 48 Ark. 160; 54 Ark. 30; 63 Ark. 268; Mechem on Sales, § § 483, 561, 587, 588, 591, 592 and 599.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

HART, J. R. H. Settles has appealed from a judgment of conviction of larceny by embezzlement.

The facts as developed by the State at the trial, briefly stated, are as follows: In September, 1907, J. C. Womble delivered to the defendant, R. H. Settles, a piano upon the understanding that Settles should repair it and sell it for $60. The piano remained in the possession of Settles until the 1st of August, 1908, at which time, by a contract in writing, the piano was sold to Settles for $50 upon condition that the title should remain in Womble until the purchase price was paid. Settles never paid any part of the purchase price, and on the 3d day of August, 1908, sold the piano to Miss Bertha Guebel for $25.00. He sold the piano without the knowledge or consent of Womble,

and represented to Miss Guebel that it belonged to him, and that he had a right to sell it.

The indictment was found under section 1839 of Kirby's Digest, which is as follows: "If any carrier or any bailee shall embezzle or convert to his own use or make way with or secrete with intent to embezzle or convert to his own use any money, goods, rights in action, property, effects or valuable securities which shall have come to his possession, or have been delivered to him, or placed in his care or custody, such bailee, although he shall not break any trunk, package, box or other thing in which he received them, shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny."

The record, as amended on certiorari, contains a correct copy of the indictment. The indictment contained all the essential allegations necessary to a charge of larceny by embezzlement under the statute quoted, as approved by this court in the following cases: *Fleener* v. *State,* 58 Ark. 98; *Dotson* v. *State,* 51 Ark. 119; *Ritter* v. *State,* 70 Ark. 472. The views we shall hereinafter express renders a more extended discussion of the indictment useless. Was the defendant guilty as charged in the indictment?

This court has frequently held that the vendee of personal property, sold on condition that the title shall remain in the vendor until the purchase money is paid, acquires an interest in such property which he may sell or mortgage. *Phillips* v. *Hollenberg Music Co.,* 82 Ark. 9; *Sunny South Lumber Co.* v. *Neimeyer Lumber Co.,* 63 Ark. 269, and cases cited.

In discussing the question in the case of *Phillips* v. *Hollenberg Music Co., supra,* in regard to the sale of a piano, the court said: "The obligation of the appellant to pay the purchase money became absolute upon the delivery of the piano, and was not conditioned upon the vesting of the title in the purchaser.

In the case of *Dedman* v. *Earle,* 52 Ark. 164, where the subject of the conditional sale was a mule, the court said: "He (referring to the purchaser) did not become a mere custodian of the mule. He had a right to sell him at such a profit as he could make."

In the case of *Krause* v. *Commonwealth,* 93 Pa. St. 418, 39 Am. Rep. 762, the syllabus is as follows: "The owner of

horses delivered them to defendant under an agreement that the defendant was to buy them, the horses to remain the property of the owner till paid for, and to be returned at a specified period, if not paid for. The defendant refused to pay for them, or to return them. *Held* not larceny, nor larceny by a bailee."

In discussing a similar statute of that State the court said:

"The term 'bailee' is one to be used not in its large but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods *bona fide,* and then fraudulently convert. Where it does not appear that a fiduciary duty is imposed on the defendant to return the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted. Whart. Crim. Law, § 1855 (8 Ed.)."

The court said: "A delivery of chattels upon a sale made on condition that the title shall pass upon payment of the purchase money at a future day is something more than a bailment; it gives the buyer a conditional title." So in the present case the payment of the purchase money would have been a complete performance of the contract. Settles was not bound to return the identical property. He was something more than a bailee. He had an interest which he could sell or mortgage. Hence we conclude that Settles was not a bailee within the meaning of section 1839 of Kirby's Digest, under which the indictment was found, and that there was no evidence which would warrant the jury in finding a verdict of guilty.

Therefore the judgment will be reversed, and the cause remanded.

GILMORE v. STATE.

Opinion delivered November 8, 1909.

HOMICIDE—BLOW AS CAUSE OF DEATH.—Where there was evidence that defendant struck deceased blows which caused him to fall from a wagon in which he was riding, so that a wheel of the wagon passed over his body and killed him, the jury were justified in finding that the blows were the cause of the death.

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

STATEMENT BY THE COURT.

The appellant was indicted for voluntary manslaughter, was convicted of involuntary manslaughter, and sentenced to seven months' imprisonment in the penitentiary. He appeals to this court.

In October, 1907, appellant and several others, including Nick White, were in a wagon going from DeQueen to Ultima Thule. Appellant and White had a fight. Appellant left the wagon, seized a "binding pole" about six feet long, and struck at White three times. White was on the wagon, and the wagon was in motion. Appellant struck White two blows. White got on his hands and knees, and attempted to turn around as if to put his hands on the side of the wagon, but he missed the "wagon bed" and fell. The left hind wheel of the wagon ran over his shoulder and down his body. White went down the road a short distance and lay down. It was shown that the stick with which appellant struck White was crooked, and the witness for the State did not know whether the blows knocked White off the wagon or not.

The doctor who was called to see White soon after he was hurt testified that his bowels were badly injured, and it was his opinion that White's death resulted from the injury to his bowels. White complained only of the injury to his bowels where the wheel ran over him, and the body indicated that the bowels had been badly mashed and injured. It was shown that in a dying declaration White said "that the boys had butchered him up so that he could not live, that George (appellant) knocked him out of the wagon, and Jim Polk (the driver) ran the wagon over him." He received his injuries in Sevier County, and died there about six days after.

One of the witnesses for the defense who was on the wagon and saw the fight testified substantially as follows:

"I was sitting by Tom Polk, who was driving. The first I knew of the matter was Tom said they were going to have a dance, and George said he was going. Nick began to curse George. Tom told him to shut up, and told George that he was

just drinking and cutting up. George jumped off the wagon and got the stick. He struck at Nick, but hit the side of the wagon and the coal oil tank. He didn't strike Nick at all. Nick tried to get his knife out, and attempted to put his hand on the side of the wagon, but missed it and grasped the wheel. It threw him under the wagon, and he was run over. Mr. Dale was sitting on the back end of the wagon. He and George had two pints of whisky. Yes, sir; I saw him drink some of it. Nick had his knife in his hand when he was trying to get off the wagon and fell under."

The court, among others, gave the following prayers of the State:

"1. Manslaughter is the unlawful killing of a human being without malice, expressed or implied, and without deliberation. Manslaughter may be voluntary or involuntary.

"12. If the jury believe from the evidence beyond a reasonable doubt that the defendant struck the deceased with a binding pole, and knocked him off the wagon, or the deceased fell from the wagon as a result of the blow, and the wagon wheel ran over the deceased, and the deceased died in consequence of such striking and being run over by the wagon wheel, then the defendant would be guilty, provided you believe such striking was done without legal excuse or justification."

Appellant objected to the giving of these requests and excepted to the ruling of the court.

The following instruction was asked on behalf of the defendant, and given, after being modified by the court, by inserting the words "without fault or carelessness on his part:"

"You are told that the defendant had the right to defend himself against an assault made upon him by the deceased; and to use such force as reasonably appeared to him at the time to be necessary to repel such assault; and if he struck the deceased without fault or carelessness on his part, honestly believing at the time that deceased was about to cut him with a knife, and that it was necessary for him to strike deceased to prevent deceased from cutting him, you may acquit the defendant, although you may believe deceased was knocked from the wagon and run over as a result of such blow."

Appellant objected to the modification of his prayer by the court and duly excepted to the ruling.

The grounds of the motion for new trial are that the verdict is contrary to the evidence, and that the court erred in giving instructions numbered respectively 1 and 12, requested by the State, and erred in modifying appellant's prayer number 4 and giving same as modified.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

Where there is evidence to support the verdict, it will not be disturbed. 67 Ark. 399; 70 Ark. 571. Appellant cannot complain of an error in his own favor. 77 Ark. 458. There can be no distinction between giving the law to the jury on an affirmative state of facts, and giving it to them on a negative statement of the same facts.

WOOD, J., (after stating the facts). There was evidence to warrant the jury in finding that the blows given White by appellant caused him to fall from the wagon and under the wheel that passed over his body, and that these blows contributed directly to produce the death of White.

We find no error in the instructions. Number 1 was a copy of section 1779, Kirby's Digest, and proper to be given in such cases. Number 12 announced a correct principle, applicable to the facts here, and likewise number 4 as modified. These with other instructions presented the law of the case to the jury. There was no error in the trial. Let the judgment be affirmed.

WARD v. BLYTHE.

Opinion delivered November 8, 1909.

PLEADING—FAILURE TO ANSWER—WAIVER.—Where a plaintiff sued several defendants, and one of them failed to answer, and the plaintiff went to trial without asking a judgment against such defendant, he will be held to have waived the want of an answer, and cannot take advantage thereof on appeal.

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

T. E. Hare, for appellants.

When no objection is made to evidence, the complaint must be considered as amended to conform to it. 29 Ark. 323; 40 Ark. 352.

John B. Jones, for appellee.

A stipulation in a deed of trust that the contract shall be governed by the laws of some particular State is binding on the parties thereto, although executed in another State. 64 Ark. 39; 34 Miss. 181; 62 L. R. A. 45.

T. E. Hare, in reply.

Only the maker, his vendees, assigns or creditors, can plead usury. 66 Ark. 125.

BATTLE, J. T. S. Blythe borrowed of H. C. Grigger $1,500, and in consideration thereof executed to him his note for $1,725 and ten per cent. per annum interest from maturity, the note being dated January 11, 1902, at Smithdale, Arkansas, and payable one year after date at the First National Bank of Memphis, Tennessee. Blythe and his wife, Fannie M. Blythe, conveyed certain lands in the State of Arkansas to Joe Ward in trust to secure the payment of the note. In the deed of trust it was stipulated: "This contract embodied in this conveyance and the note secured hereby shall in all other respects be construed according to the laws of the State of Arkansas, where the same is made." The mortgage was duly acknowledged and filed for record on the 18th day of January, 1902. On the 24th day of October, 1902, Blythe sold and conveyed the land to O. N. Killough, and entered into the following agreement in writing as to such sale:

"The said T. S. Blythe guaranties the lands this day sold to O. N. Killough are incumbered only for the following amounts, for which amounts mortgages have been by him executed, to-wit: $3,267 of date 1-11-1902, to Crosgry, trustee, on November 15, 1903; $500 of date 8-12-1902, to Cross County Investment Company, due 2-12-1903; and that this is all the debts and liens against the lands, except for $1,725 to one Grigger, which Blythe states is usurious and void, and Blythe agrees to resist the payment of the same, provided suit is brought against him to recover. O. N. Killough agrees on his part to satisfy and pay all the liens existing at this time on the lands this day purchased of Blythe that may be declared legal."

Ward and Grigger are citizens and residents of the State of Tennessee, and Blythe and his wife are citizens and residents of the State of Arkansas.

On the 24th day of August, 1903, Ward and Grigger brought suit on the note and deed of trust in the Cross Chancery Court against Blythe and his wife, and O. N. Killough and Blanche Killough, his wife, to foreclose the deed of trust. An answer was filed for Blythe, in which he alleged that the note was void for usury. Killough and his wife did not answer, and no judgment was rendered against them on account of the failure to do so. Evidence was adduced which proved that Blythe borrowed of Grigger $1,500 and executed to him the note sued on in consideration of the same.

Upon final hearing the court found "for the plaintiff in the sum of fifteen hundred dollars, and that the same bear interest at six per cent. per annum from the date of the note," and rendered judgment in favor of plaintiff H. C. Grigger for $2,050, and decreed that the deed of trust was a lien on the lands for that amount, and ordered the same sold to satisfy the lien. Plaintiffs appeals.

An answer by Killough to the complaint was waived by plaintiff by the failure to take judgment against him and going to trial. The parties thereby treated the cause at issue, and cannot now take advantage of the failure to answer. *Pembroke* v. *Logan,* 71 Ark. 364; *Cribbs* v. *Walker,* 74 Ark. 104.

Killough, by the stipulation made by him in the purchase of the lands, did not unconditionally assume payment of the note of Blythe for $1,725. Blythe represented the note as usurious and void, and agreed to resist the payment of the same, provided suit should be brought against him to recover, and only so far as it may be declared legal did Killough agree to pay it, and only to that extent he is bound. By the stipulation in the deed of trust the parties made the note and deed an Arkansas contract. *Lanier* v. *Union Mortgage, Banking & Trust Co.,* 64 Ark. 39. And, being such, they are void for usury. Appellants therefore have no right to complain, and appellees do not.

Decree affirmed.

BYRNE v. LESS.

Opinion delivered November 8, 1909.

1. TAXATION—WEEKLY PUBLICATION OF DELINQUENT LIST.—The requirement in Kirby's Digest, § 7085, that the list of lands delinquent for taxes shall be published "weekly for two weeks between the second Monday in May and the second Monday in June in each year," is not met by publishing the list twice in a weekly newspaper, but two weeks apart, between the second Monday in May and the second Monday in June. (Page 212.)
2. SAME—INSUFFICIENCY OF NOTICE.—Failure of the clerk to publish the delinquent tax list for two weeks in succession as required by Kirby's Digest, § 7085, rendered the tax sale void. (Page 213.)

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

L. A. Byrne, pro se.

The presumption is in favor of the validity of a tax deed. Kirby's Dig., § § 7104-5; 81 Ark. 319; 30 Ark. 732; 59 Ark. 195.

James D. Head, for appellees.

Property to be sold for taxes must be properly described in the notice of sale. 25 L. Ed. (U. S.) 327; 59 Ark. 460; 69 Ark. 358; 56 Ark. 172; 50 Ark. 484; 79 Ark. 442; 64 Ark. 432; 62 Ark. 189. And defects therein cannot be cured by any communication made to the bidders on the day of sale. 7 L. Ed. (U. S.) 882. The failure of the clerk to attach his certificate is fatal to the sale. 68 Ark. 248; 74 Ark. 583; 61 Ark. 36; 81 Ark. 296. It cannot be placed there after the sale. 65 Ark. 595. The findings of a chancellor as to the facts will not be disturbed. 71 Ark. 605; 68 Ark. 314; *Id.* 134; 72 Ark. 67; 75 Ark. 52; 77 Ark. 305. The delinquent list was not published as required by law. Kirby's Dig., § 7085; 55 Ark. 192; 15 Ark. 363; 30 Ark. 739.

BATTLE, J. L. A. Byrne brought this action against Gus Less and another in the Miller Circuit Court to recover a certain tract of land. He bases his right to recover upon a purchase at a sale of the land on the 13th day of June, 1904, for the taxes of 1903. Less denied his right to recover, alleging that the sale was void for several reasons, one of which was the notice of the sale was not given in the manner prescribed by law. No-

tice was given by a publication of the lands returned delinquent, of which the land in controversy was a part, "in the *Weekly Texarkanian,* a weekly newspaper published in Miller County, for two weeks between the second Monday in May and the second Monday in June, 1904, the first insertion being dated May 11, 1904, and the second insertion being dated May 25, 1904," thirteen days intervening between the dates of the two insertions. Was the notice in compliance with the statute?

The statute provides that the delinquent list shall be published "weekly for two weeks between the second Monday in May and the second Monday in June in each year." Kirby's Digest, § 7085. "Weekly for two weeks" means two weeks in succession; for the two weeks it must be weekly. It would not have been weekly if a month had intervened between the two insertions. A newspaper published every two weeks would not be a weekly but a bi-weekly. In this case the publication was bi-weekly, and was not in compliance with the statute. Did the failure to comply with the statute render the sale void?

Judge Cooley, in his work on Taxation, says: "The first proceeding usually required of the officer who is to make sale is, that he shall give public notice of his intention to do so. Under different statutes notices in various forms are required, as may be thought most suitable to the case. * * * Whatever the provision is, it must be complied with strictly. This is one of the most important of all the safeguards that have been deemed necessary to protect the interests of persons taxed, and nothing can be substituted for it or excuse the failure to give it. The notice being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them. He is under no obligation to take notice of the proceedings unless notified." 2 Cooley on Taxation (3 Ed.), pages 928-930. To the same effect see Black on Tax Titles, § § 82, 84, and Blackwell on Tax Titles, § 215.

In *Townsend* v. *Martin,* 55 Ark. 192, this court said: "The notice for the sale upon which the forfeiture to the State is based was not published for the full time prescribed by the statute by three days. It is conceded that that fact is established by the record. The previous decisions of this court upon the subject

of tax titles are uniform to the effect that failure on the part of an officer engaged in the proceedings devised for raising the revenue to observe a requirement of the statute, the non-observance of which tends to deprive the land owner of a substantial right, will avoid the deed. * * * The failure, therefore, to give notice in the manner or for the length of time prescribed by statute is prejudicial to the owner's interest and will avoid the sale."

In this case the notice required by the statute was not given. The owner of the land was not legally notified, and the sale is void.

There are other questions in the case which we have considered, but it is unnecessary to notice them in this opinion.

Judgment affirmed.

DAVIS *v.* SPANN.

Opinion delivered November 8, 1909.

1. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT—PRESUMPTION.—Where appellant fails to abstract the evidence so as to show that the judgment appealed from is erroneous, it will be presumed that it is correct. (Page 215.)
2. SALE OF LAND—EFFECT OF AGENT'S VERBAL AUTHORITY.—While authority to convey land or the growing timber thereon must be confirmed by an instrument of equal dignity with the instrument of conveyance, authority to sell and to make a binding contract of sale may be conferred verbally. (Page 215.)
3. TIMBER—VERBAL SALE—VALIDITY.—One who purchases timber on land under verbal contract, pays the purchase price, enters upon the land by permission and cuts the timber can in equity successfully defend his title. (Page 215.)

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

Thomason & Thomason, and *J. T. Coston,* for appellants.

The timber was part of the land on which it stood (118 S. W. 1021), and cannot be conveyed except by deed in the usual form for conveying real estate. 118 S. W. 1021; 61 Mo. App. 409; 5 Barb. 364. The power to convey is to be exe-

cuted only in accordance with the provisions prescribed in the deed. 31 Ark. 406. A purchaser of land takes it with notice of whatever appears in his chain of title. 50 Ark 327. A special power of attorney should be strictly construed. 19 Wall. 610. Where the owner of an estate prescribed in an instrument creating a naked power the manner of exercising it, such requirements must be strictly complied with. 83 Am. Dec. 780; 100 *Id.* 231; 32 S. W. 1056; 30 S. W. 52; 37 Tex. 19; 16 S. W. 310; 14 Wis. 630; 12 Minn. 546; 1 Ia. 242. A ratification by the principal of the not properly authorized act of the agent must be by an act of the character required for original authority. 18 N. W. 151. The burden of proving ratification of an unauthorized act rests upon the party asserting it. 84 Am. Dec. 613; 20 So. 749; Mechem on Agency, § 132.

W. J. Lamb, for appellee.

When counsel for appellant fails to abstract the transcript of the record, the decision of the trial court will be affirmed. 75 Ark. 571; 76 Ark. 138.

McCULLOCH, C. J. Mrs. Elizabeth Ballew, a resident of Tennessee, owned a tract of land in Mississippi County, Arkansas, and Judge Thomason, an attorney of Osceola, Arkansas, was her agent; the particular extent of his authority not being shown in this record as abstracted by counsel for appellants. Appellee Spann made an offer to Judge Thomason to purchase the timber on the land for $100, and the latter accepted the offer, subject to the approval of his principal. After submitting the offer to Mrs. Ballew and receiving her approval, Judge Thomason accepted appellee's offer and executed to the latter a deed signing his principal's name thereto as her agent, conveying the timber and stating a stipulated time within which it should be removed. The deed, as it now appears in the record, specified three and one-half years as the period of time within which the timber must be removed, but appellants contend that the deed was originally written specifying only three years, and that it has been changed since it was delivered to appellee. Appellee contends that the deed has not been changed since it was delivered to him, and we must accept this as true, since the chancellor so found on conflicting testimony, and appellants have not abstracted the testimony. Afterwards appellants purchased the land from Mrs.

Ballew, with notice that the timber had been sold to appellee, and they instituted this suit to recover from him the timber cut during the half-year disputed period. The chancellor denied them any relief, and they appealed to this court.

Judge Thomason testified that the only authority he had from his principal to sell the timber was contained in her letter to him authorizing him to accept appellee's offer of $100, in which she directed him to allow three years within which to remove the timber. Appellants insist that the testimony on this point is uncontradicted, but counsel for appellee dispute this; and, as the testimony is not abstracted, we cannot, without exploring the record, determine which contention is correct. It is our duty, therefore, to sustain the findings of the chancellor. It is the duty of an appellant to abstract the record so as to show that the judgment or decree appealed is erroneous; otherwise we indulge the presumption that it is correct. *Files* v. *Law,* 88 Ark. 449; *Shorter University* v. *Franklin,* 75 Ark. 571.

Appellants do not even abstract the letter which they claim constituted the authority of Judge Thomason to sell the timber, nor do they refer to it in the record. We have no information at all that the record contains it.

Learned counsel are also in error when they insist that under the law authority to sell land must be in writing. This court has held to the contrary. They overlooked the distinction between authority to sell and authority to convey land. Authority to convey land must be conferred by an instrument of equal dignity with the instrument of conveyance, but authority to sell and to make a binding contract of sale may be conferred verbally. *Forrester-Duncan Land Co.* v. *Evatt,* 90 Ark. 301; *McCurry* v. *Hawkins,* 83 Ark. 202. This distinction is not important in the present case, for, even if Judge Thomason exceeded his authority in the execution of the timber deed, appellee was the equitable owner under his contract of purchase, and, having paid the purchase price, entered upon the land by permission and cut the timber, he can in equity successfully defend his possession. *Daniel* v. *Garner,* 71 Ark. 484.

We are unable to discover any error in the proceedings, as abstracted. So the decree is affirmed.

BAILEY v. STATE.

Opinion delivered November 8, 1909.

1. LARCENY—INSTRUCTION AS TO INTENT.—Where it was a question in a larceny case whether defendant took a certain pistol with intent to steal or merely to defend himself, it was reversible error to refuse to charge the jury specifically that if defendant took the pistol without intention to steal it, but only for the purpose of disarming the owner, he would not be guilty of larceny, even though in another instruction the jury were told that, in order to convict, they must believe beyond a reasonable doubt that defendant stole and carried away the pistol with intent to deprive the owner of his property. (Page 217.)
2. SAME—EVIDENCE.—Where, in a prosecution for larceny of a pistol, the defense was that he took the pistol from the owner to prevent him from doing him a personal injury, it was error to refuse to permit defendant to testify that, prior to the occurrence, the owner of the pistol had repeatedly threatened to kill him, and that they were on bad terms. (Page 219.)

Error to Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; reversed.

Jo Johnson, for appellant.

An instruction on a trial for larceny which disregards the element of intent to steal is erroneous. 32 Ark. 238; 13 Ark. 168; 60 Ark. 5; 34 Ark. 341; 37 Ark. 261; 56 Ark. 315. Possession is not sufficient evidence of larceny unless accompanied with some claim of ownership or interest. 73 Ark. 32; 80 Ark. 497; 73 Ark. 169; 70 Ark. 144; 42 Ark. 73. Unless the defendant acted with felonious intent, he cannot be guilty of larceny. 70 Ark. 204; 34 Ark. 443; 55 Ark. 244; 34 Ark. 693; 44 Ark. 39; 58 Ark. 576; 67 Ark. 155.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

The bare fact that there were no negroes on the jury is not sufficient for reversal. 189 U. S. 426; 200 U. S. 316; 86 Am. St. R. 668; 65 S. W. 1066; 95 S. W. 1069; 45 Tex. Cr. R. 430; 69 Ark. 189. If appellant desired an instruction on the element of felonious intent, he should have requested it. 67 Ark. 416; 75 Ark. 373; 77 Ark. 455.

MCCULLOCH, C. J. Appellant, Pete Bailey, was convicted under an indictment charging him with grand larceny by stealing a pistol, the property of one Adams. The testimony adduced

at the trial below by the State tended to establish the following facts:

Appellant lived in the city of Fort Smith, and Adams, who was a policeman, went to the former's house and attempted to arrest him for permitting gambling in his house. Adams had no warrant for appellant's arrest, but claims that he saw a crowd of negroes shooting craps in appellant's house; that he had a warrant for the arrest of Arthur Edwards, who was one of them, and that when he went to the house all of them ran away, and he attempted to arrest appellant for permitting gambling to be carried on in his house. When Adams attempted to make the arrest, appellant and Edwards set upon him, knocked him down and beat him into insensibility, and took his pistol from him and ran away with it. Adams testified that he did not know which one of them took the pistol, but said that in the melee he felt it moved out of the scabbard.

Appellant testified that during the fight the pistol fell out on the ground, and that Adams and Edwards both reached for it, the latter getting to it first and securing it. Appellant and Edwards ran away, pursued by officers or persons seeking to apprehend them. They crossed the river into Oklahoma, and the next day were arrested by officers at the town of Sallisaw, in that State. When arrested, appellant had the pistol on his person, and he stated to the officer that he came from St. Louis, where he resided, and that the pistol had been given to him by his father. Appellant testified at the trial that Edwards took the pistol and gave it to him to keep during the night, and that they never intended to steal the pistol, but intended to return it at the first opportunity. He testified that after he and Edwards had escaped from their pursuers they talked about the pistol and agreed that he (appellant) should return to Fort Smith and "turn it over."

Appellant requested the court to give instructions to the effect that if he or Edwards took the pistol without any intention of stealing it, but only for the purpose of disarming Adams, then they would not be guilty of larceny. This is the law, and the court should have so instructed the jury. There was evidence sufficient to warrant a submission of that question to the jury, and appellant was entitled to a specific instruction to that

effect. *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 134; *Prescott & N. W. Ry. Co.* v. *Weldy,* 80 Ark. 454; *Western Coal & M. Co.* v. *Buchanan,* 82 Ark. 499; *Western Coal & M. Co.* v. *Burns,* 84 Ark. 74; *St. Louis & S. F. Rd. Co.* v. *Dyer,* 87 Ark. 531; *Jackson* v. *State, ante* p. 71.

It is true that the court in all of its instructions told the jury in general terms that if they believed, beyond a reasonable doubt, that appellant stole and carried away the pistol with intent to deprive the owner of his property, or aided or abetted Edwards in doing so, they should convict him, thus making his conviction depend upon the finding of these facts beyond a reasonable doubt. But the existence of an intent to steal being an essential element of the crime of larceny, and there being sufficient evidence to justify a finding that the pistol was not taken with any such intent, appellant was entitled to a specific instruction as asked. In *Gooch* v. *State,* 60 Ark. 5, Judge RIDDICK, speaking for the court, said: "To constitute larceny, the taking must be done with a felonious intent. It has been held that a person who takes muskets to prevent their being used against himself and friends does not commit larceny, there being no *lucri causa.*" He added a quotation from Bishop, that "a better reason for this just decision would have been that his motive was not to deprive the owner of his ownership in them."

In this case the taking and carrying away of the pistol was conceded, and the only question substantially in dispute was as to the intent. The testimony adduced by the State was sufficient to warrant a finding that Edwards, aided and abetted by appellant, took the pistol from Adams and carried it away with the felonious intent to steal it; and, on the other hand, the jury could have found that there was no intent to steal the pistol, but that they took it away from Adams in order to disarm him, either for the purpose of preventing him from successfully defending himself from their assault or from arresting them. It is unimportant what the real motive was, whether it was good or evil, so long as there was no intent to steal. And whether or not such an intent existed was, under the circumstances of the case, a question for the jury to decide under proper instructions. The minds of the jury should have been directed to this particular point by a specific instruction; at least when the appellant asked for such

an instruction, he was entitled to it. *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 134; *Prescott & N. W. Rd. Co.* v. *Weldy,* 80 Ark. 454; *Western Coal & Mining Co.* v. *Buchanan,* 82 Ark. 499; *Western Coal & Mining Co.* v. *Burns,* 84 Ark. 74; *St. Louis & S. F. Rd. Co.* v. *Dyer,* 87 Ark. 531; *Jackson* v. *State, ante.* p. 71.

Appellant offered to prove by his own testimony that, previous to this occurrence, Adams had repeatedly threatened to kill him, and that they were on bad terms; but the court refused to permit such proof to be made. We think this testimony was competent for the purpose of showing the intent with which appellant participated in the act of taking the pistol away from Adams and carrying it away. It tended to strengthen appellant's contention that he did not intend to steal the pistol, and it might have induced the jury to find that appellant aided or encouraged Edwards to take the pistol away from Adams because he was afraid of Adams and wanted to disarm him.

Other errors are assigned, not of sufficient importance to discuss. But for the error indicated the judgment is reversed, and the cause is remanded with directions to grant appellant a new trial.

WESTERN UNION TELEGRAPH COMPANY *v.* GRIFFIN.

SAME *v.* GORDON.

(Two Cases).

Opinion delivered November 8, 1909.

1. TELEGRAPH COMPANIES—SPECIAL DAMAGE—SUFFICIENCY OF NOTICE.—A message to one from his son-in-law, announcing the death of the former's daughter and requesting him to come at once and to send an answer, sufficiently indicates that the daughter's funeral was being held in abeyance until the expiration of a reasonable time. (Page 226.)
2. SAME—WHEN DAMAGE FOR MENTAL ANGUISH RECOVERABLE.—The sender of a message addressed to his father-in-law, announcing the death of his wife and requesting him to come at once and to answer the message, may recover damages for mental anguish caused by the failure of the telegraph company to deliver the message within a reasonable time. (Page 228.)
3. SAME—DAMAGES FOR MENTAL ANGUISH—PARTIES.—Where a telegraphic message was sent from this State, where damages for mental anguish are recoverable, to be delivered in another State, where such damages

are not recoverable, and the telegraph company duly transmitted the message, but negligently failed to deliver it to the addressee, either the sender or the addressee may, in an action in this State, recover such damages for mental anguish as they may establish. (Page 229.)

4. SAME—MENTAL DAMAGES—BASIS OF RECOVERY.—As the statute (Kirby's Digest, § 7947) makes mental anguish an element of recoverable damage for failure to receive, transmit or deliver a telegram, a recovery may be had *ex contractu* in this State for negligent failure to deliver a message, even though the negligence occurred in a State where mental anguish is not an element of recoverable damages. (Page 230.)

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

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

1. Appellant is not chargeable with negligence. The message was not received at Water Valley until seven minutes after four in the afternoon. Sunday office hours were from eight to ten A. M. and from four to six P. M. The operator's testimony that she used diligence to find a special messenger is uncontradicted and stands as proved. 75 Ark. 406.

2. The proof shows that after the message was mailed, which was the next quickest means of delivering it, Gordon would not have received it until Tuesday morning. Deceased was buried Monday afternoon. If there was any error or delay in the message, it was not the proximate cause of the failure to attend the funeral, and there can be no recovery. 27 Am. & Eng. Enc. of L., 1075-6. The remains had been embalmed, and could have been held for two weeks. Griffin had endeavored to communicate with Gordon by other means. He learned on the next morning that a friend had sent word to Gordon at Banner, but proceeded to have the funeral that afternoon, Monday. He should have postponed the funeral a reasonable time after learning of his friend's effort. Having made no effort to minimize the damage, he should not be heard to complain. 90 Ark. 203; Sedgwick on Dam., § § 204, 214; 27 Am. & Eng. Enc. of L. 1033e; 84 Ark. 506.

3. Appellant was not notified that the funeral arrangements were in abeyance until word should be received from Gordon. 78 Ark. 545; 79 Ark. 33; Sedgwick on Dam., § § 879, 880; 84 Ark. 461; 27 S. W. 144; *Id.* 52; 26 S. W. 490.

4. If there was any negligence, it occurred in the State of Mississippi, where the mental anguish statute does not apply. 68 Miss. 748; 47 So. 552. The action of an addressee for failure to deliver a telegram is in tort, not in contract. 77 Ark. 536; Thompson on Electricity, § 427; 79 Ark. 452; 84 Ark. 327; 85 Ark. 268. The negligence of the operator at Water Valley, if any, constituted a tort, and Mississippi law applies. In South Carolina, from whose statute ours is taken verbatim, it is held that the law of the place of the negligence governs. 60 S. E. 435; 52 S. E. 107. See also 66 Ark. 466.

5. Griffin cannot recover for mental anguish because his father-in-law was not present at the funeral to console him. It is too remote and speculative. 83 Ark. 476; 79 Tex. 649; 24 Tex. Civ. App. 84; 57 S. E. 757; 60 S. E. 660; *Id.* 662; *Id.* 663; 54 S. W. 829; *Id.* 830; 31 So. 78; 30 S. W. 896; *Id.* 298; 39 S. W. 198.

R. W. Robins, for appellees.

1. Due diligence is not shown. The message on its face gave notice of its urgency, not to mention the fact that the agent at Conway was given full notice of the necessity for prompt delivery and had agreed to have it delivered by special messenger. Water Valley is shown to be a city of from 3,500 to 4,000 inhabitants. There is no claim that there was no livery stable or other establishment in the city from which a messenger could be sent, nor that any attempt was made to hire such a messenger. And the message was mailed within an hour of the time it was received by the operator.

2. This haste in placing the message in the mail for delivery without making sufficient effort to forward it by special messenger was negligence, and was the proximate cause of Gordon's failure to receive the message in time to attend the funeral.

3. The message was sufficient on its face, aside from information given to the operator, to put the appellant on notice that the funeral arrangements would await an answer from Gordon. Damages are recoverable under such circumstances, even though a reply message is necessary to procure a postponement of the funeral. 78 S. W. 491; 54 S. W. 414; Joyce on Electric Law, § 811; 87 Ark. 303, 307; 88 Ark. 499, 504.

4. Appellant's answer does not plead the Mississippi law as a defense, so as to put appellees on notice and give them an opportunity to show where the negligence occurred. The plea is not now available, in the absence of an amendment of its pleadings. But if the plea were properly before this court, appellants are under the law entitled to recover. 77 Ark. 531, 535. It was not the intention of our Legislature to confine the right of recovery to negligent acts of the telegraph company in this or some other State where the mental anguish doctrine prevails; nor has our court ever so construed the statute. See Arkansas cases cited by appellant. 69 S. W. 427; 74 S. W. 752; 49 S. E. 952; 45 S. E. 938; 135 Mo. 661; 56 L. R. A. 486; Thompson, Law of Electricity, § 165, p. 190; 95 Ind. 12; Jones, Tel. & Tel. Companies, § 598.

5. The true doctrine is that where consanguinity does not exist between the parties mental anguish because of the absence of one of them will not be *presumed;* "but if mental anguish does actually result from the failure to deliver a message, where there is only affinity between the parties, it may be shown and damages recovered." 132 N. C., 317, 322; 85 Ark. 263; 83 Ark. 39; 87 Ark. 303.

BATTLE, J. On Sunday, March 24, 1907, Mrs. Genie Griffin, wife of Ben L. Griffin, died, and the following telegram was delivered to the Western Union Telegraph Company at Conway, Arkansas, on that day, about one o'clock, P. M. to be sent to A. A. Gordon, at Banner, Mississippi:

"A. A. Gordon, Banner, Miss., *via* Water Valley, Miss.

"Genie died very suddenly at one P. M. today. Come at once. Answer, my expense.

"Ben L. Griffin."

The funeral of Mrs. Griffin took place at Conway, on the 25th of March, 1907, at about five o'clock P. M. A. A. Gordon was not present, the telegram not having been delivered to him until three or four days thereafter.

Ben L. Griffin and A. A Gordon brought separate actions against the Telegraph Company to recover the damages occasioned by the failure to deliver the message in time.

Ben L. Griffin alleged in his complaint, substantially, as follows: "The defendant is a corporation, engaged in transmitting

telegrams, and on March 24, at one o'clock P. M. plaintiff delivered to it the following telegram: 'A. A. Gordon, Banner, Miss., *via* Water Valley, Miss.: Genie died very suddenly at one P. M. today. Come at once. Answer, my expense. Ben L. Griffin.'

"That at the time the message was delivered to defendant it was notified that A. A. Gordon was the father of 'Genie,' and that plaintiff was very anxious for prompt delivery of the message, so that the addressee could come at once, and be present at the funeral, which was to occur at Conway. That the addressee was then at Banner, and plaintiff desired him to be present at the funeral. That the price for transmitting the message was paid and charges for its prompt delivery guarantied. That defendant agreed to transmit the message and deliver it promptly to the addressee; that defendant wantonly, wilfully and negligently failed to deliver the message promptly, or within a reasonable time, and that the message was not delivered until March 29; that, on account of the failure to deliver the message, the addressee did not attend the funeral and was not with the plaintiff before and at the time of the funeral," which was the occasion to him of great mental anguish, and caused him to suffer damages in the sum of $1,500.

The defendant answered and denied the material allegations in the complaint.

A. A. Gordon alleged in his complaint, substantially, that the telegram was sent in the manner alleged in Griffin's complaint, "and that it was not delivered to plaintiff within a reasonable time, because of the negligence of the defendant, and that it was not received by plaintiff until March 29; that, had he received the message promptly or within a reasonable time, he could and would have gone to Conway and have been present at the funeral, and that solely because of the failure to deliver the message promptly he was not present at the funeral; that his failure to attend the funeral occasioned him mental anguish and damaged him in the sum of $1,500."

The defendant denied material allegations.

By consent the two actions were heard as one, and the jury returned a verdict in favor of each of the plaintiffs for $200, and judgment was rendered accordingly; and the defendant appealed.

In the trial of the issues in the case evidence was adduced tending to prove the following facts:

On the 24th of March, about twelve o'clock, Mrs. Genie Griffin died at her home in Conway, Arkansas. She was the wife of Ben L. Griffin and the daughter of A. A. Gordon. About one o'clock P. M. of the same day, Griffin delivered to the defendant, at Conway, a telegram in words and figures set out above, to be sent to A. A. Gordon, at Banner, Mississippi. J. R. Pearcy delivered the telegram for him, and told the defendant's operator, at the time he delivered it, that "Genie" mentioned in the message was the wife of Griffin and the daughter of Gordon; explained to the operator about the funeral, and told him that a reply to the message was desired at once, so that Griffin might know whether or not to expect Gordon to come to the funeral, and told him where Gordon resided, which was about eighteen miles from the defendant's telegraph office at Water Valley, Miss., and that it would be necessary to send the telegram to him from Water Valley by special messenger. and offered and agreed to pay all charges for sending the message and extra charges for sending it from Water Valley to Gordon, and defendant agreed to transmit the message and send it to Gordon by special messenger.

The body of Mrs. Griffin was embalmed, so as to preserve it for a week or two, and the time of the funeral was postponed, awaiting a reply to the message. The telegram was sent and reached Water Valley on the 24th of March, 1907, at 4:07 P. M. The operator at that place testified: "After making inquiries from several parties, none of whom knew Mr. Gordon, I asked several parties to deliver said message, without success. I then placed a copy of the message in postoffice at about five o'clock, Sunday afternoon, directing it to Banner, Mississippi, Banner being twenty miles from this place (Water Valley), and there being no telephone communication there, this being the quickest way to get it to destination." Water Valley is a town of about 3,500 or 4,000 inhabitants, and the distance between it and Gordon's residence could have been traveled by horse in three hours. Gordon was at home on Sunday and Sunday night, which was the 24th of March, 1907, and remained there until 5 o'clock A. M. of the day following. If he had received the telegram on or be-

fore 10 o'clock P. M. on Sunday, he could have reached Conway at 6 or 10 P. M. of the next day. If Gordon had received the telegram on or before 10 o'clock Sunday night, he could and would have sent telegram to Griffin that he would come, and that he could and would have come to Conway at once; and that if such a message had been received by Griffin, he could have and would have postponed the funeral of his wife until Gordon arrived.

After many ineffectual efforts to hear from his message, Griffin heard, on the morning after it had been delivered to the defendant for transmission, at eleven o'clock, that it had been received at Water Valley, and had been placed in the postoffice at Water Valley addressed to Gordon at Banner, to be sent to him by mail. It was then uncertain when it would reach him, and in fact did not until the 29th of March, 1907. When he heard the message had been sent to Gordon by mail, he caused his wife to be buried on Monday evening, March 25, at about five o'clock, and Gordon was not present. While he was waiting to hear from his telegram, he was anxious and much worried.

The court instructed the jury, in part, at the request of the defendant, as follows: "You are instructed that the defendant was not compelled to attempt to deliver said telegram otherwise than by sending it to Water Valley and from there attempting to deliver it to the addressee; and if you find from the evidence that the defendant transmitted said message to Water Valley with reasonable dispatch and made the efforts of a reasonably prudent person under the circumstances to send it by special messenger from Water Valley to Banner, Miss., but was unable to secure such special messenger, your verdict will be for the defendant."

And refused to instruct as follows:

"You are instructed that the telegram in suit was transmitted to Water Valley, Miss., with reasonable dispatch, and that defendant committed no act of negligence in the transmission of said message that would have occasioned plaintiff any damages unless in the delay in delivery of the message from Water Valley to Banner, Miss.; but, even if you find that defendant was guilty of negligence in not delivering said message from Water Valley to Banner, in the State of Mississippi, sooner than it did, you are

instructed that its tort was committed in the State of Mississippi, and the law of Mississippi will govern as to plaintiff's right of recovery for mental anguish; and you are further instructed that the law of Mississippi does not allow a recovery for mental anguish in such cases, and your verdict will be for the defendant, as to the plaintiff, A. A. Gordon."

Many instructions were given and refused.

The evidence adduced in the trial court tended to prove that the telegram delivered to appellant to be sent to Gordon reached Water Valley at seven minutes after four o'clock P. M. on the day it was sent. Appellant agreed to deliver it to Gordon, who resided near Banner, in Mississippi, eighteen or twenty miles from Water Valley, and Griffin, who sent the message, agreed to pay the expenses of sending it from the latter place to him. To do so it was necessary to send it by special messenger. The operator at Water Valley testified that she asked several parties to deliver the message, without success. Was that sufficient? Water Valley is a town of 3,500 or 4,000 inhabitants, and it was not shown that a horse and rider or conveyance could not have been hired in that place to carry the message to Gordon. The question as to whether reasonable efforts were made to secure such a conveyance was submitted to a jury, and they found in the negative, and the evidence sustains them.

If appellant had sent the message to Gordon by special messenger, as it agreed to do, the evidence tends to prove that the funeral would have been postponed, and Gordon would have been present, and in this respect sustains the verdict of the jury.

Appellant says it had no notice that the funeral of Mrs. Griffin was in abeyance. The evidence shows that it did have. The message was sufficient to put it on notice that it would be postponed until the expiration of a reasonable time. The message to Gordon was to "Come at once. Answer at my expense." It expressed a desire for him to come and a request for an answer. The answer was, evidently, for the purpose of ascertaining whether he would come, and, if so, when, so that the funeral could be postponed to a time when he could be present. All this indicated that the funeral was in abeyance at the time the message was delivered.

Appellant says that the relation of son-in-law by Griffin to Gordon was not sufficient to sustain an action for mental anguish

occasioned by the failure to deliver a telegram. But it was held to the contrary in *Western Union Tel. Co.* v. *Moxley,* 80 Ark. 554. Two opinions were delivered in that case, and it was held as stated in the first opinion, and this much of the first opinion was not retracted or modified by the second.

It is contended that, if there was any negligence in failing to deliver the message in question, it occurred in the State of Mississippi, where damages on account of mental anguish without personal injury are not recoverable and appellees cannot recover in their actions. This view is not sustained by *Western Union Telegraph Co.* v. *Woodard,* 84 Ark. 323. In that case a message was sent from Fayetteville, Tennessee, to Stuttgart, Arkansas, notifying the addressee of the death of his sister. The message never reached this State. After quoting from Wharton on the Conflict of Laws, the court said: "Applying this principle here, it is not material in this case which view is generally taken as to the action, whether *ex delicto, ex contractu* or statutory; for the actions must be sustained by reason of the Tennessee contract. It is held in Tennessee that the addressee recovers upon the contract of the sender inuring to his benefit, and that mental anguish is a recoverable element in such contracts.

* * * * * * * * * * * * *

"In this case, although there may be no statutory action arising in Arkansas, for the reason that no negligence has occurred actionable under the statute, yet there is a contract which, under the laws of Tennessee where it was made between the sender and the Telegraph Company, inured to the benefit of the addressee; and one element of the contract was the right to recover for mental anguish. That action is, under the principles heretofore quoted from Wharton (which seem fully supported by the authorities), sustainable here; and that is as far as the court is required to go in this case."

According to that case these actions are sustained by the contracts sued on, it having been made, like the Tennesse contract, under a statute which allows the recovery of damages for mental anguish.

Judgment affirmed.

FRAUENTHAL, J., disqualified and not participating.

ON REHEARING.

Opinion delivered November 20, 1909.

McCULLOCH, C. J. It is insisted that the conclusion reached in the present case is in conflict with the decision in *Western Union Tel. Co.* v. *Ford,* 77 Ark. 531. In that case a telegram was sent from Missouri, where damages on account of mental anguish are not recoverable, into Arkansas, and the negligence occurred here. Suit was brought by the addressee, and we held that damages for mental anguish could be recovered, although not recoverable in the State whence the message came. The opinion in that case contains inaccurate language, which is in conflict with other decisions of this court. We said that the right to recover such damages did not depend on any contractual relation existing between the Telegraph Company and the person injured, and that no contract existed between the addressee of the message and the company. Now, the addressee is one for whose benefit the contract is made. Therefore, a contractual relation with him is established. We have in other cases recognized the principle that the cause of action to recover damages on account of mental anguish arises out of the contract, although the element of damages is created by statute.

In *Arkansas & La. Ry. Co.* v. *Stroude,* 77 Ark. 109, we said of this statute that "manifestly, it was the intention of the lawmakers to change by statute the law as declared by this court in the case referred to above, and to make mental pain and anguish an element of damages resulting from a negligent failure to receive, transmit or deliver a telegraphic message."

In other cases we have held that the contract governs to the extent that a stipulation therein, requiring notice of a claim for damages, is enforceable, and that no recovery can be had unless notice be given in accordance with the terms of the contract. *Western Union Tel. Co.* v. *Moxley,* 80 Ark. 554; *Western Union Tel. Co.* v. *Nelson,* 86 Ark. 336.

In *Western Union Tel. Co.* v. *Raines,* 78 Ark. 545, and in *Western Union Tel. Co.* v. *Hogue,* 79 Ark. 33, we recognized the force of the contractual rights of the parties by holding that the rule in *Hadley* v. *Baxendale,* 9 Exch. 341, would control so as to exclude a recovery of damages when

notice was not given that the same might accrue, Judge RIDDICK, speaking for the court in the Hogue case, said: "Such damages may, under our statute, be recovered in some cases, but the statute does not change the rule that when a plaintiff seeks to recover of a defendant special damages on account of the breach of a contract he must show that at the time the defendant entered into the contract he had notice of the special circumstances out of which the special damages arose, so that it may be reasonably said, as a matter of law, that such special damages were in contemplation of the parties at the time they made the contract." He then quoted the following from the American & English Encyclopedia of Law (vol. 27, p. 1059): "While actions against telegraph companies are not necessarily or usually *ex contractu,* but *ex delicto* for a breach of a public duty, the cause of action is so far dependent upon the original contract of sending as to make the rule just stated controlling, and it has been universally applied in this class of actions, without regard to whether the particular action is *ex contractu* or *ex delicto.*"

In the Raines case Judge BATTLE, speaking for the court, said: "The damages recoverable under the statute are such as the jury may conclude resulted from the negligence of the telegraph company. Such damages are allowed as a compensation for the mental anguish or suffering; and the liability of the company for the same depends upon its having had notice, before or at the time of receiving the telegram, of the special circumstances on account of which mental suffering was caused by negligence in transmitting or delivering the message. This notice may be given by or through the telegram itself or otherwise."

We think the decisions in all these cases are reconcilable with the decision in the Ford case, though some of the language used in the Ford case is, as already stated, inaccurate. The Ford case is also reconcilable with the conclusion reached in the present case. Mr. Wharton, in his work on Conflict of Laws, states the principles upon which a recovery can, without conflict of principles, be had in each of these cases. (Wharton on Conflict of Laws, 3d Ed. § 471f.) He states that "the general rule seems to be that a contract made in one State or country for the transmission of a telegram from a point in that State or country

to a point in another is governed by the law of the State or country in which the contract is made and from which the telegram is sent, rather than by that of the State in which it is received," but that some cases "assume that the performance of the contract is the delivery of the telegram, and that the transmission is merely a means of enabling the telegraph company to perform; and they therefore refer the contract to the law of the place of delivery as the sole place of performance." He then proceeds: "Assuming, however, that the former rule is the correct one, it does not apply to matters that relate to the remedy, as distinguished from the substantive contract, and therefore does not operate to relieve a contract from the effect of a statute, which is remedial rather than substantive, of the State in which the telegram was to be delivered, if the action is brought in that State."

This fully sustains, without conflict, the decision in the Ford case and in the present case. The statute makes mental anguish an element of recoverable damage for failure to receive, transmit or deliver a telegram; yet the relation out of which the duty arises is created by contract, and the cause of action primarily grows out of the contract. For this reason a recovery may be had here for negligent failure to deliver a message, even though the negligence occurred in a State where mental anguish is not an element of recoverable damages. On the other hand, as in the Ford case, a recovery may be had for a negligent failure here to deliver a message sent from another State where such element of damage is not recognized. When the negligence occurs here, the statute of this State applies, and makes mental anguish an element of damages, regardless of the law of the State whence the message came, for the statute is intended to give redress for negligent failure to perform the contract to deliver a message.

The peition for rehearing is therefore denied.

BECKETT v. WHITTINGTON.

Opinion delivered October 18, 1909.

1. ADMINISTRATION—CONCLUSIVENESS OF SETTLEMENTS.—An order of the probate court confirming an administrator's settlement is a judgment binding upon all persons interested in such estate, and conclusive of

all matters embraced in such settlement, and within the scope of the proceedings. (Page 234.)

2. SAME—EFFECT OF CONFIRMATION OF FINAL SETTLEMENT.—When the probate court confirms the final settlement of an administrator and closes the administration, it is a conclusive finding that all the assets of the estate have been reported and administered, and that all matters of the accounting have been fully and finally made, and that the jurisdiction of the probate court over the estate is at an end. (Page 235.)

3. SAME—REOPENING SETTLEMENT IN EQUITY.—If, through fraud, accident or mistake, any property of an estate which has been settled has not been reported, accounted for or administered, equity has jurisdiction to set aside the judgment of the porbate court confirming the final settlement and remand the administration, if deemed necessary, to the probate court for further action. (Page 235.)

4. SAME—FINAL SETTLEMENT—REOPENING.—An order of the probate court appointing an administrator in succession after the former administrator's final settlement has been approved is without jurisdiction and void. (Page 236.)

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

Stevens & Stevens, for appellant.

1. The burden was on Whittington to show a valid settlement. 24 Ark. 124; 68 Ark. 284. He has not shown it.

2. The probate court had jurisdiction to appoint a second administrator. Const. Ark., art. 7, § 24; Kirby's Dig. § § 20, 21; 46 Ark. 373; 46 *Id.* 467; Kirby's Dig. § 46.

3. It is proper to appoint an administrator *de bonis non* on discovery of assets subsequent to the discharge of the former administrator. 18 Cyc. 105; 65 S. W. 713. A right of action which survives to the estate is sufficient for such appointment. 18 Cyc. 104-106.

4. The action of the probate court is final except on appeal. 33 Ark. 575; 44 *Id.* 496.

5. The administrator in succession has capacity to sue. 35 Ark. 289; 83 Ark. 495.

C. W. McKay and *J. G. Lile,* for appellee.

1. It is the duty of a surviving partner to wind up the partnership affairs and make settlement with the proper party, *i. e.,* the administrator. 69 Ark. 237, 242; 83 Ark. 311. The partner-

ship must be settled up as of the day of its dissolution—the death of the partner. 30 Cyc. 620 to 649.

2. The probate court was without jurisdiction to appoint Beckett administrator. The appointment was therefore void, and he had no legal capacity to sue. 23 Cyc. 1070; 18 Cyc. 141; Kirby's Dig., § 45; 34 Ark. 63; *Id.* 117; Kirby's Dig., § 140; 42 Ark. 186; 40 Ark. 393; 36 Ark. 383; 33 Ark. 727; 77 Ark. 351. All parties interested in an estate having the right to go into chancery and have a judgment of the probate court set aside for fraud, accident or mistake, and the matter remitted to that court for further administration, they are thereby amply protected, and there is no necessity for a second administration; neither does the law authorize it. 20 Miss. 153. The only occasion for an administrator in succession or *de bonis non* is where the administrator dies, resigns or his letters are revoked.

FRAUENTHAL, J. On the 3d day of October, 1907, S. C. Beckett, as administrator of the estate of J. S. Dawson, deceased, instituted this suit in Columbia Chancery Court against the defendant below, D. C. Whittington, and in his complaint alleged that the decedent and defendant were, prior to decedent's death, equal partners in the ownership and operation of a mill and gin; and upon the death of Dawson in 1902 the defendant as surviving partner retained possession of all the partnership property and continued to carry on the partnership business; and he asked for an accounting and settlement of said partnership.

The defendant in his answer alleged that upon the death of said J. S. Dawson the probate court of Columbia County duly appointed one O. H. V. Dawson administrator of his said estate, and that he had duly administered on said estate, and had duly filed his final settlement as such administrator in 1905; and that said final settlement was duly confirmed by the Columbia Probate Court; and by the judgment of said probate court made in 1905 said administration of said estate was fully and finally closed, and said administrator discharged. That thereafter and in 1907 S. C. Beckett was appointed administrator of the said estate of J. S. Dawson, and that such appointment was without authority of law and without the jurisdiction of said probate court; and that on this account the said Beckett had not the legal capacity to represent said estate or to institute this suit. He

further alleged that, as surviving partner of J. S. Dawson, he had made a full settlement of said partnership in 1903 with the said O. H. V. Dawson as administrator of said estate.

It appears from the evidence adduced in the case that on or about January 1, 1901, J. S. Dawson and D. C. Whittington became equal partners in the ownership and operation of a mill and gin, and that the partnership business continued until the death of Dawson on August 28, 1902; and that thereafter the defendant as surviving partner retained the partnership property. On October 20, 1902, O. H. V. Dawson was by the probate court of Columbia County duly appointed administrator of the estate of J. S. Dawson, deceased, and duly qualified as such administrator. As such administrator, he duly filed inventory of said estate and made settlements thereof in said probate court. Immediately after his appointment as such administrator, and in 1902, he investigated the affairs, business and properties of said partnership; and in 1903 he had negotiations with the defendant for the purpose of making a settlement of the said partnership. The defendant testified that a full settlement of all the assets and affairs of said partnership was made, and in pursuance thereof the said administrator by bill of sale transferred to defendant all the title and interest of said estate in said partnership properties and business. Upon the part of the plaintiff the testimony tended to show that while such negotiations for a settlement were made and a bill of sale for certain properties of the partnership executed by said former administrator, the settlement did not include all the properties of the partnership and was not fully consummated.

Thereafter on March 31, 1905, the said O. H. V. Dawson, as administrator of the estate of J. S. Dawson, filed in said probate court his second and final settlement. This settlement was at the following term duly confirmed by the judgment of said probate court, and the administration of said estate adjudged closed by the following order:

"SECOND AND FINAL SETTLEMENT CONFIRMED.

"This settlement, having been filed at the last term of this court, as required by law, is this day submitted, and the court, upon examination, finding that said settlement has been duly advertised according to law, and that proper vouchers have been

filed for the credits asked, and the court finds further that said administrator has faithfully discharged his duties as such administrator and has turned over all moneys and other property belonging to said estate, and now asks the court to discharge him and his bondsmen from any further responsibilities as such administrator and bondsmen. And the court is of the opinion that said settlement should be approved, and the administrator and his bondsmen discharged. It is therefore considered, ordered and adjudged by the court that the settlement herein be and is hereby approved and confirmed and ordered recorded as the law directs, and it is further ordered by the court that the administrator and bondsmen herein be, and the same are, hereby discharged."

On October 3, 1907, S. C. Beckett was appointed administrator of the estate of J. S. Dawson, deceased, by the Columbia Probate Court; and on the same day instituted this suit.

Upon the trial of this cause by the chancery court, that court found that the plaintiff had no legal capacity to maintain this action, and entered a decree dismissing the complaint. From that decree the plaintiff prosecutes this appeal.

The merits of this appeal are determined by the nature and effect of an order of the probate court confirming the final settlement of an administrator and closing the administration of the estate of the decedent and discharging the administrator because of the full and final accounting of the estate. It has been uniformly held by this court that the probate courts are superior courts, and that the orders of those courts are judgments, and are final and conclusive like the judgments of any superior court. By the Constitution the courts of probate have original jurisdiction in all matters relating to the estates of deceased persons and administrators. In the administration of the estates of decedents settlements are made by the administrator of such estates, and the probate court has the exclusive original right to pass on such settlements; and when these settlements are confirmed (and no appeal taken therefrom), they cannot thereafter be investigated, except in a court of chancery for fraud or some other recognized ground of equitable jurisdiction.

Section 140 of Kirby's Digest provides that: "Any person interested as heir, legatee or creditor may file exceptions to such account, * * * and such account when confirmed shall

never thereafter be subject to investigation unless in a court of chancery." *Borden* v. *State,* 11 Ark. 519; *Dooley* v. *Dooley,* 14 Ark. 122; *Reinhardt* v. *Gartrell,* 33 Ark. 727; *Mock* v. *Pleasants,* 34 Ark. 63; *Jones* v. *Graham,* 36 Ark. 383; *Trimble* v. *James,* 40 Ark. 393; *Currie* v. *Franklin,* 51 Ark. 338; *Washington* v. *Govan,* 73 Ark. 612; *Hare* v. *Shaw,* 84 Ark. 32; *Nelson* v. *Cowling,* 89 Ark. 334; 18 Cyc. 1119, 1188.

The settlements are an accounting of the assets of the estate and of the disbursements and disposition of those assets. Provision is made for the giving of notice of the pendency of such settlements, and thereby all persons interested therein are given their day in court in the examination of and the passing upon said settlements by the court. The orders of the probate court confirming the settlements thereby become binding upon all persons interested in the estate, and are judgments, and as such judgments they are conclusive of all matters embraced in the settlements and of all matters belonging to and within the scope of such proceedings. The final settlement is the last accounting of the assets of the estate, and, in conjunction with the annual settlement filed and acted upon by the court prior thereto, presents the issues that are to be determined by the probate court when it renders its judgment thereon. Those issues presented by such final settlement, in conjunction with the previous settlements, are that all assets of the estate have been duly reported and accounted for; that all the assets of the estate have been duly administered. And when the probate court confirms the final settlement and closes the administration, it finds that all the assets of the estate have been reported and administered, and that all matters of the accounting have been fully and finally made, and that the jurisdiction of the probate court over the estate is at an end. And such judgment is conclusive of these findings.

If, through fraud, accident or mistake, any property of said estate has not been actually reported, accounted for or actually administered, a chancery court has jurisdiction to investigate such charge and to set aside such judgment confirming the final settlement and closing the administration. When that is done, the chancery court will remand the administration, if deemed necessary, to the probate court to be proceeded with. *Reinhardt* v. *Gartrell,* 33 Ark. 727; *Shegogg* v. *Perkins,* 34 Ark. 117.

But, until such judgment confirming the final settlement is set aside by the chancery court, the probate court has no further jurisdiction over the estate. And it cannot therefore, after confirmation of the final settlement and the judgment closing the administration, appoint an administrator in succession, unless the the same shall be set aside by the chancery court. Under such circumstances the order of the probate court appointing an administrator in succession would be a nullity. As is said in the case of *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81: "The probate court is a court of superior jurisdiction, and within its jurisdictional limits its judgments import absolute verity, the same as other superior courts. But where its judgment shows affirmatively on the face that the court was proceeding in a matter over which it had no jurisdiction, or acting beyond its jurisdictional limits, such judgment is void." *Myrick* v. *Jacks,* 33 Ark. 428; *Meyer* v. *Rousseau,* 47 Ark. 462; *Wallace* v. *Turner,* 89 S. W. (Tex.) 432.

It is urged by counsel for appellant that the probate court is authorized to appoint an administrator in succession after confirmation of final settlement by virtue of section 46 of Kirby's Digest. That section was enacted by the act of the General Assembly approved March 13, 1889; and in that act it is a part of one section, of which the following section 47 of Kirby's Digest is the other part. Prior to the passage of that act the administrator *de bonis non,* or, as he is here denominated, in succession, could not sue the former administrator and the sureties on his bond for property of the estate wrongfully converted by his predecessor, who had died, resigned or been removed. *State* v. *Rottaken,* 34 Ark. 144; *Brice* v. *Taylor,* 51 Ark. 75.

And this enactment was for the purpose of giving such succeeding administrator that power and authority. Section 46 of Kirby's Digest provides that the administrator in succession can only be appointed "before the estate has been fully administered and settled." But when the final settlement is confirmed it is conclusively determined that the estate has been fully administered and settled; and therefore after such confirmation of the final settlement, and while it is in full force and effect, such administrator in succession cannot be appointed. 18 Cyc. 1119.

After the confirmation of the final settlement of an administrator, if there still remain assets unadministered and indebted-

ness against the estate still unpaid, then, upon a suit brought by any heir, distributee or creditor of said decedent, a court of chancery, upon a proper and sufficient showing for equitable relief, would have jurisdiction to uncover such assets and set aside such order of confirmation of the final settlement. See cases above cited. If, however, there was no indebtedness against the estate unpaid, then the heirs and distributees of the decedent would have the right to institute a suit in the proper court for the recovery of such assets. *Crane* v. *Crane,* 51 Ark. 287; *Winningham* v. *Holloway,* 51 Ark. 385; *Sanders* v. *Moore,* 52 Ark. 376; *Jordan* v. *Hunnell,* 96 Ia. 334.

It follows that the appointment of the appellant as administrator in succession of the estate of J. S. Dawson after the order of the probate court confirming the final settlement of the former administrator and the closing of the administration of the estate, and while said order and judgment was in full force, was beyond the power and jurisdiction of the probate court; and therefore the appellant had no legal capacity to institute this action.

The decree is affirmed.

DERRICK v. STATE.

Opinion delivered October 18, 1909.

1. WITNESSES—LEADING QUESTIONS—DISCRETION OF COURT.—It was not reversible error, in a criminal case, to permit the prosecuting attorney to ask his witnesses leading questions when no abuse of the court's discretion is shown. (Page 239.)
2. SAME—EXAMINATION.—It was not error, in a criminal case, to permit the prosecuting attorney to ask one of his witnesses concerning his testimony before the grand jury, and to produce the minutes of the grand jury and examine the witness as to same. (Page 239.)
3. TRIAL—ARGUMENT—REFERENCE TO ARTICLE IDENTIFIED BY WITNESS.—Where a coat, said to have been worn by the prosecuting witness in a case of assault with intent to kill, was handed to him while on the witness stand, and identified by him, it was not error to permit the prosecuting attorney to hold the coat before the jury and comment upon it. (Page 240.)
4. SAME—WHEN ARGUMENT NOT PREJUDICIAL.—It was not prejudicial error to permit the prosecuting attorney, in a case of assault with intent to

kill, to remark to the jury that "the proof shows that the defendant not only murderously cut the said Newton, but tried to cut his throat after he was on the ground," where the evidence was to the effect that defendant cut Newton nine times, once after he was on the ground, and had to be stopped by a third person. (Page 243.)

5. INSTRUCTIONS—AMBIGUITY.—The giving of an ambiguous instruction is not ground for reversal if, when construed with the other instructions, it could not have misled the jury. (Page 241.)

6. ASSAULT WITH INTENT TO KILL—SELF DEFENSE.—In determining whether one charged with assault with intent to kill acted in self defense, the jury should consider all the facts and circumstances connected with the assault, the condition of the person assaulted, whether drunk or sober, the nature and extent of wounds inflicted by the accused, with all of the other facts shown by the evidence. (Page 241.)

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

H. A. Parker, for appellant.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. Mere words, however vile or insulting, do not justify an assault, neither do threats. Clark's Crim. Law, 1894 Ed., 215 and cases cited; 2 Bishop's Crim. Law, 7th Ed., art. 40; 75 Ark. 142; *Id.* 238.

2. The law presumes that one intends the reasonable consequence of his acts; and where, as in this case, it is apparent from the circumstances of the attack and the weapon used, that the defendant intended to commit an injury, the law will presume malice. 1 Wharton, Crim. Law, § 970; 25 Ark. 405; 35 Ark. 585; 38 Ark. 221; 45 Ark. 281.

3. The plea of self defense being interposed, it was proper for the jury to take into consideration all the physical facts and circumstances connected with the case, and also the condition of the assaulted party with reference to being drunk or sober, the nature and extent of the wounds inflicted. And, before such plea is available, it must appear that the defendant employed all means in his power consistent with his safety to avoid the danger and avert the necessity for the assault. 29 Ark. 225; 29 Ark. 248; 37 Ark. 238; 40 Ark. 445; Kirby's Dig. § 1798.

4. Where the witness testifies at the trial differently from the way he testified before the grand jury, it is proper for the State's attorney, notwithstanding the witness was summoned on behalf of the State, to question him as to what he testified before, and to introduce the evidence taken by the grand jury to show what his testimony was. 68 Ark. 587; 42 Ark. 542.

McCULLOCH, C. J. Appellant was indicted for assault with intent to kill, and was convicted of that offense. The alleged offense consisted of cutting one Newton with a pocket knife. The testimony shows that he cut Newton nine times, two or three of the wounds inflicted being serious ones, and the last was inflicted after Newton fell to the ground. Newton was intoxicated at the time, and does not pretend to remember all that occurred, but relates a good deal that he says he remembers. Suffice it to say that the testimony which he gave at the trial of the case was sufficient to make out a case of assault with intent to kill against appellant. The testimony introduced by appellant was sufficient, if it had been accredited by the jury, to reduce the offense below the crime of assault with intent to kill, but it is doubtful whether his own testimony is sufficient to show that he was justified in cutting Newton as he did; for it is probable, even according to his own version of the facts, that he continued to cut Newton after the necessity therefor, in what appeared to him to be his own defense, ceased.

Appellant in his motion for new trial, and in oral argument of his counsel before this court, attacks the method of the State's attorney in examining witnesses, but we do not find that his grounds of attack are fully borne out by the record. It is true that there are some leading questions asked; but this is not reversible error without an abuse being shown of discretion of the trial judge in regulating and controlling the examination of witnesses. *Taylor* v. *State*, 82 Ark. 540.

The propriety of the conduct of the State's attorney is also challenged in asking one of his witnesses, who appeared to be an unwilling one, as to his testimony before the grand jury and in producing the minutes of the grand jury and examining the witness as to same. There was no impropriety in this, for, if the prosecuting attorney was surprised at the testimony of his witness, he had a right to examine him as to what his testimony before the grand jury had been.

The coat said to have been worn by Newton when he was cut was handed to him while on the witness stand, and he identified it. It was not formally offered in evidence; but in his closing argument the State's attorney referred to the coat and held it before the jury, commenting upon its appearance. This was objected to by appellant and assigned as error. After the coat was identified as the one worn by Newton, it was not improper for the prosecuting attorney to refer to it in argument, although it had not been formally offered in evidence. Appellant had an opportunity to cross examine Newton concerning the coat if he desired to do so, or he could have introduced any other testimony to show that it was not the coat worn by Newton. He contented himself merely with an objection to the State's attorney making reference to the coat in his argument. We can really see no hurtful effect anyway in the reference to the coat, as all it could have shown was the rents in it made by the knife thrusts of the appellant; and appellant made no denial as to the number of times he had cut Newton, nor as to the places where the wounds were inflicted.

Objection is also made to the following remark of the State's attorney in his closing argument: "The proof shows that the defendant not only murderously cut the said Newton, but tried to cut his throat after he was on the ground."

The only evidence which justified this remark was the statement of Newton to the effect that the defendant had jumped on him after he had fallen to the ground, and cut him again, and had to be stopped by a third person. No witness testified that appellant tried to cut Newton's throat after he fell, but it was competent for the State's attorney to argue from the evidence that the defendant persisted in his effort to murder Newton after the latter fell to the ground, and this is about all that the remarks amounted to. It added little, if anything, to the force of the statement for him to say that defendant tried to cut Newton's throat after the latter had fallen, when in fact he did cut Newton nine times, once after he was down ,and continued his vicious assault until it was arrested by the interference of Yelvington. We do not think that such inaccuracy in the statement of or deduction from the evidence by the prosecuting attorney in argument, under the circumstances of this case, calls for a reversal.

The giving of the following instruction is assigned as error: "The court instructs the jury that language, be it ever so vile or insulting, does not justify an assault. So, you are instructed that if you believe from the evidence that the defendant made an assault upon Luther Newton because of any insulting language so used by the said Newton to the defendant, you will find the defendant guilty as charged in the indictment."

The objection urged to this instruction is that it fails to take account of the degree of assault or of specific intent to kill, and leaves it open to the jury to find appellant guilty of the higher crime of assault with intent to kill without finding that the specific intent to kill existed at the time. We are not prepared to say that this instruction, if it stood alone in the record, would be free from that objection. But it must be read and considered in connection with the others given to the jury along with it. The court gave to the jury instructions in the language of the statute on all degrees of assault, and then gave one containing the following statement of the law: "If you have reasonable doubt of his intention to kill Newton, then you should acquit him of that charge, and then next take up and consider aggravated assault," etc., referring in turn to all the degrees of assault.

Now, when these instructions are read together, we do not think they have any misleading effect, as they show clearly that the court did not, by the concluding words of the first instructions, "as charged in the indictment," mean that an assault made because of insulting language necessarily constituted assault with intent to kill. The jury could only have understood it to mean just what the court intended, that an assault merely because of insulting words would be an unlawful assault, and would not be justifiable in law.

Another instruction objected to and assigned as error is as follows: "The court instructs the jury that, in determining whether the defendant was acting in necessary self-defense, you should take into consideration all the physical facts and circumstances connected therewith, and the condition of the party assaulted with reference to being drunk or sober, and the nature and extent of the wounds made upon the witness, Newton, by defendant, with all the other facts and circumstances shown by the evidence.

No well-founded objection can be stated to this instruction, as it was proper for the court to submit all the circumstances which there was any evidence tending to establish.

Other objections were made to the rulings of the court in giving and in refusing instructions, but we find no error in this respect, and nothing calling for further discussion. The case was fairly tried, and the defendant was convicted on legally sufficient evidence. Therefore the judgment is affirmed.

WOOD, J., dissents.

YOUNG v. BOLES.

Opinion delivered November 8, 1909.

1. APPEAL AND ERROR—WHEN APPEAL DISMISSED.—Where, in an election contest for the office of State Senator, the circuit court directed a recount of the ballots, and pending an appeal from such order to the Supreme Court the contestee was declared by the State Senate to be entitled to retain his seat, there being no question of costs involved, the appeal, on motion of the appellee, should be dismissed. (Page 243.)
2. APPEAL AND ERROR—UNNECESSARY COSTS.—The costs of an appeal, unnecessarily taken after the subject-matter of the litigation had been settled by another tribunal should be taxed against appellants. (Page 244.)

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

Brizzolara & Fitzhugh, Ben Cravens and *Oscar L. Miles,* for appellants.

W. A. Falconer, Read & McDonough and *Youmans & Youmans,* for appellee.

PER CURIAM. Jno. H. Holland and appellee, Thomas Boles, were rival candidates at the September election, 1908, for the office of State Senator for the 28th Senatorial District, which is composed of Sebastian County. Holland received the certificate of election, and Boles instituted contest. He made demand upon the election commissioners of Sebastian County for a recount of the ballots in certain specified townships, and upon a refusal instituted this action in the circuit court for the Fort Smith Dis-

trict of Sebastian County, asking for a writ of peremptory mandamus compelling the appellants, Young and others, as election commissioners, to recount the ballots. Upon a hearing of the cause the court awarded a writ, directing a recount in certain of the townships named, but denied the writ as to certain other townships. Both parties noted their exceptions, and the election commissioners took an appeal to this court. They forthwith gave bond with sureties, in accordance with the provisions of the statute, to supersede the judgment. Whether or not the judgment awarding the writ of mandamus in this case was such as could be superseded by a statutory bond, and whether or not the bond was effective for that purpose, we need not now consider.

The contest of Boles against Holland progressed before the State Senate, and in January, 1909, during the early part of the session, Holland was duly declared to be entitled to retain the seat. This of course ended the contest, as the Senate was the only tribunal under the Constitution of this State competent to adjudicate that contest.

The original appeal in the case was never perfected; but on May 4, 1909, the election commissioners, Young and others, prayed an appeal and obtained it from the clerk of this court. Appellee Boles now moves the court to dismiss the appeal on the ground that the contest of Boles against Holland was settled before the appeal was taken, and that there is nothing left about which to litigate.

This court concludes that appellee's contention is a sound one, and that the appeal should be dismissed. The statutes of this State which bear upon the subject read as follows:

"Sec. 1227. Where the appeal or writ of error was improperly granted, or the appellant's right of further prosecuting the same has ceased, the appellee, in lieu of pleading, may move the court to dismiss the appeal or writ of error, the grounds of which motion shall be stated in writing, signed by the appellee or his council, and, if not appearing on the face of the record, or by a writ purporting to have been signed by the appellant and filed, shall be verified by affidavit. The motion shall not be heard or determined before the day on which the appeal or writ

of error is set for trial on the docket, unless the appellant consents thereto.

"Sec. 1228. The appellee may, by answer filed and verified by himself, or agent or attorney, plead any fact or facts which render the granting of the appeal or writ of error improper, or destroys the appellant's right of further prosecuting the same; to which answer the appellant shall file a reply, likewise verified by affidavit of himself, agent or attorney, and the questions of law or fact thereon shall be determined by the court." (Kirby's Digest).

The fact that the contest case had been settled has been properly brought to our attention by the statement of facts in the motion, and it is conceded to be true. Whether or not we would take judicial knowledge of the judgment of the State Senate we need not decide.

The purpose of the present action was to compel a recount of the ballots in aid of the contest; and, since the contest has ended, no useful purpose would be served by continuing the litigation in this court. There is nothing to litigate over.

In *Mills* v. *Green,* 159 U. S. 651, Mr. Justice Gray, speaking for the court, said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." The same rule is announced in *Jones* v. *Montague,* 194 U. S. 147; *Tennessee* v. *Condon,* 189 U. S. 64; and in *Codlin* v. *Kohlhausen,* 181 U. S. 151.

Appellants are not even burdened with a judgment for costs, as none was rendered in this case. They should properly pay the cost of this appeal, for they prayed the appeal unneces-

sarily, after the subject-matter of the litigation had been fully settled.

Appeal dismissed at cost of appellants.

McABEE v. WILEY.

Opinion delivered November 8, 1909.

1. LIMITATION OF ACTIONS—PAYMENTS.—Payments indorsed on a note which were admitted by the debtor to be correct, or were impliedly assented to by him, are sufficient to stop the running of the statute of limitations. (Page 247.)
2. SAME—PAYMENT BY AGENT.—Part payment made by an agent of the debtor suspends the running of the statute of limitations as effectually as if made by the debtor himself. (Page 247.)
3. APPEAL AND ERROR—PRESUMPTION.—Where the instructions given by the trial court were not abstracted, it will be presumed that they were correct. (Page 247.)

Appeal from Sharp Circuit Court, Northern District; *J. W. Meeks,* Judge; affirmed.

Geo. L. Green and *Sam H. Davidson,* for appellant.

When the statute of limitations is pleaded, the burden of proof is on plaintiff to show that the partial payment indorsed on the contract sued on was made before the statute bar attached. 70 Ark. 598; 69 Ark. 311; Wood on Lim. (3 Ed.), § 116. And such proof must be made *aliunde* before the indorsement can be put in evidence. 9 Ark. 455.

David L. King, for appellee.

Circumstances from which the payment may be presumed are enough, in the absence of a rebuttal of the presumption. 18 Ark. 522; 44 Ark. 534. When material evidence of one party is not contradicted by the other, it must be presumed to be true. An act done for another by a person not assuming to act for himself, but for such other person, though without precedent authority, becomes the act of the principal, when ratified by him. Clark on Cont. p. 720; 6

Man. & G. 236; 75 Va. 178. The acts of an unauthorized agent may be ratified by conduct. 23 Vt. 564; 99 N. Y. 309; 50 Ark. 458; 69 Pa. St. 426; Whart. on Agency, § 86. Where a person acquiesces in the act of an authorized agent for two years without objection, he will be held to have ratified it. 66 Ark. 206; 67 Ark. 236.

FRAUENTHAL, J. This was an action instituted by Wm. Wiley, the plaintiff below, against H. D. McAbee, the defendant below, for the recovery of the amount due upon a note. The defendant pleaded the statute of limitation against a recovery. The note sued on was for $33, with interest from date until paid, dated November 15, 1893, and payable one day after date. Upon the note were the following indorsements: "H. D. McAbee. Note $33.05." "Recd. on the within note $6.50 dollars, it being for 22 gallons of sorghum molasses. Nov. the first, 1908."

"Recd. on the within note 4 dollars, it being for 8 bus. turnips, Sept. 30, 1902."

"Recd. on the within note $1.50 dollars May 10, 1904, by R. C. Meade." "S. J. Walker, 4, 2, 1908, without recourse."

"Amount due Apr. 15, 1907, $49.00."

The suit was instituted on September 28, 1908. The defendant admitted the execution of the note, but denied that he had made the payment of $1.50 on May 10, 1904, as indorsed on the note, or that he authorized any one to make said payment. He did not deny any of the other payments which are indorsed upon the note.

A witness on the part of the plaintiff testified that in 1906 he presented the note to the defendant for payment, and that at that time all of the above indorsements of payments were upon the note; "that the defendant took the note, and read all the credits on it. When he read them over, he said they were all right," and further said he could not pay the note just then. Another witness testified that he presented the note to the defendant in 1906 or 1907, and that all of the above credits were then indorsed upon the note. "I read them all over to Mr. McAbee, and he said they were all right, except that he ought to have more credits for some turnips that was not on it."

The issue was passed upon by a jury, which returned a verdict in favor of the plaintiff.

It is contended by counsel for the defendant that when the statute of limitation is pleaded the burden of proof is upon the plaintiff to show that payment was made before the statute bar attached, and that the testimony does not show when the last indorsement of payment was made upon the note. The proof of a payment on indebtedness and of the indorsement of same upon the written evidence of that indebtedness may be made in the same manner as the proof of any other fact. It may be made directly, or by circumstances, or by the admissions of the defendant. It is actually the fact of the payment that tolls the statute, and not the indorsement; the indorsement is only a memorandum, or at most an evidence, of such payment; and there can be no stronger proof of such payment than the admission of the defendant himself, who at the trial is then the only person controverting it. 25 Cyc. 1374.

And the indorsements of payments admitted by the debtor himself or assented to by him, even impliedly, will toll the statute. 25 Cyc. 1377; *State Bank* v. *Woody,* 10 Ark. 638; *Wood* v. *Wylds,* 11 Ark. 754; *Ruddell* v. *Folsom,* 14 Ark. 213.

In the case of *Wilson* v. *Pryor,* 44 Ark. 535, Judge COCKRILL, in delivering the opinion of the court, said: "In this case the indorsement was made with the express consent of the debtor, and his admission that the payment had been actually made was proved. These were matters for the consideration of a jury, and the court, acting in that capacity, was certainly warranted in the inference that the payment was actually made."

A payment made by an agent is as effectual to suspend the statute as when made by the party himself. 25 Cyc. 1384.

In the case at bar it was peculiarly a question of fact for a jury to determine as to whether the payments were made and as to whether they were made as of the dates of the indorsements. That could be proved by the admissions of the debtor. There was testimony tending to prove that the defendant saw these indorsements on the note with their dates, and actually read them himself; and, after having thus read them, he admitted their correctness and assented to their actual indorsement on the note. There was therefore sufficient evidence to sustain the verdict of the jury. The defendant does not claim that any

error was committed by the court in the giving or refusing to give instructions. In fact, he does not abstract or refer to them. The presumption is that the court fully and correctly instructed the jury on the issues involved in this case.

Judgment affirmed.

BEEBE STAVE COMPANY v. AUSTIN.

Opinion delivered November 8, 1909.

1. LIEN—ENFORCEMENT.—One who has a lien upon property which is wrongfully converted by another with the notice of such lien may enforce his lien upon the proceeds of the property so converted. (Page 251.)
2. FRAUDULENT CONVEYANCES—INADEQUACY OF PRICE.—Payment of $200 as the price paid for timber worth $400 is not so grossly inadequate as to indicate that the purchaser knew of a fraudulent intent upon the part of the seller, and thus assisted him in the commission of fraud. (Page 253.)
3. BILLS AND NOTES—FRAUD—NOTICE.—Where negotiable notes were accepted as payment for timber sold, and were transferred to an innocent purchaser, subsequent notice to the maker of the note that the sale of the timber was a fraud upon the rights of a third person will not bind such maker. (Page 254.)

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

J. A. Comer, for appellant.

To impeach a conveyance for inadequacy of consideration, the inadequacy must be so gross as to shock the sense of justice and indicate fraud. 29 Ohio St. 1; 86 Ark. 460; 7 Md. 537; 61 Am. Dec. 375; 64 Ark. 185. While a creditor need not now reduce his claim to judgment, he must prove the insolvency of the grantor before he can successfully attack the conveyance. Kirby's Dig. § 6297. When negotiable notes given as evidence of an indebtedness are negotiated by the payee, it is equivalent to paymtnt by the debtor. 55 Ga. 497.

John L. Hill, for appellee.

Although the deed recited the consideration paid, yet the vendor had an equitable vendor's lien on the land enforceable against the vendee and his assignees with notice. 41 Ark. 292; 31 Ark. 728; 29 Ark. 218; *Id.* 440; *Id.* 563. All persons buying with notice of an equity take subject to that equity. 29 Ark. 568; 31 Ark. 89; 41 Ark. 292. Notice at any time before payment is sufficient to defeat the defense of an innocent purchaser. 32 Ark. 257; 12 Ark. 552. One who purchases with notice of such facts as put him on inquiry takes no title. 58 Ark. 446. Implied notice is imputed to one who is shown to be conscious of having means of knowing which he does not use. 1 Am. St. 295; 57 *Id.* 515.

FRAUENTHAL, J. The appellees, Mrs. John Austin and the First National Bank of Perry, the plaintiffs below, instituted this suit against the defendants below, J. D. Richards and the Beebe Stave Company, to enforce a vendor's lien upon certain land, and to charge the Beebe Stave Company with the value of the timber cut therefrom. It is alleged in the complaint that Mrs. Austin sold the lands to Richards, and conveyed same to him by a deed which recited that the consideration had been paid in full, but that the recital was untrue, and that Richards had not in fact paid such purchase money or any part thereof, but had given notes therefor which were unpaid; and for a recovery of the notes the suit was brought; that Richards sold the timber on said land to the Beebe Stave Company, who purchased with full knowledge that said purchase money of the land had not been paid. The prayer was for judgment against Richards for the amount of the notes, and that same be declared a vendor's lien upon the land, and for sale thereof in event of non-payment of the judgment; and also for judgment against the Beebe Stave Company for the value of said timber.

The Beebe Stave Company made answer that it purchased the timber from Richards in good faith and for a valuable consideration and without any notice that any of the purchase money for the land was unpaid.

It appears from the evidence that the plaintiff, Mrs. Austin, who was a nonresident of the State, had employed one G. W. Rhea to sell the land for her, and agreed to sell same for $500, and to pay him $20 for his services. He thereupon sold

the land to defendant J. L. Richards and sent to her a deed for execution which recited that the consideration was $480, and also recited that the purchase money was paid in full. She duly executed the deed on January 28, 1907, and returned the same to her agent, Rhea, who delivered it to Richards. The Beebe Stave Company was engaged in buying timber with its office at Little Rock, Ark.; and at this time was engaged in logging near the land in controversy. One of the men who was logging for the company had gone over the land in controversy and had estimated the amount of timber on the land. This party had desired to borrow from the Beebe Stave Company money with which to purchase this timber, but the officers of the company told him that the company would purchase the timber if it was for sale.

On February 27, 1907, Richards went to the office of the Beebe Stave Company at Little Rock and offered to sell the timber on the land for the sum of $200. He had with him his deed from Mrs. Austin, which was examined by the secretary of the Beebe Stave Company; and, relying upon his statement that he owned the land and the recital of the deed that the purchase money was paid, it bought the timber from Richards, who executed to it a timber deed therefor. In payment for the timber, the Beebe Stave Company executed to Richards two negotiable notes, each for $100, and due, respectively, 90 and 120 days after date, and Richards accepted these notes in payment for the timber. At this time the deed from Mrs. Austin to Richards had not been recorded. On the following day, February 28, 1907, Richards for value sold and transferred the two notes to the German National Bank of Little Rock, Ark., who then became the true owner thereof.

It appears from the testimony that Rhea, the agent of Mrs. Austin, actually sold the land to Richards for $625, taking from him two notes, each of which was dated January 28, 1907, and due twelve months thereafter, and recited that it was given as payment for said land. One of these notes was for $500, and made payable to Mrs. John Austin, and the other was for $125, and was made payable to G. W. Rhea. This latter note Rhea sold and transferred to the First National Bank of Perry, one

of the plaintiffs. It is upon these two notes, aggregating $625, that this suit is instituted.

It appears that the Beebe Stave Company began cutting the timber on the land soon after their purchase, and in May, 1907, they had cut a great part thereof when they were notified that Richards had not paid the purchase money. The amount of timber cut by them from the land was estimated to be of the value of $400.

The chancery court rendered a judgment against Richards by default for $625, the amount of the notes, and decreed a sale of the land for its payment. The land was sold by a master under this decree pending the further litigation against the Beebe Stave Company, and brought $259.40, exclusive of the cost of the suit to that date. Thereupon the court found that the plaintiffs had a lien on the timber sold to the Beebe Stave Company for the purchase money of the land, and rendered a judgment against that company in favor of plaintiff for the sum of $220.60, the difference between the amount named in the deed as the purchase price of the land, towit: $480, and the above net amount, after payment of cost, for which the land was sold by the master. From the decree thus rendered against it the Beebe Stave Company prosecutes this appeal.

The only question involved upon this appeal is the right of the plaintiffs to recover from the Beebe Stave Company the proceeds of the timber which they cut and removed from the land or any part of said proceeds. The plaintiffs contend that they had a vendor's lien for the purchase money upon the land involved in the suit, and therefore upon the standing trees thereon as a part of the land. That the Beebe Stave Company purchased the timber with notice that the purchase money had not been paid, and therefore with notice of their lien therefor, and thereafter removed the trees from the land and wrongfully converted them to its own use. It is a principle of equity that when one has a lien upon property which is taken, and said property is wrongfully converted by another, with notice of such lien, the owner may have his lien fixed upon the proceeds of the property, where the lien on the property has thus been destroyed by the wrongdoer. 3 Pomeroy, Eq. Jur. (3d Ed.) § 1233; *Reavis* v. *Barnes,* 36 Ark. 575; *Judge* v. *Curtis,* 72 Ark. 132.

And it is upon this equitable doctrine that the plainiffs base their right to equitable relief in this case against the Beebe Stave Company. But from the evidence in this case we are of the opinion that it clearly appears that the Beebe Stave Company at the time it purchased and paid for this timber was a *bona fide* purchaser thereof for a fair and adequate consideration and without any notice, either actual or constructive, that the purchase money was not paid or that plaintiffs had any lien on the timber therefor. The Beebe Stave Company was engaged in purchasing timber at this time, and was then logging near the land in controversy. It had been buying timber on lands in that locality from parties indiscriminately, and it was not unreasonable for it to have told one of its logging men, who desired to purchase the timber on the land, that the company would rather purchase it. From this party the company learned the amount and character of the timber upon the land, so that, when Richards offered to sell the timber, it was sufficiently advised as to the value of the timber to make a price therefor.

Richards came to the office of the company in the ordinary way of doing business and made the offer to sell the timber in the usual course of business. He presented his deed for inspection and claimed to own the land. That the deed was not recorded was no suspicious circumstance, as urged by plaintiffs, because numbers of good and honest men do not place their deeds on record. The deed recited the amount of the consideration of the land and that the entire purchase money was paid. The amount of the consideration named in the deed was a reasonably fair price for the land and the timber thereon, because all that the plaintiff asked therefor was $500, and the deed named the amount of the consideration to be $480. The land contained 160 acres, and the sum of $200 as the price named for the timber thereon was not an unreasonably small price. The company then paid for the timber with its negotiable notes. There was nothing in the acts or conduct of Richards in his transaction with the Beebe Stave Company to arouse any suspicion that he was endeavoring to defraud the plaintiff; and there is not a particle of testimony that indicates that the officers of this company intended to defraud the plaintiff or had any reason or right to believe that Richards was endeavoring to do

so. There is no act or word of Richards or circumstance that was sufficient to give them notice that the purchase money was not paid or to cause them to make any further inquiry, so that they could have learned that it was not paid.

It is urged by the plaintiffs that the price paid by the company was so inadequate as to put it on inquiry, and that such inadequacy of price stamps the transaction as fraudulent. But mere inadequacy of price is not sufficient to put the purchaser upon inquiry or to invalidate the sale. Mr. Pomeroy in his work on Equity says: "The doctrine is now well settled that mere inadequacy—that is, inequality in value between the subject-matter and the price—is not sufficient to constitute constructive fraud." "When the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be sufficient proof that the purchase is not *bona fide*." 2 Pomeroy, Eq. Jur. §§ 926, 927.

Another writer says the inequality must be so great as to shock the sense of justice. 6 Am. & Eng. Enc. Law, 701. The proof of a grossly inadequate price paid for the property is really evidence affecting the good faith of the purchaser from which it might be inferred as a fact that the purchaser knew of the fraudulent intent of his grantor, and thus assisted him in his commission of fraud. *Hogg* v. *Thurman,* 90 Ark. 93.

In the case at bar the price of the land with the timber thereon was placed by the owner at $500. The land after the timber had been cut off sold by the master for $300. It cannot then be said that $200 was a grossly inadequate price for the timber. It is true that an estimate had been placed on the timber of a value of $400 by some parties. But, when the vicissitudes of the logging and timber business are considered, it cannot be said that an ordinarily prudent and careful business man who wishes to make some profit upon his trades has given a grossly inadequate price in paying only the price that the Beebe Stave Company paid for this timber. It is not sufficient to definitely prove that the officers of the company had reason to believe that Richards was trying to defraud his vendor; and when the deed was shown to them reciting that the vendor acknowledged full payment of the purchase money, the price at which Richards agreed to sell the timber was not sufficient to

arouse a just suspicion in them which would reasonably call upon them to make further inquiry. *Fly* v. *Screeton,* 64 Ark. 183; *Hoskins* v. *Fayetteville Gro. Co.,* 79 Ark. 399.

And from the evidence we do not find proof of any other fact or circumstance of suspicion which gave the officers of the company notice of any fraudulent intent on the part of Richards, or that the purchase money was not paid; nor of any circumstance sufficient to cause them to make further inquiry. It is urged by plaintiffs that in May, 1907, and before all the timber had been cut and removed, actual notice was given to the Beebe Stave Company that the purchase money had not been paid. But at that time said company had fully paid for the timber, and the timber was then its property. It had given for the timber negotiable notes which were accepted as payment, and these notes had been long before May sold and transferred to an innocent third person, who then held and owned the notes, and thereafter the Beebe Stave Company made payment of these notes to this third person, the German National Bank, the true owner thereof. This constituted a full payment, as the notes were sold and transferred long before the notice received by the company. 30 Cyc. 1203.

It follows therefore that the chancery court erred in holding that the Beebe Stave Company bought the timber with notice, either actual or constructive, of the equitable rights or lien of the plaintiff, and that it erred in rendering any judgment against the Beebe Stave Company.

The decree of the chancery court is reversed, and a decree is here rendered dismissing the prayer of the complaint, in so far as it seeks any judgment against the Beebe Stave Company.

OZARK & CHEROKEE CENTRAL RAILWAY COMPANY *v.* FERGUSON.

Opinion delivered November 8, 1909.

CONTRACTS—SUBSTITUTION.—Where a new contract covers the subject-matter of earlier agreements, and is inconsistent with them, they will be held to be abrogated by it.

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

W. P. Evans and *B. R. Davidson,* for appellant.

A suit cannot be maintained upon a title obtained during the pendency thereof. 17 Ark. 443; 21 Ark. 186. A meritorious suit cannot be maintained after three years, even by one who owned the lands at the time they were appropriated. Kirby's Dig. § § 2093 and 5064. An indorsement upon a note is not a covenant running with the land. 71 Ark. 289; 77 Ark. 168. The contract of indorsement on the note having been incorporated in and taken up by a subsequent contract, plaintiff cannot recover thereon. 141 U. S. 510; 24 Ark. 210; 21 Ark. 69; 23 Ark. 557; 2 Ark. 360; 96 U. S. 544. The former contract was merged into the second. 24 Ark. 197; 28 Ark. 387; 48 Ark. 413; 80 Ark. 505.

Purchasing the stock and even electing a board of directors is not taking control. 11 Fed. 634; 115 U. S. 587; 120 U. S. 649. To control one must take possession. 44 N. W. 558; 15 N. E. 138. He admitted knowledge of the transfer, which is as binding, at least in equity, as notice served. 16 Ark. 340; *Id.* 543; 33 Ark. 465; 55 Ark. 318; 68 Ark. 126.

Walker & Walker, for appellee.

Where part only of a contract is reduced to writing, parol proof of the entire contract is competent. 55 Ark. 112; 58 N. Y. 380; Greenl. Ev. § 284a. Appellants were not entitled to specific performance. 55 S. W. 222. Such an agreement will not be enforced if inequitable under the circumstances. 119 Mo. 28; 92 Mo. 97; Story's Eq. Jur. § § 769-770.

HART, J. The plaintiff, James A. Ferguson, instituted this action for damages, as provided by the statute, against the Ozark & Cherokee Central Railway Company and St. Louis & San Francisco Railroad Company, alleging that said railroad companies had wrongfully appropriated for their use for railroad purposes certain of his lands in Washington County, Arkansas.

The railroad companies filed separate answers, in which they admitted that the Ozark & Cherokee Central Railway Company had entered upon the lands described in plaintiff's com-

plaint and constructed its line of railroad over the same. The defendants asked that the cause be transferred to the chancery court, and for grounds therefor allege facts which, briefly stated, are as follows: They say that in the month of August, 1899, W. A. Bright and others, who constituted the Arkansas Construction Company, were promoting and endeavoring to build a railroad from Fayetteville, Arkansas, to a connection with the Kansas City, Pittsburg & Gulf Railroad Company, and were soliciting from the property-owners rights of way and donations of money, and that the plaintiff, James A. Ferguson, being a large landowner and presumably to receive great benefits from the construction of such road, on the 29th of August, 1899, gave what is called by the parties hereto a subsidy note to said Arkansas Construction Company, its successors and assigns, for the sum of five hundred dollars. The consideration of the note was the benefit which would accrue to Ferguson in the construction and operation of a railroad, commencing at Fayetteville, Arkansas, and extending to and connected with the Kansas City, Pittsburg & Gulf Railway, within the period of 18 months from October 1, 1899, and the erection and maintenance of a depot within the corporate limits of the city of Fayetteville by said Arkansas Construction Company, its successors or assigns. The note was made payable as the work of construction progressed, and the whole was to be paid when the road was completed and in operation within the specified time.

On the 26th day of September, 1899, the time within which to construct the road was extended in writing until October 1, 1902, upon condition that the railroad to be constructed should not pass into the control of the St. Louis & San Francisco Railroad Company within three years and six months from October 1, 1899. That on the 8th day of November, 1899, said James A. Ferguson, in consideration of the benefits to be derived from the construction of said railroad in the county of Washington and State of Arkansas, conveyed to said railroad company a right of way over his lands, 100 feet wide, and depot grounds to be selected and located by the engineers of the railroad company. The conveyance was made upon condition that the railroad be built and in operation within said county of Washington within one year.

On the 13th day of January, 1902, said James A. Ferguson gave an option deed to the Ozark & Cherokee Central Railway Company, assignee to the Arkansas Construction Company, in which he obligated himself at any time within 60 days to convey to said railway company a strip of ground 100 feet in width for a right of way over his lands, upon which the railroad was already located; also depot grounds 100 feet wide and 600 feet long, terminal facilities and right of way over Ferguson's Addition to the town of Fayetteville; and also in section 5 of said contract such lands of specified dimensions as the railroad company might select over certain other of his lands for yard room and grounds. The purchase price to be paid therefor by the railroad company was the sum of five hundred dollars, represented by the subsidy note of the said James A. Ferguson then held by said railroad company, and the further sum of two hundred dollars per acre for land taken by said railroad company for yard room. That on the 10th day of March, 1902, the said Ozark & Cherokee Central Railway Company served notice on the said James A. Ferguson that it would take said lands in accordance with the terms of the said contract, and made a demand for a deed to said lands under the terms and conditions of said option contract. That they have been ready and willing to pay the amount due upon presentation of a deed for said land. That the acreage taken under said contract amounts to four acres. That defendants are due plaintiff for it the sum of $800, and tender it in court.

The plaintiff answered, alleging that it was part of the consideration of said option contract that a depot should be constructed and maintained on said lands. That this was omitted from the terms of said contract through fraud or mistake, and that said railroad company has failed and refused to maintain said depot. The cause was transferred to the chancery court.

The road was constructed and in operation westward between July and October 1, 1900. A connection was made with the Kansas City, Pittsburg & Gulf Railroad in the spring of 1901. By February, 1903, the St. Louis & San Francisco Railroad Company had acquired all of the stock of the said Ozark & Cherokee Central Railway Company, and in June purchased

all of its bonds; on July 1, 1903, assumed control of said railroad, and has since operated it as the owner thereof.

The chancellor found that the agreement of January 13, 1902, was binding upon the plaintiff, and that under it the defendant had tendered $800 in accordance with section 5 of the agreement, but that the plaintiff had refused to comply with the agreement by conveying the lands mentioned in section 5 of said agreement; and refused to assess any damages for right of way claimed by the plaintiff.

The chancellor further found that the subsidy note of $500 was a valid obligation at the time of the execution of the contract of January 13, 1902, and that subsequent to that time and before the expiration of three years and six months from the 1st day of October, 1899, the St. Louis & San Francisco Railroad Company had obtained control of the Ozark & Cherokee Central Railway Company by acquiring all of its stock, which was contrary to the contract of August 29, 1899, and the extension thereof made September 26, 1899, and that said note thereby became void. The court entered a decree vesting the title to the lands in controversy in the St. Louis & San Francisco Railroad Company upon payment to the plaintiff of the $800 already tendered and the $500 adjudged to be due. The defendants prayed an appeal to this court, and the plaintiff has taken a cross appeal.

It is contended by counsel for the plaintiff that, when the contract of January 13, 1902, was executed, it was a part of the consideration for its execution that the railroad company should erect and maintain a depot on his land, and that this was omitted from the contract by mistake. When the contract was made, there were present James A. Ferguson, his son, Wallace Ferguson, H. W. Seaman, general manager of the railway company, J. C. Duffin, his stenographer, and J. H. McIlroy. Both the Fergusons say that a part of the consideration for the contract was the erection and maintenance of a depot on the land. They are contradicted by Seaman, Duffin and McIlroy. The chancellor found in favor of the defendants on this point, and his finding will not be disturbed.

The chancellor erred in finding in favor of the plaintiff on what is called the $500 subsidy note. On August 29, 1899, the

plaintiff, being a large landowner in Fayetteville, Arkansas, agreed to donate to the Arkansas Construction Company the sum of five hundred dollars to secure the construction and operation of a railroad from Fayetteville to a connection with the Kansas City, Pittsburg & Gulf Railroad. The contract was reduced to writing, and by its terms the money was to be paid as the work progressed, and the last installment was to become due when the road was complete and in operation. The road was to be completed within a specified time, and the donation was upon condition that the road should not be transferred to the St. Louis & San Francisco Railroad Company within two years from October 1, 1899. On September 26, 1899, the time for the construction of the road was extended upon consideration that the railroad to be constructed should not pass into the hands of the St. Louis & San Francisco Railroad Company within three years and six months from October 1, 1899. On the 8th day of November, 1899, Ferguson executed a donation deed conveying the right of way over his lands in Washington County to W. A. Bright, trustee, to secure the construction of said railroad. When the agreement in writing of January 13, 1902, was executed, the railroad was completed and in operation from Fayetteville to a connection with the Kansas City, Pittsburg & Gulf Railroad. The new agreement took up the subject-matter of all the prior agreements. The purpose of the new contract was to give the railroad company a 60-day option to purchase certain lands from the plaintiff for its right of way, depot and yard grounds. What is called the $500 subsidy note was recited as part of the purchase price, and no mention is made of the condition attached to the original contract for the subsidy note The subsidy note was due, but the original contract provided that the amount of it should be refunded if the railroad should pass into the control of the St. Louis & San Francisco Railroad Company within three years and six months from October 1, 1899. That time had not expired when the option contract of January 13, 1902, was executed. The time limit of the option contract was 60 days from its date. The new contract does not expressly abrogate the prior agreements, but the scope of the latter takes up all matters of the earlier contracts, and covers the same subject-matter. It is inconsistent

with the terms of the earlier agreements, and we are of the opinion that the condition imposed in regard to the railroad passing into the hands of the St. Louis & San Francisco Railroad Company was discharged by the execution of the new agreement of January 13, 1902.

"The discharge may take the form either of a total obliteration of all contractual relations between the parties in regard to the subject-matter of the contract, or it may be effected by the substitution of a new agreement in place of the old one. In such case the new agreement takes the place of the old, and consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged; in other words, a contract may be rescinded in part and stand as to the residue. 9 Cyc. 595. To the same effect see 3 Page on Contracts, § § 1339, 1340.

The railroad company, in compliance with the terms of the option contract of January 13, 1902, tendered to the plaintiff the purchase price and demanded a deed for the right of way, depot and yard grounds. It was entitled to this.

For the error in finding for the plaintiff for the amount of the $500 subsidy note, the decree is reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

CHEROKEE CONSTRUCTION COMPANY *v.* HARRIS.

Opinion delivered November 8, 1909.

HOMESTEAD—RIGHT OF WIDOW AND MINOR HEIRS TO OPEN MINES.—During the continuance of the homestead estate of the widow and minor children, they have not the right, as incident to such estate, to open new mines on the land and to mine and sell coal therefrom, or to lease the same to others for that purpose.

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

Ira D. Oglesby, for appellant.

An action of waste can be sustained against a widow owning dower interest in her husband's land for waste committed by her. 20 Mass. 203; 12 Ga. 235; 112 Ia. 210. So she may be enjoined from committing waste. 85 Ia. 78; 53 Ind. 267; 110 Penn. 473; 16 N. J. Eq. 248; 33 *Id.* 603; 39 Md. 33; 2 Hill 157; 49 Md. 549; 33 Am. St. R. 280; 66 *Id.* 370; 41 W. Va. 559; 56 Am. R. 884; 64 *Id.* 891; 179 Pa. St. 371; 43 W. Va. 562.

T. B. Pryor, for appellee.

Art. 9, sec. 6, Const. 1874, is to be liberally construed. 54 Ark. 11; 65 Ark. 251; 70 Ark. 483; 71 Ark. 594; 77 Ark. 186. The homestead estate is superior to that of dower. 47 Ark. 455. A widow cannot sell her dower and deliver possession while the right of homestead exists. 58 Ark. 302. The probate court cannot order the land sold until the homestead rights of both the widow and children have terminated. 50 Ark. 329. A vein of coal beneath the surface of a homestead is a part thereof, and is protected to the same extent. 70 Ark. 318.

FRAUENTHAL, J. The appellant, who was the plaintiff below, instituted this suit in the chancery court against the appellees, seeking to have certain lands partitioned and to enjoin the defendants from committing waste by mining and removing from the lands the coal underlying the same. It alleged that one Matthew Pew was the owner of the lands in his lifetime, and that plaintiff became the owner of an one-half interest in the lands by purchase from the adult heirs of said Pew.

The defendants alleged that the land was the homestead of said Pew, and that it was occupied as such homestead by his widow, who was one of the defendants, and his minor children; that the widow for herself and minor children made a lease to the other defendants of the right to take and mine the coal underlying the land; and that by virtue of their homestead estate in the land they had the right to mine said coal.

It is conceded that the facts developed in the case are as follows: The land in controversy was at the death of Matthew Pew his homestead, and was occupied as such. At the time of his death he left surviving him his widow, defendant herein, who after his death married W. B. Thompson, with whom she now resides on said land. The deceased, Matthew Pew, at the time of his death had six adult and four minor children.

That plaintiff is owner of a half interest in said land by purchase from the adult children of Matthew Pew, as set out in the complaint; that each of the four minor children own an undivided one-tenth interest in the lands, and they now reside on it with their mother, Mrs. W. B. Thompson, one of the defendants. At the time of the death of Matthew Pew it was used and occupied as a farm for farming purposes only, and was so used at the time of the marriage of his widow with Thompson, and was so used thereafter, and is still so used; that at the time of the death of Matthew Pew no coal was mined, or had ever been mined, from said land, and no opening of any kind whatsoever made for said purpose. That in the year 1907 defendant Mrs. Thompson, for herself and minor children, made a lease to the defendants herein, Harris, Williams and Welchel, of the right to take and mine the coal from under said land, for which they were to pay a royalty of ten cents per ton, which produces $75 per acre, and they are now, and have been since the execution of said lease, mining coal from said land, and have sunk a slope or shaft on same for this purpose; that all the royalty under said lease is being paid to Mrs. Thompson for herself and children; that the youngest child is about four years of age, and the oldest of the minors nine years old; that the value of said land including the coal is $75 per acre, and its value after the coal is removed $10 per acre; that rental or income of the land, if used only for farming purposes, would not exceed $100 a year; that under the terms of said lease a larger part, if not all, the coal under said land will be mined out before the youngest child reaches lawful age.

The chancery court denied the plaintiff any relief; holding that the widow and minor children had the right to open new coal mines and to mine and remove the coal underlying the land; and dismissed the complaint. From that decree the plaintiff presents this appeal.

Upon the fact being developed that the land was the homestead of Matthew Pew at the date of his death, and was at the institution of this suit occupied by his widow and minor children, claiming same as a homestead, the plaintiff did not press that portion of his complaint which sought to partition the land, but

did seek the relief, and does now seek only the relief, of enjoining the mining and removal of the coal from under said lands.

The question involved in this case is whether, during the continuance of the homestead estate of the widow and minor children, they have the right, as against the adult children or their grantee, to open on the land coal mines where none had been opened during the lifetime of the husband and parent, and to take and mine the coal therefrom solely for the purpose of sale.

The defendants assert this right by virtue of the homestead provided for the widow and minor children by the Constitution. Article 9, section 6, of the Constitution provides: "If the owner of a homestead die, leaving a widow but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rent and profits shall vest in her during her natural life, provided, that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits until each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or child may reside on the homestead or not; and, in case of the death of the widow, all of said homestead shall be vested in the minor children of the testator or intestate."

The chief purpose of this constitutional provision was to secure to the widow and minor children a fixed home during the life of the widow or minority of the children. To secure this object, it was made exempt from sale; so that it can not be sold to pay the decedent's debts, and it cannot be partitioned, either in kind or for sale. *Trotter* v. *Trotter,* 31 Ark. 145; *Kirksey* v. *Cole,* 47 Ark. 504; *McCloy* v. *Arnett,* 47 Ark. 445; *Nichols* v. *Shearon,* 49 Ark. 75; *Stayton* v. *Halpern,* 50 Ark. 329; *Burgett* v. *Apperson,* 52 Ark. 213; *Bond* v. *Montgomery,* 56 Ark. 563; *Sparkman* v. *Roberts,* 61 Ark. 26.

It protects the occupant in the possession of the land, and holds it together as a place of residence and a home preserved against sale or partition. It cannot be sold or alienated by the widow; by the act of sale she abandons it as a homestead. *Garibaldi* v. *Jones,* 48 Ark. 230; *Sansom* v. *Harrell,* 55 Ark. 572.

But the homestead law does not create any estate greater or any right more enlarged than that of the occupancy of the land and the right to the enjoyment of the rents and profits therefrom during the life of the widow or minority of the children.

In the case of *Kessinger* v. *Wilson,* 53 Ark. 400, it is held that when one dies seized of a homestead his minor children have two separate and distinct estates in the land, the estate of homestead and of inheritance. These two do not merge; but the right to the enjoyment and possession of the one follows the other, and the right by inheritance cannot be impaired by the right of enjoyment of the homestead during their minority.

After the estate of homestead has terminated by the death of the widow and the majority of the children, the land is still liable for the debts of the parent. *McAndrew* v. *Hollingsworth,* 72 Ark. 446. And the homestead cannot be devised so as to free it from those debts after the termination of the homestead estate. *Winter* v. *Davis,* 51 Ark. 335. And, subject to the homestead estate, the heirs of the decedent have an estate of inheritance in the land. As affecting the rights of the heirs, therefore, the homestead estate is one for life or for years. "The right of homestead is purely the creation of statutes, which have no extraterritorial force. It is generally spoken of as an estate in land and created as an estate for life." 1 Washburn on Real Prop. § 540. Now, a tenant for life or for years must not commit waste. Anything that is done or permitted to be done that essentially injures or impairs the estate of the remainderman or reversioner is waste. It is the duty of the life tenant or tenant for years to protect the land from injury to the freehold. 1 Tiedeman on Real Property, § 75; 1 Washburn on Real Property, § 270; 1 Lomax, Dig. 594; 1 White & T. Lead. Cases Eq. 1011; 30 Am. & Eng. Enc. Law (2nd Ed.) 236.

In the case of *McLeod* v. *Dial,* 63 Ark. 10, it is held that "a life tenant has no right to cut trees growing upon land or to allow them to be cut, except so far as it might be necessary to the proper enjoyment of his life estate in conformity with good husbandry, so as not to materially lessen the value of the inheritance." *Modlin* v. *Kennedy,* 53 Ind. 267.

In the case of *Smith* v. *Smith,* 31 S. E. 135 (Ga.) it was held that a widow who has taken a homestead in her deceased husband's land cannot, as against the rights of those entitled to the property in reversion after the homestead estate shall have expired, make a sale of the standing timber on the land when same will injure the value of the freehold and is not essential to the legitimate use of the property for homestead purposes. *Parker* v. *Chambliss,* 12 Ga. 235.

It is uniformly held that it is waste to open lands to search for new mines. If there are mines already opened on the land when the tenant takes the estate, it is not waste to continue to work them. The offense of waste consists in the first penetration and opening of the soil. And so it has been held that a mine which was opened at the vesting of the life estate or estate for years may be worked by the tenant, even to exhaustion. 1 Lomax, Dig. 54; 1 Washburn on Real Property, § 280; *Crouch* v. *Puryear,* 1 Rand. (Va.) 258. But tenants for life or for years are guilty of waste in opening and working new mines and which were unopened at the time of the vesting of the estate. 20 Am. & Eng. Enc. Law, 769; 1 Washburn on Real Property, § 280; 16 Cyc. 625. They may use the premises as they may see fit, provided it does not injure the inheritance. They may work old mines already opened when they obtained the estate; but they cannot open new mines. Tiedeman on Real Property (2d Ed.), § 75; *Hook* v. *Garfield Coal Co.,* 112 Iowa 210; *Gerkins* v. *Ky. Salt Co.,* 66 Am. St. Rep. 370; *Koen* v. *Bartlett,* 41 W. Va. 559; *Williamson* v. *Jones,* 43 W. Va. 562; *People's Gas Co.* v. *Tyner,* 131 Ind. 227.

It follows that the life tenant has the right to use and enjoy the premises as he may see fit, provided he commits no injury to the inheritance. He takes the land in the condition in which it was when the estate vested in him, and he is entitled to all the rents and profits that then issued therefrom, and to continue to use and enjoy them to the same extent until the termination of the estate. But such tenant by an original act of his own is not entitled to obtain from the land any profit that would result in an injury to the inheritance. And the widow and minor children do not obtain by the homestead law any greater right in the use and enjoyment of the homestead than this. They have

not the right in their use of the homestead to commit waste, and cannot during their occupancy do or permit any act to be done that will prove an injury to the estate of the reversioner. It is urged by counsel for appellee that they should have the right to open new mines under the authority of the case of *Russell* v. *Berry,* 70 Ark. 318. But it was there only determined that the coal underlying the surface of the earth was land and a part of the homestead; and that therefore the exemption of the homestead extended thereto, so that the coal could not be sold to pay the debts of the decedent. But it was there expressly stated that it was not decided that the widow and children have the right to mine and sell the coal. We therefore hold that during the continuance of the homestead estate of the widow and minor children they do not have the right, as incident to the homestead estate, to open on the land new mines and to mine and sell coal therefrom or to lease the same to others for that purpose.

We do not, however, pass upon the question as to whether or not the probate court, in which the guardianship of these minors may be pending, has the power to order for their benefit the sale of the entire interest of the minors in the underlying coal of the homestead left them by their parent. *Merrill* v. *Harris,* 65 Ark. 355.

It follows, threfore, that the chancery court erred in holding that the widow and minor children had the right to open new coal mines upon the homestead and to mine and remove the coal underlying the same for the purpose of sale.

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

WELCH STAVE & MERCANTILE COMPANY *v.* STEVENSON.

Opinion delivered November 15, 1909.

1. INSURANCE—REQUIREMENT THAT OFFICERS FILE ANNUAL STATEMENTS.—Kirby's Digest, § § 848, 859, requiring the president and secretary of business corporations organized under that act to file an annual report of the affairs of such corporation with the county clerk, and providing that

a president or secretary who shall neglect or refuse to comply with such requirement shall be liable for all debts of the corporation contracted during the period of such neglect or refusal, are applicable to all insurance corporations, whether mutual or otherwise. (Page 268.)

2. SAME—IMPLIED REPEAL OF STATUTE.—Under the rule that a statute is not repealed by a later statute unless there is a clear repugnancy between the two, sections 848, 859, Kirby's Digest, requiring certain corporate officers to file annual reports and rendering them liable, if they neglect to do so, for all debts of the corporation contracted during the period of their default, were not repealed, as to mutual insurance companies, by Kirby's Digest, § 4349, requiring such companies to file annually with the State Auditor sworn statements showing their financial condition. (Page 270.)

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

STATEMENT BY THE COURT.

Appellant (plaintiff below) alleged that on and since February 26, 1906, the Ozark Insurance Company had been a corporation of this State, as organized under the provisions of section 837 and the following sections of Kirby's Digest authorizing the organization of corporations "for the purpose of engaging in or carrying on any kind of manufacturing, mechanical, mining or other lawful business," and that defendant Stevenson was president and defendant Kimmons was secretary of said corporation from and after said day of February. That said corporation was organized as a mutual insurance company for the purpose of insuring property against fire, and on February 26, 1906, issued to plaintiff its policy insuring certain property against loss by fire for twelve months from that date. That on August 3, 1906, the property so insured was destroyed by fire, and that on April 4, 1908, plaintiff recovered judgment against said corporation in that court on account of said loss for five hundred dollars with interest, which judgment remained wholly unpaid. That the defendant president and secretary did not, nor did either of them, file the certificates required by section 848 of Kirby's Digest during the years 1905 or 1906, and by reason of the neglect to do so had become liable to plaintiff for the amount of said judgment, and it prayed judgment accordingly.

Defendant filed a general demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause

of action. The court sustained said demurrer, and, the plaintiff electing to stand upon its complaint, the court dismissed the case at the costs of the plaintiff, and plaintiff appealed.

Mechem & Mechem, for appellant.

1. Kirby's Digest, § 848, applies to all corporations. It was the duty of the officers to make the certificate regardless of the inability, if any such, of complying with every item of the demand.

2. This section has never been repealed by implication by section 4349 or any other. Repeals by implication are not favored. 28 Ark. 325. The provisions of the subsequent act must be clearly repugnant to the former. *Ib;* 41 Ark. 151; 50 *Id.* 137; 55 *Id. State* v. *Kirk;* Sutherland, Stat. Const. (2 Ed.) 465.

C. E. & H. P. Warner, and *T. W. M. Boone,* for appellees.

1. Section 848, Kirby's Digest, has no application to mutual insurance companies. It applies only to manufacturing and other business corporations within the meaning of subdivision 2, ch. 31, Kirby's Digest. Further, insurance companies, etc., are governed by sections 4337, 4347-8-9, etc.

2. To determine whether a statute is applicable, or not, to a given case, courts consider the reasons which underlie and support such statute. 3 Thompson, Corp., § 4222. Specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it. Suth. St. Const., p. 412, § 325; 59 Ark. 606.

WOOD, J., (after stating the facts). Section 848 of Kirby's Digest provides as follows: "The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz: the amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or August with the county clerk

of the county in which said corporation transacts its business, who shall record the same in a book to be kept by him for that purpose." Section 858 requires "the certificate to be made under oath or affirmation by the person subscribing same." Section 859 makes the president or secretary who shall neglect or refuse to comply with the provisions of 848 jointly and severally liable to an action founded on the above statute for all debts of such corporation contracted during the period of any such neglect or refusal.

Appellees contend that, inasmuch as the complaint shows that the corporation was organized as a mutual insurance company for the purpose of insuring property against fire, therefore the requirements of section 848, *supra,* do not apply, and that, instead thereof, the provisions of section 4347 are applicable.

It is alleged in the complaint, and admitted by the demurrer, that the insurance corporation named in the complaint was organized under the provisions of chapter 31 of the general incorporation act, subdiv. 2, Kirby's Digest, for "manufacturing and other business corporations." The Legislature in express terms having made it the duty of the "president and secretary of every corporation organized under the provisions" of that act to file the certificate specified in section 848, *supra,* it is not within the province of the courts to say that they did not intend what they have expressed in such plain terms. In such case there is no room for construction.

Nothing remains but to give effect to the law unless it has been repealed by some subsequent enactment. Section 4349 of Kirby's Digest, *supra,* (act of May 23, 1901), provides: "All mutual insurance companies of life, fire, etc., or other kind of mutual insurance organizations, organized under the laws of this State, shall annually file with the Auditor of State during the month of February a full and complete sworn statement of its financial condition on the 31st day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete itemized account of income and disbursements during the year."

Unless the section just quoted repeals 848, it is not repealed.

There is in the above no express repeal of section 848, and, applying the familiar rules that obtain, and that have been often announced by this court, with reference to repeals by implication, we are of the opinion that section 4349 does not repeal section 848. The two sections are not in irreconcilable conflict, nor can it be said that the provisions of section 4349—the later act—cover the whole subject of section 848—the former act—and that the last enactment embraces new provisions in addition to the subject covered by the first, showing plainly an intention that the last should be a substitute for the first. Mr. Sutherland expresses the rule for repeals by implication as follows:

"There must be such a manifest and total repugnance that the two enactments cannot stand. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to, each other, or unless in the later statute some express notice is taken of the former, plainly indicating an intention to repeal it; and when two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal by implication of the former." Sutherland, Statutory Const. (2 Ed.), p. 465. To the same effect, see *English* v. *Oliver,* 28 Ark. 325; *Coats* v. *Hill,* 41 Ark. 151; *Chamberlain* v. *State,* 50 Ark. 137; *State* v. *Kirk,* 53 Ark. 337.

We deem it unnecessary to parallel the two sections in comment to show that they are not repugnant. They are set forth in the opinion, and the mere reading of them will discover that they may be readily harmonized. Section 848 was passed for the information and benefit of creditors of the corporation. Section 4349 was for the purpose of giving, primarily, information to the Auditor, and to enable him to determine whether the agents of such organization are entitled to solicit business for same, and as to whether such agents are entitled to a certificate showing that they have authority to solicit business. See *McKee* v. *Rudd,* 121 S. W. 312. In so far as the statements required by section 4349 may be of benefit to creditors, it is in this respect not repugnant but supplemental to section 848. The two sections were passed for a different purpose, as will be readily seen, and there is nothing to indicate that the last enactment was intended as a substitute for the first. As repeals by implication are not favored, it is for the Legislature, and not for the

courts, to say that section 848 has no application to mutual insurance companies. Thus far the Legislature has not so declared.

The trial court erred in sustaining the demurrer to the complaint. The judgment is therefore reversed, and the cause is remanded with directions to overrule the demurrer.

COTTON PLANT OIL MILL COMPANY v. BUCKEYE COTTON OIL COMPANY.

Opinion delivered November 15, 1909.

PARTNERSHIP—POWERS OF MAJORITY.—**In case of a difference of opinion among partners as to the mode of conducting a business the will of a majority controls.**

Appeal from Jackson Circuit Court; *Charles Coffin,* Judge; reversed.

J. F. Summers and *John W. & Joseph M. Stayton,* for appellant.

1. The arrangement between these parties constituted a partnership. Whether or not exclusive authority to buy and sell cotton seed was conferred upon Pearce is a disputed question; but, if such authority was conferred, appellant would not be bound by it unless notice had been given thereof. 30 Cyc. 401 (e) and cases cited.

2. If exclusive authority was conferred upon Pearce, it was revocable by the action of a majority of the partners. The bill of sale to appellant was executed prior to the bill of lading to appellee executed by Pearce's procurement. The execution of the bill of sale constituted a revocation of Pearce's authority. 31 Cyc. 1303 and cases cited; 30 Cyc. 481; George on Partnership, 158.

3. Pearce's testimony is not sufficient to contradict the date of the bill of sale. Its execution and delivery was all that was necessary to complete the sale to appellant. 31 Ark. 163;

35 Ark. 190; 80 Ark. 572. There could have been no delivery to appellee until the bill of lading was procured.

Gustave Jones and *J. W. & M. House,* for appellee.

1. In case of a trading partnership, every partner, in the absence of any special arrangement between the parties, is entitled to take part in the management of the busniess; but this rule may be modified by partnership agreement, contract or conduct of the parties, so that one part of the business may be committed to one member, another part to another member, or the whole management to one member of the firm. 23 Ark. 566; 44 Ark. 34. Such an agreement cannot be waived or changed except by consent of all members of the partnership, and then only in a court of equity. 44 Ark. 36; 54 Ga. 29; 55 Ga. 427; 32 Vt. 616. The proof is clear that Pearce was made the sole manager of the Tupelo Gin Company, and that he was elected secretary and treasurer, was given exclusive authority to buy and sell cotton seed and had entire management of the Tupelo gin. If appellant had notice of these facts, or had sufficient facts before it to put a reasonable person on notice that such was the the case, it was bound by such partnership agreement, and purchase of seed from any other persons than Pearce would not be binding or valid. 48 Am. St. Rep. 436; 38 N. H. 27; 75 Am. Dec. 183; 4 Johns. 251; 4 Am. Dec. 273. But this is not a trading partnership, but is a non-trading partnership, such as a number of persons engaged in mining operations, or in a farming operation, and in such cases a *bona fide* purchase does not apply. 26 Am. Rep. 185; 19 Am. Rep. 757. In such partnerships the authority imparted to the individual member to bind the partnership in transactions with third persons is limited by the nature of the business. 50 Miss. 358.

2. There was no completed sale to appellant. The bill of sale was executed by two partners only. They could not bind the gin company. Two members of the partnership had no power to make the sale under the agreement, and there was no such delivery as is required by law. Moreover, appellant knew that Pearce was the only one authorized to buy and sell seed. 1 Bates on Partnership, § 323.

HART, J. This is an appeal from a judgment rendered in the Jackson Circuit Court in favor of the Buckeye Cotton Oil

Company against the Cotton Plant Oil Mill Company for two cars of cotton seed.

In the summer of 1906 a local lodge of the Farmers' Union wished to rent a cotton gin near Tupelo, Ark., for the benefit of its members, and a committee for that purpose was appointed. Without going into details, it is sufficient to say that Dr. W. N. Pearce, G. W. Neeley, J. A. Wilson, Thomas Hurst, T. J. Looney and M. F. Massey agreed to rent the gin with the understanding that the members of the union should haul them their cotton. The above-named parties were to share the profits and bear all the losses of the business. The business was to be conducted in the name of Farmers' Union Gin Company of Tupelo. They rented a gin from the Tupelo Gin Company, and made and entered into a written contract with it, whereby they agreed to sell to the Cotton Plant Oil Mill Company all of their cotton seed, provided the company would pay the customary price for the seed. The same persons owned the Cotton Plant Oil Mill Company, and the Tupelo Gin Company. G. W. Neeley was elected president, and Dr. W. N. Pearce was elected secretary and treasurer of the Farmers' Union Gin Company of Tupelo. It was understood that Dr. Pearce would handle all the money, and buy and sell all the cotton seed handled by the company. There is testimony tending to show that this fact was known to the Cotton Plant Oil Mill Company. Pursuant to their agreement, they began to ship seed to the Cotton Plant Oil Company; Dr. Pearce handling the business for the Gin Company. Sometime in the latter part of October or the first part of November a controversy arose between Dr. Pearce and the manager of the Cotton Plant Oil Company, and Dr. Pearce began shipping seed to the Buckeye Cotton Oil Company. On the 15th day of November, 1906, the Gin Company had a quantity of seed in a house near the railroad track, and Dr. Pearce was loading the seed in the cars, preparatory to shipping them to the Buckeye Cotton Oil Company at Little Rock, Ark.

On the same day G. W. Neely and M. F. Massey executed a bill of sale of these seed to the Cotton Plant Oil Mill Company, which is as follows:

$1,117.62. "Tupelo, Ark., Nov. 15, 1906.

"Received of the Cotton Plant Oil Mill Company eleven hundred and seventeen 62-100 dollars, as an advance payment on

(100) one hundred tons of cotton seed now in seed house of Tupelo Gin Company, and being loaded in (2) two I. C. Refrigerator Cars, towit: one car No. 54,053 and one car No. 54,853. These seed to be shipped out as soon as said cars can be loaded and sufficient others furnished us on side track at said gin, and to be billed to the Cotton Plant Oil Mill Company at Cotton Plant, Ark., the price being twelve dollars per ton on cars at Tupelo.

"Farmers' Union Gin Co. of Tupelo.
"By G. W. Neeley, President.
"M. F. Massey."

G. W. Neeley, J. A. Wilson, M. F. Massey and T. J. Looney were present when the bill of sale was drawn up, and approved of its execution. The cars of seed in controversy are the ones mentioned in the bill of sale.

On the 16th day of November, 1906, after the cars had been loaded, Massey got the numbers of the cars and went to the agent of the railroad company for a bill of lading. While there, Dr. Pearce came up and forbade the agent to issue a bill of lading to the Cotton Plant Oil Mill Company, and demanded one for the Buckeye Cotton Oil Company, which was issued.

On the 19th day of November, 1906, the Cotton Plant Oil Mill Company instituted a suit in replevin against G. W. Neeley and others for the possession of the two cars of seed and also the seed in the house. The seed were taken charge of by the sheriff, and afterwards the Buckeye Cotton Oil Company intervened, claiming to own the two cars of seed, and upon giving bond was allowed to retain possession pending the litigation. The value of the seed was $445.03.

Dr. Pearce for the intervener testified that on the 15th day of November, 1906, he had the two cars set on the side track and commenced to load them. That he finished loading one of them on the evening of the 15th, and the other the next morning. That he got a bill of lading on the 16th, and sent it to the Buckeye Cotton Oil Company. He says that he does not think that the bill of sale to the Cotton Plant Oil Company bears its true date, but does not state any fact or circumstances upon which his belief is founded. The other witnesses testify that the bill of

sale bears the date that it was executed, and that the consideration named therein was a balance due the Cotton Plant Oil Mill Company by the Farmers' Union Gin Company of Tupelo.

There was a trial before a jury, and a verdict for the intervener for the two cars of seed.

This statement places the testimony in its most favorable light to appellee. We do not think it entitles appellee to recover. It is conceded that the agreement of Pearce, Neeley, Massey, Looney, Wilson and Hurst constituted a partnership. A part of their business was to buy and sell cotton seed, and this made it a trading partnership. George on Partnership, p. 91.

It is earnestly insisted by counsel for appellee that there was no complete contract by virtue of the bill of sale of November, 15, 1906, because by the terms of the original agreement Dr. Pearce had exclusive authority to buy and sell seed, and this fact was known to appellant. The record in this case discloses that a majority of the partners became dissatisfied with the way Dr. Pearce was conducting the selling of seed, and that in good faith for the interest of the partnership they directed the bill of sale in question to be executed. This they had a right to do. Ordinarily, each partner is the general agent for the firm for the transaction of its business in the ordinary way. In this case the other partners delegated this power to Dr. Pearce. The power to grant the exclusive agency carries with it the right to revoke it. The rights of Dr. Pearce are not involved in this suit; and for this reason the authorities relied upon by counsel for appellee are not applicable to the issue raised by the appeal. There was here a diversity of opinion between the partners as to the conduct of its affairs; and a majority of them, acting in the scope of the partnership business, directed a sale of the seed in controversy, and the partners to whom this authority was given executed a bill of sale to the two cars of seed in controversy. The act of the majority of the partners governs in such cases. George on Partnership, p. 158; Story on Partnership, § 123; 30 Cyc. p. 480, and cases cited in note 57.

Again, it is objected that the bill of sale does not bear its true date. It bears the date of November 15, 1906. All the witnesses except Dr. Pearce say that was the date of its execution. Dr. Pearce only says he does not think so. He does not

attempt to give its date or to detail any fact or circumstance which leads him to believe that it was not executed on that day. This was not sufficient to impeach it.

From the conclusions we have reached it necessarily follows that it was a completed sale to appellant on the 15th inst., and that, as the bill of lading to appellee was not issued until the 16th inst., the jury was not warranted in finding for appellee.

Because there was no evidence to support the verdict, the judgment will be reversed and the cause remanded.

MARYLAND CASUALTY COMPANY v. CHEW.

Opinion delivered November 15, 1909.

1. DEPOSITION—RIGHT TO READ ADVERSARY'S.—A party has no right to read a deposition taken by his adversary which, though filed and published, the latter never offered in evidence, where there was no agreement that it should be read in evidence. (Page 283.)
2. INSURANCE—ACCIDENT POLICY—INSTRUCTION.—Where the amount of indemnity that one holding an accident policy was entitled to receive depended upon his occupation, and he sued as a cotton factor, and there was evidence tending to prove that he was a "supervising farmer" at the time of the accident, and therefore not entitled to recover as much as he would have been entitled to if he had been only a cotton factor, an instruction which ignored the evidence as to his being a "supervising farmer" was erroneous. (Page 283.)
3. SAME—ACCIDENT POLICY—TOTAL DISABILITY.—Where an indemnity policy insured a cotton factor, one only of whose duties was to sample cotton, it was error for the court in its instructions to assume that insured was totally disabled by reason of his inability to sample cotton. (Page 283.)
4. SAME—ACCIDENT POLICY—AGGRAVATION OF INJURY.—Damages are not recoverable under an accident policy on account of an extension of the injury occasioned by the assured's failure to observe the directions of his physician. (Page 286.)

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

M. L. Stephenson, for appellant.

1. The statement of warranties was a part of the contract, and appellee was bound by it. 29 Ind. 568; 33 N. E. 106;

58 Ark. 528; 65 Ark. 295; 1 May on Ins. 335; 49 S. W. 153; 53 N. Y. 603; 19 L. R. A. (N. S.) 798. Misrepresentation by the assured as to his occupation avoids the policy. 62 N. W. 1057; 65 Ark. 295.

2. It was error to permit the appellee to read as evidence to the jury the deposition of Dr. Smythe over the objection of appellant, the same having been taken on the part of appellant after notice given, and not offered by appellant; and the fact that it was taken on interrogatories to which appellee appended cross-interrogatories did not authorize its admission over appellant's objection. 15 Ark. 351; 85 Ark. 390. Its introduction was prejudicial. 69 Ark. 648; 77 Ark. 431; 148 U. S. 673; 119 U. S. 103; 17 Wall. 630; 5 Wall. 795; 110 U. S. 47.

3. Appellant should have been permitted to question the appellee as to what instructions, if any, were given him by the surgeon. It was material for the purpose of showing whether or not he had taken proper care of himself to obtain relief from the disability, which was a question for the jury. It was his duty in this respect to obey reasonable instructions of the physician. 46 Ark. 206; 78 N. W. 227.

4. The policy of insurance is the contract sued upon, and under its terms appellee must recover, if at all. This policy covers both partial and total disability, and the second instruction is manifestly wrong. 1 Cyc. 269; 3 N. W. 237; 64 N. W. 1039, 1041; 43 Ill. App. 148; 138 Pa. 595; 13 Ind. App. 539; 65 Ark. 295; 17 S. E. 982; 74 N. Y. 23; 49 U. S. (8 How.) 28. That part of the instruction authorizing a verdict if he was unable to sample cotton was in effect a peremptory instruction to the jury to disregard the evidence offered by appellant of disinterested, unimpeached witnesses. 84 Ark. 57. It practically instructed them to disregard the evidence and the terms of the contract, and allows a total disability recovery for a partial disability. 1 L. R. A. 700; 33 N. E. 105; 149 Mass. 457; 138 Fed. 629; 65 Ark. 299.

5. In view of appellee's own admissions, and of uncontradicted testimony of witnesses that he was engaged in another occupation besides that of cotton factor at the time the policy was issued, appellant's request for a peremptory instruction in its favor should have been granted. 67 Ark. 514; 117 S. W.

788; 138 Fed. 629, 637; 65 Ark. 295, 300; 56 Ark. 53, 55; 19 L. R. A. (N. S.) 798, 802.

R. W. Nicholls and *Moore & Vineyard,* for appellee.

1. The question as to whether or not there was a breach of warranty is settled by the verdict of the jury under the evidence and proper instructions.

2. If it be conceded that the deposition of Dr. Smythe was improperly admitted, no prejudice resulted, the verdict being amply supported by other evidence. 63 Ark. 134, 137; 77 Ark. 431; *Id.* 453; 73 Ark. 407; 74 Ark. 417; 76 Ark. 276.

3. The court properly refused to permit appellant to question appellee as to the physician's instructions. Appellant had taken Dr. Smythe's deposition, and by that deposition could have shown all the facts.

4. The court would not have been warranted in directing a verdict for appellant unless there had been a total want of testimony on the part of the appellee.

The test is not so much whether the assured had in fact abandoned the occupation stated in the application and policy, but whether or not *at the time of the injury* he was in fact engaged in another occupation, not merely incidental, but as a business, of a more hazardous classification. 138 Fed. 635.

BATTLE, J. Frank H. Chew brought an action against Maryland Casualty Company. Complaining, he alleges in his complaint substantially as follows:

On the 29th day of May, 1906, the defendant, in consideration of $25 received by it, did issue and deliver to him a certain policy of insurance, and thereby insured him in the principal sum of $5,000, and for a weekly indemnity of $25, for a period of twelve months from May 28, 1906, against bodily injuries not intentionally self-inflicted, sustained by the assured, while sane and effected directly and independently of all other causes through external, violent and accidental means.

Among other provisions in the policy is the following:

"If such injuries shall not result in any of the disabilities mentioned in section 1, and shall immediately, continuously and wholly disable the assured from performing any and every kind of duty pertaining to his occupation, the company will pay him

for the period of such total disability the weekly indemnity above specified, but to an amount not exceeding the principal sum."

On the 8th day of April, 1907, while the policy was in full force and effect, plaintiff, Chew, was injured by the accidental discharge of a pistol, the bullet entering his right breast, and causing total, complete and permanent paralysis of his right arm, thereby immediately, continuously and wholly disabling him from performing any and every kind of duty pertaining to his occupation. He alleged that he was entitled to recover $650 on the policy for indemnity against loss on account of the accident; and asked for judgment for that amount.

The defendant, the Maryland Casualty Company, denied the foregoing allegations. It stated the facts to be substantially as follows: On the 29th of May, 1906, plaintiff made an application to it for a policy of insurance, making certain warranties. In consideration of the sum of $25 and of the application and warranties, it issued the policy sued on. He represented himself to be engaged in the occupation of a cotton factor, but at the time he made this application and these warranties he was not so engaged, but in another and additional and more hazardous occupation, and by reason thereof the policy is void, and was of no force and effect on the 8th day of April, 1907, when the alleged accident occurred.

One of the provisions of the policy is as follows: "If the assured is injured fatally or otherwise in any occupation classified by this company as more dangerous than that stated in the schedule of warranties indorsed hereon, the company's liability shall be only for such proportion of the principal sum or other indemnity provided for herein as the premium paid by him will purchase at the rates fixed by the company for such increased hazard."

At the time of and prior to the accident, plaintiff was engaged in the occupation of "supervising farmer," in addition to that of cotton factor, and as a separate business, which is classified by the defendant as more hazardous than that of cotton factor, and under the policy he is not entitled to the indemnity he claims as cotton factor, but as before stated.

Plaintiff, Chew, did not use due diligence to secure the recovery of his arm.

In the trial of the issues in the case the policy sued on was adduced and read as evidence. It contained the provisions set out in the pleadings and the following in addition to others:

"No. 2. Or, if such injuries shall not result in any of the disabilities mentioned in section 1 and shall immediately, continuously and wholly disable and prevent the assured from performing any and every kind of duty pertaining to his occupation, the company will pay him for the period of such total disability the weekly indemnity above specified, but to an amount not exceeding the principal sum; or, if such injuries shall not wholly disable the assured as above, but shall immediately, continuously and wholly disable and prevent him from performing one or more important daily duties pertaining to his occupation, the company will pay one-half the weekly indemnity above specified for the period of such partial disability, not exceeding twenty-six consecutive weeks from the date of injury; or, if such partial disability shall follow a period of total disability, the indemnity provided for partial disability shall be paid, but not for more than twenty-six weeks; nor shall the company be liable under the provisions of sections 1 and 2 for a sum greater than the principal sum."

Contained in the policy is a schedule of warranties, which in part are as follows: "I am F. H. Chew, of Helena, Ark., whose business is that of cotton factor. The duties of my occupation are fully described as follows: office work; classified as select."

The deposition of Dr. F. D. Smythe, which was taken by the defendant to be used as evidence in its behalf in the trial of this cause, was read as evidence by plaintiff in the trial, over the objection of the defendant:

The following extracts were parts of the deposition:

"The patient's general condition was bad when he reached the hospital, and the idea of operating at once was not entertained, owing to the location of the injury, also its recent occurrence. I felt that life would be jeopardized by operating at that time, and so advised him. He left the hospital for his home, and I informed him that the only chance for restoration of function of the arm was by a performance of the operation for deuteropathy or nerve suffering; that the operation in this case

was not without risk, and at the same time I could not assure him of success attending my efforts, but, as it offered him the only hope of regaining the use of his arm, I advised him to take the chance. Some months later he called to see me, his arm being in about the same condition except the atrophy advanced somewhat. He had slight use of some of his fingers and thumb, but not sufficient to be of any possible use. I talked with Mr. Chew, and advised him of the importance of having the operation performed. I told him I did not think he should delay having it done. He asked me concerning Doctor Murphy of Chicago, and I stated to him that Doctor Murphy had perhaps had more experience in nerve surgery than any surgeon in America, and that he could not go to a better man. My experience in this particular line of work has been limited. The operation can be performed successfully many months and even years, after the injury, without injury, though it requires a longer time to restore function in case it has been long delayed. He will remain permanently injured unless a successful operation should be performed upon him. There is no assurance that the operation will be followed by a successful result, but the chances are sufficiently promising to justify the operation."

"The patient was advised to report occasionally for examination, in order that the operation might be performed at the earliest possible moment with safety. I did not see or hear from him for some time after he left the hospital. There was no treatment that could influence his case, except surgical treatment, and all that could be done was to advise his physician to look after him in a general way. The patient was informed that the operation was associated with danger in his case, due to the location of the injury and the large and important blood vessels so closely related to the injured nerves. The patient was advised of such danger.

"I advised the patent, if I remember correctly, that an attempt to suture the nerve should be made as soon as he could be gotten in condition for its safe undertaking, and that if we failed to succeed his arm would be in no worse condition than if left unmolested, and that, inasmuch as there was a reasonably fair chance of success following the operation, I thought that the proper course. I do not remember whether or not I urged

the operation. I know I did not urge him to have it performed by myself. I merely told him that I would do the operation if he was willing to have same performed."

The following instruction was given at the instance of plaintiff over the objection of the defendant:

"The jury is further instructed that the words 'total disability' mean that the plaintiff was disabled from prosecuting his business as a cotton factor; that he was not able to prosecute his business as such unless he was able to do and perform all of the substantial acts necessary to be done in the prosecution; that, if the prosecution of the business of cotton factor required him to do several acts and perform several kinds of labor, and he was able to do and perform only one, he was as effectually disabled from performing his business as much as if he could do nothing required to be done. Therefore, if you find from the testimony that the business of cotton factor required as one of its duties the sampling of cotton, and that it was necessary, in order to perform that duty, to use both arms and hands, and that the right arm and hand of plaintiff have been totally paralyzed from the date of the accident to the 8th day of January, 1908, and that by reason thereof he has not been able to sample cotton, then such total paralysis of said arm and hand is a total disability, under the terms of the contract in the policy, and you will find for the plaintiff for the time and amount fixed by said policy."

And the court gave the following at the request of the defendant: "No. 5. You are instructed that, to entitle the plaintiff to recover damages for total disability under the terms of the policy in evidence, it is necessary for him to show, by a preponderance of the evidence, that he was continuously and wholly prevented by reason of the accidental injury from performing any and every kind of duty pertaining to his occupation; and if you believe from the evidence plaintiff was able, during any of the period from April 8, 1907, to July 8, 1908, to perform any of the duties pertaining to his occupation, then you should in your verdict allow him only for partial disability for such time, if any, you believe from the evidence he was able to perform any of such duties.

"You are instructed that it is not sufficient for the plaintiff to show a substantial disability to transact his business, but he must show by a preponderance of the evidence that he was unable to perform any and every kind of duty pertaining to his occupation."

And refused to give the following at the request of the defendant: "No. 2. You are instructed that it is incumbent upon the plaintiff to observe reasonable care to avoid unnecessary disability or the unnecessary continuance of disability; and if you believe from the evidence that the plaintiff, Chew, did not observe reasonable care in following the advice of his physician, Dr. F. D. Smythe, and if you further believe from the evidence that, because of his failure to observe such reasonable care, he was disabled to a greater extent or for a greater length of time than he would have been by the exercise of such reasonable care, then you should find for the plaintiff only to the extent and for the length of time he would have been disabled if he had exercised such reasonable care."

Plaintiff recovered judgment, and the defendant appealed.

Plaintiff had no right to read the deposition of Dr. Smythe as evidence without the consent of the defendant, the same not having been taken under an agreement. *Sexton* v. *Brock,* 15 Ark 345; *Ong Chair Co.* v. *Cook,* 85 Ark. 390.

The court erred in giving the instruction at the instance of the plaintiff. It is in violation of the terms and conditions of the policy sued on. The parties had the right to make their own contract, and the courts are powerless to make another or a new contract for them. As said in *Standard Life & Accident Insurance Co.* v. *Ward,* 65 Ark. 295, "The insurance company had the right to fix the terms and conditions upon which it would insure appellee, and the latter had the right to accept or reject the insurance in these terms and conditions; but, having accepted the same, it was a contract between them, and, being in violation of no principle of law, nor in contravention of the policy of the law, must be enforced according to its terms and meaning; and the courts have the right neither to make contracts for parties, nor to vary their contracts to meet and fulfill some notion of abstract justice, and still less of moral obligation."

The instruction assumes that plaintiff had the right to re-

cover the indemnity as a cotton factor, if at all, when there was evidence tending to prove that he was a "supervising farmer" at the time of the accident, and if he was such he was not entitled to recover as great an indemnity as he would have been entitled to had he been only a cotton factor; and also assumes that he is totally disabled by reason of his inability to "sample" cotton, when the evidence shows that there are many other duties he has to perform in pursuing his vocation of cotton factor. There the instruction is in conflict with that given upon the same subject at the request of the defendant.

The instruction asked by the defendant and refused by the court is not entirely correct. The failure of the plaintiff to observe reasonable care in following the advice of his physician could not affect the defendant unless it increased the indemnity, and defendant would have no right to complain, but this fact is not mentioned in the request. It has been held in cases of personal injury that no damages should be allowed the injured party for any impairment of health or physical condition occasioned by his neglect to observe the directions of his physician. *Keyes* v. *Cedar Falls* (Iowa), 78 N. W. Rep. 227, 229. Upon the same principle no indemnity should be allowed to an assured in actions like this on account of an extension of the injury where such extension is occasioned by his neglect to observe such directions.

Appellant lays stress upon the evidence tending to prove that appellee was a "supervising farmer" at the time the policy was issued and at the time the accident occurred; but this evidence was submitted to the jury upon proper instructions given at the request of appellant. As a new trial will be granted, comments are unnecessary.

Reverse and remand for a new trial.

PINE BLUFF AERIE NO. 209 FRATERNAL ORDER OF EAGLES *v.* DREYFUS.

Opinion delivered November 15, 1909.

LANDLORD AND TENANT—LEASE BY ADMINISTRATRIX—PARTIES.—Where an administratrix, in signing a lease of her own realty, described herself

"administratrix," etc., she could elect to treat the contract as her own and sue upon it in her individual name.

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

T. M. Hooker, for appellant.

The attempt in this case to lease the property for five years was not binding. It would require an order of the probate court to authorize a lease of it, and then it could not extend beyond a period of one year. Kirby's Dig., § 82; 34 Ark. 204; 64 Ark. 353. The lease was executed in appellee's representative capacity, and this suit so prosecuted, and she cannot now be heard to say that she is not proceeding for the estate, but in her individual capacity, or that, being the owner of the property, she is therefore entitled to enforce what is otherwise a void contract. 5 Ark. 475; 11 Ark. 425. An administrator cannot bind his estate by his individual contract. 64 Ark. 436; 61 Ark. 410; 62 Ark. 451. See also 46 Ark. 373. If the contract could not be enforced against the appellee, then the appellant was not bound.

Irving Reinberger, for appellee.

Appellant will not be relieved from payment of rents by restoration of the premises, nor on the ground that the lease is void because an executor or administrator cannot lease real estate for a longer term than one year. 33 Ark. 627; 12 Am. & Eng. Enc. of L. 751; 92 U. S. 107; 42 Ark. 289. The lease was appellee's personal contract, and the use of the word "executrix" in naming herself in the contract was mere surplusage. 7 Am. & Enc. of L. 337; 7 *Id.* 365, 366. Where the complaint discloses a cause of action in the plaintiff personally, although describing herself in her representative capacity, the descriptive words may be rejected. 104 N. Y. 543; 53 N. C. 302; 15 L. R. A. 850. Having paid the bequests, and there being no debts against the estate, appellee had no control over the land in her official capacity. 46 Ark. 373; 32 Ark. 337.

HART, J. This suit was begun in a justice of the peace court by appellee to recover the sum of $140 alleged to be due her by appellant on a lease contract. From the judgment rendered in her favor an appeal was taken to the circuit court, where

there was a trial *de novo* upon the following agreed statement of facts:

That prior to the 21st day of September, 1904, Leon Dreyfus was the owner of a building situated at 208 West Barraque Street, the same being situated on a part of lot two, block 20, original town of Pine Bluff, Arkansas. That prior to the said date aforesaid the said Leon Dreyfus departed this life, leaving a will making his wife, Mrs. Leon Dreyfus, executrix under said will and only legatee and devisee, excepting he left one dollar ($1) each to his two children, which has been paid by her, one of which died, and the other one is married. That on the 21st day of September, 1904, the plaintiff and the defendant entered into a contract with each other by which the entire second story of the property hereinbefore described was leased by the plaintiff to the defendant for a period of five years from that date at a rate of twenty dollars per month, which rent was due and payable on the 15th day of each month in advance. Said lease was entered into without any order of court. A copy of said lease is hereto attached and made a part of this statement of facts. That the defendant had quiet and peaceable possession of the same, and that on the 15th day of March, 1907, the defendant tendered to the plaintiff the leased premises and keys thereto, which the plaintiff refused, and defendant at the same time gave plaintiff a written notice that it would no longer be responsible for the rent; and that said building was subject to plaintiff's order and control. That the defendant had paid rent up to and including March 14, 1907 (same being the term during which defendant occupied the building), and at the time of the trying of this suit seven months had passed since the 14th of March, 1907.

The circuit court sitting as a jury found in favor of appellee, and an appeal has been taken to this court from the judgment rendered.

The lease contract shows that it was executed by Mrs. Leon Dreyfus, administratrix and executrix of the estate of Leon Dreyfus, deceased; but the property had become her property under the will of Leon Dreyfus, deceased, and the contract thus became her individual contract. The words "administratrix," etc., were words of personal description, and the appellee might

elect to treat them as such. *Bailey* v. *Gatton,* 14 Ark. 180. See also 18 Cyc. 980 and cases cited in note 21.

The record in the present case shows that appellee treated the lease as her individual contract, and that she has prosecuted this suit in her individual name and for her own benefit. The judgment, both in the justice court and in the circuit court, was rendered in favor of Mrs. Leon Dreyfus.

There is no error in the record, and the judgment will be affirmed.

AMERICAN JOBBING ASSOCIATION *v.* WESSON.

Opinion delivered November 15, 1909.

1. SALE OF CHATTELS.—WHEN EXECUTORY.—Proof that goods sold were delivered to a responsible carrier for transportation, without showing to whom they were consigned, is insufficient to show delivery to the purchaser. (Page 289.)
2. SAME—RESCISSION.—A party to an executory contract is discharged therefrom where the other party has renounced liability thereunder. (Page 289.)

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

J. T. Coston, for appellant.

When the letter of February 22, 1906, was deposited in the postoffice, appellant became the owner of the old jewelry, and appellee then owed appellant the balance, $116.37. Appellee was not prejudiced by the shipment back to her of the old jewelry—she still owed the balance stated and no more. The contract was not thereby rescinded. She was then the owner of the new jewelry, and owed the balance. 32 N. E. 411; 92 Pac. 1087; 154 Fed. 826; 108 Fed. 179; 9 Cyc. 635.

HART, J. This suit was instituted by the American Jobbing Association against Mrs. E. V. Wesson, doing business under the name of the Evadale Grocery Company, to recover the sum of $115.92 alleged to be due on a contract for the sale of jewelry.

The court, sitting as a jury, made the following finding of fact: "In this case the court finds the fact to be that the plaintiff failed to comply with the terms and conditions of contract and sale upon which it sued, and that the defendant, by reason of such breach upon the part of plaintiff, was released from liability thereunder."

Accordingly, judgment was rendered by the court dismissing the action. The plaintiff has appealed to this court.

The abstract of plaintiff shows the facts to be as follows:

Plaintiff entered into a written contract to sell defendant certain jewelry. It was claimed by defendant that the agent of the plaintiff who made the sale agreed that plaintiff would take certain old jewelry of defendant's and credit her account with the sum of $99.22. After exchanging a few letters, plaintiff, on February 2, 1906, wrote defendant, agreeing to accept the old jewelry according to her contention. Upon receipt of this letter defendant wrote the plaintiff February 16, 1906, as follows: "Since you agreed to abide by the arrangements made here by your Mr. Hargis, we will take the case and jewelry out of the office, and open up the first of March."

February 19, 1906, defendant wrote plaintiff as follows: "We ship today the jewelry taken up by your Mr. Hargis. Give us credit for $99.22. We will now take the goods out of the office."

February 22, 1906, plaintiff wrote defendant as follows:

"We are in receipt of your esteemed favor of the 19th, and beg to state that we will accept the goods you have returned to us. We have already given your account credit for $99.22, which leaves a balance of $116.37."

On the 12th day of March, 1906, plaintiff wrote defendant that the old jewelry had been received, examined and found worthless. That the same had been returned to defendant and said: "We supposed that you were acting in good faith with us when you made your claim as to an alleged agreement with Mr. Hargis, and when you made your statement as to the amount of goods to be sent to us for credit on account under this alleged agreement, but you know yourself that the goods you shipped to us did not at the original invoice price begin to figure up to the amount of credit that you insisted upon."

The defendant then repudiated the whole contract.

The theory upon which plaintiff seeks to recover is that the contract was executed before the letter of March 12, 1906, was written; but this contention is not borne out by plaintiff's abstract of the record. It is not shown that the jewelry was ever delivered to defendant. In her letter of February 19 defendant states that she would take the goods out of the office, but it does not appear that she did so. It is true that a delivery to a responsible carrier for transportation consigned to the defendant would have been a delivery to her. *Gottlieb* v. *Rinaldo*, 78 Ark. 123. But from aught that appears from the abstract of the record the goods may have been consigned to shipper's order. In which event there was no delivery, and the contract would be executory. It is well settled that an executory contract may be discharged by one party renouncing his liabilities under it. Plaintiff's letter of March 12 amounted to a refusal to abide by its contract as made, and so relieved the defendant from the obligation on her part. *Cochran* v. *Chetopa Mill & Elevator Co.*, 88 Ark. 343.

The judgment is therefore affirmed.

HARDY v. SAMUELS.

Opinion delivered November 15, 1909.

HOMESTEAD—AGREEMENT TO ALIENATE.—An agreement made before entering a homestead upon land of the United States that the enterer will hold the homestead for the benefit of others is illegal and void.

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; reversed in part.

C. T. Lindsey, for appellants.

Appellant acquired title to the five acres by her continuous adverse possession of and residence upoon the same for the period of thirty years, claiming the same as her own. Kirby's Dig., § 5056; 36 N. W. (Minn.) 551; 22 N. E. (Ind.) 725; 6 So. 634; 42 N. W. 915; 34 Ark. 598; 38 Ark. 181; 45 Ark. 81; 9 So. (Ala.) 537; *Id.* 368.

BATTLE, J. Mary Hardy and Ellen Hardy brought suit in the Pulaski Chancery Court against Richard Samuels and S. N. Tanner to recover a certain tract of land. They allege in their complaint that they are the owners of the land, but that the legal title is vested in Richard Samuels. They ask that the title be divested out of Samuels and vested in them.

Upon a final hearing the court dismissed their complaint for want of equity; and plaintiffs appealed..

The cause was heard by the chancery court upon an agreed statement of facts, of which the following is a part: "2. That the father of the plaintiff Mary Hardy and the defendant Richard Samuels immigrated from Georgia to Arkansas, in 1883, donated this same land, and set apart this five-acre homestead for himself and family, and he lived there until it was agreed between him and his family, on account of his old age, to give up the land and let his youngest son, the defendant, donate the same land as a homestead for the benefit of the whole family in 1889, which was done, and the defendant obtained his patent for said land in 1896, which the defendant has now, by which he claims title to said whole tract of land, including said five-acre homestead. That the defendant has sold the east 40 acres, and told the plaintiff that he owned the west 40."

"4. That plaintiff says she has had and lived in open adverse possession on said land, especially the five-acre homestead, described in her complaint, enclosed with a rail fence, with the two houses built thereon, for about 30 years next prior to this suit, and she is corroborated by all her witnesses in their evidence, namely, Ellen Hardy, Wesley Collier, Mary Collier, Jane Means and Alex Samuels, as well as all the witnesses for the defendant, and himself, in their testimony."

The lands were entered under the laws of the United States as a homestead. The agreement of Samuels to enter the land for a homestead for the benefit of others was a violation of the statute, and is illegal and void. *Cox* v. *Donnelly,* 34 Ark. 762; *Marshall* v. *Cowles,* 48 Ark. 362; *Nichols* v. *Council,* 51 Ark. 26.

Plaintiffs have held open adverse possession of five acres of the land, without color of title, but by actual possession within an enclosure, and have thereby acquired title to the same, and

are entitled to a decree quieting their title to the same as against the defendants.

The decree of the court as to the five acres is reversed, and as to the remainder it is affirmed, and the cause is remanded with directions to the court to enter a decree in accordance with this opinion.

COOK v. COLLINS.

Opinion delivered November 15, 1909.

MORTGAGES—SEVERAL NOTES—APPROPRIATION OF PROCEEDS.—Where a mortgage was executed to secure the payment of two notes due at different times and to different parties, upon a foreclosure sale the proceeds should be applied, first, to the payment of the cost of executing the trust, and the remainder should be appropriated *pro rata* in part payment of the two notes.

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

J. C. Brookfield, for appellant.

Smith & Smith, for appellees.

BATTLE, J. On the 8th day of April, 1905, J. C. Crabtree executed a deed of trust, and thereby conveyed certain personal property in trust, to W. W. Shaver to secure the payment of two promissory notes, one for the sum of $840, dated the 8th day of April, 1905, payable to M. Collins, J. B. Hamilton and J. W. Cook, and the other for $122, payable to the order of J. W. Cook, and due May 8, 1905; and provided, if the notes were not paid on or before the 8th day of May, 1905, the trustee should be authorized to sell the property at public sale to the highest bidder for cash, and appropriate the proceeds of the sale, first, to the cost of executing the trust, and, second, the aforesaid notes, and the balance, if any, pay to Crabtree. Shaver failing to act, J. C. Harrell became trustee by the terms of the deed, and sold the property according to the terms of the deed for $787.50, which is insufficient to pay both notes. Parties differ as to how it shall be divided, and appeal to the court to decide. The chancery court decreed that it shall be appropriated

to the payment of the note for $840, and any remaining thereafter to the other note; and Cook appealed.

The proceeds of the sale should be applied, first, to the payment of the cost of executing the trust, and the remainder should be appropriated *pro rata* in part payment of the two notes. *Penzel* v. *Brookmire,* 51 Ark. 105.

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

JOHNSON v. JOHNSON.

Opinion delivered November 15, 1909.

DOWER—SALE OF LAND—WIDOW'S PORTION.—Under Kirby's Digest, § 2707, providing that "in proceedings had in circuit court for the allotment of dower when it shall appear to the court that dower cannot be allowed out of the real estate without great prejudice to the widow or heirs, and that it will be most to the interest of such parties that said real estate may be sold, the court shall decree a sale of the real estate free from such dower, and that such portion of the proceeds may be paid to the widow in lieu thereof, or her interest therein secured, as to the court may seem equitable and just," *held* that the widow's dower should either be carved out of the specific property possessed by the deceased husband or be allotted out of the proceeds of a sale thereof when it cannot be divided without prejudice, and that such portion of the proceeds should be paid to the widow in lieu of dower as to the court may seem equitable and just.

Appeal from Lonoke Chancery Court; *John E. Martineau,* Chancellor; reversed.

Geo. Sibly, for appellants.

Under the statute the decree is erroneous. Kirby's Dig., § 2707. There is no testimony that the dower could not be allotted in land, nor that it would be to the best interest of the parties that it be sold. The court's finding is not conclusive, but this court will review the evidence to see if the findings are founded on facts disclosed by the evidence. Moreover, the segregation of a part of the lands for sale negatives a finding that an allotment in kind cannot be made. The statute contem-

plates a sale of the entire realty, not a part of it, and only when great prejudice to the widow *and heirs* would result from a division.

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

1. Since it appears from the decree that the case was heard on evidence which is not brought into this record, the court will presume that the evidence sustains the findings. 84 Ark. 429; 83 Ark. 79; 81 Ark. 427; *Id.* 327; 80 Ark. 74; 79 Ark. 192. The omission from the record of the oral testimony heard at the trial is fatal to the appeal. 87 Ark. 232; 84 Ark. 107; 83 Ark. 77; *Id.* 424.

2. The chancellor's finding that the dower could not be allotted in kind and that it was to the best interest of the parties that it be allotted in gross and enough land sold to pay the same, will not be disturbed unless clearly against the preponderance of the evidence. 85 Ark. 83; 84 Ark. 429; 81 Ark. 68; 87 Ark. 600; 79 Ark. 581; 88 Ark. 590.

3. The statute, section 2707, Kirby's Dig., is not limited to an "indivisible piece of real estate," as contended, but applies in any case where dower can not be allotted in kind without great prejudice to the parties, and where it is to their interest to sell the lands and pay a gross sum in lieu of dower. 3 Bush (Ky.) 667; 14 Cyc. 1007; 5 Am. & Eng. Enc. of L. 929; 3 Bland, 186, 278. Equity is the proper forum, where an assignment of dower cannot be made by metes and bounds. 7 Am. & Eng. Enc. of L. 193; 23 Ala. 616; 56 Ala. 397; 95 Ala. 269. See also 82 Ga. 247; 35 Mich. 415; 5 Am. & Eng. Enc. of L. 929.

McCULLOCH, C. J. A. V. Johnson, a resident of Lonoke County, Arkansas, died intestate, leaving a widow, the plaintiff, Fannie L. Johnson, and several children who are minors. He owned one thousand acres of land in the counties of Lonoke and Prairie, and said widow instituted this proceeding in the chancery court of Lonoke County, seeking an assignment of her dower. She alleged in her complaint that "the greater portion of said lands are wild, uncleared and not in cultivation, and that it will be difficult to allot dower out of said estate without great

prejudice to said petitioner or said heirs," and that it will be to the best interest of all parties that the said real estate be sold free from such dower, and "that such portion of the proceeds may be paid to her in lieu of dower as the court may deem equitable and just." She prayed that dower be allotted, and that, if the land could not be allotted in kind without prejudice, the same be sold, and her share of the proceeds of such sale be paid to her. The court rendered a decree directing the lands to be sold for the purpose of allotting to Mrs. Johnson a share of the proceeds as her dower; but an appeal was taken to this court, and the decree was reversed because two of the infant defendants had not been served with process. *Johnson* v. *Johnson,* 84 Ark. 307.

After the case was remanded, these defendants were properly brought in by service of process, and answers were filed for all of the defendants by their guardian. The court heard the case anew, and found that the widow's dower could not be allotted to her in kind without great prejudice to her and to the heirs. The court further found the total value of said real estate to be $15,000, that the present value of the widow's dower interest is $3,154.32; and directed that 520 acres of the land, describing it, be sold in order to raise funds to pay said sum to her. The heirs have again appealed.

The statute which it is claimed authorizes the sale of the decedent's land for the purpose of allotting dower out of the proceeds reads as follows:

"Sec. 2707. In proceedings had in circuit court for the allotment of dower, when it shall appear to the court that dower can not be allotted out of the real estate without great prejudice to the widow or heirs, and that it will be most to the interest of such parties that said real estate may be sold, the court may decree a sale of the real estate free from such dower, and that such portion of the proceeds may be paid to the widow in lieu thereof, or her interest therein secured, as to the court may seem equitable and just." (Kirby's Digest.)

It is contended by learned counsel for appellee that we should not attempt to review the evidence, for the reason that the recitals of the decree show that the action was heard on oral evidence, and that the same is not brought into the record.

The decree recites that the case was heard on the pleadings, depositions of certain witnesses, "records of the probate court in the matter of the guardianship of said minors, the admission of counsel and oral testimony that the lands described in the complaint are a correct list of the lands belonging to the estate of A. V. Johnson."

The above recital shows that the admission of counsel and oral testimony related entirely to a verification of the list of lands owned by the decedent described in the complaint. There was, and is, no controversy about this. The only issue of fact is whether or not the lands are susceptible of division for the purpose of assigning dower, without prejudice to the widow or heirs. The only testimony bearing on this issue is found in the record, and it is our duty to review it for the purpose of ascertaining whether the decree appealed from is correct.

After a careful review of all the testimony, we have reached the conclusion that there is none at all to support the finding that the land can not be divided without prejudice to the widow and heirs. The several tracts contain in the aggregate one thousand acres, only a small portion of which is in cultivation, and this is on the homestead. The lands are partly timbered lands and partly prairie lands—the latter being shown to be especially adapted to rice culture. Much of the land however is of poor quality and not very fertile. Nothing is shown in the evidence which renders the land incapable of division. Not a witness gives a reason why it cannot be divided without impairing its value. The case seems to have been tried below on the theory that it was sufficient to show that it would be to the best interests of the widow and heirs to sell the land and divide the proceeds, instead of dividing the land itself and allotting to the widow her proportionate share. In support of this theory, it was shown that much of the land is covered by timber, and that it would involve considerable expense, beyond the ability of the widow, to put the rice lands in cultivation. But this affords no reason for selling the land. The statute above quoted, authorizing the sale of real estate for allotment of the widow's dower out of the proceeds, does not mean this. The decree is inconsistent with itself in finding that the lands could not be divided without prejudice to the widow and heirs, and at the same time as-

certaining the present value of the widow's dower and segregating a portion of the land for sale for the purpose of raising funds to pay the widow's dower. If the lands could not be fairly divided, it was certainly unfair to the heirs to segregate a portion of them for the satisfaction of her claim, either with or without reference to the relative value of that portion. The effect of this would be to declare a lien on the lands of the decedent in favor of the widow for the *value* of her dower claim; and if this method of assigning dower should be pursued, it might result in selling the whole of the decedent's estate in order to satisfy the dower claims of the widow, thus depriving the heirs of their inheritance. Such is not the design of our statute. The widow's dower is to be carved out of the specific property of which her husband was possessed. *Hill* v. *Mitchell,* 5 Ark. 608; *Pike* v. *Underhill,* 24 Ark. 124; *Tiner* v. *Christian,* 27 Ark. 306; *Hoback* v. *Miller,* 44 W. Va. 635.

The design of the statute hereinbefore quoted is to prevent a denial of the widow's enjoyment of her dower because it cannot be set apart to her, and to authorize a sale where the estate cannot be divided without prejudice, so that the widow can be awarded a proportionate share in lieu of dower, or her interest therein secured.

It is unnecessary to a decision of the present case for us to say whether the operation of the statute is limited to sales of separate indivisible pieces of real estate. But we do hold that the statute does not authorize the sale of a part of the estate for the purpose of paying over to the widow the value of her dower interest, ascertained without reference to the amount of the proceeds of the sale. Our statutes on the subject of dower, when read together, clearly contemplate that the widow's dower shall either be carved out of the specific property possessed by her deceased husband or be allotted out of the proceeds of a sale thereof when it cannot be divided without prejudice, and that "such portion of the proceeds may be paid to the widow in lieu thereof, or her interest therein secured, as to the court may seem equitable and just."

The decree of the chancellor is erroneous, and it is therefore reversed, and the cause remanded with directions to assign

dower to the plaintiff out of said lands by allotment in kind, and for further proceedings not inconsistent with this opinion.

HART, J., not participating.

STONEMAN-ZEARING LUMBER COMPANY v. MCCOMB.

Opinion delivered November 15, 1909.

1. PLEADING—INDEFINITENESS—REMEDY.—In an action of trespass for cutting and removing timber on several tracts of land, the complaint is not demurrable because it fails to state the kind, quality and value of the timber cut from each tract, the proper method of raising such objection being a motion to make the complaint more specific. (Page 297.)
2. SAME—DEMURRER—WAIVER BY PLEADING OVER.—If it was error to overrule a demurrer to a complaint in trespass which raised the objection that the complaint was not sufficiently definite, such error was waived by the defendant pleading over. (Page 298.)
3. TRESPASS—CUTTING TIMBER—BURDEN OF PROOF.—In an action for cutting and removing timber from plaintiff's land, the burden is on plaintiff to prove the quantity and value of the timber cut by defendant. (Page 298.)

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

J. H. Harrod and *J. G. & C. B. Thweatt,* for appellant.

S. Brundidge, Jr., and *Cypert & Cypert,* for appellee.

MCCULLOCH, C. J. This is an action instituted by appellee in the circuit court of White County against appellant to recover from the latter damages for cutting and removing timber from three tracts of lands, aggregating 160 acres. The complaint alleged that the trespass was wilfully committed, and prayed for three-fold damages. The jury found in favor of appellee, but awarded only single damages.

Appellant demurred to the complaint because the kind, quantity and value of the timber cut on each separate tract was not stated therein. The demurrer was not well taken, and the court properly overruled it. It was not essential to a statement of the cause of action to set forth the description and value of the timber cut on each tract of land. If appellant deemed it necessary, in order to prepare its defense, that these matters should be set out in the complaint, the particular reasons should

have been set forth in a motion to make the complaint more definite and certain. Moreover, appellant waived the error of the court in overruling the demurrer, if it had been error, by pleading over.

There is no question raised as to appellee's title to the land on which the timber is alleged to have been cut. The points at issue are whether the appellant or its agents cut the timber, and, if so, the quantity and value thereof.

It is insisted that the evidence is not sufficient to sustain the verdict. We are unable to discover in the record any evidence legally sufficient to sustain the verdict. Appellant owned adjoining lands, and its men were cutting timber there. There is enough evidence to justify a conclusion that appellant's men got over the line and cut some of appellee's timber. But there is no way even to approximate the amount so cut. There is no direct evidence that any of it was cut at all by appellant's men, and it is only inferentially that this much may be gleaned from the testimony. Appellee relied, in order to make out his case, on the testimony of a surveyor who went on the land after the timber had been cut and made an estimate of the amount of timber which he said appeared to have been cut within two or three years prior to that date. There is no evidence in the record to show how long appellant had been cutting timber in that locality, or whether any one else had been cutting there. It was purely a matter of conjecture, without evidence on which to base it, that appellant had cut all of the timber on the lands which had been cut within two or three years. The burden of proof was on appellee, before he could recover, to show by a preponderance of the testimony that the appellant had cut the timber. Before he can recover anything, he must prove the quantity and value of the timber cut by appellant, if any. Bare proof that some of the timber was cut by appellant's men is not sufficient to charge it with responsibility for all the timber missing from the land during an indefinite period of two or three years.

Appellant sold some of the timber on this land, the persimmon and ash, to other concerns, and the latter cut that timber. In doing so it appears from the evidence that the men employed to cut the timber got over the line onto appellee's land

and cut timber of that kind. It does not appear that appellant was responsible for its vendee mistaking the boundary lines. There is some evidence to the effect that appellant's foreman, or timber boss, directed the men where to cut the timber. But, according to the uncontradicted testimony, this man had no authority, either express or implied, to direct the appellant's vendee or the latter's employees where to cut. The responsibility was on these vendees for getting beyond the line and cutting appellee's timber.

There is no evidence at all upon which any amount of appellant's liability can be fixed. Therefore, the judgment must be reversed, and the cause remanded for new trial, and it is so ordered.

BOULDIN v. JENNINGS.

Opinion delivered November 1, 1909.

1. PLEADING—EXHIBITS.—While exhibits form no part of the complaint in an action at law, they may be referred to for an explanation of its allegations. (Page 305.)
2. JUDGMENTS—AMENDMENT.—The authority of a court to amend the record of its judgments by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken. (Page 305.)
3. SAME—POWER OF COURT OVER.—Except for the purpose of amending its record to make it speak the truth, a court rendering a final judgment, as a general rule, is absolutely without power to alter it in substance or merit after the expiration of the term at which it was rendered. (Page 305.)
4. ADMINISTRATION—VALIDITY OF SALE—DESCRIPTION OF LAND.—Where an order of the probate court for the sale of land of an estate was defective in describing it merely as "part" of a certain forty-acre tract, the court was not authorized to amend it at a subsequent term so as to describe the land accurately. (Page 305.)

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

Beloate & Lomax, for appellant.

The statute of limitations does not run against a minor, neither can a minor be estopped by any conduct during mi-

nority to claim its inheritance. 85 Ark. 556; 87 Ark. 206. A void judgment has no effect; it neither binds nor bars. 81 Ark. 463.

W. A. Cunningham and *J. N. Beakley,* for appellee.

The validity of the judgment of a probate court ordering the sale of lands does not depend upon the sufficiency of the petition therefor. 44 Ark. 267; 70 Ark. 88; 74 Ark. 86. The court in directing a verdict did not abuse his discretion. 69 Ark. 432.

BATTLE, J. On the fifth of October, 1906, Annie Bouldin and others brought an action against W. S. Jennings to recover the possession of "all that part of the northwest quarter of the northeast quarter of section thirty-four in township seventeen north, and in range one east, lying east of Village Creek, the bed or channel of which being the west boundary line." They state in their complaint sustantially as follows: James Tillman died on the 26th day of May, 1895, leaving Annie Bouldin, his widow, and Dollie Bagley, then of the age of seventeen, Oscar Tillman, then of the age of fifteen, and Essie Tillman, then of the age of three, his only heirs, they being his children. He died seized and possessed of the land described, occupying the same as his homestead. B. A. Morris was appointed administrator of the estate, and prior to the 18th day of July, 1899, paid all the probated claims against the same, and thereafter presented a petition to the Lawrence Probate Court for the sale of certain lands, describing them as follows: "Part of the northwest fourth of the northeast fourth, section 34, township 17 north, range 1 east," alleging that debts probated against the estate remained unpaid. On the 18th day of July, 1899, the probate court made the order of sale, describing the lands as described in the petition. A copy of the order is made an exhibit to the complaint. The land as described was sold by the administrator, and he made report of the sale to the probate court, which was approved. The order approving is made an exhibit to the complaint. Plaintiffs further stated "that said defendant, realizing that his said deed was void for uncertainty in the description and that same created no color of title, attempted to get the Lawrence Probate Court for the Eastern District to grant him

an order *nunc pro tunc* correcting the description in said order of sale in his deed, and obtained another order." A copy of the order is filed as exhibit to the complaint.

They asked for "judgment against the defendant for the possession of the land, for cost and all other relief."

The first exhibit shows that the court ordered "part of northwest quarter or the northeast quarter of section 34, township 17, range 1 east," to be sold.

The second exhibit shows that the administrator reported to the court that he had sold "part of northwest quarter of the northeast quarter of section 34, township 17 north, range 1 east."

The third exhibit is as follows: "In the matter of the estate of James C. Tillman, deceased:

"Comes W. S. Jennings and, petitioning the court, would respectfully state that at the July, 1899, term of this court an order was made upon the petition of B. A. Morris, administrator of the estate of James C. Tillman, deceased, for the sale of certain lands belonging to said estate for the purpose of paying debts probated against said estate; that on the 19th day of August, 1899, said B. A. Morris, as such administrator, in accordance with the order of said court, offered said lands for sale, and this petitioner became the purchaser of the same for the price and sum of four hundred and fifty dollars, which was more than two-thirds of the appraised value of same; that at the January term, 1901, of this court the said administrator reported the said sale to this court, and the same was approved, and in all things confirmed, and the said administrator directed to make a deed to this petitioner upon the payment of the purchase money. That on the 26th day of January, 1901, the said administrator, in obedience to said order, executed to this petitioner his deed, which is exhibited herewith. That in the order of sale, the sale report of the same and the deed made to this petitioner the said land was described as part of the northwest quarter of section 34 in township 17 north, range 1 east, when the proper description of said tract of land intended to be conveyed was as follows, towit: 'Beginning at a point on the north boundary line of section 34, township 17 north, range 1 east, where the channel of Village Creek crosses the said line; thence

down said channel to within 15 feet of the upper side of the old bridge; thence west parallel with said bridge to a point where said line crosses the north boundary line of section 34; thence east to the place of beginning, and all that part of the northwest quarter of the northeast quarter of section 34, township 17 north, range 1 east, lying east of Village Creek, excepting the following: Beginning at a point south 88 degrees, east 2.40 chains from the quarter section corner and the north line of sections 34-17-1 east; thence south 45½ degrees, east 12¼ chains; thence north 29 degrees, east 9.15 chains; thence 88 degrees west, 13.30 chains to place of beginning, said excepted tract having been deeded to the town of Walnut Ridge, Ark.

"That since making the said deed B. A. Morris has been discharged as administrator of the estate of James C. Tillman, deceased, and on the 10th of February, 1903, J. N. Beakley was appointed administrator of the same by the clerk of this court, which appointment was by the court, at its present term, approved and in all things confirmed. Wherefore, the premises being seen, your petitioner respectfully asks that an order be made approving the sale of the land above described to this petitioner, and that the said J. N. Beakley be directed to make deed to this petitioner for the said land as properly described and for all other proper relief. The within petition being this day examined, and the court being satisfied, from the papers filed and the former orders of this court and from the testimony of witnesses produced, that the sale of the property was regularly made according to the law and the order of this court, but that the description of said land was not full enough, it is therefore considered and ordered by the court that the sale of the said lands, as set out in the correct description, be and the same is hereby approved and in all things confirmed, and J. N. Beakley, as administrator in succession, is directed to make a deed to said purchaser with proper recitals and containing proper description as herein contained."

The defendant answered in part as follows:

"That he admits that James Tillman departed this life about the date set out in said complaint, and that plaintiff Annie Bouldin was his widow, and that the other plaintiffs were his heirs at law, but states that he is not sufficiently advised as to

their respective ages at the time of their father's death to either admit or deny the same. Defendant admits that at the death of said James Tillman he was seized and in the actual possession of the lands described in plaintiff's complaint, but denies that the description given is the correct description of the same. And he denies that said lands were at the time of his death the homestead of the said James Tillman, deceased. Defendant admits that the estate of the said James Tillman was administered on by B. A. Morris, but he denies that on the 18th day of July, 1899, or any other time before the sale of the lands mentioned, the said administrator paid off or satisfied all the debts probated against said estate, and he denies that at the time mentioned as the date of the order of the probate court there were no probated debts against the said estate, but states that when said order was made there were debts probated against said estate which at that time remained unpaid.

"Defendant admits that on or about the 18th of July, 1899, said administrator applied to the probate court of Lawrence County, for its Eastern District, for an order to sell the lands described for the purpose of paying the debts probated against said estate, and that an order of said court was duly made and entered directing the said administrator to sell said lands for that purpose. In obedience to said order the lands described in plaintiff's amended complaint were, after due advertisement and appraisement, as required by law, duly offered for sale to the highest bidder on the 19th of August, 1899, at which sale this defendant became the purchaser thereof at and for the sum of four hundred and fifty dollars.

"Defendant admits that at the January term of the said court, 1901, said administrator reported the said sale, and that the same was approved and in all things confirmed, and the said administrator was directed to make a deed to the defendant.

"Defendant admits that in said report of sale the lands were not fully described, but were described as part of the northwest quarter of the northeast quarter of section 34, belonging to said estate.

"Defendant further admits that he afterwards filed a petition in the probate court of Lawrence County for its Eastern District, asking that an order be made correcting said order of

court and confirming said sale by the correct description, and that an order was duly made, which plaintiff refers to and purports to exhibit to his complaint, but does not attach the same. * * * *

"Defendant, for his further and separate defense to plaintiff's purported cause of action, states that the plaintiffs, after being fully advised of the facts and circumstances in and about the sale, filed a suit in the circuit court of Lawrence County for its Eastern District against B. A. Morris for the purchase money paid for the land sued for in this case. And defendant pleads such act as an estoppel against plaintiff in this suit."

The record in this case is, in part, as follows:

"On this day, this cause coming on to be heard, come the plaintiffs, Effie Tillman, Oscar Tillman, Annie Bouldin and Dolly Bagley, in person and by attorney, and comes W. S. Jennings in person and by attorney, and, all parties coming ready for trial, comes a full jury of the regular panel to try same. After paneling the same, the plaintiff asked and obtained leave to amend his complaint by inserting 'occupying same as his homestead,' and the defendant amended his answer and at the same time making an additional answer, setting up the cause wherein Oscar Tillman *et al.* was plaintiff, and B. A. Morris was defendant, as an estoppel, and the plaintiffs thereupon interposed a demurrer to said answer, which, upon being overruled, and to the overruling of which they at the time excepted, and asked that their exceptions be noted of record, which was done, and plaintiffs thereupon refused to proceed further, but stood upon their demurrer. Whereupon the court directed the jury to return a verdict for the defendant, which they did in words and figures as follows: 'We, the jury, find for the defendant. Frank F. Sloan, foreman.' After the verdict was signed, but before it was read by the clerk, plaintiff asked to be allowed to take a nonsuit, but was refused by the court. Which refusal was excepted to by the plaintiff and duly noted of record, which was done, and the verdict read. It is therefore ordered and adjudged that plaintiff take nothing by this suit; that the defendant have and recover of and from said plaintiffs all his cost laid out and expended."

While the exhibits in this case form no part of the complaint, they may be referred to for an explanation of its allegations. *Abbott* v. *Rowan,* 33 Ark. 596. Using them in this manner, we find it alleged, and not denied, that the Lawrence Probate Court ordered part of the northwest quarter of the northeast quarter of section 34, township 17 north, range 1 east, to be sold by the administrator of Tillman's estate; that the administrator sold the land as described, and reported the sale to the court as so made, and it was approved in the same manner; and that the probate court, at a term held subsequently to the time when the sale was made, undertook to correct the order approving the sale by the administrator by an order *nunc pro tunc,* by describing the land alleged to be sold by metes and bounds, without evidence showing that a sale of such land was ordered, made, reported or approved, virtually making a new order as a substitute for the order actually made.

"The authority of a court to amend its record by a *nunc pro tunc* order is to make its speak the truth, but not to make it speak what it did not speak but ought to have spoken." *Tucker* v. *Hawkins,* 72 Ark. 21; *Liddell* v. *Landau,* 87 Ark. 438. Further than this, a court rendering a final judgment, as a general rule, is absolutely without authority to alter it in substance or merit after the expiration of the term at which it was rendered. 17 American & English Enc. of Law, (2 Ed.) 816 and cases cited.

In the case at bar the order directing the sale made described no land, the description in it not being sufficient to designate any. The order approving the report of the administrator was equally defective. The order amending the latter was a new order, and was of no effect.

The court erred in directing the jury to return a verdict in favor of the defendant when the pleadings showed that he had no title to the land in controversy, but on the contrary it belonged to the plaintiff, and there was no evidence to the contrary.

Reversed and remanded for a new trial.

MARYLAND CASUALTY COMPANY v. LITTLE ROCK RAILWAY & ELECTRIC COMPANY.

Opinion delivered November 22, 1909.

1. INDEMNITY INSURANCE—CONSTRUCTION OF POLICY.—Where an insurance company undertook to insure an electric light company from liability for damages on account of bodily injuries accidentally suffered by its employees while on duty, and such company had at the time the policy was issued no power house and no employees in engine and boiler rooms, upon a subsequent sale of such lighting business a transfer of the policy will not be held to extend its terms to cover employees of the transferee engaged in engine and boiler rooms. (Page 309.)
2. SAME—ASSIGNMENT OF POLICY—EFFECT.—A transfer of a policy of casualty insurance insuring an employer against liability to its employees will not be held to extend its terms to cover a class of employees that was not included in the policy at the time of its execution. (Page 309.)
3. SAME—EXTENSION OF TERMS OF POLICY.—Payment by the insured employer of an additional premium for a casualty policy, made on account of a report of the wages of a class of employees not covered by the policy, being made under a mistake of law, will not extend the terms of the policy. (Page 309.)
4. PAYMENTS—RECOVERY.—A voluntary payment of an additional premium on a casualty policy in excess of what was due, made under a mistake of law, can not be recovered. (Page 309.)

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

Murphy, Coleman & Lewis, and *Downie, Rouse & Streepey,* for appellant.

1. Appellee by its action in demanding indemnity for injuries coming within the time it now claims it was not protected, and at a time when there was no dispute between the parties, will not now be permitted to change front and say it was not protected after March 3, 1903. 106 S. W. (Mo.) 561, 567; 20 Cent. Dig. § 2129.

2. The policy covered all of the employees of the power company all of the year and the boiler and engine room employees of the railway company from March 3 to December 28, 1903. 100 Fed. 604, 607.

3. Wherever a class of employees is embraced under the terms of a policy of insurance, all must necessarily be included,

since it would be impossible to tell which particular part of the *class* was being protected. 118 S. W. (Ky.) 370.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, J. The plaintiff, Maryland Casualty Company, brought suit against the defendant, Little Rock Railway & Electric Company, to recover an additional premium alleged to be due on a policy of casualty insurance.

On the 28th day of December, 1902, plaintiff entered into a contract with the Little Rock Edison Electric Light & Power Company, a corporation organized under the laws of the State of Arkansas, whereby it agreed to indemnify said Edison Company against loss from liability for damages on account of bodily injuries accidentally suffered by its employees while on duty in any operation in connection with its business as an electric light and power company for a term of one year from the date of the policy.

The provisions of the policy with which we have to contend are as follows: Exhibit "A". The schedule attached to the policy provides that it shall cover "all operations in connection with our business as Electric Light & Power Company, Little Rock and elsewhere, in the service of the assured, including maintenance and ordinary extension of lines, including drivers, helpers and stablemen." The estimated payroll is shown to be $8,900.

The indorsement attached to the policy is as follows:

"Boston, Mass., Sept. 1, 1903.

"It is hereby understood and agreed that, all the interest of the Little Rock Edison Electric Light & Power Company having been acquired by the Little Rock Railway & Electric Company, this policy shall, on and after the above date, attach and cover in the name of said Little Rock Railway & Electric Company, ceasing to cover as originally written. Attached to and forms a part of policy No. 62,926 of the Maryland Casualty Company, of Baltimore, Md., issued to Little Rock Edison Electric Light & Power Company."

Two of the material provisions of the policy are set forth verbatim as follows:

"6. No assignment of interest under this policy shall bind the company unless the written consent of the company is indorsed hereon by one of its officers."

"C. The premium is based on the compensation to employees to be expended by the assured during the period of this policy. If the compensation actually paid exceeds the sum stated in the schedule attached hereto, the assured shall pay the additional premium earned; if less than the sum stated, the company will return to the assured the unearned premium *pro rata.*"

The business of the Edison Company was furnishing electricity for light and power to the inhabitants of Little Rock and vicinity. It had no power plant, and purchased whatever current it needed from a corporation engaged in operating a line of electric street railway in the city of Little Rock.

In March, 1903, the Edison Company and the street railway company were purchased by the Little Rock Railway & Electric Company, the defendant in this action. After the sale the Edison Company ceased to do business, and ceased to exist after March 3, 1903. The defendant continued the business of both companies.

A report of the payroll was made by defendant to plaintiff, which included all of the employees of the old lighting company for the entire year, and later an amended report was furnished which included in addition thereto a certain proportion of the power house and boiler room employees from March 3 to December 28, 1903.

It is the contention of the plaintiff that the policy after March 3, 1903, covered all the employees of the old lighting company and in addition all the boiler and engine room employees of the defendant company. As above stated, this suit was brought to recover such additional premium.

The defendant filed an answer and counterclaim, in which it denied liability and asked judgment for the amount of premium accruing between the 3d of March, 1903, when the Lighting Company ceased to do business, and the 1st day of September, 1903, when the indorsement of the transfer of the policy was written on it.

The case was tried before the court sitting as a jury, and the court found "that said policy of indemnity only covered,

when transferred, that department that had been the Edison Electric Light & Power Company the same as was covered by it before the transfer, and that the wages of the men in the boiler and engine rooms were not covered by said policy; but, as the payment of the premiums on them had been voluntary after knowledge of the facts, they could not be recovered."

Judgment was rendered in accordance with the findings of the court, and both parties have appealed.

We think the decision of the court was correct. The policy provides that it shall cover "all operations in connection with our business as Electric Light & Power Company, Little Rock and elsewhere, in the service of the assured, including maintenance and ordinary extension of lines, including drivers, helpers and stablemen." That the conditions existing at the time the policy is written may be looked to in determining the extent of the risk covered is illustrated in the case of *Home Insurance Co.* v. *North Little Rock Ice & Electric Co.*, 86 Ark. 538. When the policy was issued, the Lighting Company was purchasing its current from the Electric Street Railway Company, and had no power house and consequently no employees in the engine and boiler rooms. Hence it was not contemplated by the parties that the employees engaged in such occupation should be covered by the policy. It follows that a transfer of the policy did not extend its terms, but only continued in existence the policy as it was originally written. In other words, the transfer of the policy did not extend its terms to cover a class of employees that were not included in the policy at the time of its execution. After the contract had expired, a payment of an additional premium was made on account of the report of the wages of a class of employees not covered by the terms of the policy. This act did not extend the terms of the policy. It was a voluntary payment made under a mistake of law, and as such cannot be recovered. *Ritchie* v. *Bluff City Lbr. Co.*, 86 Ark. 175.

The same may be said of the payment between March 3 and September 1, 1903. Mr. Trawick was the manager of both the Edison Company and the defendant company, and made the payments.

The judgment will be affirmed.

W. T. ADAMS MACHINE COMPANY *v.* CASTLEBERRY.

Opinion delivered November 22, 1909.

1. SALE—WARRANTY—DAMAGES FOR BREACH.—For breach of a warranty in the sale of machinery the vendee is entitled to recover not only the difference between the machinery as warranted and as it is, but also such conseqential damages as are the direct, immediate and probable result of the breach. (Page 311.)
2. SAME—BREACH OF WARRANTY.—Where the vendor of machinery, upon a breach of warranty, retook and resold the machinery, together with other machinery attached to it which belonged to the vendee, the vendee was entitled to recover the purchase money paid by him, the freight and the expense of setting up and trying to run the machinery after it was set up, as well as the value of the other machinery so taken and sold. (Page 312.)
3. APPEAL AND ERROR—MOTION FOR NEW TRIAL—GENERAL ASSIGNMENT.—A ground set up in defendant's motion for new trial that "the court erred in admitting any and all of the evidence offered by plaintiff over objections of the defendant" is too general and indefinite. (Page 312.)

Appeal from Scott Circuit Court; *J. B. McDonough,* Special Judge; affirmed.

T. B. Pryor, for appellant.

The second instruction given by the court is erroneous. The measure of damages is the difference between the actual and selling market value of the machinery and what appellee contracted to pay for it. 47 Ark. 167; 30 Ark. 540.

A. G. Leming and *Youmans & Youmans,* for appellee.

This is not an action for deceit but upon express warranty. The second instruction was right. 30 Am. & Eng. Enc. of L. (2d. Ed.) 217 and authorities cited; 64 Ark. 510.

HART, J. This is an appeal by the W. T. Adams Machine Company from a judgment of $587.50 rendered against it in the Scott Circuit Court in favor of R. A. Castleberry for damages on account of a breach of warranty in the sale of machinery for a saw mill.

Appellee purchased the machinery in question for the purpose of running a saw mill, and made that fact known to appellant at the time of the purchase. Appellee paid a part of the purchase price and also the freight and expenses of putting up the machinery. When the machinery was set up, appellee could

not do anything with it, and wrote to appellant notifying it of the defect in the machinery. Quite a number of letters passed between them in regard to the matter, and appellant kept promising to make it all right but never did. Appellee purchased a Curtis feed rig, and put it on in the place of the one on the machinery, and says that he could do pretty good work then, but that it would never do nearly as good work as other machinery of the same class and size.

Afterwards appellant's agent took charge of said machinery, including the Curtis feed rig purchased by appellee, and sold the same. Appellee adduced evidence tending to show that the machinery was properly set and adjusted, but that it failed to do the work it was warranted to do because the machinery was defective, and on that account would not do as good work as machinery of the same class and size.

That part of the contract which contains the warranty reads as follows:

"WARRANTY.

"The above described machinery is warranted to be made, or that it will be made, of good material, and, when correctly and properly set and adjusted, that it will do as good work as machinery of the same class and size."

The principal contention of appellant is that the court erred in giving the following instruction:

"2. If the plaintiff is entitled to recover, and if the machinery was returned by the plaintiff, or if taken back by the defendant without fault of the plaintiff, the plaintiff is entitled to recover any sums plaintiff may have paid on the purchase price and all expenses necessarily incurred in setting up said machinery, in any efforts made to give the machinery a fair trial."

Counsel for appellant rely upon the case of *Matlock* v. *Reppy*, 47 Ark. 148, to sustain their contention. We do not think the case in point. That case was an action for damages for false representations, and the present one is for breach of an express warranty.

A warranty is part of the contract of sale; but a representation is only inducement to it. Inderman's Common Law Cases, p. 20.

Appellee's testimony shows that the part purchase price, the freight, the expenses of setting up the machinery and of trying to make it run, the cost of the Curtis feed rig, and the expense of taking off the feed rig of appellant and of putting on the new feed rig, amounted to $597.00.

Appellant, when it took possession of the machinery it sold to appellee, also took the Curtis feed rig and sold it, and appellee was entitled to recover its value.

Appellant having taken possession of the machinery sold to appellee, and the jury having found that there was a breach of warranty, appellee was entitled to recover that part of the purchase price paid by him, the freight and the expenses of setting up the machinery. He was also entitled to recover the expense of trying to make the machinery run after it was set up as expense necessarily incurred in consequence of the defect in it.

The amount of these items is not disputed, and we think were proper elements of damage under the facts of this case.

The general rule in such cases is as follows: "The damages recoverable of a manufacturer or dealer for the breach of warranty of machinery which he contracts to furnish or place in operation for a known purpose are not confined to the difference between the machinery as warranted and as it appears to be, but include such consequential damages as are the direct, immediate and probable result of the breach." 30 Am. and Eng. Enc. of Law (2nd Ed.), 217, and authorities there cited.

That reasonable expenses incurred in consequence of the defect in the machinery are recoverable, see *Murry* v. *Meredith*, 25 Ark. 164; *Tatum* v. *Mohr*, 21 Ark. 349.

It is also insisted by counsel for appellant that the judgment should be reversed "because the court erred in admitting any and all of the evidence offered by plaintiff, over objections of the defendant."

This assignment of error points to nothing. It is too general and indefinite. *Edmonds* v. *State*, 34 Ark. 720. See also *Central Coal & Coke Co.* v. *Niemeyer Lumber Co.*, 65 Ark. 107.

We find no error in the record, and the judgment will be affirmed.

LAWHON v. CROW.

Opinion delivered November 22, 1909.

1. CHATTEL MORTGAGES—FURNISHING SWORN STATEMENT OF ACCOUNT.—The requirement of Kirby's Digest, § 5415, that, before any mortgagee shall proceed to foreclose any mortgage or to replevy personal property under such mortgage, he "shall deliver to the mortgagor a verified statement of his account, showing each item, debit and credit, and the balance due," is a prerequisite to the bringing of such a suit, and is not complied with by furnishing to the mortgagor unsworn statements as to the items at the time they were purchased, nor by furnishing a sworn, but unitemized statement of the account. (Page 314.)

2. SAME—WAIVER OF STATEMENT OF ACCOUNT.—The statutory requirement that the mortgagee, before proceeding to replevy mortgaged chattels shall furnish an itemized and sworn statement of the mortgagor's account (Kirby's Digest, § 5415) is not waived where the mortgagor sets up such noncompliance by a motion to dismiss the replevin suit. (Page 315.)

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

STATEMENT BY THE COURT.

The suit at bar was first instituted by the appellant before a justice of the peace of Saline County, to recover from the appellee a mule and two bales of cotton, which he had mortgaged to appellant to secure an open account for supplies advanced to him with which to make his crop. At each time appellee bought supplies of appellant he was furnished with an itemized list of each purchase and its price. Before suit was instituted under the mortgage given by appellee to appellant the appellee was served at three different times with a sworn statement of his account, showing the total balance due appellant. It is now admitted that these statements were not itemized, and it is further agreed that there were no credits due appellee, and that the amount of the account, so sworn to, was correct. The case was taken from the jury because of the appellant's failure to itemize his account, as required by section 5415 of Kirby's Digest.

Downey, Rouse & Streepey, for appellant.

There was a substantial compliance with the statute in that on each occasion appellee bought goods he was furnished an

itemized statement setting forth the separate articles bought and the price of each, and that on three different occasions before suit was brought appellant served appellee with a sworn statement showing the balance due. The statute is directory merely, and not mandatory. 4 Neb. 336; Sutherland, Stat. Con. § 627; 34 Ark. 493; 30 Ark. 32, 38; 4 S. Dak. 195. It ought to be declared directory because it prescribes no penalty for failure to comply with its provisions. 7 Nev. 106. A failure to serve appellee with an itemized statement of his account forfeits neither the account nor the mortgage. 65 Ark. 316.

J. S. Abercrombie and *W. R. Donham,* for appellee.

A statement merely showing the "total amount due" was not sufficient. An itemized statement, showing each article purchased and the price and showing each item of credit, was essential. Kirby's Dig., § 5415; 73 Ark. 589; 65 Ark. 316.

WOOD, J. (after stating the facts). Section 5415 of Kirby's Digest is as follows: "Before any mortgagee, trustee or other person shall proceed to foreclose any mortgage, deed of trust, or to replevy, under such mortgage, deed of trust, or other instrument, any personal property, such mortgagee, trustee or other person shall make and deliver to the mortgagor a verified statement of his account, showing each item, debit and credit, and the balance due.

The statute is mandatory. Compliance with its terms is a prerequisite to the maintenance of a suit to replevin mortgaged property. This has already been practically decided by this court in *Atkinson* v. *Burt,* 65 Ark. 316, where we held that failure to furnish a verified statement might have been pleaded to a suit to foreclose or to replevy the property. Where a failure to comply with the statute may be pleaded as a defense, necessarily the statute is mandatory.

The purpose of the statute, as declared in *Perry County Bank* v. *Rankin,* 73 Ark. 589, is "to give the mortgagor an opportunity before suit to pay the debt" and to settle any controversy over any items that might be in dispute without "going to law." The Legislature did not have in view the matter merely of saving the mortgagor the costs that might be incident to a lawsuit. Its purpose was not only to prevent that but also any annoyance and inconvenience he might suffer by having his

property taken from him by process of law before giving him an opportunity to adjust any differences with the mortgagee and to settle his account, if possible, without a lawsuit. The burden was therefore placed on the mortgagee, as a condition precedent to the maintenance of a suit to foreclose or for possession, that he comply with the statute. But the mortgagee does not forfeit his debt by failing to comply with the statute. *Atkinson* v. *Burt, supra.* He still has the right to his debt and to any other remedies provided by law for the enforcement of its payment. He may still have his remedy of foreclosure by complying with the statute. It is a reasonable provision and subserves a useful purpose. It is not a compliance with the law to furnish statements as the items are bought from time to time, nor to furnish a sworn statement of the account without the items that compose it.

Compliance with the statute is not waived where the mortgagor sets up the noncompliance in defense, which was done in this case by his motion to dismiss.

The ruling of the court was correct. Affirm.

LATHAM *v.* FIRST NATIONAL BANK OF FORT SMITH.

Opinion delivered November 22, 1909.

1. DEED—EFFECT UPON RIGHT TO RECEIVE RENTS.—Where property is rented at the time it is conveyed, the right to receive the rents subsequently due passes to the grantee, unless the deed reserves the right in the grantor to collect and receive the rents. (Page 319.)
2. AGENCY—DECLARATIONS OF AGENT.—The authority of an agent cannot be established by his own declarations. (Page 319.)
3. AGENCY—POWERS OF AGENT.—One who deals with an agent is bound to ascertain the nature and extent of his authority. (Page 320.)
4. APPEAL AND ERROR—PRACTICE IN CHANCERY CASES.—When a chancery cause is appealed, it will be determined upon competent evidence. (Page 320.)

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

STATEMENT BY THE COURT.

On December 15, 1906, appellee loaned to W. F. Latham one thousand dollars, for which Latham executed his note, due sixty days after date. The note was not paid, and appellee brought this suit to recover the amount of the note. The complaint alleged that W. F. Latham to secure the note assigned to the bank a lease on a certain lot in the city of Fort Smith; that Mrs. Latham claimed the lease; that the tenants would pay the rents to W. F. Latham or Mrs. Latham unless restrained. The prayer was for judgment on the note, for sale of the lease, and that the rents and the proceeds of the sale of the lease be subjected to the payment of the amount found due the bank, for which judgment was asked. A temporary restraining order was issued restraining the tenants under the lease from paying the rents to W. F. Latham or Mrs. Latham.

Mrs. Latham answered the complaint, setting up among other things that she was the owner of the lot and of the lease mentioned in the complaint, that the lot was deeded to her by warranty deed from W. F. Latham, her husband, on the 5th day of October, 1905; that, if the lease was assigned to appellee as collateral security for the note, such assignment was without her knowledge or consent. She prayed that her rights to the rents under the lease be recognized, that the proceeds of the lease and the rents paid into the registry of the court be turned over to her, that the restraining order be dissolved, etc.

The proof showed that W. F. Latham deeded the lot in Fort Smith to his wife October 5, 1905. The consideration for the deed was several thousand dollars. There is no question as to the *bona fides* of the sale from Latham to his wife. He had used between four and five thousand dollars of her money, and the lot was deeded to her in consideration of this money. The deed was placed on record October 7, 1905. At the time the deed was executed there was a lease on the lot which would not expire until December 31, 1909. The deed did not contain any reservation in the grantor of the right to collect the rents under the existing lease. The deed, on the contrary, in the usual form conveyed the lot "with all the privileges, appurtenances and improvements thereupon situate, appertaining and thereunto belonging."

After the deed was executed and recorded, W. F. Latham, February 20, 1906, borrowed of appellee $1,500, for which he executed his note, and deposited with appellee the contract of lease on the lot as collateral security for the loan. This note was paid before the note in suit was executed. On December 12, 1906, W. F. Latham made application by letter for the loan in suit. He inclosed the note, and in his letter asking for the loan he says: "You have my rent contract, which you can hold as security." Appellee accepted the note and advanced him the money. W. F. Latham collected the rents from the tenants after the deed was made to Mrs. Latham, and after the note in suit was executed. As the rents accrued, W. F. Latham drew drafts on the tenants in favor of the Commercial Bank of Alexandria, La., for the amounts. The Commercial Bank sent the drafts to the American National Bank at Fort Smith for collection, and credited W. F. Latham's account with the amount collected. One witness stated the drafts were given to secure a debt due the Commercial Bank. W. F. Latham collected the rents in this way until, and including, the month of July, 1907, when the payment to him was enjoined. In a letter to appellee after suit was brought Latham, complaining of the temporary order restraining him from collecting the rents, says: "Mrs. Latham has loaned me this money to help me along."

It was alleged, and not denied, that W. F. Latham was a nonresident of the State of Arkansas, and that he owned no property in the State out of which the note in suit could be collected. Latham was in good financial condition when the deed to Mrs. Latham was executed, but has become insolvent since.

Mrs. Latham testified that the rental was collected monthly by W. F. Latham, and that the money was used for living purposes for the family. She authorized Mr. Latham to collect it. She did not know that the lease contract was assigned by Mr. Latham to secure his note to appellee. If it was so assigned, it was without her knowledge or consent. If her husband assigned the rents to the Commercial Bank of Louisiana to secure or pay money borrowed of that bank, she knew nothing of it. She did not know that her husband drew drafts on the tenants of the lot for the monthly rents, payable to the Commercial Bank of Alexandria, La.

The court rendered a decree in favor of appellee for the amount of the note and interest. The court found that to secure the payment of said note the said W. F. Latham placed in the hands of the said plaintiff a lease on the building No. 502 Garrison Avenue, Fort Smith, Arkansas. That said W. F. Latham on the 4th day of October, 1905, conveyed to said Daisy Latham, who was then and still is his wife, the said building and the ground on which it stands, but he retained the lease on said building and the rights to collect the rents therefrom and appropriated them to his own uses, and the said Daisy Latham gave to the said W. F. Latham the rents arising from said building for his own use, and he collected the said rents and appropriated them to his own use with her consent. That the said W. F. Latham was the owner of said rents, and he had the right to pledge the same to plaintiff for the payment of said note. That, under an order made in vacation by the chancellor, the said defendants, Dave Mayo and Allen Henderson and Coffey Williams, tenants occupying said building, have paid into this court thirteen hundred thirteen and 86-100 dollars as rents on said building since the first of August, 1907.

The court directed the amount of the decree to be paid out of the funds collected as rents, and the balance after "paying the amount of the interest and costs to be paid to Winchester & Martin, the attorneys for Mrs. Latham."

Mrs. Latham appeals.

Winchester & Martin, for appellant.

There is no reservation whatever of the rents falling due for the leased property in the deed from W. F. Latham to appellant. The rents therefore, thereafter accruing, belonged to appellant. Jones on Landlord and Tenant, § 658; *Id.* § § 428, 670; 10 Ark. 9; 39 Ark. 383; 23 Mo. 597; 72 Mo. 612; 37 Am. Dec. 117; 35 *Id.* 234; 56 *Id.* 581; 61 *Id.* 364; 45 Ia. 670; 64 Ia. 84; 15 Ind. 152; 4 So. 752; 14 S. W. 572.

Youmans & Youmans, for appellee.

Appellant's testimony to the effect that the rent "was simply collected monthly by Mr. Latham and used for household purposes" is contradicted by other competent testimony and evidence going to show that it was collected by him with her con-

sent, and used for his own purposes, and it is also clear from the evidence that she exercised no control whatever over the rents. She is therefore estopped from making any claim against the bank which extended credit to her husband on the security of these rents. 50 Ark. 42; 74 Ark. 161; 84 Ark. 227; 86 Ark. 486; 36 Ark. 525.

WOOD, J., (after stating the facts). There is no evidence in the record to support the finding of the chancellor that when W. F. Latham sold the lot in Fort Smith to his wife "he retained the lease on said building and the right to collect the rents therefrom." The deed contains no such reservation. On the contrary, Mrs. Latham, by the express terms of the grant, acquired the land mentioned and "all the privileges thereunto appertaining." That the fee simple title to the land carries with it the right to its absolute dominion is axiomatic; and where the property is rented at the time it is conveyed, unless the deed reserves the right in the grantor to collect, and use the rents, these pass, as a necessary incident, with the land, to the grantee.

"Rent which does not become due till after a conveyance by the landlord goes to the grantee entire." Jones, Landlord and Tenant, § 658; *Gibbons* v. *Dillingham,* 10 Ark. 9.

Mrs. Latham testifies that "the rental was collected monthly by Mr. Latham; it was used for living purposes for our family." There is no evidence that she knew that Latham had assigned the lease contract to the appellee for any purpose.

The evidence shows that Latham had authority as her agent to collect the rents and to use same for household purposes. But it does not show that he had authority to use the rents for some other purpose. His declarations were not competent to show that he had authority to use them for some other purpose. The fact that Latham assigned the lease contract as collateral to the appellee for the note in suit does not warrant the conclusion that Mrs. Latham knew of such assignment and consented thereto. Mrs. Latham testified that she did not know of such assignment. There is no evidence, direct or circumstantial, that she did know of it. Latham had no authority over the rents except as the agent of appellee. An inspection of the records of Sebastian County would have discovered that fact.

The authority of an agent cannot be established by his own

declarations. *Carter* v. *Burnham,* 31 Ark. 212; *Holland* v. *Rogers,* 33 Ark. 251; *Chrisman* v. *Cannon,* 33 Ark. 316; *Howcott* v. *Kilbourn,* 44 Ark. 213.

A principal is not bound by the acts and declarations of an agent beyond the scope of his authority. A person dealing with an agent is bound to ascertain the nature and extent of his authority. No one has the right to trust to the mere presumption of authority, nor to the mere assumption of authority by the agent. *City Elec. St. Ry. Co.* v. *First Nat. Exch. Bank,* 62 Ark. 33, 40. These well settled principles must determine this controversy in favor of appellant.

The declarations of Latham, the agent of appellant, that he owned the lease contract, and that appellee could have same as security, were wholly incompetent as against appellee to establish the authority of Latham to use the rents belonging to Mrs. Latham, for the purposes stated, or to show that he owned the lease.

Likewise was his declaration in the letter to appellee that Mrs. Latham had loaned him this money to help him along.

The fact that W. F. Latham gave drafts for the rent to the Commercial Bank to pay or to secure the payment of his account with that bank does not prove that he was using the rent money for other than household purposes. Latham's account with the Commercial Bank may have been for money that was used by him to pay his household expenses, and, if so, the drafts to pay that account were for the purpose designated by Mrs. Latham in the payment of household expenses. But, even if these drafts were given to pay Latham's account for money used by him for some other purpose, there is no evidence that Mrs. Latham knew that the drafts were being so used.

It has been often held that where a married woman permits her husband to use her separate estate as his own, and to obtain credit on the faith that the estate so used is his own, she will not be allowed afterwards to assert her claim to the property as against her husband's creditors. *Buck* v. *Lee,* 36 Ark. 525; *Driggs* v. *Norwood,* 50 Ark. 42; *Davis* v. *Yonge,* 74 Ark. 161; *Roberts* v. *Bodman-Pettit Lumber Co.,* 84 Ark. 227; *Mitchell* v. *State,* 86 Ark. 486.

But the case at bar is differentiated sharply from the above cases by the facts. Here there is no direct evidence that Mrs. Latham assented to the use of her rents for the payment of her husband's debts, nor are there any circumstances from which such assent should be implied. The competent evidence is to the contrary. When a cause in chancery reaches this court, it must be decided on the competent evidence. *Niagara Fire Ins. Co.* v. *Boon*, 76 Ark. 156.

The decree is reversed with direction to enter a decree for Mrs. Latham for the amount of the rents, and to dismiss appellees' complaint for want of equity.

McCOMB v. SAXE.

Opinion delivered November 22, 1909.

1. ADVERSE POSSESSION—NOTORIETY.—Enclosing land with a three-wire fence, without any other improvements, is sufficient to put the owner of the land on notice that his rights are invaded. (Page 323.)
2. SAME—INTERRUPTION.—The continuity of the possession of land by virtue of a fence maintained thereon is not broken by occasional breaches in the fence due to high water which were repaired as soon as the water went off. (Page 324.)

Appeal from White Chancery Court; *John W. Martineau* Chancellor; affirmed.

S. Brundidge, Jr., and *Harry Neelly*, for appellant.

1. There are no such acts of adverse and hostile possession shown in this case as to give appellee title to the land. There is no building on the land; none of it placed in cultivation, and the only visible evidence of improvements of any kind is the two or three wires strung on trees or temporary posts around some part of it in order to use it for pasturing stock, and the evidence shows that it is the common custom in that part of the country to construct such fences, without regard to the lines of the lands or the ownership thereof. One claiming title by adverse possession is not favored in law, but is held to strict proof of all things necessary to make good his claim. All presumptions

are in favor of the holder of the legal title. 29 N. J. L. 319; 157 Ill. 430; 89 Wis. 426; 71 N. E. 822; 69 N. E. 519; 23 N. E. 154; 68 Mo. 400.

2. There is here no such substantial inclosure as is contemplated in law. 90 Fed. 575. An inclosure of the character shown in this case, which was permitted to remain down throughout a considerable portion of each year, is not only not a substantial inclosure, but shows that it is only erected for temporary use, adds nothing to the value of the land, constitutes no notice of adverse claim or holding, and amounts to nothing more than periodical acts of trespass. 81 Ark. 303; 68 Ark. 551; 75 Ark. 415; 76 Ark. 533; 64 Mich. 309; 22 Ill. 609; 41 N. J. L. 527; 22 Ill. 609; 65 Ark. 426; 42 Ark. 121; 140 Fed. 433; 54 N. E. 1018; 52 N. E. 569.

J. H. Harrod, for appellee.

Tested by the rule of law stated by Tiedeman in his work on Real Property (3rd Ed.), § 495, the decree must be sustained. "No particular act or series of acts is necessary to be done on the land in order that the possession may be actual. Any visible or notorious acts which clearly evidence an intention to claim ownership and possession will be sufficient to establish the claim of adverse possession."

McCULLOCH, C. J. Appellant, A. C. McComb, instituted this action in the chancery court of White County against appellee, G. R. Saxe, to quiet his title to a tract of land containing 320 acres. He deraigned title from the Government, and alleged that appellee was claiming title under a purchase from the administrator of the estate of one Pickett, who was one of the owners of the land in appellant's chain of title, and who conveyed the same during his lifetime to appellant's grantor. Appellee answered, claiming title to the land by adverse possession under color of title for more than seven years prior to the commencement of the action. The chancellor found from the testimony that appellee had held actual, open and notorious possession of the land for more than seven years under color of title, and sustained his plea of the statute of limitations. Decree was rendered accordingly against appellant, and he appealed to this court.

There is practically no conflict in the testimony. The lands are wild and uncultivated. Appellee lives in the State of Illinois, and usually makes annual trips to Arkansas to look after his lands. In 1896 or 1897, which was about ten years before the institution of this suit, appellee entered into an agreement with certain persons in White County engaged in the stock business whereby he agreed to allow said parties to inclose the lands in controversy with a fence, so that it could be used for grazing stock, and on condition that they would look after the lands for appellee and preserve the timber. They were to build the fence at their own expense. These parties inclosed the land with a wire fence stretched partly on trees and partly on posts set in the ground. It was constructed of from one to three strands of wire. The lands were used as pasture lands, and the fence has thus been maintained continuously from that time to the present, except that occasionally the fence would be broken in the spring of the year in times of high water, but would be immediately repaired as soon as the water went off, in order to hold the live stock. No part of the land was ever cleared, and no building of any kind was ever placed thereon.

It is insisted that these acts were not of sufficient notoriety to give title by limitation. But we do not agree with this contention. The correct rule on this subject is stated as follows: "No particular act or series of acts are necessary to be done on the land in order that the possession may be actual. Any visible or notorious acts which clearly evidence an intention to claim ownership and possession will be sufficient to establish a claim of adverse possession." Tiedeman on Real Property, 3 Ed. § 495.

It is not essential that there shall be buildings on the lands in order to claim actual adverse possession, nor that any part thereof shall be in cultivation. It is sufficient if the claimant notoriously occupies a visible relation to the land which is sufficient to put the true owner on notice that his rights are invaded. In other words, the claimant must exercise such acts of ownership and occupancy as are sufficient to "hoist his flag" over the lands, so that all may observe it. And he must continue those acts without a break, so as to keep the flag flying. In *Carpenter* v. *Smith,* 76 Ark. 447, we held that where a party fenced a portion of a tract of land with a three-wire fence for the purpose

of penning cattle thereon at certain seasons of the year, and also for the purpose of preserving it for hay-cutting, these were sufficient acts of adverse possession which, continued during the statutory period, gave title by limitation.

The occasional damage done to the fence in times of high water, where the same was repaired, was not sufficient to break the continuity of possession. *Robinson* v. *Nordman,* 75 Ark. 593. There is no evidence that the actual possession acquired in the manner indicated above was ever abandoned.

The decree of the chancellor is fully sustained by the evidence, and the same is therefore affirmed.

LEVY v. MCDONNELL.

Opinion delivered November 22, 1909.

DEEDS—REPUGNANT CONDITION.—Where a sale of land was completed by the execution of a conveyance, a stipulation in the deed that if the vendee failed to pay the purchase money the conveyance should be void and the vendee should be liable thereafter in a sum named as rent to be paid annually is a repugnant condition and void.

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

Taylor & Jones, for appellants.

Under the stipulation in the deed, when David failed to pay the note as he contracted, the relation of landlord and tenant instantly began, and that relationship was as fully in force as though no contemplated sale had ever existed. 75 Ark. 578; 78 Ark. 574.

Crawford & Hooker, for appellee.

The deed in this case created the relation of vendor and vendee, and not that of landlord and tenant, notwithstanding the deed was not to become absolute until paid, and the fact that the note falling due in November, 1905, was not paid at maturity. Cases cited by appellant on this point do not apply, because the instrument in this case is a deed, and not a lease.

Title passed to Davis, the vendee, the moment the Levy deed was delivered to him. Merely calling a vendee a lessee does not make him so unless it appears from the whole contract that he is a lessee. 39 Ark. 560; 54 Ark. 16; 75 Ark. 410; 51 Ark. 218; 61 Ark. 515. Even if the provision as to payment had been for real and customary rent, and not for purchase money, the provision would have been void because repugnant to the granting clause in the deed. 82 Ark. 209; 78 Ark. 230; 15 Ark. 695.

MCCULLOCH, C. J. Minnie B. Levy and her husband, W. J. Levy, two of the appellants herein, by their deed duly executed and delivered, containing covenants of general warranty of title, conveyed in fee simple to one Davis a tract of land in Jefferson County for the sum of $5,000, payable in eight equal annual installments, as evidenced by the promissory notes of said Davis duly executed to them and recited in said deed. After the habendum and the warranty clauses of the deed, there follows this stipulation:

"And when all of said notes are paid according to the tenor and effect thereof, then this instrument is to become absolute; and if the said Davis shall fail to pay said indebtedness for any year according to the tenor and effect of said notes, then in that event this conveyance shall be void, and the grantors shall be entitled to possession, and said grantee is to be held as a tenant of the said Minnie B. and W. J. Levy for any year he shall so fail, and shall be liable to the grantors for rent in the sum of six hundred and twenty-five dollars, and when the rent shall be paid for each year to the amount as set out in said notes, then he is to have the same placed to his credit as purchase money."

Davis failed to pay the second note, which fell due on November 1, 1905. He had mortgaged his crop on the land to appellee for supplies, and during the fall of the year he gathered the crop and delivered it to appellee, and the latter sold it and applied the proceeds in satisfaction of his mortgage debt. This action against appellee was subsequently instituted in chancery to recover from him the proceeds of said crop, and a lien on said crop is asserted under the above quoted stipulation in the deed.

It will be noticed in the first place that the stipulation does

not expressly purport to declare a lien on the crop. Therefore it cannot be held to constitute an equitable mortgage. If any lien exists at all, it is by virtue of the relation of landlord and tenant, which is declared to arise in the event that said Davis shall fail to pay either of said notes. Appellants rely upon the principle stated in the following quotation, approved by this court in *Thomas* v. *Johnston,* 78 Ark. 574: "The parties to an agreement for the sale of land may also contract with the right, at the election of either party in the future, upon the performance or nonperformance of certain conditions, to treat the transaction either as a purchase-and-sale contract or a lease; and if the election is made to treat it as a tenancy, it relates to the time of making the contract, and the relation of landlord and tenant, with all the incidents and liabilities, will be regarded as having begun at that time." 18 Am. & Eng. Enc. Law, 2 Ed. pp. 168, 169.

This principle applies, however, only to executory contracts for the sale of land, and not to contracts fully executed by delivery of deeds conveying the title to the purchaser. The two relations of vendor and vendee and of landlord and tenant are inconsistent, and cannot exist at the same time. But the parties to an executory contract may establish either one or the other of these relations, and provide when the one shall end and the other shall begin. This is the controlling principle in *Thomas* v. *Johnston, supra,* and the cases which preceded it. But when the fixed relation of vendor and vendee is created by the conveyance of the title, which is an executed contract, the other inconsistent relation cannot be created, for, the title being in the vendee, the relation of landlord and tenant cannot exist. Merely denominating the debt as rent in certain contingencies would not make it rent, where the relation of landlord and tenant does not in fact exist. *Walters* v. *Meyer,* 39 Ark. 560; *Watson* v. *Pugh,* 51 Ark. 218; *Quertermous* v. *Hatfield,* 54 Ark. 16; *Smith* v. *Mayberry,* 61 Ark. 515.

The deed exhibited in this case conveyed the title in fee simple to Davis, and the grantor could not burden the conveyance with a condition which defeated it. The condition is repugnant to the grant, and is void. *Carl Lee* v. *Ellsberry,* 82 Ark. 209; *Whetstone* v. *Hunt,* 78 Ark. 230.

Other questions are raised which it is unnecessary to decide.

Decree affirmed.

BAILEY v. O'NEAL.

Opinion delivered November 8, 1909.

1. CORPORATIONS—LIABILITY OF DIRECTORS—PARTIES.—Under Kirby's Digest § § 863, 864, providing that if the directors of a corporation shall intentionally neglect or refuse to comply with the provisions of the act of April 12, 1869, or to perform the duties required of them, or if any corporation shall violate any of the provisions of such act, and the directors order or assent to such violation, they shall be liable for the debts of such corporation contracted during such neglect or refusal, or after such violation, *held* that an action may be brought by creditors of an insolvent bank directly against the directors, without making the receivers of the bank parties. (Page 329.)
2. SAME—WHEN DIRECTORS LIABLE.—Kirby's Digest, § § 863, 864, do not make the directors of a corporation liable for a single act of negligence on the part of the executive officers of the bank; but they make them liable for a series of connected acts of negligence continued for such a length of time that it must be inferred that their acts were intentional. (Page 331.)
3. BANKS AND BANKING—LIABILITY OF DIRECTORS.—Where the directors of a bank knowingly permitted the cashier to pursue for a number of years a reckless course of dealing, the probable consequence of which would be the insolvency of the bank, they will be held liable to the creditors of the bank. (Page 332.)

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

Stuckey & Stuckey, Gustave Jones, S. D. Campbell and *Morris M. Cohn,* for appellants.

Trustees are not held responsible for the *devastavit* which co-trustees may perpetrate. 141 U. S. 151; 30 Fed. 307; Story's Eq. Jur. § 1280; Perry on Trusts, § 417. Directors of corporations may delegate duties to cashiers as well as to presidents. 77 Ark. 172; 62 Ark. 33; 66 Ark. 327; 141 U. S. 132; 155 Mo. 1; 87 Ky. 574; 147 Pa. St. 140; 12 Serg. & R. 256; 8 Wheat. 338; 91 Fed. 587; 33 C. C. A. 222; 183 Mo. 552; 82 S. W. 76. Directors are not trustees. 59 Ark. 562; 71 Ark. 438. The court will take judicial notice of the usages and customs of banking. 4 Ark. 302; 12 Ark. 645; 45 Ark. 347; 77 Ark. 172; 6 Ark. 292; 67 Ark. 243. There is no privity between a director and a depositor of a bank. 155 Mo. 232; 96 N. W. 1033; 67 Mo.

256; 183 Mo. 552; 82 S. W. 76; 105 N. W. 924; 15 S. W. 448; 89 Tenn. 633; 73 O. St. 275.

A creditor cannot maintain an action against the directors for nonfeasance of duty. 9 W. Va. 580; 155 Mo. 271; 67 Mo. 264; 183 Mo. 570. The neglect of the director must be an intentional neglect or refusal. 37 Mich. 217; 102 Mich. 547; 61 N. W. 9; 155 Mo. 232; 206 U. S. 158. A cashier, when intrusted with the duty of making loans, is not responsible for an error of judgment when he has exercised reasonable skill, diligence and prudence. 48 N. Y. 305. Directors are not liable for mistake of judgment. 71 Pa. St. 11; 147 *Id.* 140; 82 Wis. 460; 52 N. W. 600. A director is not presumed to know the contents of the books of the bank of which he is director. 141 U. S. 162; 15 S. W. 335; 89 Tenn. 630; 126 N. Y. 113. A bank is not insolvent under the law unless it is unable to meet its liabilities as they accrue. 29 N. W. 166; 54 S. W. 226; 152 Mo. 522; 92 N. W. 420; 75 Ark. 153.

HART, J. W. R. O'Neal and S. Heineman brought separate suits in the Jackson Circuit Court against A. D. Bailey, George W. Decker, Thomas J. Graham, J. M. Jones, Joseph M. Stayton, E. P. Shoffner and T. S. Stephen. The complaint in each case, in substance, alleges that the Bank of Newport was a corporation, organized under the laws of the State of Arkansas, and was engaged in carrying on a general banking business at Newport, Arkansas. That the plaintiff was a depositor in said bank, and that the defendants were directors thereof. That said bank became insolvent, and on the 20th day of April, 1906, a receiver was appointed by the chancellor of the Jackson Chancery Court to take charge of its affairs. That the defendants as directors of said bank intentionally neglected and refused to perform the duties required of them by statute, and that thereby the bank became insolvent. Wherefore plaintiff asks judgment for the amount due him as a depositor of said bank. The defendants answered, denying any liability under the statutes.

The cases were consolidated for purpose of trial, for the reason that they were cause of a like nature and relative to the same question. (See Acts of 1905, p. 798.) On petition of the defendants a change of venue was granted to the Independence Circuit Court. The cause was heard before a jury, and at the

conclusion of the testimony, after hearing the argument of counsel on the instructions, the court directed the jury to return a verdict in favor of the plaintiffs, which was accordingly done. From the judgment rendered upon the verdict the defendants have appealed to this court.

It is first insisted by counsel for the defendants that the plaintiffs, as creditors of the bank, could not maintain the action, but that it should have been brought by the receivers. In considering this question it may be well to set out all our statutes that may have any bearing on the subject. They are the sections of Kirby's Digest, which read as follows:

"Sec. 841. The stock, property, affairs and business of every such corporation shall be under the care of, and shall be managed by, not less than three directors, who shall be chosen annually by the stockholders at such time and place as shall be provided by the by-laws of said corporation, and shall hold their offices for one year, and until others shall be chosen in their stead."

"Sec. 848. The president and secretary of every corporation shall annually make a certificate showing the condition of the affairs of the corporation," etc.

"Sec. 859. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 848 and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

"Sec. 862. If the directors of any such corporation shall declare and pay a dividend when the corporation is insolvent, or any dividend the payment of which would render it so, the directors assenting thereunto shall be jointly and severally liable in an action founded on this statute for all debts due from any such corporation at the time of such dividend."

"Sec. 863. If the president, directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them respectively, such of them as so neglect and refuse shall be jointly and severally liable, in an action founded

on this statute, for all the debts of such corporation contracted during the period of any such neglect or refusal."

"Sec. 864. If any corporation, organized and established under the authority of this act, shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable, in an action founded on this statute, for all debts contracted after such violation as aforesaid."

In construing sec. 859, this court has recognized the right of the creditor to bring the suit against the officers of the corporation. *Nebraska National Bank* v. *Walsh,* 68 Ark. 633; *Beekman Lbr. Co.* v *Ahern,* 75 Ark. 107; *Myar* v. *Poe,* 79 Ark. 465; *Jones* v. *Harris,* 90 Ark. 51.

It is true that in *Fletcher* v. *Eagle,* 74 Ark. 585, a case precisely similar to the one at bar, the suit was brought by the creditors in the name of the receiver of the bank, but no objection was made on that account, and the case turned on other issues.

In the case of *Beekman Lumber Co.* v. *Ahern, supra,* the court held that when an officer fails to file the annual certificate as required by section 848, and upon discovering his oversight files it, he is not liable for debts thereafter contracted by the corporation until he makes another default in filing another statement. The reason given for such holding is "that it was the intention of the law to make it to the interest of the officer to file his statement at as early a day as possible, when he discovers the oversight."

The object of each of the statutes is to make the officers named therein liable for the debts of the corporation during the period of their neglect. Liable to whom? Manifestly to the creditors of the corporation; for any other rule would ignore the real policy of the statute, which is for the protection of the creditor. The act expressly provides that the director shall be liable in any action founded on the statute for certain debts of the corporation, and it plainly means that he is liable to the person to whom the debt is due. In each of the sections of the statute above quoted, the liability is directly to the creditor, and not to the corporation. In the case of *Patterson* v. *Stewart,* 41 Minn. 84, the Supreme Court, in a well considered opinion de-

livered by Mr. Justice Mitchell, in construing a similar statute of the State of Minnesota, expressly held that a right of action is given to the creditor directly against the directors, and that the fact that the affairs of the corporation have been placed in the hands of a receiver neither takes away nor suspends this right of action. See, also, 3 Thompson on Corporations, § 4265. In such cases the decision reached must come from the terms of the statutes themselves. Hence there can be no profit in reviewing decisions based upon the common law, or upon statutes unlike those now under consideration.

The most serious question in this case arises upon the merits; and is, did the court err in directing a verdict for the plaintiffs?

In considering this question we must determine whether malfeasance or nonfeasance on the part of the directors is the test of their liability. This action is founded upon sections 863 and 864 of our statutes quoted above. The statute creates the duty to be performed by the directors, and the liability that attaches for a failure to perform that duty. It changes the rule of the common law, and is therefore the exclusive test of liability. Hence it will not be pertinent or useful to consider whether the defendants are liable at common law, and a review of the cases based upon the common law or upon statutes essentially different from our statutes will be passed by.

Our statutes in question have been construed by this court in the case of *Fletcher* v. *Eagle,* 74 Ark. 585. Chief Justice HILL, who delivered the opinion of the court, in discussing the instructions given in the case, said:

"The circumstances mentioned in the sixth instruction, and they are sustained by the evidence, fully authorized the directors to have implicit confidence in England, and justified their selection of him as president; but no circumstances justify directors in committing the management of the bank to the president, further than the duties of that office require. No matter how honest and capable the president is, the directors have their duties to perform, and cannot fail to perform them because their confidence in the president renders them unnecessary in their opinion. It was their duty as directors to perform the functions required of them by statute, common usage and the by-laws of

the corporation, and any committal of management to the president, which meant a nonfulfillment of their duties as directors, was negligence for which they are liable, provided other facts fixing their liability were present." See also *Patterson* v. *Stewart, supra.*

Section 841 requires that the affairs and business of the corporation shall be under the care of, and shall be managed by, the directors of such corporation.

By law certain duties also devolve upon the cashier of a bank. The cashier and directors of a bank stand in a reciprocal relation to each other. The duties of a cashier are rather executive, and those of the directors, administrative. They have the power to appoint a cashier, and to confer upon him the powers and duties usually exercised in such an office; but they cannot divest themselves of the duty of general supervision and control. They must not be mere figureheads, and may not confide the exclusive management of the affairs of the bank to the cashier. They cannot rely entirely on his good faith and judgment, and thereby escape liability. In short, the law, by positive enactment, makes it the duty of the directors to manage the affairs of the corporation; and they cannot discharge that duty by delegating it to another person.

Sections 863 and 864 do not make the directors liable for a single act of negligence, however inconsequential; but they make them liable for a series of connected acts of negligence continued for such a length of time as it must be inferred that their acts of negligence were intentional.

Tested by this rule, we are of the opinion that the evidence in this case, considered in its most favorable light to the defendants, renders them liable under our statutes. The testimony taken in the case was very voluminous, and embraced a vast amount of details in connection with the conduct of the affairs of the bank.

Having reached the conclusion that the undisputed evidence in the case makes the directors liable, it will not be necessary to abstract all of the testimony, but only to state the substance of that part of it that goes to fix the liability of the defendants.

The Bank of Newport was organized in 1899, with a capital stock of $50,000, fifty per cent. of which was paid up, for the

purpose of doing a general banking business. It conducted its business as a bank until the 30th day of April, 1906, at which time it applied to the chancellor of the Jackson Chancery Court in vacation for a receiver, stating in its petition therefor that it was insolvent. Alcorn Ferguson and T. D. Kinman were appointed receivers. At the time of its application for a receiver the plaintiffs were depositors of the bank, and the defendants were its directors. Almost from its inception C. B. Kelley, and the Kelley Lumber Company, of which he was the principal stockholder, were the principal borrowers from the bank. The indebtedness of the Kelley Lumber Company, and the various other subsidiary corporations chiefly owned by C. B. Kelley, increased their debt to the bank by progression. In the statement for 1902 the indebtedness of the Kelley companies to the bank had increased to over $70,000. The statement for 1903 shows the amount to exceed $120,000. For 1904 the bank's statement shows that it had increased to $157,415, and for 1905 it had reached the sum of $162,197.43. The condition of the bank on April 28, 1906, the time of its failure, in short was as follows: Liabilities $241,684.00; assets, $324,154.44; Kelley indebtedness $174,646.94.

The Kelley indebtedness was never secured by anything except the stock of the various companies. In September, 1903, it had reached the sum of $80,000. V. Y. Cook, then one of the directors of the bank, began to complain of this increase, and ordered it stopped. In November of that year he resigned. All the directors knew that the Kelley indebtedness was rapidly increasing, and that no security other than the stock of the companies was being given to the bank. They knew that the Kelley Lumber Company was in the business of running a sawmill, and that the ability to pay the debt depended upon the profits of the business. All of the directors had been in office since 1903, and most of them for several years prior to that time. They all knew and recognized the hazard of the enterprise engaged in by Kelley. They talked over the situation in 1903, and knew that the debt was being rapidly increased. They knew that prospect of paying the Kelley indebtedness depended entirely upon the profits to be made by the companies. They knew that the failure of the bank would cause the failure of the Kelley corpo-

rations, and must have known that if the Kelley companies increased their indebtedness it would mean the insolvency of the bank, yet they took no steps to obviate the impending danger to the solvency of the bank. They say they relied entirely in the matter upon the cashier. No more than one-half of the subscribed capital stock was ever paid up. Here we have the anomalous condition of directors, whose duty it was to manage the affairs of the bank, allowing the cashier to lend to one man and his various enterprises, without security, sums of money largely in excess of the capital stock of the bank, and to continue that course of dealing for a period of several years.

In 1903 the debt had been increased to $80,000. With a knowledge of this fact, they still permitted the cashier to pursue the same reckless course of dealing, so that at the time of the failure of the bank the indebtedness had been increased to the sum of $174,646.94. The inevitable result of such management of the affairs of the bank was the insolvency of the bank and of the Kelley Lumber Company and its subsidiary corporations. Reasonable minds could come to no other conclusion, and the defendants must be presumed to have intended the natural and probable consequences of such acts of negligence on their part which continued for a period of several years, and to have assented to the negligent acts of the cashier. To hold otherwise would be to say that the statute imposes no duty on the directors other than to elect a cashier whom they believe to be competent, and then to turn over to him the management of the bank. Such was not the intention of our lawmakers. They prescribed certain positive duties upon the directors, and imposed certain liabilities upon them for the intentional neglect of these duties, and for assenting to such violation whereby the corporation becomes insolvent; and we are of the opinion that the facts and circumstances in this case will lead all fair-minded men to believe that the directors must have known that their neglect of their duties would lead to the insolvency of the bank. Therefore, there was no question of fact to be submitted to the jury, and the trial court was right in directing a verdict for the plaintiffs.

Having reached this conclusion from the evidence, admittedly competent, it is not necessary to review the assignments

of error in regard to the admission and exclusion of evidence; for no prejudice could have resulted to the defendants in that regard.

Finding no prejudicial error in the record, the judgment will be affirmed.

FIRST NATIONAL BANK OF BATESVILLE *v.* BOARD OF EQUALIZATION OF INDEPENDENCE COUNTY.

Opinion delivered November 15, 1909.

1. TAXATION—NATIONAL BANKS.—A State may tax shares of stock in a national bank at their actual value, without regard to the fact that a part or the whole of the capital stock of the bank is invested in nontaxable bonds, for taxation of the shares of stock is not taxation either of the capital stock of the bank or of the nontaxable bonds in which the same may be invested. (Page 337.)
2. SAME—MODE OF TAXING BANK STOCK.—The revenue statutes of this State contemplate that the shares of stock in banks shall be taxed and not the capital stock of the bank itself; the tax to be assessed *in solido* against the bank as trustee or agent for its stockholders, and to be paid by the bank and collected from its stockholders. (Page 341.)

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

Ernest Neill and *McCaleb & Reeder,* for appellant.

1. Capital stock of a national bank invested in United States bonds is not subject to taxation. Rev. Stat. U. S. § 3701; 2 Pet. 449; 2 Black (U. S.) 620. The capital stock of a national bank cannot be assessed by State authority. 4 Biss. 472; 53 N. Y. 49; 3 Dill. 298; 52 S. E. 494. The only theory upon which this assessment could be upheld is that the effect of the action of the board of equalization was to assess the shares of the shareholders; but that was not done nor attempted. The record shows that it was the property of the bank which was assessed, and not the shares of the stockholders. 173 U. S. 664, 43 Law. Ed. 1038; 166 U. S. 446.

2. The proceeding was void on account of discrimination. See agreed statement of facts. The authority conferred by § 5219, Rev. Stat. U. S., to tax shares in a national bank is only upon express condition that such tax shall not be at a greater rate than is assessed upon moneyed capital in the hands of individual citizens of the State. 23 Wall. 480; 113 U. S. 689; 4 Wall. 459; 3 Wall. 573; 101 U. S. 148; *Id.* 153; 121 U. S. 535.

Sections 6920, 6921 and 6924, Kirby's Digest, clearly show that it was the intention of the Legislature to tax the capital of banks—the working capital employed by them in banking, except such portions thereof as had been invested in United States bonds or other nontaxable securities for more than one year prior to the first Monday in June of the current year. Sections 6922 and 6923, authorizing taxation of shares in banks, were intended to reach property not covered by the previous sections, *i. e.*, shares of stock as distinguished from the capital of banks.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant; *Sam M. Casey* and *Morris M. Cohn,* for appellee.

1. Construing the Federal statutes and the several sections of our revenue law bearing upon the question, together, the assessment was against the stockholders, and not against the bank, and the amount invested in United States bonds was properly included. Rev. Stat. U. S. § § 5210, 5219; Kirby's Dig. § § 6919 to 6924 inclusive, § 6902. The law merely requires the bank to pay the whole tax, as the agent of the stockholders, giving it a lien on the shares of stock for the taxes paid and authorizing it to deduct the same from the dividend accruing thereon. It does not attempt to provide for the taxation of the capital of a bank. 166 U. S. 440; 9 Wall. 363; 3 Wall. 573; 4 Wall. 244; 23 Wall. 481; 125 U. S. 60; 167 U. S. 461; 173 U. S. 664; 7 Fed. 518. In estimating the value of the shares of stock everything may be considered that is included in the statement required of banks under section 6920, Kirby's Dig. 94 U. S. 415.

2. There is no discrimination, and authorities cited by appellant on this point do not apply because there is no showing that the other banks of Independence County had their capital invested in bonds or that the assessment amounted to a discrim-

ination. To invalidate an assessment, it must be shown that there was a higher burden of taxation imposed upon the money thus invested than was imposed upon other moneyed capital. 31 Fed. 505. Exact equality is not required. 116 Cal. 30; 173 U. S. 205. See also notes to § 5219, Rev. Stat. U. S.; 5 Fed. Stat. Ann. 159.

McCULLOCH, C. J. Appellant, a national banking corporation domiciled and doing business at Batesville, Arkansas, listed with the tax assessor the amount of its capital stock and undivided profits, deducting therefrom the amount of capital stock invested in real estate and in bonds of the United States. The county board of equalization struck out the deduction for said investment in bonds, and on successive appeals to the county and circuit courts the action of the board was sustained. The bank appealed to this court.

The question at issue on this appeal is whether, under the statutes of this State and the Federal statutes, the capital stock of a national bank invested in bonds of the United States can be included in assessments for taxation. This question involves primarily a construction of our own statutes—whether they authorize an assessment against shares of stock in banks or against the capital stock of the bank itself, or against both. Let it be understood in the beginning that a State cannot levy a tax upon bonds of the United States, for such property is not subject to taxation. Neither can the State levy a tax upon the capital and assets of a national bank. This, too, is exempt from State taxation. The limit of the taxing power of a State with respect to a national bank is as to the real estate owned by the institution and the shares of stock therein. U. S. Rev. Stat. § § 5214, 5219.

Section 5214 declares that, in lieu of all existing taxation, a national bank shall semi-annually pay to the treasurer of the United States one-half of one per centum upon the average amount of its notes in circulation, one-fourth of one per centum upon the average amount of deposits, and one-fourth of one per centum upon the average amount of its capital stock not invested in United States bonds.

Sec. 5219 reads as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such

shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The latter section is declared to be the limit of the State's power to tax national banks. "This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property, or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any tax, therefore, which is in excess of, and not in conformity to, these requirements, is void." *Owensboro Nat. Bank* v. *Owensboro,* 173 U. S. 664; *Third Nat. Bank* v. *Stone,* 174 U. S. 432; *Rosenblatt* v. *Johnston,* 104 U. S. 462.

The capital stock of a national bank is exempt from State taxation. So are United States bonds exempt from State taxation. But a State may tax shares of stock in a national bank at their actual value, without regard to the fact that a part or the whole of the capital stock of the bank may be invested in non-taxable bonds and securities; for taxation of the shares of stock is not taxation either of the capital stock of the bank or of the non-taxable bonds in which the same may be invested. *Van Allen* v. *Assessors,* 3 Wall. 573; *People* v. *Tax Commissioners,* 4 Wall. 244; *National Bank* v. *Commonwealth,* 9 Wall. 353; *Hepburn* v. *School Directors,* 23 Wall. 480; *Palmer* v. *McMahon,* 133 U. S. 660; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134; *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440; *Merchants, etc., Bank* v. *Pennsylvania,* 167 U S. 461.

The question which arises, then, is whether the assessment in this State is for the purpose of taxing the capital stock of the bank, or for the purpose of taxing the shares of stock, or both. This question is not entirely free from doubt. It is certain, however, that it is not intended to tax both the capital of the corporation and the shares of stock. A section of the Revenue Act provides that "no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State." Section 6902, Kirby's Digest; *Dallas County* v. *Banks,* 87 Ark. 484.

The other provisions of our revenue laws relating especially to banking concerns form a part of the General Revenue Act of 1883, and, as amended by subsequent acts, read as follows:

"Sec. 29. Every corporation, company, individual person or association of persons, whether authorized by law to issue notes for circulation or not, that shall keep an office, counting house, or other place for the transaction of business in this State, and shall discount, buy or sell exchange, notes, bonds, stocks, certificates of public debt, or other evidences of debt, claims or demands, with a view to profit, shall be deemed a bank within the meaning of this act.

"Sec. 30. Every bank shall annually on the first Monday in July in each year make out and deliver to the assessor a correct statement attested by the oath of the president and cashier of such bank, or, if there be no president or cashier, then by the oath of the principal manager and principal accountant of such bank, setting forth:

"*First.* The amount of capital, whether divided into shares or not, actually paid in or secured to be paid by note or otherwise, or in any manner procured or furnished, to be employed in its banking business.

"*Second.* The amount of undivided profits arising from such business belonging to the bank, whether in its possession or subject to its control, or loaned or otherwise invested for its benefit.

"*Third.* The value of moneys, credits or other personal property converted into bonds or other securities of the United States, or of this State, not taxed in the year immediately preceding the first Monday in June of the year in which the assessment is made, and which said bonds or securities on said first Monday in June were in the possession or control of such bank.

"*Fourth.* The amount loaned to or deposited with such bank for a term certain, or which by agreement or understanding between the parties is not to be withdrawn on demand, excepting the amount which may have been deposited with any bank established as a clearing house for the redemption of the notes of banks making such deposits, and on which no interest is charged or received by the bank making such deposit.

"Which several amounts shall truly represent the condition of the means, property and assets of the bank described herein, as they shall have existed on the first Monday in June, and shall be added together, and the gross sum so produced shall be deemed the amount of property employed in banking, for the then current year, by such bank.

"The shares of persons in banks taxable by law that the holders or owners thereof are not required to list in person by the provisions of this act shall be listed by the president or principal accounting officer or agent thereof, showing the name or names of the person owning or holding the same.

"The taxes assessed upon the shares of stock thus listed shall be paid by the corporation, or company, respectively, and they may recover from the owner or owners of such shares the amount of taxes to be paid by them, or deduct the same from the dividend accruing on such shares, and the amount paid shall be a lien on such shares respectively, and shall be paid before a transfer of such stock or shares can be made.

"Sec. 31. The assessor shall return to the clerk of the county court the statement described in section thirty made by any bank in his county, and the amount so returned shall be placed upon the tax books of the county and taxed as other personal property in such city, town, ward or school districts as the same may be situated." Sections 6919-6924 Kirby's Digest.

It is seen that these sections apply to *all* banks, and of course include national banks. If the statute be held to provide for the taxation of the property of national banks, it is to that extent void, for this is beyond the taxing power of the State; and, unless the statute be held to tax the shares of stock, instead of the property of the bank itself, then the shares of stock in a national bank escape State taxation altogether. Did the Legislature intend any such result?

This court has never construed the statute in a way that could have any bearing on the present question. In *Hempstead County* v. *Hempstead County Bank,* 73 Ark. 515, we merely held that, in summing up the valuation of the property of a bank for taxation purposes, the amount of capital stock invested in real estate should be deducted. But this is not inconsistent with the conclusion, either one way or the other, on the proposition whether the shares of stock are to be taxed.

In the State of Washington a statute is in force which, we think, is, so far as the present question is concerned, substantially like our statute. It reads as follows:

"Sec. 21. Every individual, firm, corporation or association of persons carrying on a general banking business in this State, whether the same has been organized under the banking laws of this State or of the United States, or conducted under the style of private bankers, shall be assessed and taxed in the county, town, city or village where such bank or banking association is located, and not elsewhere, in the following manner: Annually, at such times as provided for listing property for taxation, every such bank or banking association as contemplated in this section shall, by its accounting officer, furnish the county or city assessor a statement, verified by oath, giving the amount of paid up capital stock, the amount of surplus or reserve fund and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus and undivided profits shall be assessed and taxed as other like property in this State is assessed and taxed; *provided,* at the time of listing the capital stock, the amount and description of its legally authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the

aggregate amount of such capital, surplus and undivided profits, and the remainder then taxed as above provided."

"Sec. 23. Each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner, under the provisions of this act, and may pay the same out of their undivided profit account, or charge the same to their expense account, or to the accounts of such shareholders, owners or owner, in proportion to their ownership."

The Supreme Court of that State, in the case of *Paul* v. *McGraw,* 3 Wash. 296, construed the statute to authorize the taxation of shares of stock of all banks, including national banks, the same to be assessed in the name of the bank and charged against shareholders. The court in its opinion summed up the reasons for that conclusion as follows: "We know that the Legislature must have had in mind: (1) That the capital of national banks could not be taxed at all. (2) That the shares of such banks could be taxed, provided that the shares of State banks were taxed, and at the same rates as State bank shares and other moneyed capital. (3) That the shares of nonresidents of the State could only be taxed at the place where the bank is located. (4) That, while all the property in the State is required to be taxed, it can only be taxed once. (5) That the very easiest and simplest way to collect the tax on property of this kind is by the garnishment method approved in *National Bank* v. *Commonwealth, supra,* and actually in operation in the State and Territory for many years."

In the later case of *First National Bank* v. *Chehalis County,* 66 Wash. 64, the court held that (quoting from the syllabus) "the assessment of the capital stock of a national bank, made to the bank *in solido,* is valid." The latter case went to the Supreme Court of the United States (*First National Bank* v. *Chehalis County,* 166 U. S. 440), and the conclusion reached by the Washington court was sustained. Mr. Justice Shiras, in delivering the opinion of the court in that case, said: "If this section (referring to sec. 21 above quoted) stood alone, there might be ground for the contention that it contemplates taxation of the capital of the bank. But section 23 of the statute provides that 'each bank and banking association shall be liable to pay any

taxes assessed against them as the agent of each of its shareholders, owners or owner under the provisions of this act, and may pay the same out of their individual profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their ownership.' The Supreme Court of Washington held in this case that these two sections are to be read together, and that, so read, their provisions are not inconsistent with those of the Federal statute. That the two sections of the State law should be read together is obviously proper, and, at any rate, we are bound by the judgment of the Supreme Court of the State in the mere matter of the construction of that law."

These decisions are precisely in point, for they construe statutes which are substantially like our own, and their persuasive force cannot be escaped. The reasoning upon which they are based goes to sustain the contention that our statutes are intended to tax the shares of stock in banks, and not to tax the capital of the bank itself, and that this taxation and the method in which it is enforced neither offend against the Federal statutes nor transcend the taxing powers of the State. The Federal statutes do not restrict the State's form or method of levying and collecting the tax. If the tax is levied on the shares of stock, the cases already cited establish the principle that the tax may be collected by assessment *in solido* against the bank as the agent of its shareholders..

Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States in *National Bank* v. *Commonwealth,* 9 Wall. 353, said: "It is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares."

It is true the Supreme Court of the United States, in *Owensboro National Bank* v. *Owensboro, supra,* said that a tax on a franchise and property of a national bank was not equivalent to a tax on the shares of stock therein, or *vice versa;* for it said that that rule would render illegal a State tax on shares of stock.

But that was said in a case which involved the validity of a tax which had been held to be a tax on the franchise of a national bank. No intimation is found in that opinion of an intention to overrule former opinions in which it was held that an assessment *in solido* against the bank, paid by the bank and collected from its shareholders, is valid.

We are therefore of the opinion that the revenue statutes of this State now under consideration provide for the taxation of shares of stock, and not the capital stock of the bank itself; and that the method of assessment prescribed by this statute, in requiring the bank to file a schedule setting forth the things enumerated, is merely intended as a method of arriving at the valuation of the shares of stock. The statute contemplates the assessment of the tax *in solido* against the bank as trustee for, or agent of, its stockholders, the same to be paid by the bank and collected from its stockholders. The statute meets every requirement of the Federal statute. It applies to all banking concerns alike, either State or National, without discrimination, and provides that the shares of stock "be taxed in the city or town where the bank is located." Under any other construction of the statute, shares of stock in national banks would escape taxation altogether.

This construction does no violence, as contended, to the language of the statute. The third subdivision of the section hereinbefore quoted does not, as claimed, exempt "the value of moneys, credits or other personal property converted into bonds or other securities of the United States, or of this State," during the preceding year. For it expressly requires banks to list such items. Nor does the fact that the statute requires the listing of time deposits show that this construction was not intended. Such items constitute the working capital of the bank, and may well be considered in arriving at a correct estimate of the value of the assets of the bank or of its shares of stock.

It is contended that the assessment in this case discriminated against the shares of stock in this bank; and in support of this contention it is shown that the assessor and board of equalization had failed to assess the shares of stock of three State banks in the same county. This appears from an agreed statement of facts in the record. But we do not understand from this that

the shares of stock escaped taxation altogether. What we understand the stipulation to mean is that the shares of stock in the State banks named were not separately assessed against the individual shareholders. There is no showing here that there was any discrimination against this bank in failing to assess the shares of stock therein in the same manner in which shares of stock in other like institutions were assessed.

We are of the opinion that the judgment of the circuit court is correct, and the same is affirmed.

NAYLOR v. MCNAIR.

Opinion delivered November 15, 1909.

1. CIRCUIT COURTS—JURISDICTION OF LIEN ON LAND.—A suit for the recovery of a sum less than one hundred dollars is within the original jurisdiction of the circuit court if it involves the decision of the question whether the amount sued for is a lien upon land. (Page 349.)
2. NEW TRIAL—SUFFICIENCY OF EVIDENCE.—A motion for a new trial, because the verdict is contrary to the evidence, is sufficient to raise the question whether the verdict was sustained by sufficient evidence. (Page 349.)
3. COVENANTS FOR TITLE—COVENANT AGAINST INCUMBRANCES—EFFECT.—Where the owner of unincumbered land gave a bond for title, and subsequently executed a deed with covenant against incumbrances, he will not be held to have covenanted against liens on the land created by persons who purchased the land after the bond for title was executed and before the deed was executed. (Page 350.)

Appeal from Pulaski Circuit Court; Second Division; *John W. Blackwood,* Special Judge; reversed.

Carmichael, Brooks & Powers, for appellant.

1. McNair could have defended against Mrs. Green's suit in chancery on the ground that he was an innocent purchaser for value, and that the note was no lien as against him. As to Naylor, it was never a lien against the lot. He was not a party to the note given by Mrs. Crisman to Kissinger, nor to their contract. Clark on Contracts, 349; Lawson on Contracts, 422; 46 Kan. 246; 29 Mass. 554; 123 Mass. 28. McNair was bound

to take notice of all incumbrances against the equitable estate in the land. 29 Ark. 650; *Id.* 358.

2. There was no breach of warranty. The lien attempted to be created by the note was only an equitable right, based upon an equitable estate, which was of no force until judicially declared. It did not reserve title. 26 Ark. 382; Pomeroy's Equity, § § 1260-61-62. The lien, if it ever existed, was only from the date of the decree in the suit of Green *v.* McNair, which was subsequent to the deed from Naylor to McNair. There was no incumbrance when the deed was made. 65 Ark. 104; Marvell on Abstracts, § 191; Maupin on Marketable Title, § 122, p. 289.

3. The decree did not affect Naylor's rights. It shows that it was based only upon the note and contract. 85 Ark. 223. Neither was he bound to appear and defend against that suit. If there was any lien, it was created by McNair, and was personal to him.

Wiley & Clayton, for appellee.

1. If the motion for new trial alone can raise any question, it cannot be other than that the verdict is contrary to the law and the evidence, and a refusal to grant a new trial on that ground will not be reviewed by this court unless there is a total lack of evidence to support the verdict. 14 Ark. 202.

2. When notice of a suit and to defend against it is given to a covenantor by a convenantee, and the former fails to defend, the judgment against the covenantee is conclusive in a suit by him on the warranty against the covenantor. 19 Ark. 470; 52 Ark. 322; 88 Ark. 169; 8 Am & Eng. Enc. of L. 206.

3. If Naylor was not concluded by the decree in chancery, the evidence shows that there was an outstanding lien which breached his covenant. A vendee with title bond may sell his interest and retain a lien on the land to secure the purchase money. 29 Ark. 257; *Id.* 218; 14 Ark. 634; 84 Ark. 41. Kissinger's title bond to Crisman created a lien on the land, which accrued to Mrs. Green, the holder by assignment of Crisman's note. Naylor's subsequent deed to McNair, made after he had been advised of Mrs. Green's claim of a lien, contains the deliberate warranty, "I will forever warrant and defend the title to said lands against all claims whatever, and that said lands are free from all liens."

BATTLE, J. On the 15th day of September, 1903, J. C. Naylor, being the owner of a certain town lot in the city of Little Rock, in this State, sold the same to H. S. Kissinger for $1,250, of which Kissinger paid $50, and for the remainder thereof executed ninety-six notes, each for the sum of $12.50 and 8 per cent. per annum interest from date until paid, each dated September 15, 1903, one payable on the 19th day of September, 1903, and one payable on the fifteenth day of each month thereafter until paid in full. When these notes shall be paid, Naylor covenanted with Kissinger to convey to him the lot by a good and sufficient deed, with usual covenants of warranty; the said agreement being evidenced by his bond for title.

On the 5th day of September, 1904, Kissinger bargained and sold the lot to Mrs. K. M. Crisman for $1,400, of which Mrs. Crisman paid $100.33, and executed six notes, each for the sum of $30, and 8 per cent. per annum interest from date, and assumed the payment of the notes executed by Kissnger to Naylor, which remained unpaid, and when all the said notes are paid Kissinger covenanted with Mrs. Crisman to convey to her the lot by a good and sufficient deed containing the usual covenants of warranty. This agreement was evidenced by a bond for title. Mrs. Crisman sold her interest in the lot to J. M. McNair, and he agreed to pay and did pay the notes executed by Kissinger to Naylor, remaining unpaid; and on the 30th day of January, 1907, Naylor and wife conveyed the lot by deed to McNair, and covenanted therein with McNair to warrant and defend the title to the lot against all claims whatsoever, and that it is free from all liens and incumbrances.

The six notes executed by Crisman to Kissinger for the lot were paid, except the last one, which was transferred for value, before maturity, on or about the 27th day of September, 1904, to Maggie E. Green. It is as follows:

"$30.00. Little Rock, Ark., Sept. 5, 1904.

"Eighteen months after date I promise to pay to the order of H. S. Kissinger thirty dollars, at Little Rock, Ark., for value received, with interest from date until maturity at the rate of 8 per cent. per annum, and thereafter until paid, at 10 per cent. per annum, payable annually. This note is one of six (6) given under my agreement of even date to purchase the following

property in C. & P. Johnson's Addition to the city of Little Rock, Ark.; lot eight (8), block four (4).

(Signed) "Mrs. K. M. Crisman."

Indorsements on back as follows:

"Indorsed over to Maggie E. Green, for value received, September 27, 1904.

(Signed) "H. S. Kissinger."

"The time for the payment of this note is extended to May 20, 1906. Filed October 17, 1907.

(Signed) "F. A. Garrett, Clerk."

On or about the 4th day of November, 1907, Maggie E. Green commenced suit against Mrs. K. M. Crisman and J. M. McNair in the Pulaski Chancery Court, to foreclose an alleged vendor's lien, alleging in her complaint substantially all the foregoing facts, and by virtue thereof claiming a lien on the lot for the payment of the note; and asked that the lot be sold to pay the lien. McNair failed to answer, and a decree *pro confesso* was rendered, and a commissioner was appointed and directed to sell the lot.

McNair having paid and satisfied the decree recovered by Mrs. Green, brought an action in the Pulaski Circuit Court against Naylor on his covenant against liens and incumbrances contained in his deed for the lot to McNair to recover $49.20, the amount paid by him to satisfy the decree, and for five dollars paid counsel for services in and about the suit instituted by Green, making in all $54.20.

Naylor demurred to the complaint in the last action, because the court had no jurisdiction, which demurrer the court overruled; and Naylor thereupon answered, and alleged that the lot was free from all liens and incumbrances at the time he conveyed it to McNair.

Plaintiff McNair alleged in his complaint that he notified the defendant Naylor in writing of the pendency of the suit instituted in the Pulaski Chancery Court by Green against Crisman and McNair, and called upon him to defend the same, and notified him that he would rely upon his covenant and warranty, and that he wholly failed to defend against the suit. The defendant failed to deny these allegations in his answer.

All the foregoing facts were proved in the trial in this action. McNair testified, in his own behalf, in part, as follows: "That he had a written contract from Mrs. Crisman, but that he had misplaced it. That he told the defendant about it, and the defendant told him that he held the notes, and would make a deed when they were all paid. * * * * That he got a notice from Mr. Wiley that they were going to sue on the note, or had already sued on it; that he then went to see the defendant, and told the defendant that it might be best to settle it up, as it might cause some trouble, and defendant said: 'No; that will not hurt us; there is no lien on the place; nobody but me holds any papers on that place, and whenever you pay up the rest of the notes I will make you a warranty deed to the place, and it will then devolve on me to defend the place.' "

After the close of the evidence the court instructed the jury to return a verdict in favor of the plaintiff for $49.20, which they did. The defendant moved for a new trial because the verdict is contrary to the evidence. The court overruled the motion for a new trial, and defendant excepted. Judgment was rendered according to the verdict, and the defendant appealed.

The circuit court had jurisdiction to hear and determine this cause, notwithstanding the amount involved is less than one hundred dollars. The issues in the case involve the determination of the question whether or not the amount paid by McNair was a lien on the lot when Naylor conveyed it to McNair; and for that reason the circuit court had jurisdiction. *Sanders* v. *Brown,* 65 Ark. 498.

The motion for a new trial was sufficient to raise the question as to whether the verdict was sustained by sufficient evidence. *White* v. *Beal & Fletcher Grocer Co.,* 65 Ark. 278.

When Naylor executed a deed to McNair, he thereby conveyed all his right, title, claim and interest in and to the lot that he had when he bargained and sold it to Kissinger. His covenants bound him only to warrant and defend such interest and estate as he undertook to convey, and no other, against all liens and incumbrances. He did not covenant against liens thereon created by subsequent purchases. His title was paramount to all the liens created by such purchasers. He is not affected by any notice to defend against such liens, because he

did not covenant against them. The record in Green *v.* Crisman and McNair, instituted in the Pulaski Chancery Court—the complait on file—showed that the plaintiff in that suit was seeking to enforce a lien for a note given in part for the purchase money of a sale of the lot made by the vendee, Kissinger, of Naylor, to Crisman, after Naylor sold to him. The record itself gave notice to Naylor that he had not covenanted against such lien, and that he was not bound to defend against it. Rawle on Covenants for Title (5th Ed.), § § 121, 122. The decree in the suit instituted by Green was *pro confesso,* and rests entirely upon the complaint, which shows the facts before stated.

Appellee attaches importance to the testimony of McNair, in which he stated that Naylor said to him that he held all "the notes and would make a deed when they were all paid;" and that the suit instituted by Green "will not hurt us; there is no lien on the place; nobody but me holds any papers on that place, and whenever you pay the rest of the notes I will make you a warranty deed to the place, and it will then devolve on me to defend the place." He evidently referred to the notes executed to him by Kissinger, and designated them as the notes held by him, and meant to say the note sued on by Mrs. Green could not affect any title he might convey as "he holds all the papers on the place." That was substantially true; he did hold all that could affect the title he subsequently conveyed to McNair.

The verdict of the jury was against the undisputed facts in the case and unsupported by the evidence.

Judgment reversed, and action dismissed.

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

Opinon delivered November 15, 1909.

1. MASTER AND SERVANT—MASTER'S DUTY AS TO APPLIANCES.—It is the master's duty to exercise reasonable care in furnishing suitable and safe machinery and appliances, and to keep the same in repair. (Page 355.)

2. SAME—DUTY AS TO INSPECTIONS.—In order to keep machinery and appliances furnished to a servant in good repair, the master must continuously make reasonable inspections thereof. (Page 355.)

3. SAME—WHEN MASTER LIABLE.—Where a servant is injured by the defective condition of the machinery or appliances with which he is required to work, without contributory negligence on his part, the master is responsible, unless the defect could not have been known or guarded against by reasonable care on his part. (Page 356.)

4. SAME—NEGLIGENCE PROVED BY CIRCUMSTANCES.—While the occurrence of an injury to a servant will not raise a presumption of negligence on the master's part, the master's negligence may be shown by proving that the defect that caused the injury was discoverable by the exercise of ordinary care. (Page 356.)

5. SAME—DUTY IN SELECTING INSPECTORS.—Where a master delegates to another the duty of making inspection of appliances furnished to a servant, he is only required to exercise reasonable care in the selection of such inspector, but not to select an inspector who possesses the highest efficiency of skill and ability. (Page 357.)

6. APPEAL AND ERROR—FORMER OPINION AS LAW OF CASE.—Where, upon a former appeal, an instruction was approved as correct, such ruling is the law of the case upon a second trial where there is no change in the evidence. (Page 358.)

7. DAMAGES—EXCESSIVENESS.—Where plaintiff was, by defendant's negligence, injured on the head to such extent that his hearing was greatly impaired; had his shoulder bruised and his collarbone broken: was confined to his bed for several weeks; before the injury was able to earn $1.12½ to $1.25 per day, and was unable to labor for several months after the injury, a verdict for $1,500 was not excessive. (Page 358.)

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

Kinsworthy & Rhoton, Horton & South, G. De M. Henderson and *James H. Stevenson,* for appellant.

1. The evidence fails to show liability on part of defendant. The company is not liable for hidden defects of which it had no knowledge, and of which it could not have known by the exercise of ordinary care. A proper inspection would not have disclosed the defect in this case. 4 Ell. on Railroads, § § 3783-4; Labatt on M. & S. § 102; 146 Ind. 564; 67 Ala. 13, 20. A railroad is not bound to adopt *extraordinary* tests to discover defects. 76 Ala. 494. The duty of the company was discharged if it used the same method and care in inspection of hand-cars as

commonly used by other prudent and well-conducted railroads in its class, etc. Labatt on M. & S. ch. 5, etc., § § 15-31, 163; 83 Ark. 318; 166 U. S. 617; 4 Thomp. Neg., § § 3803 c, 3926; 39 N. Y. 408; 7 Lea (Tenn.) 367; 86 Va. 270; 20 R. S. 926; 34 Kans. 326; 109 Wis. 602; 42 *Id.* 520; 132 N. Y. 273; 38 Mich. 537.

2. The court erred in giving the second instruction, in refusing defendant's first and third. Authorities *supra.*

Jones & Seawel and *Hamlin & Seawel,* for appellee.

1. The evidence amply supports the verdict, and the court's instructions were the law. 88 Ark. 366. The defect presented such an exterior appearance, visible to the naked eye, as would have made it discoverable by an ordinarily careful inspection. 51 Ark. 479; 67 *Id.* 305; 87 *Id.* 217; 82 *Id.* 372; 87 *Id.* 443; 44 *Id.* 524; 24 U. S. App. 295; 152 U. S. 684; 116 *Id.* 642; 137 Ill. 129; 101 N. Y. 547; 107 Ala. 645; 135 Mass. 201; 140 *Id.* 175; 117 Ind. 564; 88 N. Y. 225; 26 Cyc. 1142; 91 Ark. 343; 4 Thomps. on Neg., § § 3793-8; 78 Tex. 486; 197 Ill. 88, etc.

2. The defect being structural and of such a character as to render it unsafe, without regard to the crack, it might be inferred that the employer was aware of the defect. 26 Cyc. 1143 and notes.

FRAUENTHAL, J. The appellee, Thomas C. Reed, who was the plaintiff below, instituted this suit against the St. Louis, Iron Mountain & Southern Railway Company to recover for personal injuries caused by the breaking of the lever bar of a handcar. In November, 1907, he was in the employ of the defendant as a section hand, and in company with a number of the section crew was returning from work on a handcar furnished by the defendant. Upon the handcar was an upright bar, called a lever bar, with a handle at each end, by pumping which the car was propelled. The plaintiff and the other men of the crew were engaged in pumping the car when the lever bar broke about midway, and threw the plaintiff off backwards. He fell across the rail and on the ground between the rails. The car ran over him, and he was injured on his head, and his collar bone was broken, and he was otherwise severely hurt. He alleged that the defendant was negligent in failing to exercise ordinary care and prudence in furnishing him with a reasonably

safe handcar, and in failing to use ordinary care and diligence in keeping same in a reasonably safe condition; that the lever bar was defective, and was known to the defendant to be defective, or could have been known by it to have been defective by the exercise of ordinary care; and that its defective condition was unknown to the plaintiff.

The defendant denied the allegations of the complaint, and alleged that if there was any defect in the lever bar it was as patent to the plaintiff as to the defendant, and denied that defendant was negligent in any particular. There was a former trial of this cause in the circuit court, and a verdict was returned upon that trial in favor of the plaintiff. From the judgment rendered upon that verdict the defendant prosecuted an appeal to this court. Upon the hearing of said appeal this court reversed the said judgment and remanded the cause for a new trial. The opinion of this court upon that appeal is reported in 88 Ark. 458 (*St. Louis, I. M. & S. Ry. Co.* v. *Reed*). In that opinion there is set out a synopsis of the material evidence given upon the first trial and also the instructions which upon that trial were given to the jury.

Upon the second trial of this cause in the circuit court all the witnesses who had appeared in the first trial testified, and their evidence is substantially the same as that given on the former trial. In addition to those witnesses, other witnesses gave evidence on this second trial. It appears from the evidence that the lever bar was made of cast iron, and that it broke on account of a structural defect consisting of a blow hole on the interior of the casting. This cavity was not visible from the surface of the bar, but immediately below the broken place there was on the exterior of the bar a place that appeared corroded or rusty. After the bar was broken, a rusty streak was seen running from the cavity to the surface of the bar for about an inch, and showed that the bar was cracked to the surface.

The additional evidence on the part of plaintiff upon the second trial tended to prove that at the place where the bar was broken the rusty streak "extended clear out to the surface," and that when upon the morning after the injury the two pieces of the bar were put together the rusty streak showed on the exterior of the bar for about one-half of an inch, and that a

crack could be seen on the surface of the bar, and that this crack "was rusty and looked old." And by witnesses expert in their knowledge of this character of iron casting, and to whom was shown one piece of the broken bar, it was proved that if the rusty streak that appeared in the piece of the bar running from the cavity to the surface would have shown on the surface when the two pieces of the bar were placed together, then the crack could have been discovered by close inspection by the natural eye. There was also evidence tending to show that there was a depression on the surface of the bar near the blow hole; and one of the witnesses testified that this would denote a defect on the inside of the iron.

At the request of the plaintiff the court gave a number of instructions, all of which are reported in the former opinion; amongst which was the following instruction:

"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 them, will not prevent him from a recovery unless he did in fact know of them, or in the exercise of ordinary case 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."

At the request of the defendant the court gave a number of instructions, all of which are reported in the said former opinion; and in addition thereto gave the following instructions at the request of the defendant:

"12. I instruct you that by the words 'reasonably careful examination,' as used in these instructions, is meant such examinations as are made by other prudently conducted and operated railroads.

"13. I instruct you further that by the words competent inspectors,' as used in these instructions, is meant such inspec-

tions as other prudently conducted and operated railroads use to inspect handcars on their roads.

"14. I instruct you that if you find from the evidence in this case that the method of inspection used by defendant railway company as to the time of the inspection of its handcars, and as to the kind or class of inspectors used in its inspections of handcars, is such as to times of inspection and class of inspectors as other prudently conducted and operated railroads use for that character of inspections, then the defendant railroad company would have fully performed its duty owed to the plaintiff in that respect, and defendant would not be liable for a failure to properly inspect the handcar upon which the plaintiff was injured.

"15. All the instructions are to be considered by you as the law of this case."

Upon this second trial a verdict was returned in favor of the plaintiff for $1,500; and from the judgment rendered thereon the defendant prosecutes this appeal.

The plaintiff was in the service of the defendant as a section hand, and while engaged in the performance of his duties upon a handcar he was injured by the breaking of the lever bar. There was a structural defect in this bar. As is said by Chief Justice HILL in the former opinion in this cause, the right of a recovery by the plaintiff "turns upon whether a proper inspection would have disclosed the defect." It is the duty of the master to exercise reasonable care in furnishing suitable and safe machinery and appliances to the servant for doing the work in which he is employed. It is the further duty of the master to exercise the same care in keeping the machinery and appliances in repair; and this necessarily requires of the master the duty of making reasonable inspection and examination of these appliances and machinery. "The duty of inspection is affirmative, and must be continuously fulfilled and positively performed." *Houston* v. *Brush,* 66 Vt. 331. In the case of *Baltimore & O. Rd. Co.* v. *Baugh,* 149 U. S. 368, it is said: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe." And while the master is not required to guaranty

the safety of the machinery and appliances, still he is required to take all reasonable precautions to secure that safety. *Union Pac. Ry. Co.* v. *Daniels,* 152 U. S. 684. And this precaution can only be taken by proper inspection. Where the servant is injured by the defective condition of the machinery or appliances with which he is required to work, and without contributory negligence on his part, the employer should be held responsible, except where it could not have been known or guarded against by reasonably proper care and vigilance on his part. It is presumed that this care and vigilance has been exercised by the company in this case; and failure to do so cannot be inferred from the occurrence of the accident. But the negligence of the company in its failure to perform its duty in this respect can be shown by the facts and circumstances in the case. It can be shown by proving that the defect that caused the injury was discoverable by the exercise of ordinary care; for, if the defect was discoverable, then the company was either negligent in failing to exercise reasonable care in making the inspection to discover it, or negligent in failing to make the repair after such discovery.

As is said in 4 Thompson on Negligence, § 3803c: "If there is any substantial evidence tending to show that the appliance which broke gave way in consequence of a visible defect, or of a defect which should have been discovered by the master in the exercise of ordinary care, then the question of his negligence will go to the jury." 1 Labatt on Master and Servant, § § 155-157.

In the case of *St. Louis & San Francisco Rd. Co.* v. *Wells,* 82 Ark. 372, a locomotive engineer was injured by the breaking of the drawbar which coupled the engine and tender together, and there was evidence that the drawbar had a crack in it an inch and a quarter deep, and had the appearance of being old. It was held that this was sufficient evidence to support a finding that there was an observable defect in the drawbar, and that the defendant was negligent in failing to discover it.

In the case of *Momence Stone Co.* v. *Groves,* 197 Ill. 88, an employee was injured by the breaking of a hook used in pulling cars. An employee who picked up the hook after the accident testified that there was a visible flaw in it, and that he

could see that the break was old and rusty. In that case it was held that this was sufficient evidence tending to prove that the hook was defective, and that the defect was discoverable, and should have been known by the defendant. See also *Ultima Thule, A. & M. Ry. Co.* v. *Calhoun,* 83 Ark. 318; *Cleveland, C. C. & St. L. Ry. Co.* v. *Ward,* 147 Ind. 256; *Texas & Pac. Ry. Co.* v. *O'Fiel,* 78 Tex. 486; 1 Labatt on Master & Servant, § 159.

In the case at bar two witnesses testified that on the morning following the occurrence they saw the two pieces of this broken lever bar, and that there was a rusty streak that showed on the surface of the bar at the place of the breaking, and that this rusty streak was one-half inch long, and that a crack was visible upon the surface of the bar; and that the crack looked rusty and old, and that it had the appearance of having been done some time before; and that when the two parts of the bar were placed together, the rusty streak or crack was visible upon the surface of the bar, and showed that the streak or crack was visible on the surface before the bar broke. At the trial of the case only one part of the bar was produced. A witness, who from his experience showed expert knowledge of the subject, testified that if the crack upon the portion then shown to him should have been visible upon the surface when the two parts were put together then it could be observed by careful inspection, and that the defective condition of the bar would have been discoverable. The character and size of the crack thus shown this witness was of the size and appearance of the crack upon the surface of the bar as testified to by the witnesses who examined the two parts of the bar upon the morning after the accident. The jury were the judges of the credibility of these witnesses. We are of the opinion that this was sufficient evidence to sustain the verdict of the jury finding that there was a visible defect in the bar, and that the defendant was negligent in failing to exercise due care in discovering it.

It is urged by the counsel for defendant that the court erred in giving the above instruction number 2 on the part of plaintiff, because in the latter clause of that instruction it "in effect tells the jury that the duty of inspection and ordinary care and prudence therein can be discharged only by an inspection

by a competent inspector;" and that this in effect was to say that "to be a competent inspector * * * * a man must have been an expert in cast-iron." We do not think that this instruction is reasonably subject to this criticism, because the fair import of the entire instruction, taken together, is only to require the exercise of reasonable care in making a proper inspection. And, to emphasize the requirement of only such an inspection as would be made by an ordinarily careful and prudent person, the court in instruction number 13 given on behalf or the defendant told the jury: "I instruct you further that by the words 'competent inspector' as used in these instructions is meant such inspectors as other prudently conducted and operated railroads use to inspect handcars on their roads."

Reasonable care in the selection of men that are fit to perform the duties of their respective positions, and not men of the highest efficiency of skill and ability, is the measure of the master's duty to his servant in this regard. But the master owes to his servant the duty of a proper and reasonable inspection of the appliances, and if he sees fit to have others perform that duty that does not change the measure of his obligation to the servant or the right of the servant to insist that reasonable precaution shall be taken to secure safety in the appliances which are furnished to him to do the work. *Carlson* v. *Phoenix Bridge Co.*, 132 N. Y. 273; *Union Pacific Ry.* v. *Daniels*, 152 U. S. 683.

Taking the instruction as a whole, and especially in connection with the instruction No. 13 on the part of defendant, we do not think that it required any more efficient or further duty in this respect of the defendant. Furthermore, this court upon the former appeal held that this instruction was correct, and therefore it is the law of this case. *St. Louis, I. M. & S. Ry. Co.* v. *York, post* p. 554.

The defendant complains that the verdict is excessive. We do not think so. The plaintiff was forcibly thrown from the handcar to the ground and run over by the car. He was injured on the head above the ear to such an extent that his hearing, though slightly defective, has become very greatly impaired. His shoulder was badly bruised, and his collar bone was broken, and he is injured to such an extent that he will never be able to do railroad work or heavy labor, for which he was best adapted. He

was confined to his bed for several weeks, and suffered great pain, and whenever he does any heavy work he suffers pain on account of this injury. Before the injury he was able to earn from $1.12½ to $1.25 per day. He was unable to do any labor for a number of months after the injury. He is 26 years old; and more than a year after the injury he testified that he was unable to do any hard labor. And without education he is dependent upon his manual labor. These damages were the necessary result of this injury, and we do not think that the amount of $1,500 recovered is excessive, or that it can be considered excessive by reason of the plaintiff's refusal to accept medical treatment furnished by defendant.

We find no prejudicial error in the trial of this case, and the judgment is therefore affirmed.

CARR v. FAIR.

Opinion delivered November 15, 1909.

1. REFERENCE—CONCLUSIVENESS OF MASTER'S REPORT.—Where a master is appointed by the court of its own motion, and not by consent of the parties, his findings of fact are advisory merely; and while they are highly persuasive, they may be set aside by the chancellor if they are clearly against the preponderance of the testimony. (Page 362.)
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings upon disputed questions of fact will be set aside if against the decided preponderance of the evidence. (Page 364.)
3. SAME—WHEN CHANCELLOR'S FINDING NOT SUSTAINED.—A finding of the chancellor as to the value of certain timber cut from plaintiff's land which is clearly against the preponderance of the testimony cannot be sustained upon the theory that the value of such timber was a matter of common knowledge. (Page 365.)

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

J. T. Coston, for appellant.

1. The report of the master is clear, able and exhaustive. His findings are sustained abundantly by the evidence, and the

chancellor should have given them the same weight as that given the finding of a jury on questions of fact. 108 S. W. Rep. 518; 85 *Id.* 769; 12 Minn. 307.

2. He was appointed by *leave* of the court and *consent* of parties. 48 Pa. 499.

3. The master's findings are conclusive when sustained by *any* evidence. Cases *supra;* 18 Minn. 129; 96 Ill. App. 114; 43 Vt. 462; 6 Col. 45.

W. J. Driver and *Block & Kirsch,* for appellee.

1. This case differs from 108 S. W. 513; 74 Ark. 338. There the master had superior facilities and opportunities which the chancellor had not. In this case the hearing was on depositions alone, and the chancellor had the right to disregard the findings if in his best judgment they were not sustained. The master is only an arm of the court, his findings advisory. Story, Eq. Jur. (4 Ed.), § 450.

2. Trials in chancery appeals are *de novo,* and the chancellor's findings are persuasive merely. 75 Ark. 72. By analogy the same rule should apply to the master's findings.

3. The chancellor must be presumed to take judicial knowledge of matters of common knowledge in that chancery district. 110 Ill. 400.

FRAUENTHAL, J. The appellants instituted this suit against the appellees in the circuit court of Mississippi County for the recovery of the value of the timber which they alleged the appellees had wrongfully cut and removed from a large body of land in that county owned by the appellants. The appellees allege in their answer that they had entered into a contract with the mother of appellants for the purchase of the timber, believing that she had a right to sell same, and had made payments thereon to her. They denied that they had cut and removed the amount of timber claimed by appellants; and, in order to obtain an accounting of the amount of said timber and the right to have the payments so made by them credited on the value thereof, they asked that the cause be transferred to the chancery court. This was done. Thereupon the parties entered into the following agreed stipulation of facts:

"It is agreed and stipulated in this case that the defendants

cut and removed from the lands of the plaintiffs ash, oak, cypress, elm, gum, sycamore and cottonwood timber as follows:

Ash	2,934 feet
Elm	40,184 feet
Cypress	105,528 feet
Sycamore	222,007 feet
Gum	1,070,725 feet
Oak	477,343 feet
Cottonwood	3,499,412 feet

"It is further agreed and stipulated that said timber was cut by the defendants and removed from said land each in equal quantities each year for the years 1898, 1899, 1900, 1901, 1902 and 1903. Said land was inherited by the plaintiffs from their father, J. J. Carr, who died intestate in the year 1897, and in the year 1898 Susie Carr, the mother of the plaintiffs, entered into a contract with the defendants in which she attempted to authorize the defendants to cut and remove said timber from said land without any order of the probate court therefor. That afterwards the defendants paid the administrator of her estate and the estate of J. J. Carr the contract price agreed on by her for said timber as follows: elm and sycamore, 25 cents per thousand feet; cypress, gum and cottonwood, 50 cents per thousand feet; ash and oak, $1.00 per thousand feet. And it is expressly agreed that said sums may be deducted from the actual value of said timber."

Thereafter, the chancery court, in order to determine the value of the timber and amount of the payments made thereon, appointed a special master to whom the matter was referred for the purpose of taking proof and stating the account between the parties.

The master took the testimony of nine witnesses by depositions which were filed with his report. In his report he gave an abstract of the testimony of these witnesses; the interest of each in the litigation, the qualification of each of them to testify as experts on the subject of the market value of the timber. He gave in detail the market values placed by each witness on the various kinds of timber for each of the years during which the same was cut, and the values thereof as determined by him from this testimony. He made out a detailed statement showing the

value of each kind of timber cut during each of the above years and the amount of each payment made thereon, together with interest calculated on the same to the date of his report. He found that, after allowing all payments so made, there was due to appellants the sum of $9,088.38. The appellees filed exceptions to the report on the ground that the master erred in charging "the appellees with the various values of the timber as found by him for the various years." The court thereupon heard and passed upon the report of the master upon the depositions that had been taken and filed with his report and the report itself. The court thereupon made the following findings and order upon said report and entered its decree in accordance therewith: "The court further finds that the findings of the master as to the value of the timber cut is without evidence to support it, and the first, second, third, fourth, fifth and sixth exceptions to the master's report are therefore sustained, and the master's findings as to value set aside. The court finds, however, upon consideration of said report that the plaintiffs are entitled to recover from the defendant principal and interest at this date $6,210.40," etc.

From the decree thus setting aside the findings of the master and entering a judgment in favor of appellants for only the above amount and not for the amount found by the master, the appellants present this appeal. The questions presented by this appeal involve the weight that should be given to the findings of fact by a master in chancery, and to the findings of the chancellor relative thereto. In order to assist it in the proceedings pending before it—as for example to take the testimony, to make findings of facts, or to state accounts, etc.—the court has the power within its sound discretion to appoint a master. When such master is appointed at the request and with the consent of the parties, and with their consent that he shall determine certain matters that shall be referred to him, he is known as a consent referee or master; and his findings have the weight of the verdict of a jury. A master may and is usually appointed by order of the court of its own motion. In either event the master derives his authority from the order thus appointing him. When he is appointed by order of the court of its own motion, the report which he presents upon the evidence taken is to a great extent

advisory, and the court may accept such report and approve it or disregard it, either in whole or in part, according to its own judgment as to the weight of the evidence. Its discretion in passing on such report should be exercised under and controlled by the rules of law and the evidence in the case. The court cannot arbitrarily set aside the findings of such report. Kirby's Digest, § 6337, provides: "The report shall stand good, except such parts as are excepted to, unless it shall appear on the face of the report or from the evidence in the case that it is erroneous." It is generally held that the report of a master is presumptively correct; and there is a strong presumption of the correctness of the findings of fact of the master; and where there is conflicting evidence upon questions of fact, the findings will rarely be disturbed.

In speaking of the weight that should be accorded to the report of a master the Supreme Court of the United States, in the case of *Tilghman* v. *Proctor,* 125 U. S. 136, says "In dealing with these exceptions, the conclusions of the master pending upon the weighing of conflicting testimony have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." The findings of the master appointed by the court of its own motion should not be lightly disregarded by the court; they should be highly persuasive; and when the findings are based upon conflicting evidence, they should be accorded the great weight to which they are entitled. And if the court does not give to the findings of such master that weight which the evidence shows they are entitled to, its action will be reversed upon appeal. 17 Ency. Plead. & Prac. 1056; 16 Cyc. 453.

In this case the master was appointed by the order of the court, and his findings were subject to the review of the court. The court had the power, and it was its duty, to pass its own judgment upon the findings in the light of the evidence adduced. These findings related to disputed questions of fact, and were based upon conflicting evidence. The findings of the master should not have been disturbed by the chancellor unless they were clearly against the preponderance of the evidence. At the hearing of the exceptions to the report of the master there was no additional evidence taken, but the court passed upon the

matter upon the evidence presented by the depositions which were taken before the master, and which are all before this court. It has been uniformly held by this court that "the finding of the chancellor concerning a disputed question of fact, where the evidence is conflicting, is not conclusive upon appeal;" but that if it is against the decided preponderance of the evidence, it will be set aside. *Chapman* v. *Liggett,* 41 Ark. 292; *Gist* v. *Barrow,* 42 Ark. 521; *Nolen* v. *Harden,* 43 Ark. 307; *Kelley* v. *Carter,* 55 Ark. 112; *Goerke* v. *Rodgers,* 75 Ark. 72; *George* v. *Norwood,* 77 Ark. 216.

In the case at bar the question of fact to be determined was the value of the timber during the several years above named. This was a disputed matter, and there was conflicting evidence taken relative thereto. Upon this question the deposition of nine witnesses were taken. Five of these witnesses were experts upon the subject of the market value of these various kinds of timber during the above years in the locality of this land. They had been engaged in the said mill and timber business for a great number of years, and they had actually bought and sold this character of timber during those years, and were familiar with the market value of such timber in that locality. They were men of intelligence and good business ability, and wholly disinterested in this case. They went into details in their evidence and showed a great familiarity with actual prices paid for this character of timber involved in this case during the above years, as well as its market value. They showed such an intelligence, experience and actual knowledge of these values that their testimony should carry great weight. The average of the value of the timber for the various years under the evidence of these five witnesses is greater than that found by the master; and in some instances is greater to a considerable extent. Of the other four witnesses whose depositions were taken, two were the appellees, and one was, according to his own testimony, a close friend of the appellees. But none of these four witnesses give any clear statement of the market value of the timber during these years. Their testimony is largely composed of statements of what they paid for large bodies of land on which timber was standing, or at what prices such lands were purchased by others. They give no values at all during several of the years, but only state gen-

erally that the prices of the timber advanced or declined during such years. Their testimony is not satisfactory; and, after careful examination of their evidence, we are of the opinion that it is not clear or convincing. We have carefully examined the testimony of all the witnesses in this case, and we are of the opinion that the findings of the master are sustained by that testimony, and that the findings of the chancellor are against the decided preponderance of the testimony in the case.

Counsel for appellees say in their brief that the approximate value of timber throughout the chancery district in which the chancellor who decided this case presides is a matter of common knowledge, and that the chancellor should be presumed to have that information. But this is a cause pending in a court, and the controverted questions of fact must be established by the testimony of witnesses duly sworn; and judicial knowledge cannot be taken of those facts. As is said in the case of *Pierce* v. *Scott,* 37 Ark. 308: "Values of work and of material should be proved as other facts, and not collected by the master from his own experience * * * * or from consultation with others. This would be dangerous in the first instance, and preclude a party injured from the proper mode of correction. * * * * We must act upon some proof, the best under the circumstances that can be adduced." And this applies equally to the chancellor. His findings can only be based upon and must be based upon the evidence actually adduced in the case. In our opinion the findings of the chancellor are against the weight of the evidence in this case; and its preponderance sustains the findings of the master.

The decree of the chancery court herein is reversed, and this cause is remanded with directions to enter a decree in favor of the appellants for the amount found due by the master, and in accordance with this opinion.

PRESCOTT & NORTHWESTERN RAILWAY COMPANY *v* MORRIS.

Opinion delivered November 29, 1909.

CARRIERS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—Where the undisputed evidence showed that the engineer set the brakes on his engine so taut that when the other cars in the train moved back, taking out the slack, the engine could not move with them, and that this caused the

coupling link to break, and the cars began to move on a down grade, there being no one on the cars to set the brakes, whereupon plaintiff in fright attempted to leave the moving train and was injured, *held,* that the railway company's negligence was established, and that the jury were warranted in finding that there was no contributory negligence on plaintiff's part.

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

STATEMENT BY THE COURT.

On the 1st day of February, 1908, appellee boarded the log train of appellant at Blevins, Arkansas. To the log train was attached a coach for passengers. The train consisted of ten or twelve cars, some of them loaded with logs. There were as many as two or more cars of logs next to the passenger coach. It was a heavy load. It was after dark. There were no lights on the coach when appellee boarded it. The train had run past the station half a length, and the conductor, who was on the platform of the station, signalled the engineer to run the train back, so that some trunks could be taken on. From Blevins to the Ozan bottoms there was a down grade in the track. As the engineer put the air on, a little slack ran back, and when the brakes were put on, a link coupling the cars about midway the train broke. The coach and two log cars and other cars immediately began to roll down the grade towards Ozan bottom. Some one at this time passed through the car and said: "The coach has broken loose, and is going into the Ozan bottom." The passengers began leaving the train, and all left it. The appellee was the last to leave the car. He was a cripple, having a stiff leg, and said he was afraid to get in the aisle until the others all passed out, fearing they would run over him. The train had run something like sixty or seventy-five yards, and was slowing up some when appellee jumped off. It had been running at a speed of about two or three miles per hour. Appellee jumped from the train, fell backwards and dislocated the last bone on his spinal column, which caused him much pain, and was a serious injury. The coach and cars attached to it ran back down the grade about one hundred or one hundred and fifty yards before it was stopped. It had gone one hundred and fifty feet when appellee jumped off. Appellee says: "We

all got off. We were afraid to risk ourselves any further with it." The evidence showed that some one threw chunks under the wheels, but it did not stop for that. It was finally stopped by some one setting the brakes on the back cars next to the coach. The engineer when he stopped the engine at the station that night "ran up there and applied the brakes." One witness testified that if an engine was stopped on the top of that hill there and the brakes applied so as to hold the engine steady, as the train went back taking the slack out, it would cause a greater strain on the links or pins than if the brakes were not applied with so much force. The chunks thrown under the wheels alone would not stop a train going at the rate of speed the coach and cars were going that night without wrecking it. The brakeman whose duty it was that night to set the brakes on the train had gone off after the mail. If he had been there and had set the brakes on the coach, it might not have broken loose and run backwards at all. A witness stopped it by setting the brakes.

The above are substantially the facts presented by this record.

Appellee alleged that "the engineer and those in charge of the train negligently stopped said engine by putting on the emergency brakes or put the brakes on the engine with such force as to hold the engine and not allow it to move; that the train consisted of several cars of saw logs and perhaps other cars, and that said train began to move backward down the grade, taking out the slack, said engine remaining stationary with such force, caused the link or pin to break, letting the train loose from the engine."

All material allegations were denied, and contributory negligence was set up in defense. The appellant complains of the following instructions given by the court: "You are instructed that if you find from the evidence that the plaintiff boarded defendant's train as a passenger at Blevins, as alleged in his complaint, and that the train came uncoupled, or broke loose from the engine, and the car on which the plaintiff was riding was going backward, uncontrolled, toward the Ozan bottom, and in an effort to avoid the peril or injury from a threatened wreck the plaintiff, in the exercise of ordinary care, jumped from the car and was injured, this will make a *prima facie* case of negli-

gence against the defendant, and will be sufficient to cast upon it the burden of proving that it was free from negligence in permitting the engine to become uncoupled or broken loose from under the train, and in permitting the train to get from under the control of the engineer or others in charge of the train, if you find that it did get from under their control.

"2. You are instructed that, as a matter of law, when a passenger, through the negligence of a railroad company, is placed in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained in his seat."

The appellant also complains because the court refused to give an instruction telling the jury that: "It devolves upon the plaintiff to show that his injury, if any, was caused by one of the acts of negligence charged. If you believe from the evidence that the stopping of the engine did not cause the injury or that the engineer exercised due care in stopping the same, then you will, as to this charge, find for the defendant and dismiss this charge from your consideration."

The verdict and judgment were for $350.

Thos. C. McRae, W. V. Tompkins and *D. L. McRae,* for appellant.

The injury must be caused by the actual running of the train. 70 Ark. 481. There must have been reasonable cause of alarm caused by the negligence of the company to entitle appellee to recover. 55 Ark. 248.

J. O. A. Bush, for appellee.

This is such a case as will raise a presumption of negligence; and the instruction given was based on the evidence as to danger, together with the evidence as to the trainmen losing control of the train. 63 Ark. 636; 33 Ark. 816; 49 Ark. 535; 57 Ark. 136; 80 Ark. 19; 73 Ark. 548; 57 Ark. 418; 55 Ark. 248; 57 Ark. 306.

WOOD, J., (after stating the facts). The first instruction given at the request of appellee submitted to the jury the question as to whether or not appellee jumped from the train in order to avoid the peril or injury of a threatened wreck. We do not

understand the instructions to assume that there was a threatened wreck, and that appellee apprehended peril therefrom, but left that for the jury to determine. There was abundant evidence to warrant the conclusion that a wreck was threatened, and that appellee abandoned the coach because he apprehended danger in remaining thereon. Appellee testified: "We all got off. We were afraid to risk ourselves any further with it." "He was afraid to get in the aisle until the others passed out for fear they would run over him." When some one passed through the car and said: "The coach is broken loose and is going into the Ozan bottom," the passengers began leaving the train, and all left it. The evidence indicates that they left it in a hurry. The train was set free at the top of the grade. There were no lights on the coach. The brakeman whose duty it was to set the brakes had gone. An effort to stop the cars by throwing chunks under the wheels had failed. The cars, two of them, were loaded with logs.

There was no error in allowing the jury, under these circumstances, to determine whether appellee left the train on account of the peril he apprehended from a threatened wreck. The instruction would not be erroneous, even if it assumed that a wreck to the train under such circumstances was threatened. For the evidence was undisputed, and that was the only reasonable conclusion to be drawn from it. The passengers, it appears, did all come to the conclusion that a wreck was threatened, else why should they have abandoned the train in such haste? It was not error to submit to the jury the question as to whether the coach and cars were under the control of the trainmen at the time appellee jumped off. The court might also have assumed that the cars were not under control as an undisputed fact from the evidence. But it is clear from the concluding part of the instruction that the question was submitted to the jury. If the facts existed as recited in the first part of the first instruction, and appellee was injured under circumstances there detailed, the negligence of appellant was established, and the appellant therefore can not complain because the court told the jury that these facts, if proved, make a *prima facie* case of negligence. Appellant was not prejudiced by the instruction in this respect. It was really more favorable to appellant than it had the right to ask.

The undisputed evidence showed that the engineer set the brakes on the engine so taut that when the other cars in the train moved back, taking out the slack, the engine could not move with them, and this caused the link or pin to break. Then when the cars began to roll, there was no one on the train to set the brakes on the moving cars, the brakeman having left his post. These uncontroverted facts proved negligence on the part of appellant, and the jury were warranted in finding that there was no contributory negligence on the part of appellee. The issues were fairly submitted to the jury, when the charge is considered as a whole, and there was evidence to sustain the verdict.

Let the judgment be affirmed.

WILSON v. SHOCKLEE.

Opinion delivered November 29, 1909.

1. PLEDGES—EFFECT OF GIVING NOTE AS COLLATERAL.—Where a note for $100 was attached as collateral security to one for $180, and the latter note, with its collateral, was given as collateral security for a note for $1,500, the owner of the $100 note was entitled to its return upon payment of the $180 note, though the note for $1,500 was not paid in full. (Page 371.)
2. LIMITATION OF ACTIONS—MONEY HAD AND RECEIVED.—An action for money had and received is not barred if brought within three years after demand made upon the defendant and his refusal to pay. (Page 372.)

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

STATEMENT BY THE COURT.

Mrs. T. M. Shocklee owned a tract of land in Columbia County, Arkansas, known as the "Lane place," which her husband, acting as her agent, rented to Eubanks, Henry & Company for the year 1904, taking a note for the rent in the sum of one hundred dollars, due October 15, 1904, payable to T. M. Shocklee, dated February 2, 1904. On the 2d day of March, 1904, T. M. Shocklee bought a pair of horses of J. E. Farris, for which he

executed his note in the sum of one hundred and eighty dollars. This note of $180 recited that the Eubanks, Henry & Company's note for $100 was attached as collateral security. On the 12th of May, 1908, Farris borrowed of J. B. Wilson the sum of fifteen hundred dollars, and gave a deed of trust on the Lane place, and as collateral security the note of T. M. Shocklee for $180. Mrs. Shocklee deeded the Lane place to J. E. Farris May 16, 1904. The testimony showed that it was understood at the time the deed was executed that the rent note for $100 was to remain the property of Mrs. Shocklee. Appellant however objected to the testimony. The note of T. M. Shocklee to J. E. Farris for $180, which Wilson held as collateral, was paid to Wilson, but he did not surrender the one hundred dollar note that was attached to the $180 as collateral thereto, but retained same, claiming that it was also held by him as collateral security to the debt of Farris which remained unpaid. Wilson collected this latter note during the months of October and December, 1904, the last payment being made December 16, 1904.

This suit was brought by appellee to recover the money collected by appellant on the one hundred dollar note. Appellant denied that appellee owned the note, or that he had wrongfully collected the debt, and set up the statute of limitations. Demand was made on appellant for the money collected by him July 7, 1907, and he refused payment.

This suit was begun in justice's court November 25, 1907, and comes here on appeal from judgment of circuit court in favor of appellee. The facts as above stated are undisputed.

Stevens & Stevens, for appellant.

If appellant collected this money as his, though appellee claimed it as hers, an action for money had and received would not lie. 63 Am. Dec. 416; 32 *Id.* 404; 81 *Id.* 234.

J. M. Kelso and *J. E. Hawkins,* for appellee.

By collecting the note appellant constituted himself the agent of the owner thereof, and the statute of limitations would not begin to run until the demand for payment and his refusal to pay. 2 Ark. 402; 6 Ark. 381; *Id.* 385.

WOOD, J., (after stating the facts). Appellant cannot set up title in Farris to defeat appellee, for Farris concedes that ap-

pellee owns the note. He never claimed any interest in the note, and the recital of the $180 note showed that the $100 note was held by Farris as collateral security. Therefore appellant must be held to have known that Farris was not the owner of the $100 note. Appellant therefore had no right, after the $180 note was paid, to hold the $100 note as collateral to the debt due him by Farris. He could not appropriate the proceeds of the note owned by appellee to the payment of Farris's debt.

Appellee is not barred by the statute of limitations. She brought her suit within three years after appellant had collected the full amount of the note. The suit was brought within three years after appellee knew that appellant had claimed the proceeds of the note as his own. Appellant must be held to have collected the note for the owner. He held the proceeds for the owner, and the suit was brought within three years after demand made upon him and his refusal to pay.

The prayers granted and refused make the charge of the court conform to the law as above announced.

The judgment is correct.

Affirm.

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

Opinion delivered November 29, 1909.

1. PLEADING—AMENDMENT.—In an action against a railroad company for negligently killing a mare, where the complaint alleged that defendant negligently struck and killed a mare, and negligently chased said mare for a long distance and on to an open span to a bridge," etc., it was not error to permit plaintiff to amend, after the evidence was in, by alleging that the defendant "negligently ran said mare into said bridge, where she was injured, and from which injuries she died." (Page 377.)

2. RAILROADS—STOCK KILLING—NEGLIGENCE.—Where, in an action against a railroad company for negligently chasing a horse into a bridge and causing death, the testimony tended to show that if the trainmen had been keeping a proper lookout they would have discovered the animal sooner than they did, and that no stock alarm was sounded, the question of negligence was propjerly submitted to the jury. (Page 378.)

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

STATEMENT BY THE COURT.

The appellee alleged in his original complaint that the defendant company on the 11th day of July, 1908, by its freight train known as "Red Ball" No. 253, at or near mile post No. 64 in said county, negligently struck and killed a mare, and negligently chased said mare for a long distance, and on to an open span to a bridge, where her feet went through, and she lay helpless on the track in front of said train; and that said company and its agents stopped said train and wantonly rolled said mare off the track and killed her; that said mare was the property of the plaintiff, and valued at $175.

After the evidence was in and the prayers for instructions presented, the court permitted appellee to amend his complaint by adding thereto the allegation that the defendant company "negligently ran said mare into said bridge, where she was injured, and from which injuries she died." Appellant excepted to this ruling. All material allegations were denied.

The evidence of appellee's witnesses tended to show that they observed appellant's train stop at a water tank about one fourth of a mile from the depot at Myrtle, Arkansas; that as the train came on from the water tank, and as it neared the depot, they saw appellee's mare, mule colt and filly running by the side of the track about forty or fifty yards in front of the train; that the train did not slow up, nor did the whistle blow; only a few clangs of the bell were sounded, and they kept going. In a little while they heard the train stop, then there were three short blasts of the whistle, and the train moved a little, and all was still. Witnesses went down to the train, and found it standing about one hundred feet from the bridge over Bear Creek. They could see the train men at work on the bridge. One of the witnesses started out to where the train men were at work, and the latter requested that the witness go back. The witness did so, and the colt came off the end of the bridge. The mare was found dead, next morning under the second span of the bridge. One of the witnesses stated that: "Shortly after leaving the depot, there is a thirty-seven foot fill, about 200

yards long, then a side cut 100 yards long, then a big cut twenty-seven feet deep, about 200 yards long; then at the south end of this big cut there is another fill of twenty feet, 100 yards long; then another little side cut, that being sixty feet from the approach to the bridge."

Appellee testified as follows: "That he was the owner of the mare; that he went to the bridge over Bear Creek on the morning after she was killed, and found her lying on the edge of the creek bed under the bridge; that she was torn in the stomach, and head was caved in, and there was a cut place on her thigh that looked like she might have been struck by the pilot of the engine; that she was the only one of the three animals that had shoes on, and that he traced where she had run on the right of way by her tracks; that she had run along by the side of the rails for some 200 yards from the place that she got on the track at the crossing at Myrtle, and then got in the middle of the track, and ran all the rest of the way of the one-half mile down between the two rails; that the mare was six years old, was an extra good brood mare and a good working animal, and worth $150; that he examined her limbs, and none of the bones in her legs were broken.

The witnesses for appellant testified as follows; O. A. Adkins: "That he was the engineer in charge of the train No. 253, known as the "Red Ball", going south, on June 11, 1908; that he had taken water at the tank, and was pulling out; that he had passed the depot when he saw three animals on the track; that he sounded the stock alarm, blowing five or six short, sharp blasts of the whistle, and the stock ran down the track; that he shut off the steam and put on the air, and had his train under complete control, running at about four or five miles per hour; that he first saw the stock between the depot and the cut, which is about 300 yards from the depot; that he kept close enough to the stock to keep them in the light of the headlight, so that he could see what became of them; that he did not blow the stock alarm any more for fear that he would scare them worse and increase their peril; that there are several places before they get to the bridge where they could have gotten off the track, and that the filly did get off before they went into the last cut; that when he discovered they had run into the open

part of the bridge he stopped about twenty feet from the approach of the bridge and backed the train about eighty feet, and that he, the fireman and brakeman went out on the bridge; that they got the colt off, but that the mare was down in between the ties floundering around, and they did not touch her, and she finally fell off the side of the bridge; that he could stop the train in forty feet; that there is 300 feet of the approach to the bridge that is graveled so that stock can walk on it; that he did everything he could to prevent the mare being injured; that the train did not strike her; neither did the crew throw her off the bridge; that the train kept about 200 feet behind the stock."

W. F. Harris testified: "That he was a fireman on the train, and when he first saw the stock on the track they were in the cut, and the train was past the depot going south; that the brakeman, who was sitting on witness' seat, saw them first, and called his attention to it; that he looked and saw them, and that about that time the engineer also saw them; that there was no stock alarm, but the ringing of the bell for the crossing, which was still going on for the crossing; that one of them got off the track before the train got to the big cut, and that there was a place where the others could have gotten off, and they went through the cut before they got to the bridge; that they got the colt off in safety, but the mare was down in between the ties floundering around on the bridge, and it was too dangerous to go to her, and for that reason none of them touched her, and finally she fell off; the train did not strike her, neither was she thrown off the bridge by the crew.

Frank Marshall testified: "That he was brakeman on the train, and was sitting on the fireman's seat; that he first saw the stock between the depot and the cut, and called the attention of the fireman and engineer to it; that the engineer had the train under control, and slowed the train down, and entirely stopped when they got to the bridge; that the engineer did not sound the stock alarm; that the only one time he sounded the whistle was back at the station for a private crossing; that they were running four or five miles per hour; that he is familiar with the track at this place, and in fact helped to make it; that there were several places where the stock could get off, and that the filly did get off before they got to the last cut; that after going

through this cut there was a place and the last place where they could get off; that it is about five car lengths or 180 feet from the end of this cut to the beginning of the bridge, that is, the approach of the bridge, and that this is ballasted up so that it could be walked on. But there is a fill some eight or ten feet high before you reach the approach to the bridge, and that it is after you leave the cut and before you reach this fill, that the horses could have gotten off; that the train was running about 100 feet behind the stock; that the train did not strike the stock, neither did the train crew throw the mare off the bridge."

At the request of appellee the court instructed the jury as follows:

"1. If you find from a preponderance of the testimony in this case that the mare belonged to the plaintiff and was negligently struck by defendant's train and killed, or if you find that the mare was negligently run upon the bridge of defendant by its train, and thereby received injuries from which she died, you will find for the plaintiff, and assess his damages in any sum that you may find from the evidence in this case, not to exceed $175.

"2. I charge you that if plaintiff's mare was run into the bridge by a train of defendant's and injured, and died from the injuries received, the law presumes negligence on the part of the defendant, and you will find for the plaintiff, unless you further find from a preponderance of the testimony that defendant and its employees were free from negligence.

"3. If you find for plaintiff, the measure of damages will be the value of the mare at the time and place of its death, with six per cent. per annum from that time."

Exceptions to the ruling of the court in giving the above were duly saved.

The court refused to grant the following prayer of appellant's:

"1. You are instructed that, before you would be authorized to find for plaintiff, you must find from a preponderance of the evidence that the plaintiff's mare, described in his complaint, was killed either by being struck with the defendant's engine, or that she was killed by being rolled or thrown off a bridge or trestle,

a part of the defendant's railroad, by the employees of the defendant."

"2. You are instructed to find for the defendant."

Appellant duly excepted. The verdict was for $135. Judgment was entered for that sum, and this appeal was taken.

Kinsworthy & Rhoton, Horton & South, and *Jas. H. Stevenson,* for appellant.

The evidence does not support the verdict. 66 Ark. 248; 36 Ark. 611. It is not the duty of trainmen to stop and drive animals away. 37 Ark. 593; 69 Ark. 619. The *prima facie* presumption of negligence was overcome by the testimony, and the verdict should have been set aside, 67 Ark. 514; 78 Ark. 234; 80 Ark. 396.

J. M. Shinn and *Pace & Pace,* for appellee.

It is the duty of the engineer to endeavor to drive stock off the track by sounding the alarm, and to stop the train if there be reason to suppose there is danger. 37 Ark. 592; 69 Ark. 619. The trainmen's testimony did not overcome the statutory presumption. 68 Ark. 32; 75 Ark. 61. Pleadings may be amended by inserting allegations material to the case. 58 Ark. 13; *Id.* 612; 68 Ark. 314; 67 Ark. 426; *Id.* 142; 75 Ark. 181.

WOOD, J. (after stating the facts). The court did not abuse its discretion in permitting the amendment. The original complaint alleged that appellant "negligently struck and killed a mare, and *negligently chased said mare for a long distance* and on to an open span to a bridge," etc. The amendment was substantially a repetition of the above allegation. It did not change the cause of action.

There was evidence to warrant the conclusion that the mare was "negligently run into the bridge." It appears that the animal ran two hundred yards by the side of the rails, from the place where she first got on the track, and then for a half mile between the rails before she was killed. The testimony of witnesses for appellee tended to show that the fireman and engineer could have seen the animal running beside the track before they did see her if they had been keeping the "lookout" required by the statute. For the mare was running forty or fifty yards ahead of the train before it reached and passed the depot. "As it

neared the depot," the witness saw the animal running beside the track forty or fifty yards in front of the train, yet the testimony of the engineer and fireman shows that they did not see the animal until they had passed the depot. It was a question for the jury under the evidence to say whether or not appellant, through its engineer and fireman, was negligent in failing to keep the proper lookout. It was also a question for the jury as to whether or not appellant was negligent in failing to sound the stock alarm, and in failing to lessen the speed of its train, or even stopping same before running the animal on to the open bridge. While the engineer testified that he had shut off the steam and put on the air and had his train under complete control, there is enough contradiction between his testimony and the testimony of the other witnesses for appellant to make it a question for the jury to say whether the engineer had done "everything he could," as he says, "to prevent the mare from being injured." The engineer says he "sounded the stock alarm, blowing five or six short blasts of the whistle." But the fireman and brakeman both testify there was no stock alarm, but only the ringing of the bell. It was a plain case for submission to a jury. *Little Rock & Ft. S. Ry. Co.* v. *Trotter,* 37 Ark. 593; *St. Louis S. W. Ry. Co.* v. *Costello,* 68 Ark. 32; *Arkansas & La. Ry. Co.* v. *Sanders,* 69 Ark. 619; *St. Louis & S. F. Rd. Co.* v. *Satterfield,* 75 Ark. 61.

Affirmed.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* CARTER.

Opinion delivered November 29, 1909.

1. TRIAL—EFFECT OF ASKING PEREMPTORY VERDICT.—Where defendant asked for a peremptory verdict, which request was denied, and subsequently requested other instructions, he will be held not to have waived the right to have any disputed questions of fact submitted to the jury. (Page 384.)
2. INSURANCE—AUTHORITY OF SOLICITOR.—Where the insured failed to pay the premium of an accident policy before the injury occurred, and a forfeiture resulted by the terms of the policy, a mere soliciting

agent had no authority to continue the policy in force by issuing to the insured a renewal receipt. (Page 385.)

3. SAME—APPARENT AUTHORITY OF AGENT.—Where an insurance company furnished to an agent stationery which designated him as its general agent, it will be liable to those who dealt with him on the faith of his being such general agent. (Page 385.)

4. SAME—FORFEITURE—WAIVER.—Where a general agent of an insurance company knew that a soliciting agent had issued a renewal receipt extending an accident insurance policy without requiring the premium to be paid as required by the policy, and made no objection thereto, and after the insured was injured encouraged him to make his proofs of loss, he will be held to have waived a forfeiture on account of the non-payment of such premium. (Page 386.)

5. SAME—STATUTE ALLOWING PENALTY AND ATTORNEY'S FEE.—The statute allowing a penalty and attorney's fee to be recovered against insurance companies who fail to pay their policies within the time specified in their policies (Acts 1905, p. 307) is valid, and applies to mutual accident insurance companies. (Page 387.)

6. SAME—WHEN PENALTY AND ATTORNEY'S FEE DISALLOWED.—Under Acts 1905, p. 307, providing that insurance companies shall be liable for a penalty and attorney's fee where they fail to pay the amount of a loss within the time specified in the policy "after demand made therefor," the insured is not entitled to recover a penalty and attorney's fee where he demanded in his complaint more than he recovered. (Page 387.)

Appeal from Miller Circuit Court; *Jacob M. Carter,* Judge; reversed in part.

STATEMENT BY THE COURT.

The appellee sued appellant on a policy of insurance issued by appellant to appellee, insuring the latter against bodily injuries effected directly through external, violent and accidental means. The policy provided for the payment of one-third of $5,000 if the assured should become permanently and totally blind in either eye. The complaint alleged that on the 5th day of September, 1907, while he was engaged in his occupation as brick contractor, and, while attempting to drive a nail, he struck said nail in such manner that it rebounded, hitting him in the left eye, inflicting an injury that made it necessary for said eye to be removed; that said policy was in full force and effect on said date; that on or about the 25th day of September, 1907, he furnished affirmative proof of said injury to the defendant com-

pany through its general agent in the State of Arkansas to the defendant company at Los Angeles, Cal., as required by the policy. The complaint alleged that the plaintiff had often requested said company to pay for said injury, but said defendant had refused to do so. Appellee prayed for judgment in the sum of $1,666.66.

The answer denied all the material allegations of the complaint, and set up that the manual labor in which appellee was engaged at the time of his injury was more hazardous than that of "brick contractor, superintending only," which was the occupation appellee warranted that he was pursuing when the policy was issued; that for the more "hazardous occupation" appellee was only entitled under the policy to the sum of $1,444.44 for an accident rendering him totally and permanently blind in either eye; that appellee had failed to file proof of loss within the time specified in the policy. And that at the time of his injury the premium for insurance was due and unpaid, and that the policy therefore was not in force at the time of appellee's injury.

Appellee was permitted during the progress of the trial, over appellant's objection, to amend his complaint and to ask for judgment for an attorney's fee and penalty.

Embodied in the policy was a schedule of warranties signed by the assured, in which, among other things, he warranted his occupation as that of "brick contractor, superintending only."

The policy contains the following provisions, to-wit:

"Provided: 1. This policy shall not take effect unless the premium is paid previous to any injury under which the claim is made. The term of the policy is as stated in the Schedule of Warranties herein, and may be renewed, subject to the same conditions, from time to time, by the payment of the same pre- than thirteen weeks."

"3. If the insured is injured in an occupation or exposure classified by this company in its latest manual as more hazardous than that stated in the Schedule of Warranties, the company's liability shall be limited to such proportion of the principal sum or other indemnity as the premium actually paid will purchase at the rate fixed by the company for such more hazardous occupation or exposure.

"5. No agent has power to waive any condition of this policy.

"6. No claim hereunder shall be valid unless written notice of any injury, fatal or non-fatal, or of any disease for which claim can be made, is given to the company at Los Angeles, California, or to a duly authorized general agent or manager of the company, within twenty days from date of injury or commencement of such disease; nor unless thereafter affirmative proof is given to the company at Los Angeles, California, within twenty days from date of actual total loss as herein defined, or total blindness or paralysis as defined in Article XI (final proof of such blindness and paralysis to be given twelve months thereafter), or within twenty days from the termination of each thirteen weeks' period of continuous disability, and from the termination of such disability, if the full period is more or less than thirteen weeks."

The appellee introduced in evidence the policy sued on, showing that he was insured with appellant from April 10, 1907, to July 10, 1907. He signed a schedule of warranties showing that his occupation was that of "brick contractor, superintending only," which warranty with the premium was the consideration for the policy.

The consideration paid was $19.50. The schedule of warranties was made a part of the policy. The policy was countersigned "by a duly authorized agent," C. D. Head. The policy expired July 10, 1907.

In the latter part of July, 1907, Mr. Hoselton, who was a soliciting agent, gave appellee a receipt for the premium of renewal from July 10, to October 10, 1907. The amount called for in the receipt was not actually paid until September 5, 1907, the day the accident occurred, and after the injury was received. The appellee at the time he received the injury was setting a tile mantel and driving a spike between the joints, which rebounded, striking him in the eye and causing its loss. After the injury to his eye, and on the same day, Gus Less, the man for whom the appellee was working and who owed appellee, paid the premium for him. The premium was paid to Hoselton. After Hoselton had turned the renewal receipt over to Carter, he told Head about it, told him that he had turned the receipt over to Carter on the understanding that Carter was to pay for it. Hoselton had confidence in Carter and handed him the receipt. If Carter

had not paid for it, Hoselton would have been held responsible for it. Hoselton did not know, at the time he received the money from Less for Carter's premium, that the accident had happened.

It was about three days after the money was received by him when he learned that the accident had happened to Carter. It was shown that appellee had a conversation with Head concerning the receipt that Hoselton had given appellee, and that in such conversation Head said it was all right with him, that if it had not been paid he would have looked to Hoselton for it, and he would have had it to pay.

This conversation was after the accident. The testimony of C. D. Head on the question of his agency and what he did as to proof of loss is as follows: "I am engaged in life insurance work as a general agent, and handle some little accident insurance—not much. I began to write accident business about the first of 1907. My stationery is furnished me by the company. At that time 'Claude D. Head, General Agent,' appeared on all stationery. I got my contract from the company several years ago, and in the written contract there is no mention made of the accident business of 1907—only life insurance. I wanted to write some accident business, and I wrote the company to furnish me with the rate book and other supplies, which was done, and this was my authority for writing accident business. They furnished me a form of policy and limited me to towns of five thousand. The section of Arkansas in which I could do business was not mentioned. I have done business wherever I have gone. In 1907 I signed the accident policy as agent. I am not the general agent now. The first of the year we separated the life business, and Mr. Leigh of Little Rock took over the accident business. I received a notice of Sherman Carter's injury through the mail. It was received by me Sunday, and I mailed it the next day. I was out of town during the week, and it might possibly have come into the office a day or two before I got it. The letter handed me was written by me to the Pacific Mutual Life Insurance Company. I suggested to Mr. Carter making out his proof of loss for him. The proof is sworn to on the 7th of October, 1907. The words, '10th day of July, 1907,' were not inserted by me, and that is not my handwriting. I mailed the notice of accident on the

20th day of September, 1907, as shown by my letter, and the proof I mailed after it had been signed and sworn to. My interest in the accident business was merely that I had written the company and told it that I wanted to write some business, and they sent me rate book and supplies. I had no more authority than that. I was not the general agent for accident business in any way. As stated heretofore, I received the notice of injury by mail and forwarded it to the company. As to the proof of loss, I think Mr. Carter called at my office, and we talked it over and made the proof out for him. When I prepared the proof, I told him it would have to be sworn to before some officer. I think he brought the proof back that day, or possibly the next day, and I mailed it to the company. There was no other proof sent to the company that I know of. After the evidence was offered, the bill of exceptions recites the following: "The defendant asked the court to give the following instruction, to-wit: 'Your verdict will be for the defendant.' Thereupon the plaintiff moved the court to instruct the jury to find for the plaintiff for $1,444.44 with interest, penalties and attorney's fees. Thereupon the foregoing asked for by each party was discussed by counsel before the court, and upon consideration thereof the court refused to direct the jury to find for the defendant, to which refusal the defendant at the time excepted, and the court in lieu thereof gave the instruction asked for on the part of the plaintiff, to which ruling of the court the defendant at the time excepted, and asked the court to instruct the jury as follows, which request was made and refused before the court directed a verdict for the plaintiff." Then follow several prayers for instruction by the appellant, and after the recital showing that the court gave instruction No. 3 for the defendant, and refused the others separately and severally (to which ruling the defendant duly excepted), follows this recital: "The court then instructed the jury as follows: 'Gentlemen of the jury, the court has directed a verdict in this case for the plaintiff,' and thereupon the jury returned a verdict for the plaintiff in the sum of $1,444.44, with interest at 6 per cent. per annum from March 15, 1908."

The court rendered judgment for the amount of the verdict, and for a penalty of 12 per cent. and attorney's fees in the sum of $150, which the parties agree is a reasonable fee if one is to be allowed. Appellant duly prosecutes this appeal.

Morris M. Cohn and *Webber & Webber,* for appellant.

A waiver of condition requiring prepayment of premium must be pleaded in order to be available. 33 S. W. 549; 12 Ark. 769; 77 N. W. 529; 59 Pac. 901; 63 N. E. 755; 34 Pac. 16. The waiver must be confined to matter within the scope of authority. 75 Ark. 25; 76 Ark. 328; 54 Ark. 75; 62 Ark. 348; 66 Ark. 612; 4 L. R. A. (N. S.) 607; 187 U. S. 335; 92 N. W. 206. And the burden was on plaintiff to show a waiver. 67 Ark. 584; 72 Ark. 47. The effect of payment was to renew the policy from the time of payment only, and the court will give effect to this provision of the contract. 74 Ark. 507; 75 Ark. 25; 85 Ark. 337. The proof of loss was too late. 72 Ark. 484; 84 Ark. 224.

William H. Arnold, for appellee.

An agent authorized to adjust and settle claims against the company is authorized to waive a forfeiture for non-payment of premium, though the policy provided that this could be done only by writing signed by the president or secretary. 83 Ark. 575; 62 Ark. 570; 81 Ark. 160. There may be a parol waiver. 71 Ark. 242; 53 Ark. 494; 52 Ark. 11; 53 Ark. 215; 62 Ark. 352; 75 Ark. 98; 63 Ark. 187.

Morris M. Cohn and *Webber & Webber,* in reply.

A receipt for money is not conclusive against the party giving it. 5 Ark. 61. And a receipt "in full by cash" may be explained or contradicted. 5 Ark. 558; 56 Ark. 37; 39 Ark. 580. The question as to whether the company was estopped to deny that Head could bind it by a waiver should have been submitted to the jury. 79 Ark. 315; 71 Ark. 242; 81 Ark. 160. Where the plaintiff recovers less than his demand, he is not entitled to the 12 per cent. penalty given by the statute. 49 Ark. 492; 112 Ga. 765; 115 Ga. 113; 41 S. W. 680; 105 Fed. 31; 165 U. S. 150.

WOOD, J., (after stating the facts.) 1. The appellant did not waive the right to have any disputed questions of fact sub-

mitted to the jury. The bill of exceptions shows that appellant presented other prayers for instructions after its prayer for peremptory verdict. There is no waiver in such cases. See note to *Love* v. *Scatcherd,* 77 C. C. A. 1, where numerous authorities are collated.

2. The failure of appellee to pay the premium before the injury forfeited the policy. Hoselton, who was a mere soliciting agent, and no more, had no authority to continue the policy in force by issuing to appellee the renewal receipt. *American Insurance Co.* v. *Hampton,* 54 Ark. 75; *German-Am. Ins. Co.* v. *Humphrey,* 62 Ark. 348; *Mutual Life Ins. Co.* v. *Parrish,* 66 Ark. 612; *Fidelity Mut. Ins. Co.* v. *Bussell,* 75 Ark. 25; *Mutual Life Ins. Co.* v. *Abbey,* 76 Ark. 328; *American Ins. Co.* v. *Hornbarger,* 85 Ark. 337.

3. Upon the undisputed evidence there was really no question of fact to go to the jury, and the court did not err in instructing a verdict for the appellee. For the uncontroverted facts show that C. D. Head was the general agent of appellant. His first contract with the company several years before was to act as their general agent in writing life insurance. Then he concluded that he desired to write accident insurance, and wrote to the company for rate book and supplies in that line, and the company responded by sending the supplies of stationery. And on all the stationery Claude D. Head appeared as "General Agent." This he says constituted his authority, and this designates him as their general agent to write accident, as well as life insurance.

He was already the company's general agent to write life insurance under contract, and the appellant, by sending him the stationery for the accident business designating him as "general agent" for that line also, virtually extended his contract for life insurance to cover also accident insurance. The only limitation was that he should only write accident insurance in towns of 5,000, but that was not a limitation of his authority as general agent. He was the general agent of the company in the circumscribed territory. It will be observed that witness, Head, when asked who was the general agent in South Arkansas during the year 1907, replied that he was. Again he said: "I am not the *general agent now. The first of the year* we

separated the life business, and Mr. Leigh of Little Rock took over the accident business." Again, the record shows that, in answer to the question, "State whether or not you were acting as *general agent* of the accident department during this period of 1907," he replied: "I signed the policy as agent." Then followed the answers to the interrogations indicated *supra* that he was the general agent during the year 1907. True, on cross interrogatory he said that he had no authority as general agent for the accident business, "further than this." But he nowhere declares without qualification that he was not the general agent, and the effect of his testimony, taken as a whole, was that he was the general agent for accident as well as life. This is the only reasonable conclusion to be drawn from his evidence. But, if we are mistaken in saying that Head, under the undisputed evidence, was the general agent in fact, certainly there can be no question that the company clothed him with the apparent authority of a general agent. It held him out to the world as such. This being true, the company is liable to those who dealt with him on the faith of his being the general agent. 1 Cooley, Briefs on Ins. 345, and cases cited; *People's Fire Ins. Ass.* v. *Goyne,* 79 Ark. 315.

For the purposes of this case it is immaterial whether Head was the general agent in fact, or only had the apparent authority of a general agent. For in either case the evidence shows that the forfeiture of the policy for the nonpayment of the premium was waived by the conduct of appellant's general agent. He knew that the renewal receipt for the premium with his name as general agent thereon had been delivered to appellee, and made no objections thereto. He thus extended the credit to appellee beyond the time for payment, instead of requiring the payment to be made as the policy specified, and the company is bound by his act in so doing. Again, after the injury was received, he was advised that the payment of the premium was not made before the injury occurred, but thereafter, and he acquiesced, and encouraged appellee to make his proofs of loss.

As we construe the provision in regard to proofs of loss, appellee complied therewith substantially; but, even if he did not, the conduct of Head, the general agent, concerning this would be a waiver of forfeiture on that account. See, on waiver of

conditions by agent having authority so to do, *Commercial Fire Ins. Co.* v. *Belk,* 88 Ark. 506. Other cases on this subject are cited in appellee's brief.

The general agent of an insurance company may waive the performance of a condition inserted in a policy for the benefit of the company. *Van Allen* v. *Farmers' Joint Stock Ins. Co.,* 4 Hun 413 and cases cited; 22 Cyc. 1429.

4. This court has declared valid the statute allowing a penalty and attorney's fees as against fire insurance companies in *Arkansas Insurance Co.* v. *McManus,* 86 Ark. 115. The statute includes accident insurance companies, and there is no exception in favor of mutual accident insurance companies. See Acts 1905, p. 307.

But the act makes the company liable for failure to pay the loss "after demand made therefor." The statute thus contemplates that there shall be a demand. A recovery for penalty and attorney's fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the Legislature to make the insurance companies pay a penalty and attorney's fee for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right to resist the payment of a demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorney's fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it. The appellee, by asking judgment for $1,444.44, concedes that he was demanding more in his complaint than he was entitled to receive. The judgment for the penalty and attorney's fee is therefore set aside, and the judgment of the circuit court will be affirmed for $1,444.44, with interest from date of judgment at 6 per cent.

BATTLE, J. (dissenting). One of the important questions in this case was, was Claude D. Head a general agent of the Pacific Mutual Life Insurance Company? He testified that he was not. That was sufficient to make it a question for the jury to determine. But it is said that his testimony was inconsistent with this statement. Be that as it may, the question still remained for the jury to decide, and the inconsistent statements were for the jury to

consider in determining the weight of his testimony. It is urged that he was designated as general agent on the company's stationery. To the reverse of this it was shown that he received and forwarded applications to the company for policies of insurance against accidents and for renewals of such policies, notices and proof of the accidents to the home office for action, and if policies and renewals were granted they were sent to Head to be countersigned and delivered to the applicant, upon the payment of the premiums. These facts were known to appellee, and were sufficient to put him on inquiry as to the extent of Head's agency. They tend to show that Head was only a soliciting agent, with authority to solicit insurance against accidents, secure and forward applications, to receive policies, collect premiums, to receive applications for renewals, to receive renewals returned by the company, and collect premiums, and to receive and forward notice and proof of accident, with no power to extend insurance by renewals. This evidence and these facts, it seems to me, presented questions of facts which should have been submitted to the jury for consideration; and that the trial court erred in instructing the jury to return a verdict in favor of the plaintiff.

HART, J. I concur.

OSBORNE v. WATERS.

Opinion delivered November 29, 1909.

1. JUDGMENT—JURISDICTION OF COURT AFTER TERM.—Where an attorney recovers a judgment for his client in a case of the nature prescribed by Kirby's Digest, § 4458, and indorses upon the judgment record notice in proper form of his claim of a fee, the court has no jurisdiction upon motion at a subsequent term to order that such indorsement be expunged from the judgment record. (Page 390.)
2. ATTORNEY AND CLIENT—LIEN.—Where an attorney has recovered a judgment for his client, and taken steps to perfect his lien for his services, he acquires an interest in the judgment of which he cannot be deprived after the judgment has become final. (Page 391.)

Certiorari to Yell Chancery Court, Dardanelle District; *John M. Parker,* Special Chancellor; decree quashed.

STATEMENT BY THE COURT.

This is a proceeding by certiorari to quash certain proceedings had before a special chancellor, J. M. Parker, at the October term, 1908, of the Yell Chancery Court. So much of the record as is necessary for us to consider shows that on November 7, 1907, Hon. J. G. Wallace, the chancellor of the chancery court of Yell County for the Dardanelle District, in a case pending in said court wherein W. T. Dunbar was the plaintiff and Joseph Evins *et al.* were defendants, and W. D. Bell and W. D. Waters were cross complainants, rendered a decree in which it was "adjudged, ordered and decreed that William D. Waters do have and recover of and from the said plaintiff, W. T. Dunbar, and the said cross complainant, W. D. Bell, all the real property described in the cross bill of the said Waters and involved in this suit." It appears that T. S. Osborne, the petitioner here, was the attorney of record, and filed the cross complaint upon which the above mentioned decree was rendered in favor of Waters. On the same day T. S. Osborne filed with the clerk of the chancery court of Yell County, Dardanelle District, his claim of a lien for services rendered by him upon the judgment and property therein described, recovered for said Waters in the suit in the sum of ten thousand dollars, and the clerk made the following indorsement on the margin of the decree: "Now, on this day comes T. S. Osborne, solicitor for W. D. Waters, and files this his lien upon the judgment and decree rendered in this cause for the sum of ten thousand dollars ($10,000).

Nov. 7, 1909.

"T. S. Osborne,
"Atty. for W. W. Waters.

Attest: "Fred H. Phillips,
"Clerk."

At a subsequent term W. D. Waters by his attorney, Jo Johnson, filed a motion to have the case of W. T. Dunbar, plaintiff, *v.* Joseph Evins *et al.,* defendants, W. D. Bell and W. D. Waters, respectively, cross complainants, redocketed, and to "expunge from the record the entry of a lien in favor of T. S. Osborne." The regular chancellor announced his disqualification, and Hon. J. M. Parker was elected to hear the motion, which was resisted by T. S. Osborne on the ground, among others, that

the court was without jurisdiction, and setting up that he had already instituted suit, which was then pending, to recover of W. D. Waters compensation for his services as attorney in the suit mentioned and to foreclose his lien filed on the decree rendered therein, to which Waters had entered his appearance.

The special chancellor assumed jurisdiction, heard the motion to redocket, and sustained same, and ordered and adjudged "that the lien of T. S. Osborne be stricken from the files, and that the entry thereof on the margin of the record of the decree be expunged."

Read & McDonough and *Hill, Brizzolara & Fitzhugh,* for petitioners.

Errors in the assumption of jurisdiction are properly corrected on certiorari. 28 Ark. 37; 44 Ark. 509; 39 Ark. 347; 19 Ark. 99; 29 Ark. 178; 52 Ark. 213.

A judge may not arbitrarily decline to sit in a case in which he is not legally disqualified. 97 Cal. 101; 121 *Id.* 102; 42 La. Ann. 718; 7 So. 669; 50 So. 12; 31 Fla. 594; 34 Am. St. 41; 31 Ark. 35; 17 Ark. 580; 76 Ark. 146; 48 Ark. 227. And prejudice is no ground for disqualification. 61 Ark. 88; 31 Ark. 35. But not even the regular chancellor would have had power to reopen the old case. 33 Ark. 454; 53 Ark. 21; *Id.* 110. The recovery was actual, and the lien valid. 38 Ark. 385. A special judge may not preside by agreement. 39 Ark 254; 42 Ark. 126; 50 Ark. 340; 72 Ark. 320. A special judge cannot be lawfully appointed except in the manner provided by the Constitution. 72 Ark. 320. A person presiding in a court which is not a court is not even a *de facto* judge. 71 Ark. 310. A decree rendered by a special chancellor subsequent to the term at which he was elected is a nullity. 70 Ark. 407. If the entry of the order of dismissal is void, the case stands continued by operation of law. 11 Ark 255. The cause stands below as it did when the first person was agreed upon as a special judge. 39 Ark. 254; 6 Ark. 227; 20 Ark. 77.

WOOD, J. (after stating the facts). The record on its face shows that the proceedings before the special chancellor were *coram non judice* and void. It is unnecessary to consider whether the regular chancellor was disqualified, for even the regular chancellor would have no jurisdiction to redocket a cause that had been

finally adjudicated at a former term, and to make an order affecting an interest in the judgment. The decree at the former term became final when that term ended. The motion to redocket must be considered in the nature of new and special summary proceedings, and the court had no jurisdiction to cancel and strike from the record of the decree the evidence of the claim of lien of the attorney preserved in the method provided by the statute. As to whether or not the lien existed was a matter to be determined in the suit to foreclose. The statute in express terms gives the attorney "a lien and interest in the decree, the amount to which he is entitled by contract, or, if no amount is so fixed, a reasonable compensation for his services." A suit had been instituted by the petitioner, as the record shows, to foreclose his claim for lien thus preserved. The chancery court had no jurisdiction, on motion in the summary manner here indicated, to expunge the evidence of the lien of the petitioner obtained and preserved in the manner provided by statute. Sec. 4458, Kirby's Digest. Where the relation of attorney and client exists and the attorney succeeds in recovering a judgment in cases of the nature prescribed by the statute, he has an interest in that judgment, where his lien is duly preserved, of which he cannot be deprived on motion after the judgment has become final. The case of *Owens* v. *Gunther,* 75 Ark. 37, has no application. The fixing of the fees for the attorneys in that case in no manner affected the judgment previously obtained. The fees allowed were for the attorneys who had been employed by the guardian *ad litem,* who was appointed by the court to represent the minors. The court had jurisdiction to allow the fees for the attorneys at any time. The application for the fees really proceeded as an independent action, and was determined as such. The motion to reconsider and to hold invalid the order of nonsuit is not involved in this record.

The judgment of the chancery court striking the entry of the claim of petitioner for a lien from the margin of the judgment in the case of W. T. Dunbar v. Joseph Evins *et al.,* W. D. Bell and W. D. Waters, cross complainants, is quashed, set aside and held for naught.

ARKANSAS LUMBER & CONTRACTORS' SUPPLY COMPANY *v.* BENSON.

Opinion delivered November 29, 1909.

1. INSTRUCTIONS—HARMLESS ERROR.—The giving of an erroneous instruction was not ground for reversal where it could not have prejudiced the appellant. (Page 398.)
2. STATUTE OF FRAUDS.—CONTRACT FOR SERVICES.—A contract for personal services to be rendered within a year is not within the statute of frauds. (Page 398.)
3. SAME—WAIVER.—Where, in a suit upon a contract within the statute of frauds, the statute was not pleaded in the trial court, and the contract, without objection, was proved by parol evidence, all objections because it was not put in writing were waived. (Page 398.)
4. INSTRUCTIONS—APPLICABILITY TO EVIDENCE.—Instructions which were inapplicable to the evidence were properly refused. (Page 399.)
5. SAME—ORAL CHARGE.—It was not prejudicial error to instruct the jury orally that "written instructions have been submitted to you, covering the theory of the plaintiff and also the theory of the defendant. If, in considering the case, you adopt the theory of the plaintiff, the plaintiff's instructions should govern you. And, if you adopt the theory of the defendant, then the defendant's instructions should govern you." (Page 399.)

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

Greaves & Martin, for appellant.

The words "goods, wares and merchandise" in the statute of frauds include whatever is not embraced in the words "lands, tenements and hereditaments." 13 Gratt. 789; 24 N. Y. 353; 36 Vt. 64; 55 L. R. A. 155; 54 Atl. 225; 34 N. H. 477; 26 Atl. 134; 2 Wend. 327. There must have been a sale before the broker is entitled to his commission. 87 Ark 506; 105 Cal. 514; 45 Am. St. 87; 13 La. Ann. 51; 50 N. Y. S. 128; 27 App. Div. 117; 116 Ill. App. 397; 214 Ill. 259; 64 Ill. App. 208; 14 C. C. A. 109; 66 Fed. 425. An acceptance in order to bind the party offering must be without condition and in due time. 137 Fed. 586; 69 C. C. A. 674; 22 Fed. 596; 41 So. 675; 68 L. R. A. 226; 95 Mo. App. 426; 69 S. W. 34; 85 Mo. App. 542; 97 Me. 408; 54 Atl. 918; 35 Kans. 447. If the offer stipulates a time for acceptance, the acceptance must be within such time. 39 U. S. 77;

64 Fed. 560; 56 Ill. 204; 35 Kan. 447; 3 Dak. 141; 13 N. W. 576; 130 Mass. 173; 141 Mass. 278; 76 N. Y. 622; 30 Neb. 536. Reasonable time is such time as protects each party from losses that he ought not to suffer. 61 S. W. 889; 161 Mo. 606. Only so much time as is necessary under the circumstances. 54 Mich. 496; 71 Pac. 1032; 7 N. H. 549. The instructions should be considered together and construed as a whole. 37 Ark. 238; 48 Ark. 396; 59 Ark. 98; 55 Ark. 397; 71 Ark. 38; 64 Ark. 247; 66 Ark. 588; 86 Ark. 104; 83 Ark. 70. Conflicting instructions where the evidence is also conflicting should not be given. 74 Ark. 437; 72 Ark. 41; 65 Ark. 641; 88 Ark. 550. An instruction which assumed as proved a fact which is to be found by the jury is erroneous. 18 Ark. 521; 20 Ark. 471; 23 Ark. 411; 36 Ark. 117; 24 Ark. 540; 71 Ark. 438; 76 Ark. 468; 70 Ark. 337; 74 Ark. 563.

Hogue & Cotham, Vaughan & Vaughan and *Palmer Danaher,* for appellee.

As against the agent's right to commission, the principal cannot interpose the objection that the contract is void under the statute of frauds. 149 U. S. 481. There is no room for a plea that the contract is void under the statute of frauds, as this is an action for broker's commission. 76 Ark. 399; 130 Ill. App. 328; 133 Ill. App. 491. Where the minds of the vendor and vendee have been brought to an agreement, the broker is entitled to commission. 83 How. Pr. 440; 87 Cal. 313; 25 Pac. 430; 50 Ill. App. 120; 124 Ia. 61; 99 N. W. 103. An uncommunicated revocation is no revocation at all. 47 Ark. 527.

BATTLE, J. On the 19th day of October, 1907, A. W. Benson filed a complaint against the Arkansas Lumber & Contractors' Supply Company in the Garland Circuit Court, alleging therein that the Lumber & Supply Company, a corporation, employed him as a special salesman, and agreed to pay him a commission on all business secured for it by him at the rate of five per cent. on rough lumber and ten per cent. on millwork, and furnished him with $25 to defray expenses; that on July 27, 1907, he procured from Staunton & Collamore, contractors, a bill of specifications for wood work to be done in the Hotze or Gazette Building in Little Rock, and submitted same to the defendant, who made an estimate of the cost of the bill, and forwarded the

same to plaintiff, and that the bid of defendant was $4,600, and the same was accepted by Staunton & Collamore. Plaintiff claimed a commission of $460, and asked judgment for that amount.

Defendant denied the allegations in the complaint.

The defendant was a corporation organized under the laws of Arkansas with its chief place of business at Hot Springs, in this State, and was engaged in the business of manufacturing lumber and builders' supplies. In June, 1907, it employed plaintiff to do a soliciting business for it in Little Rock at prices it would furnish him from time to time. Benson testified that he was to receive commissions at the rate of ten per cent. on mill work, and five per cent. on rough lumber, on all the orders he received. M. M. Harrell, the manager of the defendant, testified that defendant employed him "and agreed to allow him five per cent. commission on rough lumber and ten per cent. on mill work; this commission to be paid after the material was furnished and he had collected in full for same. He was to keep his commission out and remit the balance to the company." And further testfied that "the defendant reserved the right to refuse or reject any contract on which it had submitted an estimate if it did not receive an acceptance of the bid within a reasonable length of time." The Gazette or Hotze Building, in Little Rock, Arkansas, was then in contemplation. Plaintiff secured a set of the plans of the building and took them to Hot Springs to the defendant, and it agreed to send to plaintiff at Little Rock an itemized estimate of what they would do the work and furnish supplies for. This was done on the 16th day of July, 1907, and he submitted the bid to Staunton & Collamore, the contractors who had undertaken to construct the building, on the 17th or 18th day of the same month; and they accepted the bid on the second day of September, 1907. On the 7th day of September, 1907, defendant refused to perform what it had proposed to do by its bid. Plaintiff testified that Harrell, the manager of the defendant, met him on that day and said, "Benson, we can't get out this mill work. We are going to shut down." Harrell testified: "The defendant did not accept this work, for the reason that we never heard from A. W. Benson, or any one else, in a reasonable length of time after we had made the estimate, and naturally supposed we had failed to get the job, and before

we did hear from them we had used up a quantity of birch lumber that we had figured on using for the interior of the building for this job, and that our company did not feel like accepting the order at the time he (Benson) said he had secured it, as we (defendant) were not in a position to get the work out as cheaply as we could have done had we received the order within a reasonable length of time after giving an estimate on same." H. R. Vaughan, the president of the defendant company, testified that that was not the reason, but because no arrangement was made as to how the proposition made by the bid should be performed.

Benson testified that, after the bid was submitted to Staunton & Collamore, and before its acceptance, he communicated with the defendant, through its manager, Harrell, almost daily, by letter and telephone; that the company never made any complaint of the delay at all, but encouraged him all the time, and told him to keep on trying, and that when finally he advised it of his success, it congratulated him, and told him it knew he would eventually get that job. Harrell testified that he does not remember these communications.

The contract sued on was not in writing. Twenty-five dollars were advanced to plaintiff by defendant on expense account.

The court gave the following instructions, at the instance of the plaintiff, over the objection of defendant:

"VI. The court instructs the jury that if they find that plaintiff was authorized to find purchasers and submit bids and propositions to prospective buyers for the sale of defendant's lumber, then he was the agent of the defendant for that purpose; and if you find that defendant authorized the plaintiff as its agent to submit a proposition to Staunton & Collamore, to sell them a certain quantity of lumber for $4,600, and that the plaintiff submitted said proposition to said Staunton & Collamore, while he was still acting as such authorized agent of defendant (if you so find), and before the said proposition had been revoked by defendant, then you should find for the plaintiff.

"VII. The jury are instructed that a contract may be either verbal or written, or it may result from the conduct of the parties, and that the one is just as legal and binding as the other. In order to entitle the plaintiff to recover in this case, it is not necessary for him to prove a contract in writing with the defend-

ant, but such contract may be proved by the words or conduct of the parties. And you are further instructed that it is not necessary for the plaintiff to prove that Staunton & Collamore accepted the defendant's bid on the Gazette or Hotze Building in writing, but that said acceptance may be proved or inferred from the words or conduct of the said Staunton & Collamore, made to or in the presence of an authorized agent of the defendant."

The defendant asked for the following instruction:

"V. If you find from the evidence that the agreement between the plaintiff and the defendant was that plaintiff might solicit orders for the lumber and mill work, to be supplied by the defendant; that the orders were to be sent to the defendant, and that the defendant was to exercise its judgment as to whether they were to be filled; that, in the event the orders were filled by the defendant, the plaintiff was to receive a commission of five per cent. on rough lumber and ten per cent. on mill work, payable after the orders were filled and the proceeds collected by the defendant; and if you further find that the defendant made a proposal for mill work with Staunton & Collamore, on or about July 16, 1907, and that said proposal was not accepted until September 2, and that it was not accepted outright then, but was subject to further consideration and agreement as to the time the materials were to be supplied, and when paid for, and other details, and that the defendant then declined to proceed with the matter further, your verdict will be for the defendant."

And the court modified and gave it as follows:

"V. If you find from the evidence that the contract between the plaintiff and the defendant was that plaintiff might solicit orders for lumber and mill work, to be supplied by the defendant; that the orders were to be sent to the defendant, and that the defendant was to exercise its judgment as to whether they would be filled; that, in the event the orders were filled by the defendant, the plaintiff was to receive a commission of five per cent. on rough lumber and ten per cent. on mill work, payable after the order was filled and the proceeds collected by the defendant; and if you further find that the defendant made a proposal for mill work to Staunton & Collamore on or about July 16, 1907, and that said proposal was not accepted within a reasonable time, and was not accepted outright then, but was

subject to further consideration and agreement as to the time and material that were to be supplied, and when paid for and other details, and that the defendant, for a reasonable cause, then declined to proceed in the matter further, your verdict will be for the defendant."

And the defendant asked and the court refused to give the following instructions:

"VI. If you find from the evidence that on or about the 16th day of July, 1907, defendant company furnished the plaintiff, at his request, estimates for a proposed bid on the mill work of the Hotze Building, in Little Rock, to be built by Staunton & Collamore, and that such were furnished to said building contractors, and that plaintiff was informed by them on or about the 2d day of September, 1907, of the acceptance of such proposed bid thus made on the 16th day of July, 1907, then the defendant company had a reasonable time thereafter to signify its acceptance or rejection of the said proposed order. Then as between the plaintiff and defendant, on his claim for commission, if you find such proposed bid was rejected in a reasonable time after September 2, 1908, plaintiff was not entitled to commission as upon a sale of the proposed mill work.

"VII. If you find from the evidence that the defendant, on or about July 16, 1907, made a proposal to furnish Staunton & Collamore certain mill work for $4,600, they can not be held to keep such proposal open for acceptance for an indefinite and unreasonable space of time. And if you find that said proposal was not accepted within a reasonable time, the defendants would not be bound by their proposal; and if they chose not to be bound, you will find for the defendant."

The court gave the following instruction at the instance of the defendant:

"II. If you find from the evidence that plaintiff had authority to solicit the order for mill work from Staunton & Collamore, but that such order was subject to the acceptance or rejection of the defendant company, and such order was rejected by the company, then such was not an agreed sale to the said Staunton & Collamore, so as to entitle plaintiff to commissions on such orders, if he solicited the same from them. It would be necessary in such case for plaintiff to show by a preponderance of the

evidence in the case that such order had been accepted by defendant company or its authorized agent."

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

"Written instructions have been submitted to you, covering the theory of the plaintiff and also the theory of the defendant. If, in considering the case, you adopt the theory of the plaintiff, the plaintiff's instructions should govern you. And, if you adopt the theory of the defendant, then the defendant's instructions should govern you."

The court instructed the jury, if they found for the plaintiff, to find in the sum of $435, which they did, and judgment was rendered in his favor for that amount. To reverse that judgment the defendant prosecutes an appeal.

Appellant objected to instruction given at the instance of appellee and numbered 6 because it is obscure, and justified the jury in returning a verdict for the appellee merely upon being satisfied that he had submitted appellant's proposition or bid to Staunton & Collamore, and that "regardless of whether it was accepted at all, or a sale was made." This defect could not have been prejudicial to the appellant, because the evidence showed beyond controversy that appellant's proposition or bid was accepted by Staunton & Collamore.

Instruction given at the instance of the plaintiff, and numbered VII, was properly given. It was not necessary that the contract sued on should have been in writing. It was a contract for services, and the performance of it was not to be after the expiration of one year from the making of it. *Moore* v. *Camden Marble & Granite Works,* 80 Ark. 274; *McCurry* v. *Hawkins,* 83 Ark. 202; *Kempner* v. *Gans,* 87 Ark. 221, 227; *Taylor* v. *Godbold,* 76 Ark. 399.

No objection was made to the contract between appellant and Staunton & Collamore at the time it was made because it was in parol, and appellant did not refuse to perform it because it was not in writing. The statute of frauds was not pleaded against it in the trial court, and it was proved by parol evidence without objection. All objections to it because it was not in writing were waived. *Sartwell* v. *Sowles,* 72 Vt. 270; *Montgomery* v. *Edwards,* 46 Vt. 151; *Battell* v. *Matot,* 58 Vt. 271;

Brown v. *Rawlings,* 72 Ind. 505; *Livermore* v. *Northrup,* 44 N. Y. 107; *Heard* v. *Knights of Honor,* 56 Ark. 267; *St. Louis, I. M. & S. Ry. Co.* v. *Hall,* 71 Ark. 302.

Instruction numbered V as asked or modified should not have been given. Both Benson and Collamore testified that Staunton & Collamore accepted appellant's bid outright, and they are the only witnesses who pretended to know anything about the terms of the acceptance. As to the reasonableness of the time between the making of the bid and its acceptance, the instruction in both forms was improper, because it ignored the evidence to the effect that appellant waived the delay and urged appellee to continue in asking for its acceptance up to the time it was accepted. It in effect instructed the jury to disregard this evidence.

Instructions numbered VI and VII are subject to the same objections as instruction V. They ignored the fact, as shown by evidence, that appellant had kept its proposal open at all times before the acceptance by its correspondence with Benson by telephone and letter, and left the jury to infer that the acceptance under such circumstances would be of no effect because of such delay.

Appellant objected to the oral instruction of the court. The objection is not tenable. A similar instruction was sustained in *Dempsey* v. *State,* 83 Ark. 81.

The court committed no reversible error in instructing the jury to return a verdict for $435 if they found in favor of the plaintiff. That was the amount due him according to the undisputed evidence, if he was entitled to recover anything. His commissions amounted to $460, and he was owing $25, advanced on expense account, which, deducted from the former amount, leaves $435.

Judgment affirmed.

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

Opinion delivered November 29, 1909.

1. RAILROADS—DUTY TO LOOK AND LISTEN AT CROSSING.—While it is the general rule that it is negligence for one approaching a railroad crossing to fail to look and listen for the approach of trains, there are exceptional cases in which it is proper to submit to the jury the question whether or not the failure to exercise such caution is negligence. (Page 402.)
2. SAME—CROSSING—OPEN GATES.—Where a footman, upon approaching a railroad track in a street, finds that gates placed there in charge of a gateman to keep persons from attempting to cross while trains or cars are passing are standing open, the question whether it was negligence for him to cross without looking or listening was for the jury to determine under all the circumstances of the case. (Page 405.)
3. SAME—OPEN GATEWAY AS INVITATION TO CROSS.—An open gateway at a railroad crossing is an invitation to a traveler to cross, though the gateman is not in sight. (Page 406.)

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

Thos. S. Buzbee and *John T. Hicks,* for appellant.

As a general rule, 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. 78 Ark. 59. And if one approaching a railroad crossing fails to look and listen and he is injured, when by the exercise of due care and caution he could have discovered and avoided the injury, no recovery can be had. 65 Ark. 238; 54 Ark. 431; 56 Ark. 439; 62 Ark. 158; Elliott on Railroads, 1166; 95 U. S. 161; 12 L. R. Q. B. Div. 70; 149 Mass. 127; 113 N. Y. 667; 42 N. J. L. 180; 61 Md. 108; 42 Am. & Eng. Ry Cas. 124. Where the view of a railway track is obstructed, a greater degree of care is required of a traveler than it would be his duty to exercise at a crossing not specially dangerous. 56 Ark. 457. One who goes upon a railroad track at a crossing upon a dark night and stops without listening for trains and stands there talking until struck by a moving train is as a matter of law guilty of contributory negligence. 61 Ark. 549. A traveler approaching a railroad crossing is bound to exercise ordinary prudence. 62 Ark. 156; 54 Ark. 431. Where the proof

shows that the injured party went upon the track without looking or listening for trains, there is nothing left for the jury to consider. 76 Ark. 10; 57 Ark. 461; 57 Fed. 921; 81 Ark. 325.

Greaves & Martin, for appellee.

Where the circumstances were so unusual that the injured party could not have reasonably expected the approach of a train at the time he went upon the track, he will not be held to have been guilty of negligence in not looking and listening. 78 Ark. 59; 116 Mass. 537. The question whether a traveler at a crossing took proper precaution for his own safety by looking and listening is for the jury. 117 S. W. 763. The issue of appellant's contributory negligence was properly submitted to the jury. 76 Ark. 228; 78 Ark. 261; 79 Ark. 141; 81 Ark. 190; 85 Ark. 331; 86 Ark. 183; 88 Ark. 530.

McCULLOCH, C. J. This is an action instituted by plaintiff, Al Hamilton, against the Chicago, Rock Island & Pacific Railway Company to recover damages for personal injuries. He was awarded damages in the sum of $950, and the defendant appealed to this court.

The injury occurred near the railway station in the city of Hot Springs. The main track runs east and west along Benton street. There is also a side track, and a spur track running off from the side track to a brewery depot nearby. These tracks cross Cottage Street, which runs north and south and intersects Benton Street at right angles. The precise distance between these three tracks is not shown in this record, but it is evident that they are very close together. Plaintiff was struck and seriously injured by a moving car as he was crossing the spur track which runs off to the brewery depot. He lived in the city of Hot Springs, and was on his way from his home to his working place in another part of the city. He came up the east side of Cottage Street, and when he reached the crossing of the main track he looked and listened for a train, but, according to his statement on the witness stand, he neither saw nor heard any moving engine or cars. This was very early in the morning, either before or just about daybreak.

There were gates at the main track, which were then open, and the plaintiff proceeded to cross the tracks. A box car was standing on the side track, and extended partly over into Cot-

tage Street, so that plaintiff had to walk around the end of it. He had nearly crossed the spur track when a moving car struck him and knocked him down. He says that he did not again look or listen at the time he started across the spur track. A freight train was then being made up, and cars were being switched about in making up the train. There is testimony on the part of several witnesses which, if believed, establishes the fact that the car which struck plaintiff was kicked on and down the spur track. This view must have been accepted by the jury, though the engineer and other trainmen testified that the car was being pushed on to that track, and was attached to the engine at the time plaintiff was injured.

The court, at the request of plaintiff and over the objection of defendant, gave the following instruction:

"6. It is not negligence in every case for the traveler to fail to look and listen for the approach of trains. Ordinarily, this is the rule, but that is not required in every case. It is for the jury to determine from the circumstances and facts in this case whether the conditions existing at the time of the accident were such that an ordinarily prudent person might not have expected a train of cars to pass along at that particular time. It is the duty of the jury to consider the incident in the light of the circumstances as they appeared to the plaintiff at the time, and then to say by your verdict whether the plaintiff was guilty of such imprudent and negligent conduct as caused the injury."

The court also refused the request of defendant to give an instruction telling the jury that "it is the duty of foot passengers crossing the defendant's spur track to look and listen for trains, or cars, or engines that may cross said street, and, if necessary, to stop until such train of cars or engine shall have crossed said street; and if you find in this case that the plaintiff failed to look and listen for said train of cars, and by reason of his failure to stop before going upon defendant's track the plaintiff received injuries as alleged in his complaint, the defendant would not be liable."

The rulings of the court in giving the above quoted instruction requested by the plaintiff, and in refusing that asked by the defendant, are assigned as errors. The question presented is

whether or not it was the duty of the court, under the testimony in this case, to give an instruction telling the jury that it was the absolute duty of the plaintiff to look and listen before he attempted to cross the spur track, and that he was, as a matter of law, guilty of contributory negligence if he failed to do so.

In *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.,* 78 Ark. 55, we announced the oft-repeated and well established rule that "it is negligence for one approaching a railroad crossing to fail to look and listen for the approach of trains, and that only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution is negligence." We undertook in that case to classify the exceptions to that rule, and, among others, stated the following as one of the exceptions: "Where the direct act of some agent of the company had put the person off his guard, and induced him to cross the track without precaution."

Now, the evidence in the present case shows that when the plaintiff reached the main track, which was only a short distance from and ran nearly parallel with the spur track on which he was injured, he found open or raised the gates which were placed there in charge of a gateman or watchman to keep travelers from attempting to cross when trains or cars were passing. This was an invitation to a traveler, or an assurance to him that the way was clear and that he might proceed in safety. Whether or not it constituted negligence for him to cross without taking the further precaution of looking or listening was a question for the jury to determine under all the circumstances of the case. For, when the plaintiff attempted to cross, upon the invitation of the company's agent and under the implied assurance that it was safe for him to do so, it cannot be said as a matter of law that he was guilty of negligence in failing to look or listen for danger. This exception to the general rule has been repeatedly recognized by text writers and by the adjudged cases. 3 Elliott on Railroads, § 1157; *Directors of N. E. Ry. Co.* v. *Wanless,* L. R. 7 E. & I. App. Cas. 12; *Evans* v. *Lake Shore etc., Ry. Co.,* 88 Mich. 442; *Glushing* v. *Sharp,* 96 N. Y. 676; *Ry. Co.* v. *Schneider,* 45 O. St. 678; *Wilson* v. *New York, etc., Ry. Co.,* 18 R. I. 491; *Merrigan* v. *Boston & A. Railroad Co.,* 154 Mass. 189.

The earliest case on this subject to which our attention has been directed is that of *Directors of N. E. Ry. Co.* v. *Wanless, supra.* Lord Cairns, delivering an opinion in that case, said: "It appears to me that the circumstance that the gates at this level crossing were open at this particular time amounted to a statement and a notice to the public that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open. * * * It appears to me that there was evidence to go to the jury, to which weight might have been given, and from which the jurors might have been led to conclude that he [the injured person] was there in consequence of the circumstance I have referred to, viz., the gates being open; and, that being the only point for the court to consider, I certainly am of opinion that the court could not do otherwise than hold that the question of negligence might upon this evidence be rightfully submitted to the consideration of the jury."

The Supreme Court of Ohio, in the case cited above, said: "Persons approaching such crossings have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duty, and govern themselves accordingly, and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from a disregard by the gatemen of their duties; and hence, when the gates are open and the gatemen present, they are entitled to assume that the tracks are clear and it is safe to cross."

In *Glushing* v. *Sharp, supra,* the court said: "We think the case as to plaintiff's negligence was properly submitted to the jury. He looked both ways, and whether under all the circumstances he should have looked again or continued to look was for the jury to determine. The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience. The conduct of the gateman cannot be ignored in passing upon plaintiff's conduct, and it was properly to be considered by the jury with all the other circumstances of the case."

We do not mean to hold that the open gates, though they operated as an invitation to the plaintiff to proceed across the track, thereby absolved him from the exercise of due care for his own safety. The jury might have found that, notwithstanding this invitation, the exercise of ordinary care demanded that he should look and listen for approaching trains. But, under these circumstances, it was for the jury to say whether it was negligence to proceed without observing these precautions. A traveler, while crossing a railroad track upon an invitation of the company's servants, has a right to rely, by reason of the invitation, upon the presumption that the way is clear and free from danger. But he cannot, without bringing himself under a charge of negligence, put it beyond his power to discover danger. He cannot close his eyes and proceed blindly, nor stop up his ears so that he cannot hear. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 76 Ark. 377; *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 69 Ark. 489. But in acting upon an invitation to cross the tracks it cannot be said, as a matter of law, that he is guilty of negligence because he fails to look up and down the track or to listen for approaching trains.

It is insisted that the testimony in the present case shows that the gates were raised and stood open because, under the custom there, they were not attended during the night, and that the gateman had not arrived at that early hour in the morning for the purpose of taking charge of the gates. The record does not, however, sustain this contention. There is one witness—one of the trainmen—who said, after some equivocation, that he thought it was too early for the gateman to get down for the purpose of guarding the gates. There is no evidence at all that the gates were not usually attended during certain hours, or that the plaintiff was apprised of this custom. It is shown by the testimony of many witnesses that there was a great deal of crossing by footmen at this particular place, and that at this particular time in the morning it was a very busy place. The plaintiff was accustomed to pass there on the way to his work about this time every morning. It nowhere appears that the gateman was absent during any particular hours, or that he took charge of the gates at any particular time. The bare fact stands in the record that when the plaintiff approached the crossing the

gates were raised; that he looked and listened for danger, and, neither seeing nor hearing any, proceeded through the gates and across the tracks. The burden of proof was upon defendant to establish contributory negligence; and, before it was entitled to an instruction placing upon the plaintiff the absolute duty of looking and listening, it devolved on the defendant to show a state of facts which, as a matter of law, constituted negligence for him to fail to look and listen. There might be a difference if it was shown that the gateman had not reached his post for the day, and that the plaintiff was aware of that fact. Under such circumstances, he could not, of course, accept the open gateway as an invitation to enter. But, as before stated, this state of facts does not appear in the record. The fact alone that the gateman was not in sight does not change the rule, for the open gateway which was accustomed to be closed when trains were passing, was an invitation of itself, whether the gateman was in sight or not.

The evidence in this case was sufficient to warrant the jury in finding that the servants of defendant were guilty of negligence in kicking the car down the spur track and across a street frequented by footmen, and in failing to put a light or keep a lookout on the moving car. The evidence was also sufficient to warrant a finding that the plaintiff was not guilty of contributory negligence. It is not contended that the assessment of damages is excessive.

Judgment affirmed.

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

Opinion delivered November 29, 1909.

1. LIMITATION OF ACTIONS—OBSTRUCTION OF STREAM.—Where a properly constructed levee permanently obstructed the drainage of land and thereby caused it to overflow, the injury was an original one, and the statute of limitations began to run from the time the levee was constructed, though the effect of the obstruction did not immediately become apparent. (Page 408.)

2. LEVEES—DAMAGE TO LAND—WHO MAY RECOVER.—Where a levee which was properly constructed caused a permanent injury to land by ob-

structing the drainage thereof, the injury was caused at the time the levee was constructed, and a subsequent tenant of the land who had no interest therein at the time of the injury has no cause of action on account of his crop being overflowed. (Page 413.)

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

H. F. Roleson, for appellant.

A railroad company which owns the fee of the right of way may lawfully erect a solid embankment, although the result is to stop the flow of surface water. 31 Am. R. 216; 35 Me. 200; 141 Mass. 174; 38 Am. R. 754; *Id.* 139; 41 Minn. 384. A canal company, acting under authority of the Legislature, is not liable for damages for cutting off the flow of surface water, 2 Johns. 283; 53 Am. R. 581; 21 L. R. A. 593. The action was barred by the statute of limitations. 52 Ark. 240; 62 Ark. 360; 35 Ark. 622; 86 Ark. 406; 20 L. R. A. (N. S.) 894; 88 C. C. A. 236; 161 Fed. 72.

A. B. Shafer, for appellee.

The action was not barred by the statute of limitations. 52 Ark. 240; 32 S. W. 651.

McCULLOCH, C. J. This is an action at law instituted on April 1, 1908, by Chas. G. Barton and another, partners as Barton Brothers, against Board of Directors of St. Francis Levee District, to recover damages alleged to have been sustained by reason of the construction of a solid embankment across certain lakes and bayous, thereby obstructing the lakes so as to cause water to be impounded in said lakes and bayous, eventually overflowing lands cultivated by plaintiffs. They alleged in substance that they own a lease for term of years (including the years 1906 and 1907) on a farm in Crittenden County, Arkansas, containing about two thousand acres, adjoining the levee constructed by defendant levee district; that prior to the construction of the levee in 1899 water flowing on these lands drained into various sinks, depressions, lakes and bayous near thereto, and finally found its way into Big Lake and Marion Lake, thence through bayous which were natural streams and drains into the Mississippi River; that the levee was constructed and maintained as a solid embankment across these lakes, bayous and natural drains, so as to

entirely stop the escape of any water; that afterwards rain water and seep water in great quantities began, on account of said stoppage of the outlets, to become impounded in the lakes and bayous until the year 1906, when, during that year and the year 1907, it encroached upon the lands leased and cultivated by plaintiffs and rendered 600 acres of it unfit for cultivation during those years, and also destroyed and injured crops and made part of the plantation inaccessible. They also alleged that the damages were not at first apparent, and did not become apparent until the spring of 1906, when water began to be impounded in the lakes and bayous on account of the stoppage of the drains.

Defendant answered, admitting that the levee was constructed in the year 1899 as a solid embankment across the streams, bayous and drains, but alleged that the levee was constructed, and has been constantly maintained, in the best manner known to engineering skill and experience, and that no negligence has been committed in that respect. Among other defenses, the answer alleges that plaintiff's cause of action did not accrue within three years next before the commencement of the action, and the statute of limitation was pleaded.

There was a trial before a jury, which resulted in a verdict and judgment in favor of plaintiffs for the recovery of damages, and defendant appealed.

The levee was constructed in the year 1899 as a solid embankment across all lakes, bayous, streams and drainways of every kind, thus totally and completely obstructing the passage of water into the Mississippi River, and it has been continuously maintained in that condition up to the present time. It was expressly agreed by plaintiffs' counsel during the progress of the trial that the levee was properly constructed, thus eliminating the question of negligence from the case. No change was made in the levee after that time, and defendants have done nothing since the levee was originally constructed in 1899 to cause damage to plaintiffs' lands or crops. Was the right of action barred when this action was commenced in 1908?

Plaintiffs' theory of the case is that, though the levee was constructed as a solid embankment more than three years before the commencement of this action, and thus constituted a total obstruction to drainage, the injury did not become apparent until

within a period of less than three years before the action was commenced, and that it was therefore not barred. There was testimony introduced by the plaintiffs tending to support this contention of fact, and the court submitted the case to the jury on that theory.

There is perhaps no subject of the law about which there is a greater conflict of judicial opinion than the one concerning the application of the statute of limitations to injuries of this character, and scarcely any class of cases presents such difficulties for the application of settled principles. This court has, in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, laid down general rules, which have been steadily adhered to, though, as already stated, the application of those rules in the nature of each case have presented many difficulties. The court there said: "Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. * * * * But when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of."

In the application of these rules this court has repeatedly held in cases where obstructions to drainage were total and permanent, such as by the building of a solid embankment across a drain, either natural or artificial, that the damage is original, and must be fully compensated in one action. Thus, in *St. Louis, I. M. & S. Ry. Co.* v. *Morris,* 35 Ark. 622, where "a solid roadbed embankment was built across a wet weather stream which drained an area of several square miles," this court held that the damages were original, and that the action for a recovery thereof must be commenced within three years from the time the embankment was completed. In *St. Louis, I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360, the defendant had closed up a trestle over a ditch near the plaintiff's farm, thereby stopping

the drainage of water from the farm, and the court held that the damage was original. In the opinion the court said: "So, in this case the obstruction of the ditch was permanent; that is, it will continue without change from any cause except human labor. The effect of it was to restore the land drained to the condition in which it was before the ditch was dug. Its present and future effect upon the land could be ascertained with reasonable certainty. The damage was original, and susceptible of immediate estimation. 'No lapse of time was necessary to develop it.' It was the difference between the value of the land as it would have been with the ditch open and the value of it with the ditch closed. * * * * * As the law does not favor the multiplicity of suits, and all damages which will be sustained as the necessary result of the filling of the ditch in question, and are recoverable, could have been estimated at the time of such obstruction, from the effect of it upon the value of the land, only one action should be brought therefor, and that within three years after the ditch was closed up."

This rule was again clearly recognized in *Chicago, R. I. & P. R. Co.* v. *McCutchen,* 80 Ark. 235. In that case the judges here differed as to what facts the testimony established. A majority concluded that the railroad had not built an embankment across the ditch and closed it up, but had merely been guilty of negligence in allowing dirt to slide off the roadbed into the ditch and fill it up from time to time; so we held that the damage was not original, and that there could be successive recoveries for each successive injury. Chief Justice HILL differed as to the facts. He thought that, according to the testimony, the ditch had been filled up for more than three years, and that the injury was permanent and the damages original. Therefore he dissented. In the opinion, after referring to the other decisions of this court on the subject, we said: "The distinction between the Anderson case and those last cited is that in the former there was a complete obstruction of the drainway, thus creating a permanent obstruction which necessarily caused a permanent injury, whilst in the latter there was only a partial obstruction which rendered the drainway insufficient at times, and made the future injury dependent upon the seasons and the quantity of rainfall."

The same principle was also applied in *Turner* v. *Overton,* 86 Ark. 406, 20 L. R. A., N. S. 894, where damages were sought to be recovered for straightening the channel of a creek, thus accelerating the current and causing it to overflow plaintiff's land. We held that the damage was original, and must be recovered in an action commenced within three years after the channel was changed.

Gould, in his work on Waters, § 416, says: "The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant's act. Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts and bridges, permanent dams and permanent pollutions of water, fall in this class."

We find the following statement of the law on this subject in Farnham on Water and Water Rights, vol. 2, § 586: "The rule that every continuance of a nuisance is a fresh nuisance should have no application in case of permanent nuisances of this class, any more than it should be contended that a trespass upon the land and erection of a structure there should constitute a fresh trespass every moment it was continued, for the purpose of extending the time within which the action could be brought. And there are cases which have applied the true rule that, in case the dam is a permanent one, the limitation period will begin to run against the right of action to recover damages for the injuries from the time the dam is built. The rule that the statute of limitations is not available to defeat an action for damages for the flooding of land until the right to flood it has been acquired by prescription, since every continuance of the injury is a fresh nuisance, is a mere arbitrary rule invented by the courts to meet the necessities of an apparently hard case. The difficulty seems to be that the courts have confounded two distinct rights of action. As was seen in a preceding section, it is held that ejectment will not lie to destroy an inchoate flowage easement. To avoid the effect of that ruling, the courts which apply the successive injury doctrine in order to prevent the acquisition of an easement in real estate in less than the prescriptive period hold that the nuisance is a continuing one, and that the action may be brought at any time

until the right to maintain it has been acquired by prescription. The latter holding seems illogical. If a permanent obstruction is erected so that it casts water across the boundary line on to the land of the upper owner, the injury is complete at the time the obstruction is erected and the injury done." See also *Gulf, C. & S. F. Ry. Co.* v. *Mosely,* 161 Fed. 72, and extended note in 20 L. R. A., N. S. 885; *Priebe* v. *Ames,* 104 Minn. 419, and note in 17 L. R. A., N. S. 206; *Central Branch Union Pac. Rd. Co.* v. *Twine,* 23 Kan. 585; *Fowle* v. *N. H. & N. Co.,* 107 Mass. 352.

Learned counsel for plaintiffs relies on the case of *Barnett* v. *St. Francis Levee District,* 102 S. W. 583, decided by the St. Louis Court of Appeals, where it was held that "the right of action for the negligent construction of a levee, in that it was built as a solid bank of earth across an outlet of a lake, instead of having a flood gate for drainage purposes, whereby water which would have drained off was caused to overflow lands, does not accrue when the levee is built, but when the overflow actually occurs."

There is a distinction between that case and the one now before us in the fact that it was found that damages were caused by the negligent construction of the levee, whereas in the present case it is conceded that there has been no negligence. But, whether that distinction is a controlling one or not, the decision of the Missouri court is in conflict with several of our own decisions, and it affords no reason for us to change the settled doctrine of this court.

The undisputed evidence establishes the fact that the levee was constructed in 1899, about nine years before the commencement of this action. The embankment was built across those streams and bayous, and completely stopped the drainage. Whatever damage accrued to adjoining lands was done then, for the construction of the embankment necessarily caused injury to all lands drained by those streams and bayous, though the exact amount of damage to crops from year to year could not with certainty be then determined. But the injury to the lands was a permanent one, and the damages were original, and compensation should have been sought in one action brought within the period of limitation. The action was barred.

It would perhaps be more accurate, instead of saying that plaintiffs' cause of action was barred, to say that the injury done by the construction of the levee in 1899 was a permanent injury to the land, and not to the crops subsequently planted and grown thereon; and, as plaintiffs did not own the land, and had no interest therein at the time the injury was inflicted, no cause of action ever arose in their favor.

The defendants also pleaded the bar of a special statute of limitation, enacted by the General Assembly of 1905 with reference to damage caused by the St. Francis Levee District (p. 152, § 10), and the court sustained a demurrer to the plea; but as counsel on neither side have discussed that question here, we do not deem it necessary to pass on the question of the effect or validity of that statute. As the evidence affirmatively shows that the cause of action is barred, it is useless to remand the case for a new trial.

Judgment is therefore reversed, and cause dismissed.

GRAYSON v. STATE.

Opinion delivered November 29, 1909.

1. CRIMINAL LAW—INDICTMENT—BLANK DATE.—An indictment for a misdemeanor is not defective for failure to state the date on which the offense was committed before the time of finding the indictment. (Page 415.)
2. SAME—WHEN FORMER CONVICTION NO DEFENSE.—Where defendant was accused of gaming, the indictment containing three counts in which he was charged with betting on a game of craps, with betting on a game of poker, and with betting on a game played with cards to the grand jury unknown, and the State elected to try him for the first offense, proof that he had been previously convicted of the second offense establishes no defense. (Page 416.)
3. FORMER CONVICTION—BURDEN OF PROOF.—The burden is on the defendant in a misdemeanor case to prove that the offense charged in the indictment was the same as that for which he had been previously convicted. (Page 416.)

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

Huddleston & Taylor, for appellant.

An indictment which fixes no date for the commission of the alleged crime states no cause of action. A blank statement of the year is fatal, when it is not alleged that the offense was committed within the period of limitation. 14 Ky. L. Rep. 400; 30 Mich. 371. The burden is upon the State to prove that the offense was committed within twelve months next before the finding of the indictment. 57 Ark. 495; 77 Ark. 441; 42 S. W. 915. The former indictment introduced in evidence by the defendant rendered impossible the rebuttal of the presumption of former conviction. 61 App. Div. 312; 15 N. Y. Crim. 450; 70 N. Y. Supp. 307.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

An allegation charging the commission of an offense on a future date will be treated as a clerical error. 65 Ark. 559; 75 Ark. 547. It is no ground of demurrer to charge the commission of an offense on a date beyond the statutory period. 32 Ark. 205; 45 Ark. 333. The burden is on the defendant to prove that the offense charged in the second indictment is the same offense as was charged in the first; and the record of a former conviction is not sufficient proof. 43 Ark. 372; 48 Ark. 34.

McCULLOCH, C. J. At the February term, 1909, of the circuit court of Greene County, the grand jury returned an indictment against the defendant, Charlie Grayson, containing three counts, each charging him with the offense of gaming, the first count charging that he bet on a game of craps, the second that he bet on a game of poker, and the third that he bet on a certain game of hazard and skill played with cards, the name of which was to the grand jury unknown. The indictment failed to state the date of the alleged offense, but contained the allegation that it was committed "on the —— day of ———, 19—."

The defendant demurred to the indictment on the ground that no date was alleged. The court overruled the demurrer, and the defendant then pleaded former conviction under an indictment returned at the September term, 1908, charging him

with gaming committed by playing a game of poker. This plea was overruled by the court, and on a trial before a jury the State introduced a witness who testified that she saw defendant playing craps for money in June, 1908, with one John Wise. The defendant then introduced in evidence the minutes of the grand jury to prove that John Wise was the only witness before the grand jury when the indictment was returned; and then introduced John Wise as a witness to prove that he never played craps with defendant, and never saw him play craps, but had played poker with him.

The case was then submitted to the jury on both pleas of the defendant—that of former conviction and of not guilty—and a verdict was rendered finding him guilty.

The indictment was not fatally defective because of the omission of the date of the alleged offense. This court has held that an error in an indictment in setting forth a future date as the day of the commission of the offense is not fatal. *Conrand* v. *State,* 65 Ark. 559. The decision was based on the statute which provides that it is sufficient to allege that the offense was committed *"at some time prior to the time of finding the indictment."* The court said: "The allegation as to the day on which the offense was committed is immaterial, and did not affect the sufficiency of the indictment. * * * * * According to these provisions of the statutes, an allegation in the indictment as to the day upon which the offense charged was committed cannot affect it, if it can be understood therefrom by a person of common understanding that the grand jury intended to charge that the offense was committed 'at some time prior to the time of finding the indictment.' The only necessity for such allegation is to show that the offense was committed before the indictment, unless time is a material ingredient of the offense. Except as stated, it is not necessary to a conviction that the State prove that the offense was committed on the day alleged; but it is sufficient, as to time, to show that it was committed on any day before the indictment was found, and within the time prescribed by the statutes of limitations."

This decision was followed in *Carothers* v. *State,* 75 Ark. 574. If the statement of a future date is not fatal, it is difficult to see how the failure to state any date at all can affect the

indictment, for the court, in holding that the statement of a future date would be disregarded, necessarily held that an indictment failing to state any date was sufficient. The court, in disregarding the future date stated, did not undertake to supply a past date, and could not do so.

The language of the indictment in the present case shows with certainty that the offense is charged to have been committed before the time of finding the indictment. The demurrer was therefore properly overruled.

It was manifestly intended, in the three counts of the indictment, to charge a single offense committed in different modes. Kirby's Digest, § 2230; *Blacknall* v. *State*, 90 Ark. 570; *State* v. *Bailey*, 62 Ark. 489. However, no objection has been made, either here or below, that three separate offenses were charged in the indictment. The State elected to put the defendant on trial on the first count charging the offense of gaming by betting on a game of craps, and the State's evidence was directed solely to that issue. It was sufficient to sustain a finding that he was guilty of that offense. The evidence introduced by defendant did not tend to support his plea of former conviction, for it affirmatively and conclusively showed that he had previously been indicted for and convicted of the offense of betting on a game of poker.

The burden of proof was on defendant to prove that the offense charged in the indictment was the same as that for which he had been previously convicted. *Emerson* v. *State*, 43 Ark. 372; *State* v. *Blahut*, 48 Ark. 34.

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

O'NEIL v. EAGLE GENERATOR COMPANY.

Opinion delivered November 29, 1909.

1. CORPORATIONS—FALSE CERTIFICATE—LIABILITY OF OFFICERS.—Under Kirby's Digest, § § 845, 863, requiring the president and directors of every business corporation to file with the county clerk a certificate showing the amount actually paid in on the capital stock, and making

them jointly and severally liable for debts of the corporation contracted during the period of their intentional neglect or refusal to comply with such provision, *held,* that the president and directors are liable where they knowingly filed a certifiacte showing that the capital stock was paid in, when it was not paid. (Page 419.)

2. SAME—JOINT AND SEVERAL LIABILITY OF OFFICERS.—Where the directors of a corporation filed a false certificate showing payment of the capital stock when it was unpaid, they are liable jointly and severally, and one or more of them may be sued. (Page 420.)

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

S. W. Leslie, for appellants.

Where the directors file a certificate, they are not liable under § 845 Kirby's Dig. Section 803 of same does not authorize a judgment against the directors for failing to take a step in the organization, nor for taking a step improperly, nor for not completing the organization at all. Under the statute they must intend to neglect their duty in this regard before they can be held liable.

Wood & Henderson, for appellee.

The directors, under § 863, Kirby's Digest, are jointly and severally liable in an action founded on the statute. This court will not entertain objections to instructions unless the same were urged at the trial of the case. 66 Ark. 47; 65 Ark. 255. "Intentionally" is used in the statute as synonymous with "knowingly."

BATTLE, J. Section 845 of Kirby's Digest is, in part, as follows: "Before any corporation formed and established by virtue of the provisions of this act shall commence business, the president and directors thereof shall file their articles of association, and also certificate, setting forth the purposes for which such corporation is formed, the amount of its capital stock, the amount actually paid in, and the names of its stockholders and the number of shares by each respectively owned, with the clerk of the county in which the corporation is to have its principal place of business; and shall file said articles and certificate bearing the indorsement of the county clerk in the office of the Secretary of State. Said certificate shall be recorded by the said county clerk and Secretary of State in books kept by them for that purpose."

Section 863 provides: "If the president, directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them respectively, such of them as so neglect or refuse shall be jointly and severally liable, in an action founded on this statute, for all the debts of such corporation contracted during the period of any such neglect or refusal."

The Eagle Generator Company commenced an action against T. J. O'Neil, J. C. Minor and S. W. Leslie which was founded on these statutes, and was instituted to recover an amount due on account for goods, wares and merchandise sold and delivered the Acetylene Gas Company. Plaintiff alleged in his complaint that that company was a corporation organized under the laws of Arkansas, having filed its articles of association with the county clerk of Garland County, and commenced business on the fifth day of October, 1905; that the defendants were elected directors of the Gas Company, and have been such ever since its organization, and that they as such directors refused and neglected to comply with the foregoing statutes by not filing with the clerk of Garland County, in which the Gas Company has its principal place of business, a certificate setting forth the purposes for which it was organized, the amount of its capital stock, the amount actually paid in, and the names of its stockholders and the number of shares by each respectively owned; that they intentionally neglected and refused to file said certificates, but did file on the fifth day of October, 1905, with the county clerk of Garland County, a certificate which was false and fraudulent in every important particular; that the amount named in the certificate as the amount of the capital stock paid in was greatly in excess of the actual amount; and that the number of shares stated in the certificate to have been subscribed was greatly in excess of the true number. It further alleged that between the 22d day of November, 1905, and the 3d day of February, 1905, and during the period the defendants were refusing and neglecting to file the certificate required by the statute, it sold and delivered to the Gas Company goods, wares and merchandise at and for the sum of $185, for which it is indebted to the plaintiff.

Plaintiff asked for judgment against the defendants for the $185 and six per cent. per annum interest thereon from the 3d day of February, 1906.

The defendants demurred to the complaint, because it did not state facts sufficient to constitute a cause of action, which demurrer the court overruled, and they then filed an answer specifically denying the allegations of the complaint.

In the trial of the issues before a jury the allegations in the complaint were proved by evidence adduced by the plaintiff. It was also proved that the board of directors organized by electing a president, vice president, secretary and treasurer, and thereafter filed the certificate mentioned in the complaint. Defendants adduced evidence which tended to prove that they acted in good faith in filing the certificate. After receiving instructions from the court, the jury returned a verdict in favor of plaintiff for $185. Judgment was rendered against the defendant for that amount, and from that judgment they have appealed to this court.

Appellants say: "This statement (certificate) was filed before the Arkansas Acetylene Gas Company was incorporated; but, even admitting that, upon the completion of the corporation, they would be held as directors for their failure to file the certificate, there is no provision by which they would be held liable for the debts of the company if they filed a certificate that was not correct, or even intentionally false."

The statute provides that "any number of persons, not less than three, who, by articles of agreement in writing, have associated, or shall associate, according to the provisions of this act, under any name assumed by them, for the purpose of engaging in or carrying on any kind of lawful business, and who shall comply with all the provisions of the statutes, shall, with their successors and assigns, constitute a body politic and corporate, under the name assumed by them in their articles of association." It then provides that the stockholders shall elect a board of directors, who shall have the care and management of the stock, property, affairs and business of the corporation; and that the board shall elect a president and secretary and treasurer. After this it provides that, before any corporation formed and established by the provisions of this act shall commence busi-

ness, the president and directors thereof shall file their articles of association, and certificates as provided in section 845. When all this is done, it is entitled to do business as such corporation, and it becomes the duty of the Secretary of State to issue to it a certificate, certifying that it is a corporation. Kirby's Digest, § 845. Let the time when the company becomes a corporation be when it may, it is certain that the certificate required by section 845 should be filed after the organization of the board of directors and before it commences doing business; and that was the time when the certificate in this case was filed, and the president and directors have filed no others.

The certificate required by section 845 to be filed must be true and correct. It is required to be filed for the protection of creditors, and it cannot subserve that purpose unless it be true and correct. A false certificate would be useless, and to hold that it answered the requirement of the statute would be absurd.

The defendants knew that the certificate made and filed by them was false when they signed it. They did not know or have reason to believe that shares of stock were paid as they certified. The shares certified to be paid included their own shares, and they knew that they or any part thereof were not paid at the time the certificate was made. It was confidently believed that the shares subscribed would be paid, and in belief of that fact they filed the certificate. But good faith is not equivalent to acts done. The shares certified were not taken or paid when the certificate was made. The evidence showed that defendants intentionally neglected to file the certificate required by the statute.

But appellants say that there were five directors, and only three of them were sued. The statute expressly provides that they shall be jointly and severally liable. Kirby's Digest, § 863. One or more may be sued.

Judgment affirmed.

NICHOLS v. STATE.

Opinion delivered November 22, 1909.

1. SEDUCTION—CORROBORATION.—On a charge of seduction the corroboration of the prosecutrix is required both as to the promise of marriage and the fact of sexual intercourse. (Page 423.)
2. SAME—CIRCUMSTANTIAL EVIDENCE AS CORROBORATION.—The testimony of the prosecutrix in a seduction case as to the promise of marriage may be corroborated by circumstances showing the relation and conduct of the parties toward each other. (Page 423).
3. SAME—SUFFICIENCY OF CORROBORATION.—The testimony of the prosecutrix in a seduction case as to the defendant having promised to marry her was sufficiently corroborated by proof that defendant paid court to the young lady for a number of months, during which time she kept the society of no other young man; that when her father charged him with the offense he promised to right it in a few weeks, presumably by marrying her; that, although he was a witness in attendance at court on behalf of his brother, he failed to remain after this charge was made, but fled the country; and that, when told by a witness that he ought to marry her if he had promised to do so he hung his head, without denying the promise. (Page 424.)
4. EVIDENCE—COMPETENCY—GENERAL OBJECTION.—A motion to exclude all of the testimony of a witness was properly overruled if any part of it was competent. (Page 424.)

Appeal from Fulton Circuit Court; *J. W. Meeks,* Judge; affirmed.

J. L. Short and *C. E. Elmore,* for appellant.

1. There is no corroboration of the prosecuting witness as to the promise of marriage. Her testimony must be corroborated both as to the promise of marriage and the fact of sexual intercourse. 77 Ark. 16; *Id.* 468; 40 Ark. 482; 73 Ark. 265.

2. To permit the State to introduce, by way of rebuttal and to impeach the testimony of Jonathan Nichols, testimony from the records of Fulton Circuit Court to show that he had been indicted for grand larceny, and that appellant was a witness for the defendant in that case, was reversible error. 34 Ark. 261; 43 Ark. 99; 70 Ark. 107; 80 Ark. 587.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

1. There is sufficient evidence to corroborate the prosecutrix on the question of the promise of marriage. This corroboration may be circumstantial as well as direct. 77 Ark. 472.

2. The record does not sustain appellant's contention that the records of the circuit court showing Jonathan Nichols's indictment for grand larceny were introduced to impeach him. It was not admissible for that purpose, but was admissible for the purpose of contradicting appellant's explanation of his reason for going to Texas.

FRAUENTHAL, J. The defendant, Walter Nichols, was convicted of the crime of seduction, and prosecutes this appeal from the judgment of conviction.

The evidence on the part of the State established the following facts: Dulcie Boydston was a young girl, eighteen years old and living with her parents. In December, 1906, the defendant began keeping company with her and to show her marked attention. He continued his attentions and visits to her for a number of months. Dulcie Boydston testified that in February, 1907, he asked her to marry him, and she promised to do so, but no definite date was set for the marriage. He continued to pay his suit to her, and then some time after their engagement he began to seek sexual intercourse with her by promising marriage in two months thereafter. Finally he overpersuaded her, and in March, 1907, succeeded in obtaining sexual intercourse by promising to marry her; and by telling her that all people who intended to get married "did that way." Pregnancy was the result of the intercourse. In August, 1907, the circuit court convened at the county seat of Fulton County; and at that time a brother of defendant was to be placed on trial for grand larceny, and the defendant was a witness in his brother's behalf, and attended that court. The father of Dulcie Boydston met the defendant there, and accosted him, and told him that he had ruined his daughter. The defendant told him that he would make it right in two or three weeks. The father told him that then was the time to make it right. The defendant desired to talk to the young girl privately, and, upon the father's refusal to permit him to do so, the defendant ran across the square, and at once left the town, without attending the trial of his brother or waiting to see its outcome. The testimony

tends to prove that the defendant fled the county and went to Texas. After remaining away for some time, he returned and began seeking testimony in his behalf upon this charge. He saw a young man, Robert Hightower, who had formerly waited on Dulcie Boydston. He asked this young man if he knew anything about the prosecutrix that would benefit him. Hightower told him that he did not; and said to him that, if he were in the defendant's place and had promised to marry her, he would do it. The defendant dropped his head, and thus remained for a short time without making reply, and then said he would not marry her. But in the conversation he did not say at any time that he had not promised to marry the girl. The defendant testified that he had had sexual intercourse with Dulcie Boydston, but denied that he had promised to marry her.

It is provided by section 2043 of Kirby's Digest that no person shall be convicted of the crime of seduction upon the testimony of the female "unless the same be corroborated by other evidence." On a charge of obtaining carnal knowledge of a female by virtue of a false promise of marriage the corroboration of the female is required both as to the promise of marriage and the fact of sexual intercourse. *Polk* v. *State,* 40 Ark. 482; *Keaton* v. *State,* 73 Ark. 265; *Carrens* v. *State,* 77 Ark. 16; *Lasater* v. *State,* 77 Ark. 468.

In this case it is contended that there is not sufficient evidence to sustain the verdict of the jury for the reason that there is no corroboration of the testimony of the female as to the promise of marriage. In considering the character and sufficiency of the testimony necessary to corroborate the female in this particular, Mr. Justice RIDDICK in the case of *Lasater* v. *State,* 77 Ark. 468, quotes with approval the following from Mr. Justice Folger of the Court of Appeals of New York: "It is settled that the supporting evidence is required as to two matters named in the act, and as to them only. They are the promise of marriage and the carnal connection. It is settled by the same authorities that the supporting evidence need be such only as the character of these matters admit of being furnished. The promise of marriage is not an agreement usually made in the presence or with the knowledge of third persons. Hence the supporting evidence possible in most cases is the subsequent

admission or declaration of the party making it, or the circumstances which usually accompany the existence of an engagement of marriage, such as exclusive attention to the female on the part of the male, the seeking and keeping her society in preference to that of others of her own sex, and all those facts of behavior toward her which, before parties to an action were admitted as witnesses in it, were given to the jury as proper matter for their consideration on that issue." And in the case of *Cooper* v. *State,* 86 Ark. 30, it was held that the corroboration can be sufficiently made by circumstances showing the relation and conduct of the parties to each other.

In the case at bar the defendant paid court to the young lady for a number of months, and showed to her marked attention. During all that time she kept the society of no other young man. When the father charged him with the offense, he promised to right it in a few weeks, presumably by carrying out his promise of marriage. And then, although he was in attendance at court as a witness in behalf of his brother, he failed to remain after this charge was made, but fled the country. He was told by a witness that it was proper for him to marry the young lady if he promised to do so. He did not deny that he had so promised, but hung his head as if convicted by the truth of the statement. These were all circumstances which it was proper for the jury to consider. Before them appeared all these witnesses, and they noted their manner and demeanor. They were peculiarly the judges of the weight of this evidence; and we cannot say that there is not sufficient evidence to support their verdict.

It is urged by counsel for the defendant that the court erred in permitting evidence showing that the brother of the defendant and one of his witnesses had been indicted for grand larceny. But this was not admitted for the purpose of impeaching this witness. The same testimony proceeded further and showed that the case on said charge against the brother had been set for trial on a definite day, and that the defendant had been subpoenaed in his brother's case as a witness. That on that day the defendant attended said court wherein said trial was to be had; and it was on that day that he met the father of the prosecutrix and, after being charged with the offense,

fled the town without remaining at the trial of his brother. The evidence in that regard and for that purpose was competent. In this case a general objection was made to the introduction of this evidence. Part of it was clearly competent. A motion to exclude all of the testimony of a witness is properly overruled if a part of it is competent. *Central Coal & Coke Co.* v. *Neimeyer Lumber Co.*, 65 Ark. 106; *Mallory* v. *Brademyer*, 76 Ark. 538; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 87 Ark. 331.

Being competent for one purpose, it was not error to admit it, although a part of the testimony might have been incompetent. The defendant could, if he had so requested, have had the court to specifically instruct the jury for what purpose this evidence was competent, and that it was not competent for the purpose of impeachment.

We have examined the instructions that were given by the court and those that were refused, and we find no prejudicial error in any of the rulings thereon.

The judgment is affirmed.

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

Opinion delivered November 22, 1909.

1. MASTER AND SERVANT—DISCHARGE OF SERVANT—PENALTY.—Under Acts 1905, p. 538, providing that where a railroad corporation discharges a servant or employee without paying his wages within the time and in the manner therein provided "then as a penalty for such nonpayment 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," *held*, that where a railroad company pays or tenders an employee's wages with interest the accumulation of the penalty stops, but the servant may thereafter sue to recover the penalty already accrued. (Page 428.)
2. TENDER—SUFFICIENCY.—A tender made by the defendant in a case to a justice of the peace during an adjournment of court and in the absence of plaintiffs and their counsel, and without their knowledge, was insufficient. (Page 430.)

3. MASTER AND SERVANT—PENALTY—MERGER.—Where a railroad company was sued in a justice's court for the wages of a servant and the statutory penalty for nonpayment of such wages, and a judgment was recovered against it, from which it appealed, the cause stood for trial *de novo* in the circuit court, and the penalty was not merged in the judgment, but continued to run until the wages were paid or tendered, or a judgment was obtained in the circuit court. (Page 430.)

4. SAME—OFFER OF FURTHER EMPLOYMENT—SUFFICIENCY.—In a suit against a railroad company to recover for failure to pay a servant's wages after discharging him it was no defense that defendant had offered to plaintiff further employment elsewhere; it must show that it offered to employ him in the same kind of work and in the same locality. (Page 431.)

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

Kinsworthy & Rhoton, James H. Stevenson and *Robert Martin,* for appellant.

1. The court erred in refusing to admit testimony offered by appellant to prove that it offered appellees employment, thus taking away its only defense. Kirby's Dig. § 6649.

2. The court's peremptory instruction to find for appellees was erroneous in that it authorized the jury to render a verdict for penalties after a tender had been made. Hunt on Tender, § 342; 64 Ark. 93; 66 Ark. 413.

H. S. Powell and *Daniel Taylor,* for appellees.

1. The conditions of the statute are met whenever it is shown that the employees were discharged, or whenever, if they had not been discharged, it appears that company refused to further employ them. It was the intention of the Legislature to inflict the penalty in either. Yet, if it be held that an offer of employment would be a defense, then certainly the company should be held to an offer of employment of the same kind or grade, and within the vicinity of the place of discharge. Any other construction would defeat the object of the statute. 70 Ark. 17.

2. A tender is insufficient if it does not include both the wages earned up to the time of discharge and the penalties accrued up to the date of the tender. 70 Ark. 226; 63 Ark. 259. A judgment of a justice of the peace court. when appealed from, is nothing more than an interlocutory judgment, since the grant

of the appeal vacates the judgment and opens the issues for a trial *de novo* upon the merits. Kirby's Dig. § 4671; 26 Ark. 315; 35 Ark. 445; 79 Ala. 532; 49 Me. 556; 23 N. J. L. 201; 44 N. C. 392; 64 Tex. 556; 39 Ind. 369; 89 Mo. 263; 65 Tex. 395; 28 W. Va. 184; 66 Ark. 413; Black on Judgments, § § 683-697.

FRAUENTHAL, J. The appellees, who were the plaintiffs below, were in the employ of the defendant, a railroad corporation, and they severally instituted suits in the court of a justice of the peace for the recovery of wages and penalties for the failure of the defendant to pay them their wages when they were discharged. Judgments were recovered in each of the several cases in favor of each of the plaintiffs, and the defendant appealed from all the judgments to the circuit court. In the circuit court all of the cases were consolidated. In its answer in the circuit court the defendant denied that it had discharged either or any of the plaintiffs, or that it had refused to further employ either or any of them, but alleged that defendant took the plaintiffs off the particular work they were doing and offered them work of another kind and at another point on its line of railroad. It further alleged that on December 18, 1897, it offered and tendered to each of the plaintiffs the full amount of the wages with interest then due to each of them, but that the tender was refused because the amount of the penalty to that date was not also tendered. It did not deny that it owed to the various plaintiffs the several amounts of the wages; and it tendered those amounts in court; but it denied that the plaintiffs were entitled to any penalty.

The evidence on the part of the plaintiffs established the following facts: The plaintiffs worked for defendant during the month of October, 1907, and up to November 5, 1907, when they were discharged by their foreman. They requested of their foreman to have the money due them sent to the station, Camden, where a regular agent was kept, and thereafter they applied to said agent for the payment of their wages within seven days from the date of the request and also thereafter; and that the wages were not paid to them. Thereafter they severally instituted suits in the justice of the peace court for the recovery of the wages and also of penalty, and recovered judgments in that court in November, 1907. From these judg-

ments the defendant appealed to the circuit court; and on December 18, 1907, the defendant tendered to each of the plaintiffs the full amount of his wages with interest to that date and also all costs of the court to that date. The tender was refused because the penalty was not also tendered.

In the trial of the cause in the circuit court the foreman under whom the plaintiffs had been working was asked by the defendant the following question, which the court refused to permit the witness to answer: "Q. At the time you discharged these men or pulled them off, did you offer them employment at any other place for the Iron Mountain Railroad Company?"

It was agreed that a finding and judgment should be made in favor of each of the plaintiffs for the several amounts of their wages, which amounts were also agreed on. The sole question then submitted to the jury was relative to the recovery of the penalty; and on that issue the court gave to the jury the following peremptory instruction:

"The court instructs the jury to return a verdict for the plaintiffs for their wages at rate paid at time of discharge, November 5, 1907, to May 14, 1908, as penalty for non-payment of wages within seven days after discharge."

A verdict was returned in favor of the plaintiffs for the amount of the penalties, which aggregated $3,323. From the judgment entered on said verdict for penalties the defendant prosecutes this appeal.

The sole question presented by this appeal is whether or not the plaintiffs are entitled to recover penalties herein; and, if so, the extent of such recoveries. The right to the recovery of the penalty asked in this suit is founded upon the act of April 24, 1905, which is amendatory of section 6649 of Kirby's Digest. Acts 1905, 538. That act provides that whenever any railroad corporation "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 due and payable on the day of such discharge or refusal to longer employ; and 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."

The plain object and purpose of this statute is to secure for the employee the prompt payment of the wages due by visiting upon the railroad company a penalty until the same are paid. The primary intent of this statute is not to secure the payment of a penalty but the payment of the wages; and by the provision of the statute it is stipulated that the penalty shall continue until the wages are paid. When the wages are paid, therefore, the penalty ceases. But the only way that the railroad company can make the payment of the wages is to make the offer or tender thereof; it cannot force its acceptance. If the tender is accepted, it then becomes a payment of the wages, and would cause the penalty to stop. When the railroad has, therefore, done all that it can to make the payment, it becomes in law equivalent to a payment, and so stops the continuance of the penalty. The statute provides that "as a penalty for such nonpayment, the wages of such servant or employee shall continue * * * * * * at the same rate until paid." The payment here referred to clearly only refers to the payment of the wages, and not to any penalty; and so, if that which is done is equivalent to a payment, to-wit, a tender of the amount of wages, then all is done that is required by the statute to stop the further running of the penalty. The acceptance of the wages would not be a payment of the penalty which had accrued to the date of such payment; and, as is held in the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Pickett,* 70 Ark. 226, after the payment of the wages suit can be brought for the amount of the penalty which had then accrued. But this question is ruled upon and settled in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Paul,* 64 Ark. 83, wherein Mr. Justice BATTLE says in regard to this statute: "To enforce the performance of this duty, exemplary or punitive damages are imposed upon them for the failure to do so; that is, the liability to pay the wages at the contract rate until the wages earned

on the day of the discharge or refusal to longer employ are paid. They are not necessarily more unreasonable than, or as much so as, those allowed by the Iowa statute. The railroad company can stop them by the payment or tender of payment of the amount due the employee for wages actually earned. No other amount need be tendered for that purpose."

We are therefore of the opinion that the amount of the penalty ceased to run on the 18th day of December, 1907, when the defendant tendered to the plaintiffs the full amount of their wages with interest; and that it did not also have to tender the amount of the penalty which had accrued to that day to stop the continuance of the accumulation of the penalty. The plaintiffs, upon said tender being made or upon the acceptance of that amount for the wages only, had still the right to recover the amount of the penalty which had accrued to that date, and now have that right; but not to recover any further amount for penalty.

It is urged by the defendant that it offered to the justice of the peace before the day of trial the amount of the wages, and that this was a tender of the amount thereof. But this was done in the absence of plaintiffs and their attorney, and without their knowledge, and during the adjournment of the court. We do not think this amounted to a tender, so as to stop the penalty.

It is also urged by the defendant that when judgments were recovered by plaintiffs in the court of the justice of the peace their causes of action were merged in the judgments, and that thereby the amount of the penalty was fixed to that date and ceased running, so as to make no larger amount of penalty. But the defendant took appeals from these judgments to the circuit court, and the actions were then transferred to that court. In that court the trials were *de novo,* and the causes were tried in the circuit court upon the whole case as if brought in the circuit court in the first instance. After this appeal the plaintiff could amend by adding claims against defendant which were not included in the original demand before the justice, only keeping out new causes of action. The judgment of the justice of the peace after an appeal is taken, therefore, is not final, nor is the cause of action merged therein, because the cause is tried anew in the circuit court as

if brought in that court originally. *Hall* v. *Doyle,* 35 Ark. 445; *Texas & St. L. Ry. Co.* v. *Hall,* 44 Ark. 375; *Birmingham* v. *Rogers,* 46 Ark. 254; *Little Rock & Hot Springs W. Rd. Co.* v. *Castle,* 74 Ark. 539.

It is urged by the defendant that the plaintiffs could not recover any penalty herein in event there was, at the time of the discharge of plaintiffs, offered to them employment by defendant of any kind and at any point. We think that the object and purpose of the statute was to secure to the employee the prompt payment of his wages, or a continuance of his employment, so that he would have a livelihood and a means of maintenance. To secure that object, it would be necessary to give him that employment in which he was competent to perform the duties thereof and at a place where he could reasonably be in order to perform those duties of such employment. The employee by earning his wages under the contract of employment shows that he was competent and able to perform the duties of the employment in which the wages were earned; and therefore we are of the opinion that the "further employment" meant by the statute is employment of the same class and kind and in the same locality in which his wages were earned under the contract of employment. Otherwise the railroad company might offer to the servant employment, the duties of which he might be incompetent to perform, or at a point so remote or inconvenient to the servant that he could not reasonably accept it; and thus the railroad company could escape the penalty named in this statute. We are therefore of the opinion that the court did not err in refusing to permit the defendant to prove that it had offered to plaintiffs employment generally or at another place generally. It could only show that it offered further to employ them in the same kind of work and in the same locality.

For the error of the court in charging the jury that the plaintiffs could recover penalties accruing after the tender of the amount of wages made on December 18, 1907, the judgment is reversed, and this cause is remanded for a new trial.

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

Opinion delivered December 6, 1909.

1. CARRIERS—DUTY TO FURNISH VESTIBULED TRAINS.—While a railroad company is not required to provide vestibuled trains, yet when it provides them it must maintain them in a safe condition. (Page 434.)
2. SAME—DEGREE OF CARE.—The degree of care that is required of a carrier in furnishing sound and safe appliances in its vestibuled trains and seeing to it that those appliances are kept at all times safe and sound, while its trains are carrying passengers is not one of ordinary care, but of the utmost diligence which human skill and foresight can effect; and if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation or the mode of management at the time the damage occurs, the railroad company is responsible. (Page 434.)
3. SAME—DUTY AS TO VESTIBULED TRAINS.—It is the duty of the trainmen not only to close the trapdoors in a vestibuled train between stations, but to exercise the highest care to see that they are kept closed. (Page 435.)
4. SAME—RIGHT OF PASSENGER TO PASS BETWEEN CARS.—It is not negligence for a passenger to pass from one car to another in a vestibuled train while the train is in motion, as he has a right to assume that it is safe to do so, and that all appliances are in order and in proper position. (Page 436.)
5. SAME—INSTRUCTION AS TO DAMAGES—WHEN HARMLESS.—An instruction in a personal injury case that the plaintiff was entitled to recover for loss of time caused by the injury was not prejudicial, though there was no proof upon which to base any damage for loss of time, if the extent of the physical pain which he suffered and the injury which he received and the amount of his physician's account were sufficient to justify a much larger verdict than he recovered. (Page 436.)

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

Kinsworthy & Rhoton, Bridges, Wooldridge & Gantt, and *Jas. H. Stevenson,* for appellant.

There was no negligence shown on the part of appellant; therefore the case should not have been submitted to the jury. 4 Elliott on Railroads, § 1589a; 76 Fed. 734; 96 Minn. 434; 118 Mo. App. 239; 94 S. W. 293. When the facts are undisputed, and only one inference can be drawn from them, negligence is a question of law for the court. 84 Pac. 1026; 44 Kans. 586;

69 Ark. 562. The fact that the trap door was open was not, of itself, proof of negligence on the part of appellant. 84 Pac. 1124.

M. S. Cobb, for appellee.

Passengers have a right to assume that vestibuled cars are safe and will be prudently managed. 2 L. R. A. (N. S.) 645; 76 Fed. 734; 116 Fed. 324. The doctor's bill not having been paid, it was proper for the jury to determine, from their common experience, what the services would be worth. 112 S. W. 876. Carriers by steam railway are required to use more than ordinary care for the safety of their passengers. Thomp. Neg., vol. 3, p. 191; 57 Ark. 418; 55 S. W. 270; 60 Ark. 550; 59 Ark. 180; 34 Ark. 613.

FRAUENTHAL, J. On the night of December 13, 1907, O. D. Oliver, the plaintiff below, secured passage on one of defendant's passenger trains from Malvern to Benton. While passing out of the chair car to the smoker ahead, he fell in an open trap door in the vestibule between the cars, and was severely injured. The cars of the trains were vestibuled; that is, they were provided with outer doors at each side of the coach platforms and with trap doors over the steps. When the train was in motion, these outer vestibule doors would be closed, and the trap doors closed down so as to cover the steps at the end of the coaches, and thus make a solid platform between the cars. The testimony on the part of the plaintiff tended to prove that when he entered the train of the defendant at Malvern he went into the chair car and in a short time thereafter he proceeded to go from that car to the smoking car. As he passed out of the chair car on to the platform between the cars, he met a gentleman starting to go into the chair car, and he stepped slightly to the side to permit the party to pass, and fell down the steps in the vestibule. The trap door was not down over these steps, and it was dark in this passageway between the cars and in the vestibule. The train at the time of the injury had left Malvern and was running towards Benton. The rules and custom of the defendant required that, when such a vestibuled passenger train left a station, the servants of the defendant should close the vestibule doors and close down the trap doors over the steps. These trap doors had a catch on them to hold them se-

curely when thus closed, but they could be raised by any one. Several servants of the company testified that in the performance of their duties they passed over the platform between these two coaches after the train had left Malvern, and that all the trap doors between these coaches were down and over the steps when the train left Malvern. But their testimony indicated that they did not notice this trap door, where plaintiff was injured, either at the time of or just before or after the injury; and none of them testified that it was not in fact open at the time or just before or after the injury.

Upon a trial of the cause before a jury a verdict was returned in favor of the plaintiff for $500. The defendant prosecutes this appeal.

A common carrier of passengers is not under any legal obligation to provide upon its line of railroad vestibuled trains, although such trains are apparently safer than the others, and have come to be in general use. But when the carrier has provided vestibuled trains, it is his duty to maintain them in a safe condition. It then becomes the positive duty of the carrier in the operation of such trains to use the highest degree of care consistent with the practical operation and management thereof to see that every appliance connected therewith is kept in repair and in safe condition. The passenger has the right to assume that the vestibules provided are carefully managed, and that they are convenient and safe. The principles generally recognized as fundamental in the law of carriers of passengers are applicable to these new appliances. 2 Hutchinson on Carriers, § 927; *Bronson* v. *Oakes,* 76 Fed. 735; *Crandall* v. *Milwaukee, St. Paul & Sault Ste. Marie Ry. Co.*, 96 Minn. 434; *Sanson* v. *Southern Ry. Co.,* 50 C. C. A. 53; *Northern Pac. Ry. Co.* v. *Adams,* 116 Fed. 324; 4 Elliott, Railroads, § 1589; *Chicago, Rock Island & Pacific Ry. Co.* v. *Simpson,* 87 Ark. 335.

The degree of care that is required of the carrier in furnishing sound and safe appliances in its vestibuled trains and seeing to it that those appliances are kept at all times safe and sound while its trains are carrying passengers is not one of ordinary care, but the carrier "is bound to the utmost diligence which human skill and foresight can effect; and if injury occurs by reason of the slightest omission in regard to the highest

perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible." *George* v. *St. Louis, I. M. & S. Ry. Co.,* 34 Ark. 613.

In the case of the *Pennsylvania Company* v. *Roy,* 102 U. S. 451, Mr. Justice Harlan, in speaking of the degree of care that is required of the carrier, says: "He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages."

It is the duty of the carrier not only to provide vehicles which are thus safe, but he must use the same vigilance and care in keeping the appliance with which such vehicles are equipped in a safe and suitable condition. 2 Hutchinson, Carriers, § 911.

One of the chief objects of a vestibuled train is to furnish to the passenger a safe and convenient way of passage from one car to another; and in order for such passage way to be safe ordinary prudence demands that the trap doors should be over the steps. It was not only the duty of the servants of the defendant in this case to close these trap doors, but it was their further duty to exercise the highest care to see that they were kept in this condition. In the case of *Wagoner* v. *Wabash R. Co.,* 94 S. W. 295, the majority of the court says: "It is the opinion of the court that the railroad company is not only answerable for the negligent acts of its servants in opening the vestibule doors and permitting the same to remain after having been opened by them, but it is responsible as well for its failure to exercise a high degree of care, to the end that the same are closed and the vestibule reasonably safe for use, even though they are

opened by others than the defendant's servants." In this case it became a question for the jury to determine whether under the circumstances the defendant exercised that high degree of care and vigilance in closing and keeping closed the trap door over the steps. And there was some evidence to warrant the finding that such high degree of vigilance and care was not exercised by the servants of the defendant in charge of the train.

It was not a negligent act for the plaintiff to pass from one car to the other. He had a right to assume that it was safe to so pass, and that all appliances were in order and proper position. In the case of *Bronson* v. *Oakes,* 76 Fed. 735, Judge Caldwell said: "The presence of such an appliance on a train is a proclamation by the company to the passenger that it has provided a safe means of passage from one car to another and an invitation for him to use it as his convenience or necessity may require." *Robinson* v. *United States, etc., Society,* 132 Mich. 695.

All that was required of the plaintiff in going from the one car to the other was to exercise ordinary care and prudence. The foregoing presents our opinion relative to the rules of law that are applicable to the facts of this case. There were a number of instructions given by the court at the request of the plaintiff to which the defendant objected; and a number of instructions were given also at the request of the defendant, and some asked by it were refused over its objections. But the rulings of the court upon these instructions were in conformity with the above principles of law; and we therefore find no prejudicial error in any ruling of the court thereon.

In its instruction on the measure of damages the court included as an element of damages the loss of time of plaintiff caused by the injury. Counsel for appellant contend that there was no evidence as to the value or amount of the plaintiff's earning capacity, and therefore no testimony upon which to base any damage for the loss of this time. But the defendant did not make in the lower court any specific objection to this instruction, but only objected generally. In addition to this, the evidence showed that the plaintiff on account of the injury was confined to his bed and room for four weeks, that he had

regular employment which he was unable to attend to on account of the injury. For this loss of time he was entitled to nominal damages. The extent of the physical pain which he suffered and the injury which he received and the amount of his physician's account were sufficient to justify a much larger verdict than he recovered. We do not think, therefore, that any prejudicial error of which the defendant can now complain was committed by the court by giving this instruction.

Finding no prejudicial errors in this case, the judgment is affirmed.

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

Opinion delivered December 6, 1909.

1. RAILROADS—CROSSINGS—DUTY TO LOOK AND LISTEN.—The general rule of law is that it is negligence for an adult or a minor having the discretion of an adult, who approaches a railroad crossing, to fail to look and listen for the approach of trains, and it is only in exceptional cases that it is proper to submit to the jury the question whether the failure to look and listen is negligence. (Page 442.)
2. NEGLIGENCE—MINOR.—The standard for judging the conduct of a minor is not the care and prudence that would be exercised by an adult, but only that of one of his age, intelligence and discretion. (Page 443.)
3. RAILROADS—NEGLIGENCE OF MINOR.—Where the testimony showed that plaintiff, who was injured at a railway crossing, was a boy of 16 years old and of inferior intelligence, it was error to instruct the jury that plaintiff was negligent as matter of law in failing to look and listen before attempting to cross a track in front of an approaching train; it being a question for the jury in such case. (Page 444.)
4. SAME—NEGLIGENCE OF MINOR.—Where the evidence shows that plaintiff drove upon defendant's track in front of an approaching train, and that his perilous situation was discovered by the defendant's fireman, who saw from plaintiff's conduct and appearance that he was unaware of the train's approach, it was a question for the jury to determine whether defendant's servants were negligent in failing to give warning signals. (Page 446.)

Appeal from Nevada Circuit Court; *Jacob M. Carter,* Judge; reversed.

STATEMENT BY THE COURT.

This was an action instituted by the plaintiff below, Phil Garrison, by his next friend, against the St. Louis, Iron Mountain & Southern Railway Company for the recovery of damages on account of personal injuries sustained by being struck by a train of defendant while attempting to drive a wagon across its tracks at a public crossing in the city of Prescott, Arkansas. In his complaint he alleged that while he was thus attempting to cross the track at the public crossing "the train came gliding along noiselessly and without warning or blowing its whistle, or ringing its bell, and through the negligence, wilfulness and wantonness of those in charge of the train struck the wagon and threw the plaintiff on the ground, bruising and wounding him on the head, face, side and back and knocking him senseless and unconscious." The defendant denied all acts of negligence on its part; and alleged that if the plaintiff was injured it was on account of his own acts of contributory negligence.

The testimony on the part of the plaintiff tended to prove that on the morning of October 23, 1908, he was driving along a street that runs parallel with the railroad track and about 60 feet distant therefrom. He was in a wagon going south, and in the direction of the depot, and he was attracted towards and intently looking at a large crowd of people who were congregated at the depot. While he was thus driving along this street, the defendant's train approached from the north and at his back; and for a considerable distance the fireman on the train saw him thus driving along the street. When the plaintiff got to the street that crossed over the track, he turned into that street, and then drove over a side track, and on to the main track, and the train struck the rear end of the wagon, knocking the plaintiff out of the wagon and on to the ground. At the time the plaintiff approached the crossing and was attempting to go over it, he did not slacken his progress and did not look or seemingly listen for a train; he did not see the train, but was seemingly entirely oblivious of it, and was intently looking towards the large crowd of people at the depot, which was about 350 feet from the crossing. The train had given one long whistle for the station about one quarter of a mile distant; and the testimony on the part of the plaintiff tended

to prove that no bell was rung and no whistle blown from that point until just at the time the train struck the wagon, when two or three blasts of the whistle were blown. The fireman saw the plaintiff for some distance as the train approached him from the rear, and when he turned and attempted to cross the track. When the fireman saw the plaintiff drive on the track, and thus realized his perilous position, the train was about 100 feet from the crossing, and he at once notified the engineer. The engineer applied the brakes, and made every effort to stop the train, but could not do so in time to avoid the collision on account of the speed of the train. But the bell was not rung, and the whistle was not blown, and no danger signal was given. The plaintiff was a minor; and the testimony tended to prove that he was about sixteen years old and of inferior intelligence; and, as one witness expressed it, he was not bright.

The plaintiff requested the court to give the following instructions, but the court refused to give any of them:

"1. You are instructed that if you find from the evidence that the plaintiff, Phil Garrison, while crossing the track of the defendant's railroad, was struck by its engine and injured, this is *prima facie* negligence on the part of the defendant, and is sufficient to cast upon it the burden of proving that the injury was not caused by its fault.

"2. You are further instructed that it is the duty of a railroad company to sound the whistle or ring the bell within at least 80 rods of a public crossing, and to keep the whistle sounding or the bell ringing until the crossing is passed, or the train stops, and a failure to do so is negligence.

"3. You are instructed that it is the duty of a railroad company operating its trains in this State to keep a lookout for persons on its track; and if it fail to do this, and an injury occurs to persons on its track caused by such failure, then the railroad company is guilty of negligence.

"4. Contributory negligence is a defense, and must be proved by a preponderance of the evidence by the party asserting it. And in this case you are told that while it was the duty of the defendant to keep a lookout for persons on its track, and that if it failed to do this and the injury occurred on account of such failure, it is guilty of negligence, and you should

find for the plaintiff, unless you further find that the plaintiff was guilty of contributory negligence in going on the track; but you are further told that contributory negligence is the want of such ordinary care as persons of ordinary prudence would use under the existing circumstances, and in consideration of this question you are instructed that the law only required the exercise of a degree of care commensurate with the plaintiff's age, intelligence, capability and all the surrounding circumstances of the case."

At the request of the plaintiff the court gave the following instruction:

"5. You are instructed that, notwithstanding you may find that the plaintiff was guilty of contributory negligence in getting on the railroad track in front of the approaching train, yet if you find from the evidence that the engineer or fireman on the engine saw the plaintiff and his perilous condition in time to have avoided injuring him, and they failed to use all the means in their power to avoid the injury, you will find for the plaintiff."

At the request of the defendant the court gave the following instructions:

"7. The jury are instructed that defendant's employees in charge of the engine that struck plaintiff had the right to assume that the plaintiff was rational, and that he would exercise reasonable care and caution to keep himself out of danger; and if the jury believe from the evidence that when the employees in charge of the engine first came in sight of plaintiff he was so far removed from the track as to be free from danger of collision, then they had a right to assume that he would remain at such safe distance, and that he would stop before going upon the track in front of the moving engine.

"8. If the jury believe from the evidence that the defendant's cars were being hauled by a locomotive engine upon its tracks, and that plaintiff was seated in a wagon drawn by mules upon the public crossing or highway, and that both were approaching such highway where it crossed the defendant's railway under circumstances indicating that a collision between them would likely occur, if they both proceeded without stopping, the engineer in charge of the train had a right to presume

that the plaintiff would stop before he drove upon the track in front of the moving engine, and the engineer had the right to proceed with his engine and train until he discovered that the plaintiff was not going to stop when it was too late to stop the train, if you find it was too late, to avoid the collision, and for that reason plaintiff was struck by the engine and injured, the defendant would not be liable, and you should find for the defendant."

Upon its own motion the court gave the following instruction to the jury:

"9. Gentlemen of the jury, under the undisputed evidence in this case the plaintiff is guilty of contributory negligence that bars his recovery, provided the agents of the defendant in charge of its engine did not discover his perilous position in time to have avoided it; and as to whether they did discover his perilous position in time to have avoided the injury is a question for you to decide, and the burden is on the plaintiff in this case to show by a greater weight of evidence that either the engineer or the fireman did discover his perilous position."

In his closing argument to the jury, the counsel for the plaintiff said: "Gentlemen of the jury, the great weight of the evidence in this case shows that the plaintiff was looking toward the depot; that he did not see the approaching train; that the bell was not ringing or the whistle blowing; that the men in charge of the train, or at least one of them, the fireman, saw the plaintiff was driving on the track when the train was between forty feet and seventy-five feet from the crossing; that the train was gliding almost noiselessly in; and if the engineer or fireman had sounded the whistle or rung the bell as the law required them to do, the plaintiff could have heard the sound, and would have been warned of the approaching danger, and could have escaped the injury. When the fireman saw him going on the track, it was his duty to not only use all of the means in his power to stop the train; but it was also his duty to ring the bell and sound the whistle or warn him of the peril so that the plaintiff might escape." To this argument the defendant objected, and the court sustained the objections of the defendant and said: "Gentlemen of the jury, the ringing of the bell and the sounding of the whistle are not

in this case, and you will pay no attention to any argument about the blowing of a whistle or the ringing of a bell."

The jury returned a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff prosecutes this appeal.

J. O. A. Bush, for appellant.

When the injury is shown, the company is *prima facie* liable. Kirby's Dig., § 6773; 63 Ark. 636; 33 Ark. 816; 49 Ark. 535; 57 Ark. 136; 80 Ark. 19; 73 Ark. 548. It was the duty of the company to keep the bell ringing or whistle sounding until the crossing was passed. Kirby's Dig., § 6595; 53 Ark. 201; 69 Ark. 134; 71 Ark. 427. What would be ordinary care for a boy of tender years might be culpable negligence in an adult. 81 Ark. 190; 15 Wall. 401; 81 Ga. 416; 71 Ill. 607; 26 Ore. 180; 78 Ark. 62; 25 L. R. A. 667. Seeing a person on the track who, it seems, is not likely to get out of the way, the company's employees should give extra alarm. 46 Ark. 523; 74 Ark. 412; 84 Ark. 275; 87 Ark. 631; 16 L. R. A. (N. S.) 301. The bell and whistle are for sounding danger signals. 87 Ark. 631.

Kinsworthy & Rhoton, for appellee.

Failure to look and listen before attempting to cross a railway crossing is evidence of negligence; and, if injury result to the traveler under such circumstances, he cannot recover. 54 Ark. 431; 56 Ark. 457; 61 Ark. 549; 62 Ark. 156; 69 Ark. 134; 65 Ark. 235; 76 Ark. 224. The most that plaintiff was entitled to have the court say to the jury was that, if his peril was discovered by the trainmen in time to avoid the injury, there might be a liability, notwithstanding plaintiff's contributory negligence. 54 Ark. 431; 69 Ark. 380; 77 Ark. 401; 49 Ark. 257; 50 Ark. 477.

FRAUENTHAL, J., (after stating the facts.) The plaintiff was injured while attempting to cross the railroad track of the defendant at a public crossing. The care and diligence that is required of the ordinary traveler upon the highway at the intersection of a railway is well settled in this State. It has been repeatedly held by this court that it is negligence for one who approaches a railroad crossing to fail to look and listen

for the approach of trains, and only in exceptional cases is it proper to submit to the jury the question as to whether the failure to exercise such care is excusable. The general rule of law is that the failure to exercise that care and diligence is such negligence as will defeat a recovery for any injury that is the consequent result thereof. *Railway Company* v. *Cullen,* 54 Ark. 431; *Little Rock & F. S. Ry. Co.* v. *Blewitt,* 65 Ark. 235; *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 135; *St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 225; *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.,* 78 Ark. 55; *Scott* v. *St. Louis, I. M. & S. Ry. Co.,* 79 Ark. 138.

But this rule of law is applicable to adults and to those minors who have the full measure of discretion attributed to adults. It is not a rule that is applicable to all minors, and is not applicable to those minors who have not the capacity or intelligence to appreciate the dangers, or the discretion to guard against them. The standard for judging the conduct of a minor is not the care and prudence that would be exercised by an adult, but only that of one of his age, intelligence and discretion; and it cannot be said as a matter of law that a minor is guilty of contributory negligence under circumstances that would declare an adult to be guilty of such negligence.

In the case of *Washington & Georgetown R. Co.* v. *Gladmon,* 82 U. S. 401, it is said that the rule of law in regard to negligence of an adult and the rule in regard to that of an infant is quite different. The adult must give that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant less discretion is required, and the degree depends upon his age and knowledge. "The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

The Supreme Court of Georgia has well said: "But, conceding that average may serve as a standard in adults, it will not follow that a like standard should have recognition as to children. Could we assume an ideal constant as to the former, who that knows how precocious are some children and how backward are others would carry the assumption down to childhood and apply it to children? Capacity * * * is the main

thing. Age is of no significance except as a mark or sign of capacity. * * * The study of these and other like cases will lead to two conclusions: first, that no court can hold that childhood and manhood are bound to observe the same degree of diligence; secondly, that while the same ordinary care is frequently applied to the diligence exacted by law of a child, there is little propriety in so doing. Due care is always the better and more accurate description. * * * Due care on the part of this boy might fall far short of that of a prudent man." *Western & Atlantic Ry. Co.* v. *Young,* 81 Ga. 397.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Sparks,* 81 Ark. 187, this court has said: "It has been frequently held that a child is not required to exercise the same capacity for self-preservation and the same prudence that an adult should exercise under like circumstances." In determining the question of contributory negligence the age and intelligence of the person charged therewith must be considered. A minor should be only held to exercise that care which one of his age, intelligence and ordinary prudence would exercise under the circumstances. In the case of a minor, therefore, it becomes a question of fact for the jury to determine, after taking into consideration his age, intelligence and capacity, whether or not, under the circumstances of the case, he was guilty of contributory negligence; and it cannot be said as a matter of law that the minor of tender years or of inferior intelligence or discretion is guilty of contributory negligence. *St. Louis S. W. Ry. Co.* v. *Bolton,* 36 Tex. Civ. App. 87; *Robinson* v. *Metropolitan St. Ry. Co.,* 86 N. Y. Supp. 443; *Byrne* v. *Railroad,* 83 N. Y. 620; *Dowd* v. *Chicopee,* 116 Mass. 93; 3 Elliott on Railroads, § 1172.

The plaintiff in this case was a boy 16 years old, and was of inferior intelligence. The testimony tended to show that he was not bright, and did not have good understanding. What would be ordinary care for such a boy to exercise might be culpable negligence in an adult. Under the circumstances of this case, it cannot therefore be said as a matter of law that he was guilty of contributory negligence. The court therefore erred in giving the instruction of its own motion declaring the plaintiff guilty of contributory negligence, and in refusing to

give said instructions numbers 1, 2, 3 and 4 requested by the plaintiff. And instruction number 8 given at the request of the defendant should have been modified by adding thereto the following: "Provided the engineer after the discovery of the perilous position of the plaintiff exercised due and ordinary care in using all the means within his power to avoid the injury."

We are also of the opinion that the court erred in instructing the jury that "the ringing of the bell and the sounding of the whistle are not in this case, and you will pay no attention to any argument about the blowing of the whistle or the ringing of the bell." Under the ruling which we have made above, the question of contributory negligence on the part of plaintiff was under the circumstances of this case a question of fact for the jury to determine. And therefore it became also a question of fact for the jury to determine as to whether or not the defendant was guilty of any negligence by failing to ring the bell or blow the whistle before the actual perilous position of the plaintiff was discovered. But, in addition to this, after the perilous position of the plaintiff upon the track was discovered by the defendant, it then became a question of fact for the jury to determine as to whether or not the failure to give warning signals was an act of negligence on the part of the defendant.

If the plaintiff was guilty of negligence in the manner in which he approached and went on the track, still the defendant was bound to use ordinary care to avert the injury after the peril of plaintiff was discovered. "The failure to use ordinary care to avoid injuring the plaintiff after his perilous situation has been discovered renders immaterial the inquiry as to the contributory negligence of the plaintiff in exposing himself to injury." *St. Louis S. W. Ry. Co.* v. *Thompson,* 89 Ark. 496.

In *St. Louis, I. M. & S. Ry. Co.* v. *Evans,* 74 Ark. 407, it is said: "The contributory negligence of a party is no defense where the direct cause of the injury complained of is the omission of the defendant to use a proper degree of care to avoid the consequences thereof." In that case it is said: "Appellant is not liable in this case because its servants did not stop the train, or because they ran the locomotive at an unusually high

rate of speed; but it is liable because of the fact that, under those circumstances, seeing the deceased on the track ahead of the swiftly approaching train and giving no evidence that he was aware of its approach, they negligently failed to give him any warnings of the peril."

In 2 Thompson on Negligence, § 1741, it is said: "The most obvious suggestion of prudence and social duty requires that the engineer who is driving the train shall give warning signals to a trespasser whom he sees on the track in front of the train, with his back to it, in sufficient time to enable him, after hearing the signals, to quit the track in safety." *Evans* v. *St. Louis, I. M. & S. Ry. Co.*, 87 Ark. 628.

In the case at bar the testimony tended to prove that when the plaintiff drove upon the track and his perilous situation was discovered by the fireman the train was 100 feet distant from him. The fireman saw that the plaintiff's back was towards the train, and that he was looking and had been looking away from the train, and had not seen the train; and the plaintiff's conduct and appearance gave evidence that he was wholly unaware of the train's approach. From the evidence the jury could have found that the train was then at such a distance that he might have quit the track in safety if he had been warned of the approach of the train. It then became a question for the jury to determine as to whether or not the defendant's servants were guilty of negligence in failing to give the warning signals.

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

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

Opinion delivered November 8, 1909.

1. INTERPLEADER—DEFINITION.—A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. (Page 457.)

2. SAME—BILL IN NATURE OF.—A bill in the nature of interpleader is one in which the complainant seeks some relief of an equitable nature

concerning the fund or other subject-matter in dispute, in addition to the interpleader of conflicting claimants. (Page 458.)

3. SAME—JURISDICTION.—Where a railroad company was sued in two counties by various creditors of a contractor to whom it was indebted for construction work, they holding claims in excess of its indebtedness to such contractor, it was entitled to file a bill in nature of interpleader in either county and to ask that all of the claimants be brought in, and have their claims adjusted and the amount distributed, and in such case the court first acquiring jurisdiction will grant such injunctive and other relief as may be necessary in the exercise of its jurisdiction. (Page 458.)

4. SAME—CONCLUSIVENESS OF DECREE.—Where a creditor sued in a court of one county and subsequently was made party to a bill of interpleader in a court of another county and restrained from proceeding further in the former suit, he should have appeared in the latter court and set up all his rights there, and cannot litigate his claim in the former court. (Page 459.)

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

STATEMENT BY THE COURT.

On August 30, 1899, appellee brought suit in the St. Francis Chancery Court against T. F. Moore, B. F. Hamit, Jr., R. L. Vansant and the Choctaw & Memphis Railroad Company, to recover judgment for work done in building the railroad of the company mentioned. The work was done under contract with the firm of T. F. Moore & Company, which firm was a subcontractor under R. L. Vansant. Appellee prayed for judgment in the sum of $847, and that same be declared a lien on the road bed, etc. Service was had on the defendants named in the complaint. The railroad company appeared in that suit, filing an answer and demurrer. While this suit was pending, the Choctaw & Memphis Railroad Company filed complaint in the Pulaski Chancery Court April 10, 1900, against appellee, T. F. Moore & Company, the Choctaw Construction Company, R. L. Vansant, James Brizzolara and others, alleging that claims were outstanding against the said T. F. Moore & Company on account of work alleged to have been done on said railroad amounting to about $4,000; that the work done by said T. F. Moore & Company under their subcontract with the said Vansant amounted to $26,298.54; that the said Vansant had paid

the said T. F. Moore & Company $24,106.73 on account of said work, and that he was still indebted to them in the sum of $2,191.81, which the said Vansant was withholding on account of the claims made against him by the creditors, subcontractors and laborers of the said T. F. Moore & Company. The plaintiff alleged that it was due R. L. Vansant under the terms of their contract the sum of $4,017.08. And prayed that all the parties holding time checks for work on said railroad under T. F. Moore & Company be made defendants; that T. F. Moore & Company, James Brizzolara and appellee be restrained and enjoined from further prosecution of proceedings instituted by them against said railroad company until the further order of the court; and upon final hearing that the amount, if anything, due and owing by the said Vansant to T. F. Moore & Company, be ascertained and applied on said claims according to the rights of the parties; that said railroad company be allowed to pay into court the amount of money owing under the contract between it and the said Vansant for distribution under the order of the court; and that the property of said railroad company be protected by the decree of the court against the assertion of any lien by any of the parties defendant for or on account of any money that may be owing them by the said R. L. Vansant, or the said T. F. Moore & Company, for or on account of work or labor performed under said contractors.

The appellee was duly summoned, but did not appear. He was restrained by a temporary order of the Pulaski Chancery Court from proceeding further with his suit in the St. Francis Chancery Court until the further orders of the Pulaski Chancery Court. The chancery court of St. Francis County, notwithstanding appellee had been restrained from further prosecuting his suit in that court, proceeded with the cause, and at its May term, 1900, rendered judgment in favor of appellee for the amount of his claim, and declared same a lien on the property of the railroad in the State of Arkansas. On the 26th of June, 1902, execution was issued by the clerk of St. Francis Chancery Court on said judgment, and same was placed in the hands of the sheriff of St. Francis County. The chancery court of Pulaski County enjoined the sheriff of St. Francis County from proceeding under the execution. On the 14th of March, 1907,

appellee filed the complaint in this suit against the appellants, in which, after setting out substantially the facts as above stated, he alleged that the property of the Choctaw & Memphis Railroad Company had passed, first, to the appellant Choctaw, Oklahoma & Gulf Railroad Company by deed, and then by lease from it to appellant Chicago, Rock Island & Pacific Railway Company, and that these appellants were the successors in interest to the Choctaw & Memphis Railroad Company, and were liable for the latter's debts. Appellee then alleged that he did not enter his appearance in the suit instituted against him and others in the Pulaski Chancery Court, that the final decree in that court was long after the decree in his favor in the St. Francis Chancery Court, that therefore the decree of the Pulaski Chancery Court enjoining appellee from enforcing the decree of the St. Francis Chancery Court was null and void as to him. The prayer of his complaint and amended complaint was for the enforcement of the decree of the St. Francis Chancery Court of June 15, 1900, and that appellants, their agents and attorneys, be restrained from instituting or prosecuting contempt proceedings against appellee or his attorneys in the Pulaski Chancery Court because of their connection with the present suit. A temporary restraining order was granted. Appellants demurred to the complaint, and filed motion to dissolve the temporary restraining order, which was responded to by appellee. The demurrer and this motion were overruled. Thereupon appellants answered the complaint. The answer, after setting out at length substantially the proceedings of the St. Francis and Pulaski chancery courts as alleged in the complaint, further alleged the result of the proceedings in the Pulaski Chancery Court as follows: "These defendants represent that the aforesaid suit in the Pulaski Chancery Court proceeded to a final determination, and that on the 22d day of June, 1906, a decree was rendered, in which it was decreed that there was owing by the said Choctaw & Memphis Railroad Company to the plaintiff for work done and performed under the contracts set forth therein the sum of $4,017.08, and that the defendants acquired no lien on the railroad of the plaintiff for the work and labor performed and material furnished under the contracts set out in the pleadings and depositions of said

cause; that the said sum of $4,017.08 should be paid into court, to be distributed among the defendants according to their respective rights therein, and that the defendants and each and all of them be perpetually restrained and enjoined from the prosecution of any action against the plaintiff for the purpose of subjecting plaintiff's railroad to a lien for any work and labor performed or supplies furnished by the defendants or either of them, in, upon or about said railroad under the aforesaid contracts, or from taking any further action or step in any action heretofore instituted for the purpose aforesaid, or for the enforcement or collection from plaintiff of any demand for work and labor as aforesaid, and that the plaintiff, upon the payment of said sum of money into court, be discharged from all liability to the defendants, or either of them, for or on account of any work or labor done or supplies furnished by the defendants, or either of them, under the aforesaid contract, in, upon or about the construction of said railroad.

"It was further ordered in said decree that said cause be retained by the court for the purpose of determining and settling the respective rights of the defendants and interveners in said cause, or such of them as are entitled thereto in the aforesaid fund of $4,017.08, and that said defendants appear by their respective attorneys within thirty days from the date of said decree for the purpose of asserting their claim to a right in said fund. A certified copy of said decree is hereto attached as 'Exhibit A,' and made a part of this answer, to the same extent as if set out in full herein.

"These defendants represent that the said sum of $4,017.08 was paid into court, and that on the 21st day of July, 1906, a further decree was rendered in said cause, ordering that the funds theretofore deposited into court be distributed as therein prescribed, and that the Choctaw & Memphis Railroad Company be discharged from any liability to defendants, or either of them, on account of work and labor on the Choctaw & Memphis Railroad under the contract between the said T. F. Moore & Company and the said R. L. Vansant.

"A certified copy of said decree is attached to this answer as 'Exhibit B,' and made a part hereof to the same extent as if the same were fully set out herein. These defendants state

that the two decrees aforesaid are still in full force and effect, and that the right of the plaintiff, J. W. Moore, to the enforcement of the decree of this court in the aforesaid case of J. W. Moore *v.* Choctaw & Memphis Railroad Company is fully adjudicated against the said plaintiff; and that by virtue thereof the said J. W. Moore and his attorneys are barred from further prosecuting the cause of action herein, and the same is *res judicata.*"

The prayer of the answer was "that the said J. W. Moore, plaintiff herein, his agents and attorneys, and the officers of this court, be forever restrained and enjoined from executing, or attempting to execute or claim any rights under the decree of the St. Francis Chancery Court, rendered at the May term, 1900, thereof, in a case wherein J. W. Moore was plaintiff and T. F. Moore & Company and others were defendants."

Appellee replied to the latter part of the answer above set forth as follows: "Plaintiff admits that the Pulaski Chancery Court rendered two decrees in the case of Choctaw & Memphis Railroad Company *v.* T. F. Moore *et al.,* one on the 22d day of June, 1906, and the other on the 21st day of July, 1906, certified copies of which are in the record, but he denies that he and his attorneys are barred by said decrees of the Pulaski Chancery Court from further prosecuting the cause of action herein, or that the same is *res judicata,* because an 'estoppel cannot be based on a void decree,' and the orders and decrees of said Pulaski Chancery Court in said suit, in so far as they affected the said J. W. Moore or his attorneys, were null and void, for the reason that the St. Francis Chancery Court acquired jurisdiction first of the parties and subject-matter of the suit of the said J. W. Moore against the Choctaw & Memphis Railroad Company, and had the right to render the decree of June 15, 1900, and now has the right to enforce it; the said J. W. Moore never having entered his appearance in said suit in the Pulaski Chancery Court or waived his right to the enforcement of the decree of June 15, 1900, rendered by the chancery court of St. Francis County."

The evidence in the case by appellee consisted in the introduction of the pleadings, papers and proceedings of the chancery court of St. Francis County in the suit instituted in

that court by appellee against T. F. Moore and B. F. Hamit, Jr., partners under the firm name of T. F. Moore & Company, R. L. Vansant, and the Choctaw & Memphis Railroad and the testimony of J. R. Beasley, one of the attorneys for appellee in that suit, who, among other things, testified as follows:

"The facts stated in the first decree of Chancellor Robertson of June 15, 1900, in the case of J. W. Moore *v.* Choctaw & Memphis Railroad Company *et al.* are true. Said decree was written by said chancellor, and the facts stated therein as to what occurred in court at the time and just before the rendition of said decree are stated again in the present bill.

"As attorney for plaintiff in that case, I moved the court to continue it to the next term, and stated that an injunction had been issued by the chancery court of Pulaski County for the purpose of restraining said plaintiff and his attorneys from proceeding further with the case then before the chancery court of St. Francis County. Said motion was overruled by the court, and said cause was ordered to proceed.

"The deed of conveyance made on June 30, 1900, by the Choctaw & Memphis Railroad Company to the Choctaw, Oklahoma & Gulf Railroad Company, which is on record in the recorder's office of St. Francis County, Arkansas, shows upon its face that the latter agreed to assume the payment of all the indebtedness of said Choctaw & Memphis Railroad Company, which is specified and set out in said deed of conveyance, '*and also all other indebtedness or liability of every kind and character that may exist against the Choctaw & Memphis Railroad Company, whether said indebtedness shall be due and payable at the date of the consummation of said purchase or shall become due thereafter.*' The words italicized are an exact copy from said deed. The appellants introduced the pleadings, papers and record of the proceedings had in the chancery court of Pulaski County in the case of Choctaw & Memphis Railroad Company *v.* T. F. Moore *et al.* It was shown by the complaint in that case that the Choctaw & Memphis Railroad Company entered into a contract with the Choctaw Construction Company on the 2d day of November, 1898, for the construction of its railroad, and that the Construction Company on the 11th day of May, 1899, entered into a contract with R. L. Vansant for

the performance of certain work on said railroad between the city of Little Rock and the Mississippi River, and that on the same day R. L. Vansant entered into a contract with T. F. Moore & Company for the performance of certain work on the line of railroad between Little Rock and Memphis. The proof showed that T. F. Moore & Company subcontracted part of that work to the plaintiff in the present suit—appellee—in the months of July and August, 1899. The complaint in the suit of the Choctaw & Memphis Railroad Company in the chancery court of Pulaski County filed April 10, 1900, against T. F. Moore and B. F. Hamit, Jr., under the firm name of T. F. Moore & Company, R. L. Vansant, James Brizzolara and others, showed that at the time it was filed a suit was pending in the Pulaski Circuit Court, instituted by T. F. Moore and B. F. Hamit against R. L. Vansant, for $25,469.40, the sum alleged to be due them for work on the railroad of Choctaw & Memphis Railroad Company, and that plaintiffs in that suit were seeking also to have the amount sought to be recovered of Vansant declared a lien on the railroad of the Choctaw & Memphis Railroad Company. It further showed that T. F. Moore and Hamit had also instituted a separate suit against the Choctaw & Memphis Railroad Company for $1,782.34, alleged to be due them for work on the railroad. It showed that James Brizzolara had a suit pending, and that various parties held time checks issued by T. F. Moore & Company, towit:

Robt. L. Pettus, who holds checks to amount of $	269.40
L. Rollwage & Co.	88.20
S. B. Trapp, Jr.	150.30
Fuzzell, Graham & Co.	259.90
Brandon & Baugh	283.35
T. C. Folbre & Co.	75.55
Pettus & Buford	240.50
M. C. Hamilton	424.26
Becker & Lewis	154.35
——— Mallory	3.20
J. W. Beck & Co.	1,157.20

"That these parties claimed that the amounts due them were a lien upon the railroad. It showed that appellee's suit was pending in the St. Francis Chancery Court to have the amount

alleged to be due him declared a lien upon the railroad of the Choctaw & Memphis Railroad Company. The decree of the Pulaski Chancery Court, in the case of Choctaw & Memphis Railroad Company against the various parties named and the appellee, showed that the Pulaski court adjudged in that case that appellee and the others acquired no lien on the railroad. It showed also that the Pulaski Chancery Court ordered and decreed as follows:

" 'That the said sum of $4,017.08 (four thousand and seventeen and eight one-hundredths dollars) be paid into court to be distributed among defendants according to their respective rights therein, and that the defendants and each of them be perpetually restrained and enjoined from the prosecution of any action against the plaintiff for the purpose of subjecting plaintiff's railroad to a lien for any work and labor performed or supplies furnished by the defendants, or either of them, in, upon or about said railroad, or from taking any action or step in any action heretofore instituted for the purpose aforesaid, or the enforcement or collection from plaintiff of any demand for work and labor as aforesaid, and that plaintiff, upon the payment of said sum of money in court, be discharged from all liability to the defendants, or either of them, for or on account of any labor done or supplies furnished by the defendants, or either of them, under the aforesaid contract, in, upon or about the construction of said railroad.

" 'It is further ordered that this cause be retained by the court for the purpose of determining and settling the respective rights of the defendants and interveners in said cause, or such of them as are entitled thereto, in the aforesaid sum of $4,017.08, and to that end it is ordered that said defendants appear by their respective attorneys within thirty days from the date of this decree for the purpose of asserting their claims to and right in said funds, and that all of the defendants and any interveners who may have filed an intervention in said proceeding, or their attorney of record, be notified by the clerk to present their claims within the time aforesaid.' "

This decree was entered June 22, 1906.

On the 21st day of July, 1906, the Pulaski Chancery Court entered this further decree in the cause, towit: "Now, on this

day comes the plaintiff, by its attorneys, J. M. Moore and W. B. Smith, and come the defendants and interveners, by Blackwood & Williams and N. W. Norton, their attorneys, and it appearing that of the sum of $4,017.08, due and owing by the Choctaw Construction Company to R. L. Vansant, under said contract and the estimate of the chief engineer of the railroad company, only $2,100.00 was and is payable to the defendants, T. F. Moore & Company, the said Vansant having paid said defendants all that was owing them under the subcontract between the said Vansant and the said T. F. Moore & Company, in excess of that amount, and that of the said sum of $4,017.08 $1,917.08 is going to the said Vansant, it is accordingly ordered that so much of the order and decree entered in this cause as directed said sum of $4,017.08 be paid into court, to be distributed among the defendants according to their respective rights, be set aside, and is thereupon ordered and decreed that the Choctaw Construction Company pay into court the sum of $2,100, to be distributed among defendants according to their respective rights, as provided in said decree, and that the Choctaw Construction Company be authorized to pay the residue of said sum, viz., $1,917.07, to the said Vansant.

"And thereupon [come] the following defendants, whose claims were filed in this cause on a prior day of this term, under the order and decree heretofore entered requiring all claims to be filed within thirty days, viz: Joel E. Wynne, $231.65; R. L. Pettus, 213.30; L. Rollwage & Co., $92.25; Fussell, Graham & Co., $238.50; Brandon & Baugh, $321.90; T. C. Folbre & Co., $75.00; Pettus & Buford, $196.85; M. C. Hamilton, $423.52; Becker & Lewis, $115.70; George Dooley, $18.00; Wm. Kirk, $36.05; J. P. Blanton, $19.50; W. E. Ingram, $139.20; W. T. Sanders, $46.00; T. W. Beck & Co., $811.65; T. H. Moore, $64.75, and present to the court their claims; and the court, having heard the evidence, and being well and sufficiently advised in the premises, doth allow said claims as above set forth; and, no other claims having been presented for allowance and payment, it is accordingly ordered that, after applying a sufficient amount thereof to pay the cost of this proceeding, the clerk of this court distribute the residue of the fund in the registry of this court among said defendants ratably according

to the amount of the several claims of said defendants, and each of them, and that he take the receipts of said defendants, or their attorneys of record, and file the same in this cause.

"It is further ordered and decreed that the Choctaw Construction Company, the Choctaw & Memphis Railroad Company, be discharged from any liability to defendants, or either of them, on account of the work and labor on the Choctaw & Memphis Railroad under the contract between the said T. F. Moore & Company and the said R. L. Vansant."

There was no appeal by appellee from the decree of the Pulaski Chancery Court. The St. Francis Chancery Court rendered a decree against the Chicago, Rock Island & Pacific Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company for $886.15, with interest thereon from June 15, 1900, from which they prosecute this appeal.

Thos. S. Buzbee, John T. Hicks and *Geo. B. Pugh*, for appellant.

A suit by a subcontractor involves an inquiry into the contractual relations existing between the owner and the original contractor. 17 N. W. 62; 31 Pac. 188; 34 Pac. 1113. The presence of the original contractor cannot be waived. 34 Pac. 1113; 59 Tex. 590; 6 Mo. App. 25; 45 Mo. App. 288; 73 Ga. 324. Secs. 6662-63, Kirby's Dig., prescribing the method of procedure in such cases, must be strictly construed. 59 Ark. 82; 49 Mo. App. 98. In the absence of the original contractor, the court acquired no jurisdiction. 32 N. W. 374; 74 Ark. 528. There can be no lien when the contract was let before the passage of the lien act. 71 S. W. 267. An injunction merely seeks to control the person to whom it is addressed. High on Inj., § 45. And in a proper case a suit in equity will be enjoined as well as one at law. L. R., 3 Ch. App. 76; 139 N. Y. 111; 1 Jacobs 22; 10 Sim. 479; High on Inj., § 53. Whenever it appears that a large number of suits are impending, and that the rights of the parties can be better protected and enforced in one suit, a court of equity will assume jurisdiction and issue the necessary process to prevent a multiplicity of suits. 67 Fed. 982; 30 Ark. 110; 44 Ga. 560; 67 Ark. 216; High on Inj., § 12 and 1406. The injunction order was binding on parties and privies. 3 Colo. 216; 56 Hun, 641; 9 N. Y. Supp. 223;

11 How. Pr. 365; 8 Abb. Pr. 239. A judgment obtained in violation of an injunction is void. High on Inj., § 142; 1 Swan, 1; 8 B. Mon. 613; 2 Md. Ch. Dec. 42. And if the judgment be void, then proceedings to collect it may be enjoined. 5 Ind. 384; 13 Ind. 513; 27 Ind. 477.

S. H. Mann, R. J. Williams and *J. R. Beasley,* for appellee.

Injunction was void. Prohibition was the proper remedy. 26 Ark. 51; 36 Fed. 337; 7 How. 612; 16 Ohio 373; 47 Am. Dec. 377; 49 Ark. 75; 6 Wall. 166; 43 Ark. 62. A trial upon the merits cannot be denied to a litigant upon the ground that he is guilty of contempt of court. 167 U. S. 409. It is not necessary to appeal from a void judgment. 8 How. 495. A void judgment is a nullity, and has no force, either as evidence or by way of estoppel. 60 Ark. 369.

WOOD, J., (after stating the facts.) "A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is that the conflicting claimants should litigate the matter among themselves without involving the stakeholder in their dispute." Adams, Eq. 400. Mr. Pomeroy says: "Where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and maintain against them the remedy of interpleader." 4 Pom. Eq. Jur., § 1320; 5 Pom. Eq., § 38 *et seq.*, § 60.

"Bills of interpleader have been frequently maintained where the several claimants, instead of claiming the whole fund or matter in dispute, have claimed different portions of the fund, when the aggregate of all the claims exceeded the full amount of the fund, and the complainant, being virtually a stakeholder, is unable to determine in what proportion the payments should

be made." *School Dist.* v. *Weston,* 31 Mich. 85; 23 Cyc. 3. The bill in the Pulaski Chancery Court was in the nature of a bill of interpleader. 5 Pom. Eq., § 60. It alleged that the plaintiff, the Choctaw & Memphis Railroad Company, was owing a certain amount on a contract which it had entered into for the construction of its railroad, that various parties were claiming certain sums due them for work done in the construction of the railroad, which sums claimed exceeded the amount that the railroad admitted to be due, that the parties had instituted suits to have the amounts claimed by them declared a lien on the plaintiff's railroad, and it asked that all parties making such claims be brought into one suit in the Pulaski Chancery Court, so that their respective claims might be adjusted, and that the balance (which appellant conceded) might be paid to the patries entitled thereto. It is shown by the allegations contained in the bill that there could be no statutory lien, inasmuch as the contract under which the work was done was let by the railway company prior to the passage of the lien act of 1899. *Choctaw & M. Rd. Co.* v. *Speer Hdw. Co.,* 71 Ark. 126; *Choctaw & Memphis Rd. Co.* v. *Sullivan,* 70 Ark. 262. See *Tucker* v. *Ry. Co.,* 59 Ark. 81.

It may be said of the complaint in the Pulaski Chancery Court, as was said of the bill in *Guess* v. *Stone Mountain Granite & Railway Co.,* 67 Ga. 215: "The bill is not without equity, but rests on equitable jurisdiction of avoiding a multiplicity of suits and settling interminable litigation in one trial, fixing everybody's rights and doing justice to all."

A bill in the nature of a bill of interpleader is one in which the complainant seeks some relief of an equitable nature concerning the fund or other subject-matter in dispute, in addition to the interpleader of conflicting claimants. 5 Pom. Eq. Jur., § 60. The statute (section 6013, Kirby's Digest) does not affect the jurisdiction of the Pulaski Chancery Court to maintain the suit. 5 Pom. Eq., § 61.

It is clear from the facts of this record that the Choctaw & Memphis Railroad Company could not have protected itself against other claimants in the suit instituted against it in the St. Francis Chancery Court by appellee without filing an answer in the nature of an original bill, and asking that all parties claim-

ing an interest in the amount conceded by the company to be due for construction work be brought into that suit and have their rights adjusted, and the amount distributed accordingly. But this would have been tantamount to a bill in the nature of a bill of interpleader in the St. Francis Chancery Court, and the same thing in legal effect as the bill filed in the Pulaski Chancery Court. We know of no rule of law or practice that would compel the plaintiff in a bill of interpleader to seek the one forum rather than the other, both having concurrent jurisdiction. It must be assumed, in the absence of evidence to the contrary, that the party bringing his bill of interpleader under such circumstances will select the forum most convenient for the conduct of the litigation.

The familiar doctrine that "the court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment" is not contravened here by holding that the Pulaski Chancery Court had jurisdiction. For the Pulaski Chancery Court, by the bill in the nature of a bill of interpleader filed by the Choctaw & Memphis Railroad Company against appellee and the others therein named, was the first to acquire jurisdiction of the subject-matter of that bill and all the parties named as defendants therein. Appellee's complaint in the St. Francis Chancery Court was not an interpleader's bill, and that suit could not properly have been transformed into such a bill.

The allegations set forth in the complaint filed in the Pulaski Chancery Court gave that court jurisdiction of the subject-matter, and service of summons on appellee in that suit gave that court jurisdiction of his person. Having jurisdiction, it was proper, according to the practice in such cases, to restrain the several parties to the suit from proceeding in other tribunals to have the same matters adjudicated.

The court first having jurisdiction by the bill of interpleader will grant such injunctive and other relief as may be necessary in the exercise of its jurisdiction. *Crawford* v. *Fisher,* 10 Sim. 479; *Prudential Assurance Co.* v. *Thomas,* 3 L. R. Ch. App. 76-78; 1 High on Injunctions, § § 12, 53; *Guess* v. *Ry. Co., supra.*

After appellee had been restrained from further prosecuting his suit in the St. Francis Chancery Court, no decree of that

court rendered thereafter could avail him. The injunction operated upon the person of appellee, and not upon the court in which the further proceedings were had contrary to the injunction against appellee. Appellee can not have the benefit of a decree rendered in his favor after he had been restrained from taking such decree.

As appellee was a party to the suit in the Pulaski Chancery Court, he should have appeared there, and set up all his rights in that suit; and if its rulings had been adverse, his remedy was to appeal. Although he did not appear in the Pulaski Chancery Court, he was nevertheless bound to do so, and is bound by its decree, from which he did not appeal.

It is unnecessary to consider other questions. The decree of the St. Francis Chancery Court is reversed, and the cause is dismissed.

JONES v. DYER.

Opinion delivered December 6, 1909.

1. ACTION—PREMATURENESS—ABATEMENT.—Where an action was brought prematurely, it should be abated, even though the right of action matured before the trial. (Page 463.)
2. APPEAL—WHEN REVERSAL ORDERED.—Where an action was brought by appellant prematurely, from which appellee did not appeal, but appellant recovered a less sum than he was entitled to receive, the cause will be affirmed unless appellant elects to take a reversal and a judgment abating the action without prejudice. (Page 464.)

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

Manning & Emerson, for appellant.

The account rendered became an *account stated,* and cannot be impeached except for fraud or mistake. 107 U. S. 325; 41 Ark. 502; 53 Ark. 155; 68 Ark. 534. Counterclaims as a defense cannot be interposed upon a separate cause of action from the contract sued on. 27 Ark. 489; 40 Ark. 75; 54 Ark. 190; Kirby's Dig., § 6099. Conflicting instructions should not be given. 74 Ark. 437; 57 Ark. 203; 72 Ark. 31.

Thomas & Lee, for appellee.

The suit having been prematurely brought, the plaintiff could not recover. 32 Ark. 782. An account becomes an account stated only when the parties agree that it correctly states the account between them. 55 Ark. 382.

McCULLOCH, C. J. Appellant, Jones, was, in the years 1907 and 1908, a merchant in Clarendon, Monroe County, Arkansas, and appellee, Mrs. Dyer, was engaged in farming during those years in that county. She had a family of four sons, and also had a number of tenants on her farm, and she, together with her tenants, traded with appellant at his store, the purchases being on credit payable during the crop-gathering season in the fall of the year. The account during the year 1907 (which was paid in full, and is not involved in this controversy) was not so extensive as during the succeeding year. Early in the year 1908 Mrs. Dyer arranged to trade with appellant that year, and in the beginning purchased four mules and a carload of corn, the price for these aggregating $884.50. Additional supplies furnished to her and her tenants up to the time this action was commenced in April, 1908, ran the total account up to $1,366.36.

It was agreed between them that the supplies furnished to tenants, up to certain stipulated amounts, should be charged to Mrs. Dyer, but kept on separate accounts for convenience. The supplies were to be furnished, either on written orders given by Mrs. Dyer or verbal orders of her son, Willie, who was authorized to make purchases for tenants. The principal point of controversy between the parties is as to whether or not Mrs. Dyer agreed to give security for said account. Appellant claims that at the beginning of the account, before he sold the mules and corn, he exacted of Mrs. Dyer a chattel mortgage on the mules, wagons and crops to secure the year's account, and that she agreed to give it, but postponed the execution of it from time to time on various pretexts, and failed to do so at all, and finally refused after the account had run up to the amount named above. Mrs. Dyer denied that she ever agreed to give a mortgage or other security for the payment of this account.

This disagreement caused a breach between the parties, and in April, 1908, Mrs. Dyer moved her business to another mer-

chant in Clarendon, and appellant commenced this action on April 13, 1908, to recover judgment for the amount of the account, asserting the right to treat the account as due and payable by reason of his debtor's violation of her alleged agreement to execute the chattel mortgage. Appellant alleged in his complaint that the mules, harness and corn sold to appellee were still in her possession, and at the commencement of the action he caused to be issued in accordance with the provisions of the statute in such cases (Kirby's Dig., § § 4966-4967) an order directing the sheriff or other officer to take the property described in the complaint and hold same subject to the further orders of the court. The record does not show what was done under this order, further than an allegation in the answer in which appellee claims that appellant "refused to further furnish supplies to her and her tenants, had an officer to take charge of the mules and corn sold to her by appellant, thereby demoralizing her tenants, putting her to great expense and trouble, and damaging her in the sum of one thousand dollars," for which she prayed judgment.

Appellee also in her answer denied that she agreed to execute a mortgage to appellant, and she pleaded the immaturity of the cause of action set forth in the complaint. She also alleged in her answer that she had given specific directions to appellant, limiting the amount of supplies to be furnished each month to her tenants, and that appellant failed to observe these directions, and furnished supplies in excess of the agreed amounts. Therefore she denied liability for the excess. She also pleaded that appellant violated his contract by refusing to continue to furnish supplies without security, and that she thereby suffered damages by reason of some of her tenants abandoning their crops.

The case was not tried until December 3, 1908, and in the meantime appellee paid $800 on the account, thus reducing the amount of appellant's claim to $566.36. On that day the case was tried before a jury, and the following verdict was rendered: "We, the jury, find for the plaintiff in the sum of $366.36, due January 1, 1909." The court rendered judgment in appellant's favor for that sum, and ordered execution to issue therefor,

but rendered judgment against him for all costs of the action. He appealed from the judgment.

Appellant asked the court to give the following, among other instructions, viz:

"2. You are instructed that, although you may find from the evidence in the case that plaintiff's debt was not due at the time of filing this suit, yet, if you find that the same is now due, your verdict should be for plaintiff in such sum as the proof shows defendant is indebted to plaintiff."

"3. You are instructed that if you find from the evidence that plaintiff furnished defendant mules, harness and corn, and certain supplies for self and tenants, and that defendant was to execute a note and mortgage to plaintiff for same, and was to purchase supplies for self and tenants during the season of 1908, that plaintiff was ready, willing and able to furnish said supplies, and that defendant refused to execute said note and mortgage and to purchase said supplies, then defendant's debt to plaintiff for said mules, harness, corn and supplies became immediately payable, and your verdict should be for plaintiff for the amount of said mules, harness, corn and supplies sold defendant."

The court gave the third instruction as asked, but modified the second by adding the words, "and state in your verdict when the debt became due." This instruction as asked was more favorable to appellant than he was entitled to, for appellee raised in the pleading her objection that the action was prematurely brought; and, if the evidence sustained the plea, the action should have been abated, even though the right of action had matured before the trial. *Hicks* v. *Branton,* 21 Ark. 186; *Heise* v. *Bumpass,* 40 Ark. 545; *Moore* v. *Horsley,* 42 Ark. 163; *Ferguson* v. *Carr,* 85 Ark. 246. The words thus added to the already incorrect instruction tended somewhat to obscure the issue; but we fail to discover how appellant was prejudiced thereby, for the jury must have found that appellee did not agree to execute a mortgage, and that the right of action was immature when the action was commenced. This issue was correctly submitted to the jury on the third instruction requested by appellant, and the jury found against him.

The first two instructions given on request of appellee are

objected to as being in conflict with appellant's third instruction, but we think that they can be harmonized, when read together, and are not in conflict.

The form of the verdict made it a special verdict, and the court, instead of giving judgment thereon in favor of appellant for the amount of the debt without cost, should have rendered judgment abating the action without prejudice to appellant's right to institute a new action after the maturity of the debt. Appellee did not, however, complain of this, and did not appeal from the judgment. She does not complain here, but on the contrary asks that the judgment be affirmed. Appellant cannot, of course, complain of that feature of the judgment, for it is in his favor. The verdict fixing the sum of the indebtedness is, however, clearly erroneous, and the evidence does not sustain it. There was no evidence at all justifying a deduction of $200 from the amount of appellant's account. According to the undisputed testimony, appellee's son Willie was authorized by her to purchase supplies for the tenants, and all the supplies were furnished to the tenants upon his express approval or upon his mother's orders. There is some conflict in the testimony as to whether the amount of supplies in the sum of $64.85, furnished to one of the tenants, Breeding, should have been charged to appellee; but as to the balance of appellant's account there was no conflict in the testimony. Nor was there any evidence to justify an award of damages to appellee. Two of the tenants abandoned their crops, but this was after appellee had quit trading with appellant and arranged with another merchant to furnish supplies to her and her tenants. The abandonment of crops by the tenants was not caused by appellant's failure to furnish supplies, and is not shown to have any proximate relation thereto. There is no proof that the seizure of the mules and corn caused any damage, and this was erroneously submitted to the jury.

Appellant is entitled either to an affirmance or to a judgment abating the cause without prejudice to his right to bring another action. Under the verdict against him on the issue as to the maturity of his right of action, he is not entitled to a new trial. Therefore, the judgment will be affirmed unless appellant elects within 15 days to take a reversal and a judgment here abating the action without prejudice.

KELLY v. KANSAS CITY SOUTHERN RAILWAY COMPANY.

Opinion delivered December 6, 1909.

1. RAILROADS—GRANT OF RIGHT OF WAY—OBSTRUCTION OF DRAINAGE.—The grant of a right of way to a railroad company does not authorize the company to obstruct the natural drainage of, and to overflow, the adjoining land of the grantor by the unskilful and unnecessary manner of the construction of the roadbed. (Page 468.)
2. LIMITATION OF ACTIONS—OBSTRUCTION OF DRAINAGE.—Where the roadbed of a railroad was originally constructed so that it did not obstruct the natural flow of surface water, but subsequently a ditch was filled up so as to cause the flow of surface water to be cast back upon the land of an upper proprietor, the cause of action began when the ditch was filled up, and was original and susceptible of immediate estimation. (Page 469.)
3. SAME—NECESSITY OF PLEA.—The statute of limitations must be pleaded at law and sustained by evidence, and cannot be aided by the allegations in the complaint. (Page 471.)
4. SAME—DAMAGE TO LAND.—Kirby's Digest, § 5064, providing that actions for trespass on lands shall be brought within three years, applies to an action for an injury to land by obstructing the drainage of surface water. (Page 471.)

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

J. S. Lake, for appellant.

It was appellee's duty, independent of contract, to maintain its culverts so as not to impede the free passage of surface water. 87 Ark. 480; 39 Ark. 463; 82 Ark. 447; 80 Ark. 235; 45 Ark. 252; 44 Ark. 360; *Id.* 258; 66 Ark. 271. The nuisance was not of a permanent character, within the sense that the statute of limitations begins to run from the date of construction. 52 Ark. 240; 57 Ark. 387; 72 Ark. 127; 76 Ark. 542; 80 Ark. 235; 82 Ark. 387; 86 Ark. 406.

Read & McDonough, for appellee.

The statute, after once commencing to run, cannot be stopped by death of the owner or minority of appellants. 31 Ark. 364; 52 Ark. 132. The injury was permnanent in the beginning, and the statute began to run at that time. 66 Ark. 271; 87 Ark. 475; 86 Ark. 406; 71 Ark. 78; *Id.* 451; 44 Ark. 258; 62 Ark. 360; 45 Ark. 252; 82 Ark. 453. A person making an

artificial ditch is not bound to keep it open. 21 Ill. App. 560. One is not bound to ditch the land of another. 29 N. Y. 459.

FRAUENTHAL, J. This is an action instituted by the appellants to recover damages which they claim to have sustained by reason of the obstruction of the natural drainage and flow of water over their land by the appellee in making an embankment in and filling up a ditch that had been dug along the appellant's roadbed. The plaintiffs below are the widow and minor children of Eli Harris, who was the owner of forty acres of land in Sevier County, which he occupied as his homestead to the date of his death. In 1896 he granted to the predecessor of the defendant railroad company a right of way for its railroad over said land, and in 1897 that company built its roadbed across the eastern portion of said land, running from north to south. The natural and usual flow of the water over this land, and the lands just north of it, was and had been from the northwest and towards the railroad embankment built by the defendant; so that, ordinarily, this roadbed would have obstructed the natural flow of the water which had been used to pass over this land. In the construction of its roadbed the railroad company dug borrow pits upon its right of way and upon the west side of the railroad embankment, and the connections were dug out between the borrow pits so as to make a ditch along the western side of the railroad and entirely across this land from north to south. This ditch was from two to five feet deep and from fifteen to twenty feet wide; and it drained all the land of the plaintiffs, of which complaint is now made, from the time of the construction of the railroad to the date which will be hereafter referred to, when the ditch was permanently filled up and became a part of the embankment. During all that time there was no obstruction to the flow of the water which passed over the portion of plaintiffs' land, now complained of. It is urged by the defendant that no ditch was dug along the side of the railroad by it, but that borrow pits were only dug by it; and that the defendant did not assume to provide an escape for the water by a ditch. But the evidence shows that these borrow pits were connected by drains, and that in effect they then formed practically a continuous ditch, which did successfully carry off all the water which had been theretofore used

to flow over the land. They did therefore, up to the time of the filling of the ditch, provide for the passage of the water, so that it did not injure the land involved in this case. In 1901 Eli Harris departed this life, leaving surviving him a widow and four minor children, who are the plaintiffs, and also two adult children. On January 2, 1909, the plaintiffs instituted this suit, and in their complaint alleged that in the spring of 1905 the defendant filled up said ditch, and thus obstructed the natural flow of the water and cast the same back on the land of plaintiffs, and "that the said ditch has continuously been and remained obstructed and stopped up since the spring of 1905." It appears from the evidence that this ditch was filled up by the accumulation of sediment and by the defendant throwing dirt into the ditch until there was formed a solid embankment where the ditch formerly ran across this land which was raised to a height of from one to two feet above the adjoining land upon the west, and became in effect a part and an extension in width of the railroad embankment. And the ditch was thus permanently filled up along the entire length of plaintiffs' land. There is a conflict in the testimony as to the time when the ditch was thus filled up and the embankment made therein. Some of the witnesses on the part of the plaintiffs testified that this was done two years before the institution of this suit, and others testified that it was done from three to four years prior to the date of the trial, which would have been from 2½ to 3½ years prior to the institution of this suit. The waters that had been theretofore drained by this ditch were cast back upon the plaintiffs' land by this embankment made therein; and the plaintiffs alleged that on this account they were unable to produce any crop on twenty acres of the land during 1906, 1907 and 1908, and they also alleged that two acres of the land were permanently injured by reason of a gully that was washed therein, and they sought to recover the rental value of the twenty acres for said three years and the value of said two acres. The defendant denied all liability for the alleged injury, and specifically pleaded the statute of limitation against any recovery. At the conclusion of the evidence the court directed the jury to return a verdict in favor of the defendant, which was done; and the plaintiffs prosecute this appeal.

There was sufficient evidence, we think, adduced in this case to go to the jury, which showed that the natural flow of the water which used to pass over the lands of the plaintiffs was obstructed by the defendant; and the question involved is, when did that obstruction occur which gave a cause of action; and if the obstruction occurred when the ditch was filled up, whether it was permanent or temporary. It is contended by the defendant that the obstruction occurred in 1897 when the railroad bed was originally constructed, and that it was permanent, and that the injury was then complete, and that the cause of action, if any arose, then accrued for all damages that were or could have been incurred. But, under the evidence in this case, when the defendant originally built its road embankment, it did not obstruct the natural flow of the water that passed over the plaintiffs' land, and therefore did not commit any injury thereby. By virtue of the grant given to it of a right of way over the land it had the legal right to construct its embankment thereon. This acquisition of a right of way did not, however, give to the railroad company the right to obstruct the natural drainage and to overflow the land of the adjoining and granting owner by the unskilful and unnecessary manner of the construction of the roadbed. *St. Louis, I. M. & S. Ry. Co.* v. *Morris,* 35 Ark. 622; *St. Louis, I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360. It still owed the duty to such owner not to construct its railroad embankment in an unskilful and negligent manner; and where it impeded or obstructed the natural drainage or flow of the water, it was still its duty to carry off such water by placing culverts or trestles across the embankment or by making ditches along its sides. If a railroad company attempts to alter the course of the natural drainage of a tract of land, it must provide sufficient means for the escape of the flow of such water. If the railroad company attempts to gather up the water into ditches, it is bound to care for it so that it will not do an injury to an abutting owner. In the case of *Little Rock & F. S. Ry. Co.* v. *Chapman,* 39 Ark. 463, it was held that "a railroad company has no right in the use of its right of way to injure the lands of upper proprietors by flooding them with surface water which had been used to pass over the right of way, when, by reasonable care and expense, it might, consistently with the

enjoyment of the right of way, leave a free passage for the water."

The wrong, however, does not consist in gathering the water or in diverting it from its natural course; but the wrong is done by obstructing the natural flow of the water and casting it upon the adjoining owner to his injury. If the embankment is constructed carefully and skilfully, so that it does not obstruct the natural flow of the water, and does not cast it back on the adjoining owner, but sufficiently provides for the escape of the water, then there is no injury done to the upper proprietor, and no cause of action arises. 3 Farnham on Waters and Water Rights, pp. 2660-2663.

The cause of action arises when, from the manner of the construction of the embankment, the free passage of the water is necessarily impeded and cast back upon the complaining owner; and if in the manner of the construction of the embankment this does not necessarily result, then no wrong has been done to, and no injury sustained by, and no cause of action would accrue to, such owner. 3 Farnham on Waters and Water Rights, p. 2574; *Mitchell* v. *N. Y., L. E. & W. R. Co.,* 36 Hun, 177; *St. Louis, I. M. & S. Ry. Co.* v. *Hardie,* 87 Ark. 475.

In the construction of its railroad embankment in 1897 the defendant made a ditch which carried off all the waters that were used to pass over the plaintiffs' land towards this embankment. The railroad company did not then obstruct the natural flow of this water and did not therefore injure this land. On the contrary, in the performance of its legal duty it exercised due care in providing a passage for the escape of these waters at that time. No cause of action therefore accrued to the owner of this land in 1897, and the statute of limitation was not then put in motion; nor did it begin to run until the ditch was filled up.

But when the ditch was filled up, the natural flow of the water over the plaintiffs' land was necessarily impeded and cast back on the land. Then a wrong was done to the owners of the land and an injury at once suffered; and then a cause of action accrued. The evidence in this case shows that the obstruction made in the manner in which this ditch was filled up was permanent and not temporary. The ditch was not only

filled up by sediment but the defendant cast dirt therein until an embankment was made where the ditch formerly was, and this embankment was raised several feet higher than the adjoining land. The ditch was not filled up in places only, but it was thus filled up along its entire length across the plaintiffs' land, and became a permanent part of or addition to the railroad bed. The damage thus done at the time of the filling up of this ditch was original, and should be fully compensated in one action for the injury to the land. In *St. Louis, I. M. & S. Ry. Co.* v *Biggs,* 52 Ark. 240, this court said: "Whenever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitation begins to run upon the construction of the nuisance." In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360, it is said: "So in this case the obstruction of the ditch was permanent; that is, it will continue without change from any cause except human labor. The effect of it was to restore the drained land to the condition in which it was before the ditch was dug. Its present and future effect upon the land could be ascertained with reasonable certainty. The damage was original and susceptible of immediate estimation. No lapse of time was necessary to develope it. It was the difference between the value of the land as it would have been with the ditch open, and the value of it with the ditch closed. As the law does not favor the multiplicity of suits, and all damages which will be sustained as the necessary result of the filling of the ditch in question, and are recoverable, could have been estimated at the time of such obstruction, from the effect of it upon the value of the land, only one action should be brought therefor, and that within three years after the ditch was closed."

In the recent case of *Board of Directors St. Francis Levee District* v. *Barton, ante* p. 406, Chief Justice McCULLOCH says: "This court has repeatedly held in cases where obstructions to drainage were total and permanent, such as by the building of a solid embankment across a drain, either natural or artificial, that the damage is original, and must be fully compensated in one action." *St. Louis, I. M. & S. Ry. Co.* v. *Morris,* 35 Ark. 622; *Turner* v. *Overton,* 86 Ark. 406.

In the case at bar a solid embankment was in effect made in the ditch and raised above the adjoining land, and the obstruction to drainage caused by it was total and permanent.

The damage thereby caused was then original, and should be fully compensated in one action. The statute of limitation began to run against this cause of action from the time the ditch was thus totally obstructed.

In the complaint it is alleged that this obstruction was made in the spring of 1905. But the plea of the statute of limitation is an affirmative defense, and must be sustained by evidence, and is not, in an action at law, affected by the allegations in the complaint. The evidence on the part of plaintiff tended to prove that this obstruction was made within three years next before the commencement of this action. If the action was brought within that time, then the cause of action herein in favor of the adult plaintiffs was not barred; and we are of the opinion that there was sufficient evidence adduced upon which to submit that issue to the jury. But the cause of action in favor of the minor plaintiffs that accrued by reason of the damage to their interest in the land caused by this obstruction was not in any event barred. The statute of limitation that is applicable to this character of action is three years, and is provided for in sections 5064 of Kirby's Digest. But section 5075 of Kirby's Digest provides: "If any person entitled to bring any action under any law of this State be at the time of the accrual of the cause of action under twenty-one years of age, or insane, or imprisoned beyond the limits of the State, such person shall be at liberty to bring such action within three years next after full age, or such disability shall be removed."

In as much as this cause must be remanded for a new trial, we deem it but proper to say that the plaintiffs have the right, if they are so advised, to amend their pleading so as to seek to recover those damages which under the law the injury shows they are entitled to.

The judgment of the lower court is reversed, and this cause is remanded for a new trial.

HAMBURG BANK v. GEORGE.

Opinion delivered December 6, 1909.

1. EVIDENCE—SELF-SERVING DECLARATIONS.—Where it was a question whether plaintiffs, who were partners, purchased certain county warrants for themselves or for another, evidence of conversations between the plaintiffs tending to prove that they were purchasing for themselves was inadmissible, as they were self-serving declarations. (Page 476.)
2. PLEDGE—CONVERSION—MEASURE OF DAMAGES.—While a pledgor is not entitled to recover the pledge until the debt for which it is pledged is paid, yet when the pledgee converts the pledge and thereby puts it beyond his power to return it, the pledgor is entitled to sue for the value of the pledge at the time of the conversion, less the amount of the debt. (Page 477.)
3. SAME.—It is error to instruct the jury that the measure of damages for conversion of a pledge is the highest price for which the pledge could have been sold at the time of the conversation. (Page 480.)

Appeal from Ashley Circuit Court; *Henry W. Wells,* Judge; reversed.

Moore, Smith & Moore and *W. L. & D. D. Terry,* for appellants; *J. C. Norman* and *Geo. W. Norman,* for appellants.

If appellees wished to recover the value of the scrip, the action should have been in tort, for the value thereof, and not for the value of the money received for it. 25 Ark. 100; 31 Ark. 159; 76 Ark. 600. What the scrip sold for does not necessarily show the market value. 38 Ark. 179. And evidence of that is not sufficient to support a verdict. 31 Ark. 158. A party cannot give evidence of his own declarations made in the absence of the other party. 147 Mass. 541; 5 Barb. 147; 63 Me. 22; 110 Mass. 144; 125 Mass. 451; 7 How. Pr. 113; 16 N. H. 426; 79 Ga. 105. A witness will not be permitted to state a conclusion of law. 70 Ark. 426. An instruction based partly on evidence not in the case is erroneous. 85 Ark. 325; 79 Ark. 377.

Robt. E. Craig, for appellees.

A party may waive a tort and sue in assumpsit, or he may declare in both and recover at his election what he can prove. 17 Ark. 599; 25 Ark. 100. The pleadings will be treated on

appeal as amended to conform to the proof. 84 Ark. 41; 85 Ark. 251. The evidence about which appellants complain was admissible as part of the *res gestae*. 14 Ark. 438. A pledgee does not become liable for conversion by the simple fact that he delivered the pledge to a person other than the pledgor. 93 U. S. 579. The test to determine whether plaintiff is entitled to recover is his ability to make out his case without the aid of an illegal transaction. 47 Ark. 378. The office of an amendment *nunc pro tunc* is to perfect that which is improperly done. 72 Ark. 21.

McCULLOCH, C. J. The plaintiffs (appellees), George & Butler, instituted this action at law against the Hamburg Bank, a banking corporation, and W. H. Tebbs, its cashier, to recover the value of a lot of county scrip of Ashley County, alleged to be the property of plaintiffs, and which the defendants are alleged to have converted and sold. Plaintiffs alleged in their complaint that they borrowed from defendant bank, through its cashier, the sum of $12,597.34 with which to purchase a lot of county scrip; that they purchased said scrip and delivered same on March 19, 1906, to the bank as security for the payment of said amount loaned to them, with interest thereon; that the bank and its said cashier, on October 30, 1906, sold said scrip or permitted it to be sold, without the consent of plaintiffs, and converted the proceeds. They prayed judgment for the price of the scrip less the amount of their said indebtedness to defendants, a balance of $4,911.03.

The defendants in their answer denied that they loaned money to plaintiffs with which to purchase scrip, or that the plaintiffs purchased same or delivered same to defendants as security; but alleged the facts concerning the scrip transaction to be as follows:

That G. P. George represented to one T. A. Jackson that he had an option, at the price of 45 cents on the dollar, on a lot of Ashley County scrip then owned by Caldwell & Drake, and that they (Jackson and George) entered into an agreement to the effect that George should go to Little Rock and purchase said scrip for Jackson and sell it to the latter at the price of fifty cents on the dollar; that Jackson would arrange with defendant bank to honor George's draft for the price of the

scrip; that pursuant to this agreement George purchased the scrip from Caldwell & Drake and forwarded a draft on defendant bank with the scrip attached for the price thereof, and that the bank paid the draft for and at the request of Jackson, and that the scrip was delivered to the bank for Jackson. They alleged that another lot of scrip was purchased by plaintiffs for Jackson in the same manner, and that the only connection either the bank or its cashier ever had with the scrip transaction was to pay the drafts at Jackson's request drawn for the price of the scrip. They alleged that Jackson immediately took charge of the scrip, and afterwards sold it. The case went to trial before a jury, and verdict was rendered in favor of the plaintiffs for the sum of $2,650.

There was a sharp conflict between the testimony of plaintiff George and defendant Tebbs, the cashier of the bank, between whom the transactions in question were negotiated. The former testified positively that he borrowed the money from the bank to purchase the scrip for his firm, George & Butler, and delivered it to the bank as security for the loan. Defendant Tebbs testified that he advanced the money to plaintiff on instructions from Jackson, that the scrip was delivered to the bank for Jackson attached to the draft, and that Jackson gave his note to the bank for the amount advanced. He said George told him that the scrip was being purchased for Jackson. The evidence was sufficient to sustain a verdict either way on the issues presented.

Errors of the court are assigned in permitting the plaintiffs, George & Butler, each to testify concerning conversations between themselves in the absence of defendants about their own acts and declarations leading up to the purchase of the scrip. George was permitted to testify as follows:

"When I went into the office, Butler handed me this telegram, of date March 14, 1906. It was in words and figures as follows (reading it). Mr. Butler discussed the proposition of who should go to Little Rock. It was decided that I should go. The proposition of funds was brought up. We had been in communication with the Mercantile Trust Company of Little Rock. We thought we could get the money by putting up the scrip and probably two or three thousand acres of land in Ashley

County. I told Mr. Butler to make out a list of our lands and forward it to me at Little Rock."

Butler was permitted, over the objections of defendants, to testify as follows: "We conceived the idea of locating or securing the Caldwell & Drake scrip—that was scrip issued for the building of this court house. We had correspondence with them from time to time. I don't know how many weeks or months. There was several letters passed between us. Mr. George went to Little Rock to negotiate about it. During this time we were figuring on where we were going to get the money to pay for this scrip. We had written to the Mercantile Trust Company and other banking institutions to see if we could raise the money. One of the banks wrote us. We wanted to borrow the money at 6 per cent. and give the scrip we purchased as security. We were satisfied we could get it if we had the right kind of security. Some time in March our negotiations with Caldwell & Drake culminated by them sending us a telegram to come to Little Rock. I believe it was George Caldwell who was business manager. He sent for us to come to Little Rock and make a deal about that Ashley County scrip. George was not in the office when the telegram came. It was in the morning before the train left. I 'phoned to George to come to the office at once. We discussed the matter, and decided that he should go to Little Rock, inasmuch as he had gone there before, and see if he could close the trade. Fifty cents was the limit we could offer to pay for the scrip. We had something over $3,000 in scrip before that. We had disposed of $2,000 of that to Mr. Gates and $1,000 to Mr. Compere. We got everything in shape to make possible this deal. We wanted to raise the money for this big batch of scrip. We had our abstract books, which we expected to put up in addition. I was to make out a list of the lands, the abstract books and the value of the lands. I was to send that up, so that he could present that to the bank to secure the money. After we made that agreement, he left to go to the Hamburg Bank, with whom we were doing business, to draw on our account to go to Little Rock. He was gone a few minutes, and came back with a letter from the Hamburg Bank. It said to honor George's draft for as much as $14,000. George left for Little Rock. He was gone a day

or two and came back, and said that the scrip had been landed."

The tendency of this testimony was to corroborate the testimony of George in his statement that he borrowed the money from the bank with which to purchase the scrip on their own account, instead of purchasing it for Jackson, as claimed by Tebbs. It was improper to corroborate him in this way. These were self-serving acts and declarations of the plaintiffs, which were not competent evidence against the defendants. Their prejudicial effect is manifest, for the conflict between the several versions of George and Tebbs was a sharp one, and the slightest corroboration was calculated to turn the scales in favor of either. A party cannot be permitted to corroborate himself by proving what he said or did at another time. *Res inter alios acta alteros nocere non debet* as a maxim of the law of evidence is universally recognized. Mr. Chamberlayne, in his note to Best on Evidence (§ 506), discussing this rule, says that "when the person whose words or acts are offered in evidence is also the opposite party to the suit, the evidence is further inadmissible by virtue of another important principle—that no man shall be allowed to make evidence for himself."

The following authorities may be consulted as establishing the inadmissibility of the testimony in question: 17 Cyc. 274, 279, 283; 1 Phillips on Evidence, 748; *Carrigg* v. *Oaks,* 110 Mass. 144; *Commonwealth* v. *Sargent,* 129 Mass. 115; *Builders' Supply Co.* v. *Cox,* 36 Atl. (Conn.) 797; *Baxter* v. *Camp,* 41 Atl. (Conn.) 803; *Aiken* v. *Kennison,* 58 Vt. 665; *Erie & Pac. Despatch* v. *Cecil,* 112 Ill. 180; *Swamscot Machine Co.* v *Walker,* 22 N. H. 457; *Williams* v. *Emberson,* 55 S. W. (Tex.) 596; *Ross* v. *Moskowitz,* 95 S. W. (Tex.) 86.

The admissibility of the testimony cannot be sustained on the ground contended for by learned counsel for plaintiffs, that it related to acts and declarations which constituted a part of the transaction involved in the controversy. It was not a part of the transaction in controversy, which was a contract entered into between George, on the one side and Tebbs, the cashier of the bank, on the other. The testimony related solely to acts and declarations of the plaintiffs themselves concerning the purchase of the scrip before the transaction between George and Tebbs occurred. It did not tend to establish any independent

or collateral fact which legitimately shed light on the main transaction in controversy, but it related solely to the preparations made by plaintiffs for the purchase of the scrip, and it was in effect an attempt to corroborate George by proof of acts and declarations of himself and his co-plaintiff in the absence of defendants. As we have already stated, the conflict in the testimony of George and Tebbs was a sharp one. The former stated that he borrowed the money from the bank, purchased the scrip, and delivered it to the bank as security. Tebbs denied this, and stated that he advanced the money to plaintiffs to use in purchasing the scrip for Jackson. The prejudicial effect of the objectionable testimony is manifest, for, if credited by the jury, it induced them to believe that plaintiffs intended to borrow the money from the bank and purchase the scrip for their own account; and it thus improperly went in corroboration of George's testimony as to the main transaction.

There are numerous other assignments of error, which we do not sustain, but, as the case must be remanded for the error indicated, we deem it proper to discuss some of the other important questions which will probably arise in the new trial.

Learned counsel for defendants insist that this is not a suit for the conversion of the scrip, but only for money had and received, and that, as the scrip was turned over to Jackson and sold by him, and none of the proceeds were received by either of the defendants, the evidence does not sustain a verdict against them. We think counsel are mistaken in their characterization of the action. It is one for conversion. The allegations of the complaint are sufficient to show a conversion of the scrip by defendants and to warrant a judgment for the recovery of the value thereof. *Fordyce* v. *Nix,* 58 Ark. 136. The case was tried on the theory that it was an action sounding in tort for the conversion of the scrip, and the instructions submitted the case to the jury on that theory, and we think there was ample evidence to sustain the verdict.

The letter signed by Tebbs, addressed to the State National Bank of Little Rock, and delivered to George, instructing that bank to cash George's draft for the money with which to buy the scrip—or a copy of that letter on proof of the loss of the original—was admissible. The language of the letter is con-

sistent with the respective versions of both George and Tebbs as to what transpired between them, and it was admissible as a part of the transaction between them. George's testimony as to what was said at the time the letter was written is sufficient to establish a contract with the bank to loan the money, and his statements were competent for that purpose.

The following instructions, given at the request of plaintiff, were objected to:

"1. If you believe from the evidence that plaintiffs borrowed from the Hamburg Bank the money to pay for the scrip in question and deposited the scrip so bought with the bank as security for the money borrowed, then this scrip was the absolute property of the plaintiffs, subject to the lien of the bank on the scrip for payment of the money borrowed; and if you further believe from the evidence that the bank delivered the scrip to T. A. Jackson or permitted him to take it and sell it as his own, then the bank cannot defeat this suit for the value of the scrip by claiming that it lent the money to Jackson, and Jackson paid the bank the money borrowed, and Jackson sold the scrip, but such action on the part of the bank would be a legal conversion of the scrip, and the bank is liable to plaintiffs for the value of the scrip."

"2. If you believe from the evidence that plaintiffs borrowed the money from the Hamburg Bank to pay for the scrip in question, and pledged or hypothecated the scrip to the bank to secure payment of the money borrowed, then the scrip so pledged was the absolute property of the plaintiffs, subject to the payment of the debt, and the bank is bound to account to the plaintiffs for it, regardless of any claim of Jackson or any one else may have made to the ownership of the scrip; and if the bank without plaintiff's consent let Jackson have it and sell it as his own, then the bank is liable to the plaintiffs for the value of the scrip."

It is contended that these two instructions are erroneous in declaring as a matter of law that if the plaintiffs borrowed the money to pay for the scrip, and deposited the scrip so bought with the bank as security for the money borrowed, it constituted the plaintiffs the owners of the scrip. We think the instructions were correct; for, if the plaintiffs borrowed the money from

the bank and purchased the scrip, it thereby became their property; and if they pledged it to the bank as security for the loan, the bank was responsible to them for it. Of course, these instructions must be considered in connection with other instructions given at the request of the defendants, presenting their theory of the case; notably the following:

"1. You are instructed that if you believe from the evidence that G. P. George, one of the plaintiffs in this case, agreed to sell T. A. Jackson the county scrip mentioned in the controversy for the sum and price of fifty (50) cents on the dollar, and if you believe in furtherance of said agreement that said George went to the city of Little Rock and procured said scrip, and drew a check therefor at said price on the Hamburg Bank and that the Hamburg Bank in obedience to the orders of T. A. Jackson paid said draft, and had said check charged to himself, then your verdict will be for the defendants."

"2. You are instructed that if you believe from the evidence that G. P. George, one of the plaintiffs in this case, agreed to sell Jackson the scrip mentioned in this controversy for fifty (50) cents on the dollar, and Jackson did pay for it, and that after scrip had been purchased and paid for by Jackson that Jackson agreed to permit said George to become a part owner in the said scrip, upon the said George depositing with him or the Hamburg Bank a certain amount of money, and that George failed to deposit said sum of money, then your verdict will be for the defendants."

The following instruction, given at plaintiff's request, was also objected to: "If the jury believe from the evidence that plaintiffs borrowed money from the Hamburg Bank to pay for the scrip in question, and deposited the scrip so bought with the bank as security for the loan of the money, and afterwards plaintiffs demanded of the bank a settlement, and the bank denied that plaintiffs had deposited any scrip or had any interest in the scrip, then this was a conversion on the part of the bank, and it became then and there liable to the plaintiffs for the value of the scrip."

The language of the instruction was inaccurate in the use of the word "settlement," instead of saying a "return of the

scrip." But this inaccuracy, if deemed material, should have been met with a specific objection.

The plaintiffs were not, as long as the scrip was held by the bank as a pledge, entitled to its value until they paid the debt; but when the defendants converted the scrip and thereby put it beyond their power to return it, the plaintiffs were entitled to sue for the value at the time of the conversion, less the amount of their debt, this being their interest in the scrip. *Sunny South Lbr. Co.* v. *Neimeyer Lbr. Co.,* 63 Ark. 268.

The court gave the following instruction on the measure of damages: "If you find for the plaintiffs, then your verdict should be for the highest price at which the scrip could have been sold at the time of the conversion by the defendants, from which deduct the amount of money borrowed by plaintiffs with which to buy the scrip with 10 per cent. per annum interest thereon from the 16th day of March, 1906, until the date of the conversion by the defendants, or either of them, and the balance left, with 6 per cent. interest thereon from the date of the conversion down to this date, would be the true amount due plaintiffs for which you could return your verdict."

This instruction was erroneous in stating the measure of damages to be "the highest price at which the scrip could have been sold at the time of the conversion," etc. *Perkins* v. *Ewan,* 66 Ark. 175; *Sunny South Lbr. Co.* v. *Niemeyer Lbr. Co.,* 63 Ark. 268; *Summers* v. *Heard,* 66 Ark. 550; *American Soda Fountain Co.* v. *Futrall,* 73 Ark. 464.

The exception to the ruling of the court in giving the instruction was not preserved, but we call attention to it in view of another trial.

We do not deem it necessary to discuss other rulings of the court in giving and refusing to give instructions, further than to say that we find them to be correct.

For the error indicated in admitting the improper testimony, the judgment is reversed and the cause remanded for new trial.

ROSS v. STATE.

Opinion delivered December 6, 1909.

1. CRIMINAL LAW—PROOF OF OTHER CRIMES.—Where there is a question as to whether an act alleged to be a crime was committed by accident or mistake, or intentionally and with bad motive, the fact that similar acts were done by the defendant at other times is admissible because it shows design. (Page 482.)
2. SAME—PRESUMPTION OF INNOCENCE—INSTRUCTION.—It was not error to refuse to instruct the jury that "the fact that an indictment was returned against the defendant in this case raises no presumption as to his guilt" where the court had charged that "the defendant in this case is presumed to be innocent of the charges in the indictment, which presumption prevails until overcome by testimony convincing you beyond reasonable doubt of his guilt." (Page 483.)

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

Geo. M. Chapline, for appellant.

Evidence of the commission of other crimes, though similar, is inadmissible. 54 Ark. 626.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

Evidence of other crimes is admissible when so connected that it appears that defendant had a common purpose in all. 56 Ark. 284; 109 Mass. 457; 18 N. Y. 589; 58 Vt. 315. Whatever tends to prove a man guilty of the crime charged may be given in evidence, though it also tends to show he has committed other crimes. 72 Ark. 598. Bish. New. Crim. Prac. 1123; Clark's Crim. Prac. 517; 75 Ark. 433. It is not error to refuse an instruction on a proposition already covered by others. 45 Ark. 544.

BATTLE, J. A grand jury of Lonoke County, at the August, 1909, term of the Lonoke Circuit Court, returned an indictment against George Ross. It contained two counts. In one it charged him with unlawfully stealing, taking and carrying away, on the 16th day of April, 1909, in the county of Lonoke, four dollars and fifty cents in United States money, of the property of A. Hamberg & Sons. In the other count it charged him with embezzling, at the same time and place, four dollars and

fifty cents, in United States money, of the property of A. Hamberg & Sons. He pleaded not guilty. The jury in the case found him guilty, and assessed his punishment at a fine of ten dollars and imprisonment in jail for one hour. Judgment was rendered accordingly, and from that judgment he appealed to this court.

We do not deem it necessary to set out the evidence adduced in the trial, which was conflicting. It is not for us to decide whether the defendant was guilty of the charge, but was the evidence legally sufficient to sustain the verdict? Without discussing it, it is sufficient to say it was.

Evidence was adduced tending to prove that Ross was a clerk employed by A. Hamberg & Sons to sell goods at their store in Lonoke; that they required their clerks to make out tickets in duplicate, when they sold goods, showing goods sold and by and to whom, and the amount for which the same was sold, and to give the purchaser one of the duplicates and to deposit the other in a drawer provided for that purpose in the store. That, a short while previous to the time when Ross was charged with stealing and embezzling the four dollars and fifty cents, goods were sold on one day by their clerks for cash amounting to $19.00, and only $8.75 was paid in or accounted for; that at that time Ross sold goods to one Banks and received from him more than five dollars for the same, for which he did not deposit a ticket or account. Defendant moved to exclude this evidence, and the court denied his motion.

A short time after he was accused of stealing or embezzling the money Ross left the State and wrote a letter to one Miller in which he said his reason for leaving was that he had a telegram saying his father was ill. He testified in his own behalf, and said he had no such telegram, but knew his father was not well. The letter was read as evidence. He likewise moved to exclude it, and his motion was denied.

Where there is a question as to whether or not an act alleged to be a crime was committed by accident or mistake, or intentionally and with bad motive, the fact that similar acts were done by the defendant is admissible, because it shows design. In the case at bar the defendant sold goods for A. Hamberg & Sons, received the purchase money, and failed to deposit

ticket as required and the purchase money, and when asked about it denied selling, but when confronted by the purchasers said he had sold the goods and placed the purchase money in the drawer kept for that purpose. The evidence as to the sale to Banks tended to prove this failure was intentional, and not due to any mistake or careless omission, which he corrected when reminded of his failure, and was admissible for that purpose. *Howard* v. *State,* 72 Ark. 586; *Johnson* v. *State,* 75 Ark. 427; *Woodward* v. *State,* 84 Ark. 119.

The appellant complains because the court did not instruct the jury at his request, as follows: "The fact that an indictment was returned against the defendant in this case raises no presumption as to his guilt." But it was covered by an instruction given by the court in which the court told the jury: "The defendant in this case is presumed to be innocent of the charges in the indictment, which presumption prevails until overcome by testimony convincing you beyond reasonable doubt of his guilt."

Finding no reversible error in the proceedings of the trial court, its judgment is affirmed.

BARNETT *v.* MALVERN.

Opinion delivered December 6, 1909.

MUNICIPAL COURTS—JURISDICTION.—**The mayor of a town or city of the second class has the same jurisdiction to hear and determine cases under the criminal laws of the State arising within the limits of the town or city as has a justice of the peace.**

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

W. T. Tucker, for appellant.

The existence of a city ordinance must be proved. 80 Ark. 264; 68 Ark. 483.

Henry Berger, for appellee.

The mayor of a town has the same jurisdiction within its limits as a justice of the peace. Kirby's Dig., § 2083; 68 Ark. 247; 88 Ark. 213.

HART, J. H. Barnett was arrested, tried and convicted in the mayor's court of the city of Malvern for the crime of assault and battery, alleged to have been committed on the person of Sam Henry within the city limits. He appealed to the circuit court, where he was again convicted. He has appealed to this court from the judgment of the circuit court. He asks that the judgment be reversed solely because no ordinance of the city of Malvern making it unlawful to commit assault and battery was introduced in evidence. This was not necessary. The crime charged is made a misdemeanor by section 1584 of Kirby's Digest.

The mayor of a town or city has the same jurisdiction to hear and determine cases under the criminal laws of the State arising within the limits of such city as has a justice of the peace. Section 5634, Kirby's Digest.

The point has been expressly decided in the following cases: *Searcy* v. *Turner,* 88 Ark. 213; *McCall* v. *Helena,* 86 Ark. 442; *Marianna* v. *Vincent,* 68 Ark. 247.

The judgment is therefore affirmed.

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

Opinion delivered December 6, 1909.

APPEAL AND ERROR—FORMER DECISION AS LAW OF CASE.—The opinion of this court upon a former appeal is the law of the case.

Appeal from Hot Springs Circuit Court; *W. H. Evans,* Judge; reversed.

Kinsworthy & Rhoton, Bridges, Wooldridge & Gantt, and *Jas. H. Stevenson,* for appellant.

The uncontradicted evidence is that Ferguson had been discharged by appellant before he discharged appellees. The case should be reversed for misconduct of counsel for appellees. 58 Ark. 473; 61 Ark. 130; 62 Ark. 216; 58 Ark. 353; 70 Ark. 305. Improper statements are not cured by withdrawal or ad-

monition. 61 Ark. 138; 63 Ark. 174; 65 Ark. 626; 92 Ind. 34; 76 N. W. 462; 123 Ill. 333.

H. B. Means, J. C. Ross and *R. S. Bowers,* for appellees.

Acts of an agent done after discharge bind both himself and principal, so far as regards third persons who have had no notice of the revocation of his authority. 44 Ia. 519; 74 N. Y. 599; 21 La. Ann. 388; 84 Ill. 39; 128 Mass. 240; 61 Me. 480; 66 Ind. 243; 95 U. S. 48; 49 Ark. 320. Where an objectionable remark made by counsel has been withdrawn, the case will not be reversed therefor. 67 Ark. 365; 71 Ark. 427.

HART, J. This is the second appeal in this case. The former appeal is reported in 83 Ark. 288 under the style of *St. Louis, I. M. & S. Ry. Co.* v. *Broomfield.* The suit was originally brought by section hands of the railway company to recover their wages and the accrued penalty under section 6649 of Kirby's Digest. The judgment was reversed, and the cause remanded for a new trial. A verdict was again returned for the plaintiffs, and the defendant has appealed from the judgment rendered upon the verdict. It is conceded that their wages were paid the plaintiffs at the former trial, and that only the penalties are involved in this suit. In the opinion on the former appeal the court said: "The case turns upon whether Ferguson was competent to discharge these men at the time that they claim he did, and whether the request made of him to have their money sent to the station agent at Malvern brings their case within said section 6629 of Kirby's Digest, entitling them to penalties for not receiving their money within seven days after discharge. If he was foreman at that time, and they made the request, as they testified, they were entitled to their penalties. If he was not, the company was not bound either by his discharge of them or the request of these men to him that their money be sent to them at Malvern."

This is the law applicable to further proceedings in the case. *Perry* v. *Little Rock & Fort Smith Railway Co.,* 44 Ark. 395; *Dyer* v. *Ambleton,* 56 Ark. 170. There is a conflict in the testimony as to whether plaintiffs knew that the section foreman had been discharged at the time he discharged them; but this evidence becomes immaterial in view of the law as declared by the court on the former appeal, which, as we have

already seen, whether right or wrong, is the law of the case. The question, then, is, does the uncontradicted evidence show that the section foreman had himself been discharged before he discharged his crew?

The undisputed testimony shows that Ferguson, the section foreman, received his discharge the 22d day of December, 1905, a little before or at 7 o'clock in the morning at the station of the railway company at Malvern, Arkansas, and that at that time he turned over his reports to his successor. The plaintiffs, Harry Hill and Jack Taylor, testified that they were discharged at the tool or section house about 7 o'clock A. M., or a little later on December 22, 1905. The plaintiff Rufus Graham testified that he met the section foreman between the section house and the depot about 7 o'clock on the morning of December 22, 1905, and was discharged there near the station house. He said that the foreman was going from the station toward the section house, which was about one-fourth of a mile distant from the station. Hence it is plain that, after receiving notice of his own discharge at the station, the foreman started to the section house, and on the way met Graham and discharged him; and that when he arrived at the section house he discharged Hill and Taylor. We have examined the record carefully, and do not find any testimony that would warrant the jury in finding that the foreman went to the section house and discharged the men before he went to the station and received his own discharge. Hence we conclude that the undisputed evidence shows that the section foreman was discharged before he discharged the men. For the reason that there is not sufficient evidence to support the verdict, the judgment is reversed, and the cause dismissed.

JACKSON v. WILLIAMS.

Opinion delivered December 6, 1909.

1. LIBEL AND SLANDER—WORDS ACTIONABLE PER SE.—Under Kirby's Digest, § 1854, providing that "if any person shall falsely use, utter or publish words which, in their common acceptation, shall amount to charge

any person with having been guilty of fornication or adultery, such words, so spoken, shall be deemed slander, and shall be actionable and indictable as such," *held* that the court should, in a proper case, instruct the jury that it is actionable *per se* to charge one with having been guilty of fornication. (Page 488.)

2. SAME—MEANING OF WORDS.—In actions for slander or libel the words are to be taken in their plain and natural meaning, and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard or read them. (Page 489.)

3. INSANITY—SUFFICIENCY OF PROOF.—Evidence that a woman is at the change of life and that she is subject to hysteria and to fits of rage is insufficient to justify submission to the jury of the question whether she is mentally irresponsible. (Page 489.)

4. HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR WIFE'S TORTS.—The common-law rule that a husband is liable for a slander committed by his wife in his absence and without his participation has not been abrogated by the married women's statutes of this State. (Page 490.)

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

Carroll & Turner, for appellant.

Whether words are actionable *per se* is a question of law for the court. 121 N. Y. 199; 23 Ind. 265; 98 Tenn. 139; 129 Ala. 349; 55 Ark. 498; 55 Atl. 287; 86 Ark. 56; 16 Ia. 252.

Huddleston & Taylor, for appellee.

Whatever will preclude plaintiff's right of recovery may be given in evidence. 2 Ark. 415; 3 Ark. 552. It is too late to except to the qualifications of a juror after verdict. 23 Ark. 51; 35 Ark. 109; 70 Ark. 244; 15 Ark. 403. The husband is not liable for the torts of his wife, committed during coverture out of his presence, and in which he in no manner participates. 14 L. R. A. (N. S.) 1009; *Id.* 1003; 30 L. R. A. 521.

HART, J. This is an action of slander brought by the plaintiff, Dora Jackson, against the defendants, J. M. Williams and Nancy Williams. The defendants are husband and wife. The complaint sets out the exact language which constituted the slander, and the allegation is sustained by the evidence. It is not necessary to repeat the language here; but it is sufficient to say that the defendant Nancy Williams in divers conversa-

tions with her neighbors, in plain terms, charged that the plaintiff had been guilty of fornication with her husband and co-defendant, and that such charge was false. Her husband was not present at any of the conversations, and had no knowledge of her intended acts. In a trial before a jury, a verdict was returned in favor of the defendants. From the judgment rendered upon the verdict the plaintiff has appealed.

It is first insisted by her counsel that the court erred in giving instructions Nos. 2 and 3. They are as follows:

"2. You are instructed that if you find from the evidence that plaintiff (defendant) had what reasonably appeared to her to be grounds for making the charges, then, if any damages at all are recoverable, it would be only compensatory damages."

"3. You are instructed that, although you may find from the evidence that Mrs. Williams called the plaintiff 'a whore' or any other name importing unchastity, yet if you further find that such name or names was used by Mrs. Williams and was understood by the persons to whom they were addressed as mere epithets, and not intended to charge the want of chastity which would be implied by their ordinary acceptation and definition, then and in that event the plaintiff could recover only such damages, if any, as resulted from the use of said language. But if Mrs. Williams did in fact use words which in their ordinary import charge unchastity, the burden would be upon her to show that they were not in fact so uttered and understood."

In this they are correct, for the statute makes the words spoken actionable *per se*. The instructions were faulty because they left to the jury to determine whether or not the language was actionable *per se*.

The words used were not capable of two constructions. Their plain and natural import was to charge that the plaintiff had been guilty of fornication with the defendant J. M. Williams. The court shauld have told the jury that the words were actionable *per se*, and should not have left them to believe that it was their province to determine that fact. Section 1854 of Kirby's Digest is as follows:

"If any person shall falsely use, utter or publish words which, in their common acceptation, shall amount to charge any

person with having been guilty of fornication or adultery, such words, so spoken, shall be deemed slander, and shall be actionable and indictable as such."

The words spoken being actionable *per se,* the court should have so instructed the jury as a matter of law. *Greer* v. *White,* 90 Ark. 117; *Murray* v. *Galbraith,* 86 Ark. 50; *Stallings* v. *Whittaker,* 55 Ark. 494; *Roe* v. *Chitwood,* 36 Ark. 210.

Instruction No. 3 is also erroneous because it was calculated to impress upon the minds of the jury that plaintiff was not entitled to recover at all, if they should find that the defamatory words were not intended to injure her character, and that they were not understood by the persons to whom they were addressed as having been spoken with the intent to injure plaintiff.

In the case of *Greer* v. *White, supra,* the court held (quoting syllabus): "In actions for slander it is immaterial what meaning the defendant intended to convey by the language used if the words complained of are in fact slanderous." The authorities on the question are there reviewed, and it is useless to repeat them here. As stated in 25 Cyc. 335, "the rule now is that the words are to be taken in their plain and natural meaning, and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard or read them."

Counsel for appellant also contends that the court erred in giving the following instruction:

"6. You are instructed that if you find from the evidence that at the several times Mrs. Williams uttered the charges set out in the complaint she was mentally irresponsible by reason of ill-health or other cause then plaintiff can not recover. By 'mentally irresponsible' is meant such condition of the mind as that she did not know what she was saying or understand the purpose and effect of her words. But the burden of proving such condition is upon the defendant."

The instructions should not have been given, for the reason that there was not sufficient evidence upon which to base it.

J. M. Williams testified as follows:

"Q. Tell the jury what was the condition of her health and the result of it upon her health at the time this trouble came up? A. My wife is right at the change of life, and from my study and observation I have learned that it is a very critical period of a woman's life. They are more subject to hysteria and other mental troubles at that time, and I think she is. She gets into fits of rage sometimes, and it takes me and the boys both to control her. Q. Tell the jury if that was her condition at the time this trouble came up. A. Yes, sir; it seems that it has been working on her for two or three years."

This was all the evidence upon which to predicate the instruction. The effect of the instruction was to invite the jury to find for the defendants upon a mere surmise that Mrs. Williams was insane at the time she spoke the slanderous words concerning the plaintiff, when in fact there was no substantial evidence to support such belief. The prejudice which resulted from the instruction is plainly shown from the fact that the jury did find for the defendants when the undisputed evidence showed that the defamatory words were spoken, no attempt was made to establish their truth, and the evidence on the part of the plaintiff showed them to be false.

The defendant J. M. Williams invokes the rule announced in the case of *St. Louis Southwestern Ry Co.* v. *Grayson,* 89 Ark. 154, and cases cited, and insists that the judgment as to him should not be reversed because the verdict and judgment were right. As a basis for his contention, his counsel insist that the common-law rule that the husband is liable for the slander of his wife, not committed in his presence and in which he did not in any mnaner participate, has been abrogated by the passage of our statutes with reference to the rights and liabilities of married women. Similar statutes have been passed in many of the States, and the authorities are in direct conflict as to their effect upon the liability of the husband for the torts of his wife, not committed in his presence and of which he had no knowledge, or in which he did not participate. The authorities on both sides of the question are cited and reviewed in the opinions of and notes to, the cases of *Kellar* v. *James,* 14 L. R. A. (N. S.) 1003, and *Morgan* v. *Kennedy,* 30 L. R. A. 521.

A majority of the judges are of the opinion that the trend of our decisions is to the effect that the common-law rule has not been abrogated, and that the husband is still liable.

In the case of *Kies* v. *Young,* 64 Ark. 381, this court held that "the common-law liability of a husband for his wife's ante-nuptial debts has not been abrogated by the married woman's act, which excludes the marital rights of the husband in the wife's property during coverture, and confers upon married women power to acquire and hold property."

In the opinion, Mr. Justice RIDDICK, reasoning by analogy, used the following language: "The liability of the husband at common law for the torts of the wife not committed in his presence rests upon substantially the same reason as his liability for her ante-nuptial debts," and cited with approval the decisions in such cases of those States which hold that the passage of the married woman's act does not abrogate the common-law rule. The learned judge concluded by saying: "As the Legislature which enacted the married woman's act did not, either by express words or by clear implication, express an intention to repeal such law, the presumption should be that they intended the rule to remain." They say that the reasoning of the court applies with equal force here, and that, while under our statutes married women have absolute control over their separate property, yet, owing to the marital relation, the husband's control over her conduct and actions remains, and that it would be impracticable, in cases when the tort was committed by the wife, for the courts to determine when she had acted at her own instance, and when she was guided by her husband. The opinion of the majority on this point becomes the opinion of the court. I do not agree with the opinion of the majority. I think that a wife's "brain and hand and tongue are her own," and that the control of the husband and wife over the personal conduct of each other is reciprocal. This is a plain case for the application of another rule of the common law that where the reason of the rule fails the rule fails with it.

For the error in giving instructions Nos. 2 and 3 as indicated in the opinion, the judgment is reversed, and the cause remanded for a new trial.

BANK OF JONESBORO v. HAMPTON.

Opinion delivered December 6, 1909.

1. TAXATION—GENERAL POWERS OF STATE TAX COMMISSION.—The State Tax Commission can exercise no power or authority except such as is given to it by the act creating it, either expressly or by necessary implication. (Page 493.)
2. SAME—POWER OF COMMISSION TO EQUALIZE ASSESSMENTS.—While county boards of equalization are authorized to equalize individual assessments, the State Tax Commission is not authorized to do so, but only to adjust and equalize the valuation of real property by counties, districts, towns, villages and cities, and to equalize the valuation of any class of personal property in any county, town, township, village or city. (Page 494.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk,* Judge; affirmed.

Hawthorne & Hawthorne and *Manning & Emerson,* for appellant.

The commission shall have complete supervision over the assessment and collection of taxes and the enforcement of the tax laws of the State. Act May 12, 1909, section 11. All taxable property in the State shall be assessed at its true value, and to that end the commission shall compare the returns of the assessment and proceed to equalize the same. *Id.* § 12.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

All laws which relate to the same subject must be taken to be one system, and construed consistently. 2 Ark. 229; 3 Ark. 556; 5 Ark. 349; 4 Ark. 410; 45 Ark. 341. One statute will not be held to repeal another by implication unless there is a manifest repugnance between them. 23 Ark. 304. Due process of law is deemed to be pursued when the owner is given a reasonable opportunity to be heard respecting the correctness of the assessment. 13 Fed. 725; Cooley on Tax. (2 ed.) 364-5. A statute borrowed from another jurisdiction is taken with the construction placed upon it there. 68 Ark. 433. The commission has no jurisdiction to equalize individual assessments. 138 Ind. 94; 133 Ind. 513; 86 Ky. 656; 73 Minn. 337; 56 Cal. 194; 60 Cal. 12; 56 *Id.* 194; 46 *Id.* 416; 59 *Id.* 328; 131 *Id.* 228; 4

Mich. 590; 16 Mich. 24; 64 Mo. 294; 76 Ill. 200. The object of the statute is to require each county to bear its proper share of taxation. 18 Mont. 476; 3 Col. 428; 67 Kan. 434; 107 N. W. 110. Authority for board to act must be clearly given. 49 Ark. 527; 48 Ark. 476; Desty on Tax, § 100. The intention of the Legislature should be followed in the construction of a statute. 3 Ark. 285; 10 Ark. 585; 11 Ark. 544; 29 Ark. 354; 28 Ark. 200; 37 Ark. 495; 48 Ark. 307; 65 Ark. 529. And the history of the statute furnished by the journals is the best evidence of this. 5 Ark. 536; *Id.* 608. Absurd consequences should be avoided by construction. 40 Ark. 431.

HART, J. The Bank of Jonesboro, a corporation organized under the laws of the State of Arkansas, and engaged in the banking business in Craighead County, applied to the county board of equalization for relief against an assessment returned against its property by the assessor of Craighead County. That board of equalization for relief against an assessment returned grieved at the assessment, made application to the Arkansas Tax Commission, sitting as a State Board of Equalization, for a further reduction upon the assessment. The State board refused to act upon the ground that it had no jurisdiction to equalize assessments as between individuals, partnerships and corporations. The bank then filed a petition for mandamus against the board in the Pulaski Circuit Court, 2d Division, for the purpose of compelling it to act. To this petition the Attorney General, on behalf of the board, filed a demurrer, which was sustained by the court, and the petition was dismissed. The bank has appealed to this court.

The only question involved in the appeal is: Did the act of May 12, 1909, creating the Arkansas Tax Commission, give it the power to raise or lower individual assessments? With reference to county boards of equalidation this court has said: "The powers of the boards of equalization are special and limited. They can perform no act except such as they are specially authorized to do." *Board of Equalization Cases,* 49 Ark. 518; *Lyman* v. *Howe,* 64 Ark. 436.

By analogy the same rule applies to State boards of equalization. They are wholly the creatures of the law, and have no power or authority except that which is, expressly or by neces-

sary implication, given by the acts creating them. 27 Am. & Eng. Enc. of Law (2d Ed.) p. 711 and cases cited; Desty on Taxation, § 103; *Orr* v. *State Board* (Idaho), 28 Pac. 419; *Hamilton* v. *State,* 3 Ind. 452.

The act under consideration may be found in the Acts of Arkansas, 1909, p. 764. Section 11 of the act provides that said tax commission shall have the power and authority:

"1. To have and exercise general and complete supervision over the assessment and collection of taxes and the enforcement of the tax laws of the State, and over the several county tax assessors, tax collectors, county boards of review and equalization and other officers charged with the assessment and collection of taxes in the several counties of the State, to the end that all assessments on property, privileges and franchises in the State shall be made in relative proportion to the just and true value thereof in substantial compliance with the law.

"2. To confer with, advise and direct all assessors, collectors of State and county taxes, and the county boards of equalization and review as to their duty under the laws of this State," etc.

It is first insisted by counsel for appellant that these and other subdivisions of section 11 gives the State board the authority to deal with and to equalize individual assessments. The act must be considered as a whole, and to get at the meaning of any section it must be read in the light of the other provisions of the act. Section 11 defines the duties of the board as a tax commission, and section 12 confers upon it the power to act as a board of equalization of taxes. Section 12 is as follows:

"Section 12. The said Arkansas Tax Commission shall meet as a state equalization board of taxes annually on the second Monday in November of each year for the equalization of the taxable values of such personal or real property as may come before it by reason of report or otherwise. They shall determine and compare the returns of the assessment of the property in the several counties of the State, and proceed to equalize the same, so that all the taxable property in the State shall be assessed at its true value, and that all property shall bear its equal and just proportion of the taxes of the different counties of the State."

The rules by which the board shall be governed in the performance of its duties are specifically enumerated in the five subdivisions, which follow.

It will be seen that the board acts in a dual capacity: First, as a State Tax Commission, and second as a State Board of Equalization. It is not claimed that section 12, which defines the powers and duties of the board of equalization of taxes, gives it any power to equalize individual assessments. We think section 11, when read in connection with section 12, relates rather to the supervision of the manner in which the assessors and county boards of equalization shall perform their duties. It also gives the tax commission authority to collect and preserve data to be used by it when acting in the capacity of a State board of equalization; but it does not give the State board any jurisdiction to reveiw the action of the county boards with respect to raising or lowering individual assessments.

An act of 1903 of the State of Nebraska provides that the State Board of Equalization shall have general control and direction over the assessors of the various counties in the performance of their duties. It also provides that the assessor shall prepare an abstract in detail of the assessment rolls of his county immediately after the county board has completed its labors and shall forward it to the State board, and that the assessors shall obey all the rules made under the act by the State board. The Supreme Court of that State held that, under these and similar provisions the State board had no power to deal with individual assessments, and that it could not take into consideration inequalities between individual tax payers; but that it could only deal with the values of the taxable property of a county as a whole as provided by the terms of the act.

The court said: "Individual discrepancies and inequalities, the law contemplates, shall be corrected and equalized by the county authorities, and a tax payer, failing to avail himself of the opportunity thus presented, has no legal ground of complaint because of the action of the State board of equalization in lowering or raising the valuation of all the property in the county so as to conform with all other property throughout the State. The county board is specially impowered to hear complaints and grievances as between individual tax payers, and to

adjust and remedy the same as may seem just and equitable. The State board possesses no such power. The tax payer returning money at its legal value could, if he felt aggrieved, complain that his property was assessed too high as compared with all other property. He had the right to insist that all property be valued on the same basis, and had just ground of complaint if such was not done. *State* v. *Osborne,* 60 Neb. 415, 83 N. W. 357. Not having done so, he is presumed to have been satisfied, and the State board was warranted in assuming that all property of the county of whatsoever kind had been assessed on the same basis of valuation and to equalize accordingly." *Hacker* v. *Howe* (Neb.), 101 N. W. 255; *State* v. *Drexel* (Neb.), 107 N. W. 110. See, also, *Adsit* v. *Lieb,* 76 Ill. 200; *Wells Fargo & Co.* v. *State Board of Equalization,* 56 Cal. 194; *Cummings* v. *Stark,* 138 Ind. 94.

What was said in that case applies with equal force here. The tax payer may apply to the county board of equalization for redress against the action of the county assessor; and if the county board does not grant him relief, he may appeal to the county court, and, if dissatisfied with its action, may in turn appeal from its decision. It is true the Constitution provides that "all property subject to taxation shall be taxed according to its value," but this is done when the valuation is equalized with other property of the same kind in the county. Thus we see that if the assessor and county board violate this provision of the Constitution the taxpayer had a complete and adequate remedy under the law as it existed at the time of the passage of the act now under consideration.

If he does not avail himself of that remedy, the presumption is that no inequality exists. It is not necessary to dwell upon the subject. The powers and duties of the State and county boards are separate and distinct. Each is the creature of the statute, and each has its appropriate duties to perform in equalizing taxes. The county board equalizes individual assessments. The State board, by the terms of the act creating it, is limited to adjusting and equalizing the valuation of real property by counties, districts, towns, villages and cities, and equalizing the valuation of any class of personal property in any town, township, village or city.

Lastly, it is contended by counsel for appellant that their contention that the power to equalize individual assessments is given to the State board by sections of the act above referred to is borne out by section 13 of the act.

This section deals with the duties of the board after it has exercised its powers. As we have already seen, the board can exercise no authority except such as is expressly or by necessary implication conferred upon it. The board receives its authority, and the rules and regulations governing the exercise thereof from section 12 of the act. Section 13 relates to the record that it shall keep of its proceedings as a board of equalization and the certification thereof to the respective county officers, to the end that they may discharge the duties required of them under the provisions of the act.

Manifestly, the Legislature did not intend to confer jurisdiction upon the board to act by this section; but only intended by it to deal with matters necessary to carrying out the acts done by the board in the exercise of its lawful authority. That part of the section which provides that the record shall specify "the amount added to or deducted from the assessment of individuals, co-partnerships, associations or corporations" means the per cent. to be added to their assessments. This construction is borne out by the direction in similar terms given to the county clerks in the latter part of the section.

With this construction the act may stand as a complete and harmonious whole. Otherwise, the language quoted would seem to be surplusage, and to have no proper place in the statute under consideration.

From the views we have expressed it necessarily follows that the judgment must be affirmed.

CHANCELLOR v. BANKS.

Opinion delivered November 22, 1909.

CLOUD ON TITLE—LACHES.—A suit to remove a cloud upon the title of wild and unimproved land will not be barred by laches where it was brought within four years after defendants' tax title was acquired

from the State, and where plaintiff had done nothing to indicate that he had abandoned the land except that he had failed to pay the taxes during that time.

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

Cypert & Cypert, for appellants.

Appellee is barred by his laches in neglecting, he and those under whom he claims, to assert their rights for more than forty years, and until the enhanced value of the lands made an assertion of title to appear advantageous. 96 U. S. 611; 155 U. S. 314; 43 Fed. 12; 78 Tex. 84; 81 Ark. 352; 10 Am. & Eng. Dec. in Eq. 91; 1 Dillon (U. S.) 333; Fed. Cas. No. 9952; 5 Fed. 305; 49 Fed. 512; 53 Fed. 415; 57 Fed. 959; 79 Fed. 143; 61 Ark. 575; *Id.* 527.

W. A. Leach, for appellee; *Trimble, Robinson & Trimble,* of counsel.

Laches is not merely delay, but delay that works injury to another. 81 Ark. 432. It is based upon the assumption that the party to whom it is imputed has knowledge of his rights and the opportunity to assert them. 82 Ark. 368. In this case the void forfeiture stood for 35 years, during which time appellants asserted no claim to the land, which was wild and unoccupied. There was nothing to call into activity any assertion of rights during this time by appellee or his grantors. Until there is an interference with possession, there is no occasion for action. 70 Ark. 256; 75 Ark. 197. In the absence of some supervening equity calling for the application of the doctrine of laches, a court of equity will follow the law, and not divest the true owner of title by lapse of time shorter than the statutory period of limitation. 81 Ark. 296; 46 Ark. 25; 43 Ark. 469; 20 Ark. 339.

BATTLE, J. On the 12th day of August, 1907, W. R. Banks brought suit in the Prairie Chancery Court against John C. Chancellor and H. P. Chancellor to quiet title to certain lands. He traces his title through mesne conveyances to the State of Arkansas. The defendants also trace their title in like manner to the same source, but they do so through a void tax sale. One half the land was sold in Prairie County, on the 26th day of July, 1869, at a sale for the taxes of 1868; and the other half

was sold in White County, on the 22d day of August, 1869, at a sale for the taxes of the same year. The State was the purchaser at both sales, which were void. On the 23d day of May, 1903, the State of Arkansas conveyed to H. D. Williams all her "right, title, interest and claim" in and to the land, and on the 26th day of December, 1906, Williams conveyed to the defendants. The land has been at all times wild, unimproved and unoccupied. From the time of the sale or forfeiture to the State of Arkansas in the year 1869 until after the sale by the State to Williams no one has paid taxes on the land, and plaintiff has not from that time to the bringing of this suit paid any. Since the purchase of Williams from the State the land has greatly enhanced in value, on account of the building of a railroad within four miles thereof and the location of saw mills in its vicinity, but by no act of the defendants or their grantor. They pleaded laches in bar of plaintiff's right to relief. The court, finding, upon final hearing, that plaintiff was the owner in fee simple of the land and that the tax sales were void, set aside the conveyances under which the defendants claimed and quieted plaintiff's title to the land. Defendants appealed.

The land, being wild and unimproved, is in the constructive possession of the appellee, he having the legal title.

In *Penrose* v. *Doherty,* 70 Ark. 256, 261, the court said: "The land was wild and unoccupied, and remained so until a short time before the comemcnement of this action, when plaintiff, holding the Hutchinson title, promptly asserted his rights. Until there was an interference with the possession, there was no occasion for resorting to legal remedies."

In *Jackson* v. *Boyd,* 75 Ark. 194, 197, the court said: "In this case there is no evidence as to the increase in value, and there is no situation presented requiring action on part of the appellants. Until there is an interference with possession, there is no occasion for action, and payment of taxes by another is not sufficient of itself to call for action. *Pensose* v. *Doherty,* 70 Ark. 256. The bare lapse of time will not cure defects in an invalid tax title. *Parr* v. *Matthews,* 50 Ark. 300. Payment of taxes and color and claiming title are insufficient to start the statute of limitation. *Calloway* v. *Cossart,* 45 Ark. 81." This decision was afterwards approved in *Williams* v. *Bennett,* 75 Ark. 312, 317.

In *Earle Improvement Company* v. *Chatfield,* 81 Ark. 296, 301, it is said: "Appellants, deriving their title from the void tax sale, had notice of the defects therein. They cannot claim that they were injured or misled by any omission of appellee to bring suit or pay taxes. See *Black* v. *Baskins,* 79 Ark. 382. They had notice of his title and the defects of their own. * * *

"While it is true that the length of time during which a party may neglect to assert his rights and not be guilty of laches varies with the peculiar circumstances of each case, and is subject to no arbitrary rule, like the statute of limitations, * * * yet, in the absence of some supervening equity calling for the application of the doctrine of laches, a court of chancery should and will by analogy follow the law, and not divest the owner of title by lapse of time shorter than the statutory period of limitations. * * * The payment of taxes for only five years, even with a great increase in the value of the land, we do not think would justify a court of equity in depriving the true owner of the right to have his title quieted, because the payment of taxes gave appellants no right to or interest in the land."

In *Osceola Land Co.* v. *Henderson,* 81 Ark. 432, 439, it is said: "It is true that mere delay does not, of itself, bar the plaintiff. 'Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly within the limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the asserton of the right. This disadvantage may come from loss of evidence, change of title, intervention of equities and other causes; for where the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.' "

In *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 154, 160, the doctrine announced in *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296, was approved.

In *Rhodes* v. *Cissel,* 82 Ark. 367, 371, the court quoted *Galliher* v. *Cadwell,* 145 U. S. 368, approvingly, as follows: "The

cases are many in which this defense (laches) has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another. Yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to assert them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that because of the change in conditions during this period of delay it would be an injustice to the latter to permit him to now assert them."

In *Chatfield* v. *Iowa & Arkansas Land Co.*, 88 Ark. 395, 404, the court said: "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."

There are cases in which the owner of land had failed to pay taxes on the same for many successive years exceeding the statutory period of limitations of seven years, and another, claiming the land, had paid the taxes thereon for such time, and in the meantime the land had greatly enhanced in value, and in which this court held that a court of equity will not grant the owner relief on account of laches; and in which it so held obviously for the reason that it would be unjust to permit the owner to induce another, by his silence and failure to act, to pay the taxes until the lands have become valuable or greatly increased in value, and then enforce his right. *Clay* v. *Bilby*, 72 Ark. 101; *Turner* v. *Burke*, 81 Ark. 352; *Craig* v. *Hedges*, 90 Ark. 430.

The land in question being wild and unoccupied, the appellants had no reason to believe that appellee had abandoned them or to act upon his conduct. He had the right to hold them in their wild and unimproved state on account of the prospective value of the timber growing on same. Within four years after Williams purchased the interest of the State in the land, and within eight months after Williams sold to the appellants and before they had expended any money in improvements on the land, he brought this suit to quiet his title. He was reasonably active in the as-

sertion of his rights, and in preventing defendants from acquiring any equities against him.

Decree affirmed.

SOARD v. WESTERN ANTHRACITE COAL & MINING COMPANY.

Opinion delivered December 6, 1909.

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT.—Where, in a suit on behalf of the administratrix of a deceased employee against his employer, a corporation, to recover damages for death resulting from the negligence of a fellow servant, the evidence tended to show that decedent's death was due to the negligence of a fellow servant without any concurring negligence on decedent's part, it was error to direct a verdict for the defendant. (Page 503.)
2. SAME—CONSTRUCTION OF FELLOW SERVANTS ACT.—The fellow servants act of March 8, 1907, applies to all corporations, without regard to the business in which they are engaged. (Page 504.)
3. SAME—WHEN CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.—Where the situation disclosed by the testimony is one from which different minds might reasonably draw different conclusions as to whether plaintiff's intestate was negligent, the question should have been submitted to the jury. (Page 504.)
4. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—Under act of March 8, 1907, providing that all corporations and coal or railroad companies shall be liable to respond in damages to an agent, servant or employee, himself in the exercise of due care, for injury or death resulting from the negligence of a fellow servant, *held* that the burden is on the defendant in such a suit to prove contributory negligence on the part of the agent, servant or employee so injured or killed. (Page 504.)

Appeal from Johnson Circuit Court; *J. Hugh Basham,* Judge; reversed.

Brizzolara & Fitzhugh and *Ira D. Oglesby,* for appellant.

The fellow servants act of 1907 is constitutional, and applies to all domestic corporations. 87 Ark. 587. Deceased was in the exercise of proper care for his own safety at the time of the injury. 114 Fed. 66; 98 Ill. App. 483; 92 Mo. App. 12; 28 Ind. App. 108. Appellee should have furnished appellant's intestate a reasonably safe place to work. 77 Ark. 1. Appellee is liable for

the negligent acts of deceased's fellow servant. 70 Ark. 295; fellow servants act of 1907.

Cravens & Covington and *Sellers & Sellers,* for appellee.

The act of 1907, p. 162, does not apply to this case. 101 U. S. 557; 74 Am. St. R. 20; 102 Am. St. R. 185; 71 Ark. 561; 59 Ark. 356; 70 Ark. 481. The act must be strictly construed. 70 Ark. 329; 25 Pac. 48; 10 L. R. A. 839; 113 Fed. 382; 137 N. C. 130; 76 S. W. 651; 61 L. R. A. 479; 75 S. W. 566; 41 Am. St. R. 30; 48 Ark. 305; 54 Ark. 627; 28 Ark. 469. And if the act does apply to this case, it is unconstitutional. 4 A. & E. Rd. Cas. 280; 70 Ia. 559; 28 A. & E. R. Cas. 510; 67 Ia. 75; 65 Ia. 417; 46 Ia. 400; 59 Ia. 74; 6 A. & E. R. Cas. 149; 52 Kan. 264; 34 Pac. 739; 40 Minn. 249; 43 Minn. 222; 8 L. R. A. 419; 72 Ark. 358; 165 U. S. 160; 49 Ark. 492. 87 Ark. 587 is in conflict with 207 U. S. 463.

McCULLOCH, C. J. This is an action instituted by appellant, Lula Soard, as administratrix of the estate of her deceased husband, Chas. Soard, against appellee, Western Anthracite Coal & Mining Company, a domestic corporation, to recover damages accruing by reason of the death of said Chas. Soard, which are alleged to have been caused by the negligence of appellee while said decedent was at work in the airshaft of appellee's coal mine. In the answer filed in the case the allegations of negligence contained in the complaint are denied, and the defense of contributory negligence on the part of decedent is pleaded. At the trial of the case the court instructed the jury peremptorily to return a verdict for the defendant, and judgment was rendered accordingly.

Giving the evidence its strongest probative force in favor of appellant, it established the fact that the death of her intestate, while working for appellee in an airshaft of the coal mine, was caused by the negligent act of one of his fellow servants, another of appellee's servants engaged in work at the same place; and that said decedent was at that time in the exercise of due care for his own safety. Under this state of the testimony it was error for the court to give a peremptory instruction. The disputed issues of fact should have been submitted to the jury upon appropriate instructions of law. According to the terms of the act of March

8, 1907, known as the Fellow Servant Act, the evidence warranted a verdict and judgment for damages against appellee for the death resulting from the negligence of decedent's fellow servant. We have held the statute in question to be valid legislation. *Ozan Lbr. Co.* v. *Biddie,* 87 Ark. 587; *Aluminum Co. of N. A.* v. *Ramsey,* 89 Ark. 522.

It is unnecessary to determine whether or not appellee was "engaged in mining coal" within the meaning of the statute in question, as it is a corporation, and the statute applies to all corporations, without regard to the particular business in which they are engaged.

It is insisted that, according to the undisputed evidence, appellant's intestate was not in the exercise of due care at the time he was killed, but was guilty of negligence which contributed to his own injury and death. We conclude, however, that such is not the state of the proof. The situation disclosed by the testimony is one from which different minds might reasonably draw different conclusions as to whether or not appellant's intestate was guilty of negligence. Therefore the question should have been submitted to the jury.

The burden of proof was on appellee to show contributory negligence. The language of the statute is that the injured servant must have been "in the exercise of due care" before there can be a recovery on account of the negligence of a fellow servant. This language was intended merely to preserve to the employer the defense of contributory negligence, and does not change the rule as to the burden of proof, which is still on the employer in such cases. *Aluminum Co. of N. A.* v. *Ramsey, supra.*

For the error of the court in giving the peremptory instruction the judgment must be reversed, and the cause is remanded for new trial.

COLLINS *v.* SOUTHERN BRICK COMPANY.

Opinion delivered December 6, 1909.

CORPORATION—STOCK SUBSCRIPTION—PAROL CONTRADICTION.—Under the general rule of evidence that a written agreement cannot be varied or

added to by parol evidence, it is not competent for a subscriber to stock in a corporation to allege that he is but a conditional subscriber; such condition must be inserted in the writing in order to be effectual.

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; affirmed.

J. W. Blackwood, for appellant.

The admission of parol evidence to establish a contemporaneous collateral substantive agreement does not violate the rule that it will not be admitted to contradict or vary the terms of a written contract. 27 Ark. 511; 56 Ark. 399; 64 Ark. 653; 20 Ark. 460. If a corporation accepts the benefits of an agreement entered into by its promoters, it will not be permitted to deny that it agreed to assume the burdens of the same. 1 Morawetz, § 549. The contract was voidable at the option of appellant. 1 Morawetz, § 49. The subscription was upon a condition precedent that the subscriber become manager of the corporation. 1 Morawetz, §§ 78 and 79. The promise of one was the consideration for the promise of the other. 12 U. S. App. 433; 70 Ill. 99; 25 Ind. 454; 17 Me. 372; 75 Me. 267; 23 Pick. 400; 40 N. J. Eq. 426; 8 Johns. 306; 75 Hun 145; 4 Ire. L. 257; 101 N. C. 284; 7 O. St. 275; 96 Pa. St. 447; 48 Vt. 239.

Wiley & Clayton, for appellee.

The contract of subscription is mutual, and creates a vested right in the contract of every other subscriber. 77 Ill. 335; 9 Am. Dec. note 99. Subscriptions before organization must be unconditional. 1 Morawetz, § 85; *Id.* 83. Even if this were permissible, it could not be proved by parol testimony. 20 Ark. 443; 69 Ill. 502; 13 Ind. 404. Cook on Corp., § 137. Such secret agreements are a fraud upon other subscribers, and will not be enforced. 40 Minn. 110; 41 N. W. 1026; 3 L. R. A. 796; 90 Pa. St. 269; 43 Conn. 86.

McCULLOCH, C. J. This is an action instituted in the chancery court of Pulaski County by the Southern Brick Company, a domestic corporation, against E. T. Collins, to recover on a note executed by the latter for the amount of his stock subscription, and to enforce a lien on the stock certificate. The defendant filed an answer and cross complaint, in which he alleged that he

subscribed for the stock and executed the note on condition that he would be made manager of the business of the corporation when organized, and that said condition had not been performed. He alleged that two of the promoters of the corporation, Butler and Wayman, solicited his subscription, and, with the knowledge and consent of the other promoters, represented to him that if he subscribed for the stock to the amount of two thousand dollars he would be made manager of the corporation when organized, and that he subscribed the amount on that condition. He also alleged that at the organization of the corporation, and when he executed the note for the amount of his subscription, the matter of his employment was again discussed, and it was agreed that he should be made manager. The case was heard on the depositions of numerous witnesses, and from the decree rendered in favor of the plaintiff defendant appeals.

Another action against several others, to recover on a joint note executed for a stock subscription, was consolidated with the first-named case, and a decree was rendered in favor of the plaintiff, from which defendant, Collins, also appeals. The defense in that case was different from the defense in this, but defendant now concedes that the findings in that case were not against the preponderance of the testimony, and that the decree should be affirmed. The first-named case only will be discussed.

G. M. Hampton, E. R. Buster and B. H. Woods owned a brick plant at Kingsland, Ark., which was not very successful because of the scarcity or poor quality of the brick clay at that place. There is evidence that B. W. Green, George Reaves, A. D. Beach and R. C. Butler, of Little Rock, owned lands near that city on which was situated an excellent quality of brick clay. These parties were brought together in negotiations for a plan to bring the Kingsland plant to the clay lands near Little Rock and operate it.

A plan was proposed to organize a corporation to acquire both the brick plant and the clay lands, for the purpose of operating the business. The Fordyce parties proposed to put in the Kingsland plant at an estimated value of $30,000 and to take that amount of stock in the new corporation, as well as to subscribe for a certain amount of cash stock, and that the Little Rock parties should procure subscriptions

for a certain amount of cash stock. Growing out of these negotiations and proposals, the plaintiff corporation, Southern Brick Company, was organized. The Little Rock parties turned over to R. C. Butler the task of procuring sufficient subscriptions to take up the amount of stock to be subscribed here, and Butler secured the assistance of C. L. Wayman in the undertaking. The amount of subscriptions secured here and at Fordyce aggregated $67,300, which included the subscriptions of R. C. Butler, C. L. Wayman, B. W. Green and defendant Collins. All of the subscribers signed a written subscription agreement to take the amount of stock set opposite their respective signatures. Butler and Wayman solicited and obtained the subscription of defendant Collins. After repeated interviews, in which they sought to interest him, they stated to him that they wanted him to be manager of the new concern, and he replied that he did not want any stock unless he should be manager, but that if they wanted him to be manager he would taken $2,000. This is undisputed, and it is not contended that any representations were made to defendant further than as above stated.

Sometime later the subscribers met in Butler's office in Little Rock for the purpose of organizing the corporation. At that meeting defendant executed the note in suit to cover the amount of stock he had subscribed, and there is testimony that he and Hampton had a conversation in which the latter promised that he should be manager at a salary of $100 per month for the first two months, and $125 per month thereafter. There is, however, a conflict as to this, and the preponderance of the evidence seems to be against it.

The contention of the defendant that he is not bound by his stock subscription notes, which was based on the alleged unperformed condition that he was to be made manager of the business when organized, cannot be sustained, for the well-recognized reason that a condition resting in parol cannot be engrafted on a written stock subscription. The written agreement signed by the subscribers constituted a contract between them, the mutuality of the agreement being the consideration; and it cannot be varied nor contradicted by parol testimony, nor can an oral agreement or condition be engrafted upon it. *Mississippi, O. & R. R. Rd. Co.* v. *Cross,* 20 Ark. 443; 1 Cook on Corp. (6 Ed.), § § 77, 81,

137; 1 Morawetz on Corp. § 77; 2 Beach, Priv. Corp., § 531; 10 Cyc. 413-415; 26 Am. & Eng. Enc. Law 911, and cases cited.

"Under the general rule of evidence that a written agreement cannot be varied or added to by parol evidence, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing in order to be effectual." 1 Cook on Corp. § 81.

"A subscription for shares in a corporation is a contract in writing, and therefore cannot be proved by parol evidence until the absence of the original has been accounted for. Nor can the terms of the contract entered into by a subscriber be varied by parol evidence of a special agreement or condition made prior to or contemporaneous with the subscription." 1 Morawetz, Corp. § 77.

"Parol evidence is not admissible to vary the terms of a subscription to the capital stock of a corporation, or to show a discharge therefrom in any manner other than that required by the terms of subscription, charter and by-laws. All separate agreements and conditions made at the time of subscribing, which are inconsistent with the written contract, are void, whether they be verbal or are contained in a separate written contract." 2 Beach, Priv. Corp. § 531.

This rule does not, however, exclude parol proof of such misrepresentations or fraud as would vitiate the contract; but the proof in this case is far from establishing fraud in the procurement of the defendant's subscription. The statements of Butler and Wayman to him only expressed their desire that he should be manager, and, at most, amounted to a promise that he should be made manager. The proof fails to show that they were authorized by any one to make such a promise, much less by all the other subscribers. No such state of facts is shown as would authorize a court of equity to grant relief from the contract on account of fraud.

Both of the decrees against the defendant are affirmed.

RUSSELL v. BROOKS.

Opinion delivered November 15, 1909.

1. TRIAL—DIRECTING VERDICT.—Where, in replevin for a mule, plaintiff contends that the animal was procured from him by defendant's vendor by means of a fraudulent pretense, and there was evidence tending to sustain such contention, it was error to direct a verdict for defendants. (Page 516.)
2. FRAUD—HOW PROVED.—While fraud will not be presumed, and the burden is upon him who alleges it to prove same by clear and satisfactory evidence, still it need not be shown by direct or positive evidence, but may be proved by circumstances. (Page 517.)
3. SAME—RECOVERY OF PROPERTY—TENDER.—Where personal property is procured from the owner by a felonious act, or by a fraudulent pretense, his unqualified ownership is not changed, and he may recover it without tendering the consideration received by him. (Page 518.)
4. APPEAL—HARMLESS ERROR.—The exclusion of evidence is not ground for reversal where appellant fails to show what the excluded evidence was. (Page 518.)

Appeal from Pope Circuit Court; *J. Hugh Basham,* Judge; reversed.

STATEMENT BY THE COURT.

This is a suit by appellee to recover of appellants a certain mule. The complaint was in the usual form in replevin, and was against John M. Hatley. The appellants filed the following motion and answer:

"Come T. D. Brooks, A. S. Hays and J. M. Martin, and respectfully state that they are interested in the property sued for in this action, in this, that they were the sole owners of said property, and have possession thereof, and they allege that the defendant has no interest in said property. And they ask to be made parties defendant and substituted in the place of the defendant, Hatley. And, being so substituted, they deny that plaintiff owns said mule or is entitled to the possession thereof, and deny that he has been damaged in any sum whatever. Wherefore they pray to be substituted as defendants, that this be taken as their answer, plaintiff take nothing by his suit, and for other relief."

The testimony of appellee is substantially as follows: I live in Van Buren County. I am the owner of the mule in contro-

versy. On the 24th day of August, 1908, two men drove up to my house in a two-horse buggy about one o'clock and called for dinner. The older one of the two introduced himself as Dr. Warner of St. Louis. The younger man introduced himself as Mr. Bush. And spelled his name so I would not misunderstand it, B-U-S-H. While we were putting the team away, the young man proposed to buy a "nag" I had, and which was running in the yard. I told him I would sell her. They both came in and ate dinner. A few minutes before we went in the house, he (the young man) made mention about my looking so badly. I told him I had been in bad health. While they were eating dinner, the old doctor made mention that I was looking bad. I told him I had been under the weather, and had not worked any this summer at all. He asked what the complaint was. I said rheumatism. My wife asked me to have an examination. The doctor said, I will give you an examination, if you want me to, and not charge you anything for it. I told him I had no objection. So he gave me an examination. He pronounced me to be a pretty difficult case, and we talked on some bit, and he asked me about the case. I asked him if he thought he could cure me, and he said he could. He said he could cure me for $300, if I would go to St. Louis. I told him I did not have that much money. He said that is too bad. He said that he had four cases in this State to treat, one at Marshall, one at some other place, one on Bear Creek and one at Appleton. And they had paid him big to come over there and be their doctor. And he said he would give me the advantage of this, and that he would cure me here at my own home for $100. I told him I did not have the money, and he said: "You have some stock here that you can sell, haven't you?" I said, "Yes, but I have not got any money at this time of the year." My wife insisted that I take treatment any way. And he said: "What is a mule, compared with good health?" I said: "Of course, it is nothing much." So I consented to take his treatment. The young man (Bush) said he wanted the mule, but did not have the money in his pocket. He said I would have to wait on him or take a check or something until he could get to the railroad and get money. So I told the doctor that I would take his treatment if he could make it satisfactory with the young man to buy the nag. He had

proposed to buy her (a mare) when he first came up. The doctor said, "If you can make the deal with the young man, you can get the treatment." So I went and talked to this young man again, and he looked at the nag, and said she was older than he wanted. And asked if I did not have a young mule I could sell. I said I had one, but it was not there, and he said, "How long will it take to see her?" I told him it would not take a great while. He and I went and looked at her, and he remarked: "Bring her in; I guess we can trade." I brought her in, and there was not much more said between us until the next morning. They stayed all night. After breakfast the next morning the old doctor asked me if we had traded. I told him we had not closed any trade. He said, "Make up your mind what you are going to do." The young man and I went out to the lot, and he came in $3 of the price I had offered to take for the mule. I offered to take $125, and he offered me $122. And he said: "I have not got the cash to pay you the money now. But I can pay you part of it, twenty-two dollars, and the hundred you would have to pay the old doctor would make it." And he said: "I can pay him when I get to the railroad." He said: "I will wire and get a check and pay him." He gave me the twenty-two dollars in money, and he and the doctor took the mule. The doctor gave me in the presence of the young man (Bush) a written guaranty as follows:

"Scotland, Ark., Aug. 24, 1908.

"Received of W. H. Russell the sum of one hundred dollars for medical treatment. The same amount to be refunded if patient under treatment is not permanently cured in sixty days from date of this contract. Dr. B. R. Warner,

"St. Louis, Mo."

They came to my house on Sunday, August 24, during the same week I heard that they had been arrested. I took steps to get my mule back when I heard of this telephone cutting and their arrest. I heard of this on Wednesday of the same week. I went to Scotland and telephoned to the officers to hold the mule and party until I could get there. I came on to Russellville, and found my mule in the possession of John Hatley, sheriff of Pope County.

The doctor consented to the trade, and said he would take the young man for the one hundred dollars. The young man (Bush) told me that he first met up with the doctor at Marshall, who employed him to drive him to see these four patients and to bring him to Russellville. The young man (Bush) furthermore stated that he had taken him to see three of the patients, and had one more to go to see at Appleton, and from there they were coming on to Russellville. It was at Mr. Hatley's request that I brought this replevin suit, as he said he preferred me taking the mule according to law. I sold the mule to the young man. He gave me twenty-two dollars, and was to pay the doctor one hundred dollars. The doctor agreed to his. And said he would take the young man for the one hundred dollars. I do not know whether the doctor got the one hundred dollars or not. Don't think he could get it, as he never got to the railroad. I do not know whether or not the young man paid him. The doctor released me, and took Bush for the debt. As the doctor released me, it did not make any difference to me whether the young man paid him or not, if he had cured me. I gave him the mule for twenty-two dollars if he would pay the doctor one hundred dollars, and I took the receipt read in evidence to show that I had paid the doctor. When I came to Russellville to begin suit, Brooks, Hays and Martin told me that they had bought the mule from the young man (Bush). They made me a proposition, and said if I would pay back the twenty-two dollars and give them twenty-five dollars they would get the mule back if the young man would accept it. I don't remember of them ever offering to give up the mule if I would pay back the twenty-two dollars. I don't think any such offer was ever made. I have never paid back or offered to pay back the twenty-two dollars.

H. W. Russell testified in part as follows: "I was at the house of my son about the 24th of August on Sunday when the young man and the doctor were there. The old doctor talked about medicine with me almost all of the time, and said that doctoring had advanced to that stage that he did not have to doctor by symptoms any more. That he could tell what was the matter. He talked with the young man and advised with him about medicine. But said the young man did not actually help him with the doctoring. When they went to go to feed, the old

doctor asked my son if they had traded—meaning the young man (Bush) and my son. The young man answered and said that they had, provided that he (the old doctor) would wait until he got to Russellville, and the old doctor remarked that would be all right. The young man (Bush) told me that he was running a livery stable in Marshall, and that he was hauling him (the doctor) for $6.50 per day. And that he had a patient at Appleton that he was going to operate on for abscess on the liver. And that the old doctor had the money in the bank to insure a sure cure guarantied. The young man told me what the doctor had done and was going to do with the other cases. Said he had one on 'Big Flat' and another on 'Bear Creek,' and I believe he did tell me that he took three ribs out of one of them. I asked the young man, 'What if he does go in to cure my son and don't do it?' And he says that he gives a written guaranty to cure you. He says he does that all of the time. I asked him what it was, and he said he is rich, and I asked him what that amounted to if a man is here and he in St. Louis? The young man said that the doctor is a millionaire. The trade between the young man and my son was not made in my presence. The night these people stayed all night at my son's, they had a buggy which I cannot describe, and their team consisted of a sorrel and a bay horse."

Appellant offered the testimony of one P. H. Brandt as follows: "I live at Appleton, Pope County. On Monday, August 25, of this year, I saw two men in a two-horse buggy driving a bay horse, and I did not see the other horse good, and one of the horses was leading a mule. They were traveling so fast that I took both of them to be boys. They were traveling northwest as the road runs there. The mule was tied, and was leading abreast the off horse. Before we met I suppose I was seventy-five yards in front of them. I was walking, going home, and I heard a wire 'cling' as it broke and I noticed the wire dangling a short distance ahead of me and in a short distance I met this team and buggy coming meeting me. They came on and met me, and when they passed me I noticed where the wire was cut. It was fresh cut. They were traveling so fast I can hardly describe them, one was a young fellow and he was driving. The other was an older man, well dressed and had black

mustache. Looked to be forty-five or fifty years old. The mule looked to be a sorrel or bay, or a kind of a mouse color. This was between the 20th and 25th day of August, on Monday. They were driving very fast at an unusual rate. I heard the wire 'cling' and dingle and drop just before I saw them coming, but saw them immediately afterwards. I saw the young man they put in jail, but could not say that I recognized him to be the same young man. They were driving at an unsusual rate of speed for a two-horse buggy."

The court excluded the above testimony of Brandt, and to the ruling of the court in excluding it the appellant excepted.

Witness Hatley testified as follows: "I live in Russellville, Arkansas. During the month of August, 1908, my deputy arrested two parties near Dover. They were in possession of the mule here in controversy. They were arrested on one day, and I took possession of the buggy, horses and mule the next day. I got to Dover the next morning after they were arrested. They were arrested in the night about eleven o'clock. The mule was two years old, worth about hundred or hundred and twenty-five dollars. I had been informed that Brooks, Hays and Martin claimed the mule. I was holding the mule as sheriff of the county, and had put the boy in jail, and, not being satisfied with his conduct, I detained him for further investigation. And about that time a replevin suit was brought for the mule. This is a friendly suit, as far as I am concerned. I brought the buggy, team, mule and the young man all from Dover myself. I took charge of the mule, believing it to be stolen property. In fact, I thought the two horses, buggy and mule was all stolen property. There was no agreement between me and the boy whom I had in custody as to how long I would keep the property. Something was said by the boy about the price he was to pay, but I do not remember just what was said. I wanted to catch the other man (the old doctor). I never did part with possession of the mule before suit was brought. After suit was brought I turned the mule over to Brooks, Hays and Martin. But it is understood between us that I am still in possession of the mule, but in order to save expense to them I let them take it and put it in their pasture. They are to hold me harmless for any damage that might arise out of a wrongful delivery of the mule to them."

During the examination of the above witness he was asked: "What kind of baggage or property did you find in the buggy?" He answered, "I found a grip." He was asked: "What did it contain?" Counsel for appellees suggested that the question was immaterial. The court thereupon instructed the witness not to answer, and to this ruling of the court appellant excepted.

During the examination of the witness H. W. Russell he was asked: "Now, you came to Russellville and saw this young man in jail. Tell the jury what statements he made to you."

Appellees objected. The court sustained the objection, and appellant excepted to the court's ruling.

At the conclusion of the evidence the appellees moved the court to instruct the jury to return a verdict for them, which motion the court granted. To this ruling appellant duly excepted. The jury returned a verdict for appellees. Judgment was rendered for them. Appellant moved for a new trial, alleging as grounds the rulings of the court to which he had excepted. The motion was overruled, and this appeal was taken.

U. L. Meade, for appellant.

1. The fraud practiced upon appellant amounted to larceny, and he is entitled to recover the mule. No title passed from him to Bush and Warner. 14 Ark. 79, 82-3; 1 Wharton, Crim. Law, § 916; 48 Ark. 148; 72 Ark. 241; 63 Ark. 87.

2. Brandt's testimony was competent to go to the jury as a circumstance tending to prove fraud and the larceny of the mule. 24 Ark. 222; 29 Ark. 386; 42 Ark. 542; 47 Ark. 247; 68 Ark. 529; 38 Ark. 221.

3. Tender was not a prerequisite to maintaining replevin in this case. But, if it was a prerequisite, which is not conceded, appellees made it unnecessary, in that they advised him that they would not accept the $22, but demanded $25 more, a total of $47. 68 Ark. 505; 5 Cowen (N. Y.) 506; 10 Ia. 223; 5 Watts (Pa.) 509; 15 Me. 296. Had a tender been necessary, the court erred in directing a verdict for appellees. Kirby's Dig. § 6869; 65 Ark. 448; 33 Ark. 425.

H. M. Jacoway and *Sellers & Sellers,* for appellees.

1. Appellant got all he contracted for, and delivered the property intending to part with the title. Before he could retake

it, he would have to show that he was defrauded, and that at the time he brought the suit he had the right to rescind and sue. No fraud is shown, and it will not be presumed. 6 Enc. of Ev. 6; 11 *Id.* 566; *Id.* 259; 37 Ark. 145, 149; 45 Ark. 492; 63 Ark. 16, 22. There can be no rescission without first an offer to return all that had been received. 59 Ark. 259; 46 Ark. 245.

2. The testimony excluded was not legally admissible.

WOOD, J., (after stating the facts.) Under our statute, one who obtains personal property from another by any false pretense, intending to defraud, upon conviction thereof, shall be deemed guilty of larceny. Sec. 1689, Kirby's Digest. See also 1 Wharton, Cr. Law, 916; 1 Bish. Cr. Law.

We are of the opinion that, when all the facts and circumstances disclosed by the evidence in this record are considered, it was a question of fact for a jury to say, under proper instructions, as to whether the two men mentioned had not entered into a conspiracy to defraud appellant by falsely pretending that the younger was a liveryman and driver for the elder, and that the elder was a doctor who could and would, for the consideration named, cure the appellant of the malady with which he was afflicted. It was a question for the jury as to whether these two men were making such fraudulent representations of existing or past facts, knowing same to be false, as were calculated to induce appellant to deliver to them his mule.

The facts are set out in detail, and they speak for themselves. The younger man represented that the elder was a doctor whom he had first met at Marshall. That he was employed by the doctor to furnish him conveyance to the four patients he had in this State. He represented the doctor as a millionaire who had the money in bank to insure a cure, that he had taken the doctor to see three of his patients, that he had taken three ribs out of one, was going to operate on another for abscess of the liver, and that all the time he gave a written guaranty. The elder man "talked about medicine all the time," and said "that doctoring had advanced to that stage that he did not have to doctor by symptoms any more, that he could tell what was the matter."

The appellant was so badly afflicted with rheumatism that he had not been able to work at all during the summer. The two men mentioned went to appellant's home, and through the above and other representations, as detailed in the statement, induced appellant to deliver to them his property upon the assurance that unless he was completely cured within sixty days the amount he had paid, the balance of the price of the mule surrendered should be returned to him. After they had thus obtained his property, they left his home Monday morning, August 25, and were soon thereafter arrested. The sheriff believed that not only the mule they had procured from appellant was stolen property, but also the two horses and the buggy in their possession. The young man was lodged in jail, the elder escaped. The sheriff "wanted to catch him," thus showing he had gone.

The testimony of Brandt should have gone to the jury for its consideration. It tended to show that on the day the two men left appellant's home Brandt met two men of the description of the two who had secured the mule from appellant. The mule they were leading answered the description of the mule taken. This testimony tended to show that these men were driving at an unusual speed, and were cutting the telephone wire as they went. If the men seen by Brandt were the men who had obtained appellant's mule, as this testimony tended to prove, the fact that they were cutting the telephone wire, and were driving at an unusual speed after doing so, were circumstances to be considered by the jury. Such circumstances, in connection with the other facts in proof, tended to show that the men were conscious of having committed the crime, and were endeavoring to make their escape. The testimony, because of a lack of more complete identity, was not of a very strongly criminatory nature, but it was a circumstance nevertheless tending to identify them and to show that they were conscious of having fraudulently deprived appellant of his mule, and were trying to cut off telephone connection, so as to enable them the more successfully to make their escape.

Without commenting more at length upon the testimony, it suffices to say that it was for the jury to say, from the nature of the representations themselves and the other circum-

stances in proof, as to whether such representations were made in good faith and for an honest purpose, or whether they were made to defraud appellant of his mule. While fraud will not be presumed, and while the burden is on him who alleges it to prove same by clear and satisfactory evidence, still it need not be shown by direct or positive evidence, but may be proved by circumstances. *Phelan* v. *Dalson,* 14 Ark. 79.

We do not consider the circumstances in this case so slight, and of such equivocal and unsatisfactory character as to warrant the court in taking the question of fraudulent pretenses from the jury. *Bank of Little Rock* v. *Frank,* 63 Ark. 16. It was for the jury to say whether an itinerant millionaire doctor of the "all cure or no pay" variety really existed in this case, and whether the representations which he and his boosting companion made of present and past facts were known by them at the time they made them to be false, and whether they made them for the felonious purpose of depriving appellant of his property.

The question of tender was not raised in the pleadings, and does not arise in case like this. Here the party who obtained possession of the mule from appellant had transferred same to third parties. These parties are being sued for the possession, and they set up ownership in their own right as innocent purchasers. They do not concede, but deny, that appellant is the owner. The only evidence in the record concerning this is by appellant who says: "They made me a proposition, and said if I would pay back the twenty-two dollars, and give them twenty-five dollars, they would get the mule back if the young man would accept it." Under such circumstances tender to appellees was not a condition precedent to the right to maintain the suit.

If "property has been obtained from the owner by a felonious act, his unqualified ownership is not in the least changed, and he may peaceably take it in whose hands soever he may find it." *Phelan* v. *Dalson, supra.*

The appellant did not offer to prove that the grip, found in possession of the two men when arrested, contained articles that would tend to show that the men had perpetrated a fraud on appellant in getting from him the mule. In the absence of

such offer by appellant, the ruling of the court in refusing to allow witness Hatley to testify as to the contents of the grip was not error.

The ruling of the court in excluding the declarations of the young man in jail was for the same reason correct.

For the error of the court in directing a verdict for the appellees the judgment is reversed, and the cause is remanded for new trial.

BATTLE and HART, JJ., dissent, on the ground that the court did not err in its ruling on the facts.

JONES v. GAINES.

Opinion delivered November 8, 1909.

1. PRINCIPAL AND SURETY—NOTICE OF PRINCIPAL'S DEFAULT.—The sureties upon a contractor's bond, given to secure the performance of a building contract, were not released because they were not notified of the default of their principal or of his having abandoned the work, where the bond did not require that such notice be given to the sureties. (Page 521.)
2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A motion for new trial upon the ground of newly discovered evidence must be sustained by affidavits showing its truth, as required by Kirby's Digest, § 6219. (Page 521.)

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

Geo. S. Evans and *Geo. W. Johnson,* for appellants; *Holland & Holland,* of counsel.

Sureties are bound only in the manner and to the extent provided in the obligation. 86 Ill. 78; 71 Ark. 199; 66 Ark. 287. Contracts of suretyship are construed strictly in favor of the surety. 73 Ark. 473; 59 Mo. App. 44; 82 Ark. 592; 65 Ark. 550; 9 Wheat. 680; 92 Ind. 240; 47 Am. R. 140; 29 Kans. 487. Recovery in an amicable action is not evidence against a surety. 4 Pa. St. 348. A surety on a building contract is discharged if the principal is paid faster than the contract provides. 6 C. B. N. S. 550; 2 Keen 638. Discharge

of the original contractor discharges the sureties. 4 Pa. St. 348; 65 Ark. 550.

T. B. Pryor, for appellee.

Where newly discovered evidence is made a ground for a motion for a new trial, it must be sustained by affidavits establishing its truth. Kirby's Dig., § 6219. Where appellant fails to abstract the evidence, this court will presume that it was sufficient to sustain the finding of the trial court. 76 Ark. 217. Findings of the court are as conclusive as the verdict of a jury. 60 Ark. 250; 40 Ark. 144. A general finding of fact, having evidence to support it, without declaration of law asked or given, will not be disturbed on appeal.

BATTLE, J. On the 10th day of June, 1907, Mrs. M. S. Gaines and W. A. Jones entered into a contract in which Jones agreed to remodel a certain residence in accordance with the drawings and specifications prepared by W. H. Blakely, architect, which were made a part of the contract; and Gaines agreed to pay therefor $1,985 in payments and under conditions fully set forth in the specifications. Jones entered into a bond to Gaines in the sum of $1,000, conditioned that he would well and truly complete said building in accordance with his contract, with P. M. Claunts, J. B. Basinger and E. W. Gentry, as sureties thereon. Gaines brought an action on this contract and this bond against Jones, Claunts, Basinger and Gentry, alleging in her complaint that Jones failed to perform his contract and bond, and abandoned it when about half performed; and that she was compelled to expend and did expend in the completion of the remodeling of the residence according to the contract the sum of $1,344 in excess of the contract price; and asked for judgment.

The defendants answered, and admitted the execution of the contract and bond sued on, and denied the other allegations in the complaint, and alleged that the sureties on the bond had no knowledge or information of the discharge of Jones.

The court, by consent of all parties, sitting as a jury, after hearing the evidence adduced by the parties, found that W. A. Jones entered into a contract with the plaintiff to remodel and construct a certain dwelling at and for the contract price, to-wit,

$1,985; that Jones refused and failed to carry out the contract, after partially complying with the terms thereof; that, in having the dwelling completed according to the contract at a reasonable cost, the plaintiff was forced to expend the sum of $1,444.50 in excess of the contract price; that at the time of the execution of the contract Jones, together with his co-defendants, entered into a bond to the plaintiff in the sum of one thousand dollars for the faithful performance of the contract; that the terms and conditions of the contract were violated by Jones, to the plaintiff's damage in the sum of $1,450.50."

And rendered the following judgment: "It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendant, W. A. Jones, the sum of $444.50, and also have and recover of and from the defendants, W. A. Jones, P. M. Claunts, E. W. Gentry and John B. Basinger, the sum of one thousand ($1,000) dollars, together with all her costs herein expended."

The defendants filed a motion for a new trial, in which they alleged that they discovered evidence since the trial and set it out in the motion, but did not sustain their motion in this respect by affidavits as required by section 6219 of Kirby's Digest.

The motion was overruled, and defendants appealed.

The findings of fact by the court are sustained by the evidence. It is true that the sureties were not notified of the default of their principal in the failure to perform his contract or his discharge. None was necessary. The contract did not require it, and it was their duty to see that he performed it. *Wilkerson* v. *Crescent Insurance Company,* 64 Ark. 80; 27 American & English Encyclopedia of Law, (2d Ed.) 457, and cases cited.

They, defendants, were not entitled to a new trial on account of newly discovered evidence, their motion on that ground being unsupported by affidavits. Kirby's Digest, § 6210.

Judgment affirmed.

MUELLER v. LIGHT.

Opinion delivered November 29, 1909.

1. LIMITATION OF ACTIONS—DEMURRER RAISING DEFENSE.—The defense of the statute of limitations may be interposed by demurrer in equity where the cause of action appears upon the face of the complaint to be barred, and does not disclose facts sufficient to remove such bar. (Page 525.)
2. SAME—MORTGAGES.—If the debt which a mortgage is given to secure is barred, then, under Kirby's Digest, § 5399, the right to foreclose or enforce the mortgage is also barred. (Page 526.)
3. SAME—STATUTE APPLICABLE TO MORTGAGE DEBT.—Under Kirby's Digest, § 5399, providing that in suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given, *held,* that where the mortgagor dies before the statute bar of five years applicable to the mortgage note has attached, the statute of limitation which applies to the mortgage is the statute of nonclaim. (Page 528.)

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

Huddleston & Taylor and *W. W. Bandy,* for appellant.

The statute of non-claim has no application to a debt secured by a deed of trust. 22 Ark. 535. Payment by an administrator of an unprobated debt of his decedent which is secured by mortgage will not arrest the running of the statute of limitations unless there was no order of the probate court authorizing such payment. 65 Ark. 1. The law presumes that every man does his duty until the contrary is shown. 25 Ark. 311. The statute of limitations does not afford a bar to proving a claim against a fund in court. 31 Ont. 495; 19 Pa. Super. Ct. 379.

Block & Kirsch and *Johnson & Burr,* for appellee.

The note was barred by the statute of non-claim. 84 Ark. 238; 105 S. W. 255; 73 Ark. 45; 68 Ark. 449. The statute of non-claim applies to all claims subsisting against a decedent at the time of his death, whether matured or unmatured. Kirby's Dig., § 110; 18 Ark. 334; 113 U. S. 449; 14 Ark. 246. A payment made by an administrator or executor does not stop the statute from running because it does not amount

to a promise of the debtor to pay the balance. 58 Mo. 90; 4 Fla. 481.

HART, J. The statement of the case made by counsel for appellant is adopted.

This is an appeal from the action of the chancery court of Greene County in sustaining the demurrer of defendants to plaintiff's complaint. The allegations of the complaint are substantially as follows:

On the 29th day of May, 1900, H. W. Glasscock executed and delivered to the plaintiff a note payable two years after date, secured by mortgage on certain lands in Greene County. On February 25, 1901, H. W. Glasscock died intestate, and on March 9 following M. F. Collier was appointed his administrator. The said mortgage did not correctly describe the lands which H. W. Glasscock and the plaintiff intended should be given as security for the payment of the note. One hundred and sixty acres of land were affected by this mistake, it being described as the northeast quarter of a section, instead of the northwest quarter.

In February, 1905, a partition proceeding was instituted by some of the heirs of H. W. Glasscock, in pursuance of which the lands correctly described in the mortgage, together with that intended to be described, as well as other lands, were sold to A. H. Glasscock, son of H. W. Glasscock, on April 14, 1906. The terms on which the sale was made do not appear in the complaint. During the pendency of the partition proceeding, the court ordered that all parties having any liens against said lands be made parties to the suit, but as to the plaintiff in the case at bar the order was never complied with; he was never given any notice of the proceeding.

Only one payment has been made on the note, which was on November 9, 1905, by A. H. Glasscock, acting under orders and directions and as agent of the said M. F. Collier, administrator.

There was an attempted sale of the property described in the mortgage by exercise of the power of sale therein contained on the first day of July, 1905. The purchaser at this sale assigned a certificate of purchase to the plaintiff as security for the purchase money. This sale was invalid on account of incorrect

description of the lands in the notice of sale, they being described as being in township 18, instead of township 17. Plaintiff still holds the certificate of purchase executed at the time of the sale.

On a day which appears blank in the complaint the plaintiff executed to A. H. Glasscock, who made the payment on the note as above set out, his quitclaim deed, conveying to Glasscock all his right, title and interest in and to the property which was propertly described in the mortgage—that is to say, all the real estate described in the mortgage except the one hundred and sixty acres, which was incorrectly described.

The purchase money of the lands sold in the partition proceeding has been paid into the hands of the defendant G. O. Light as commissioner of the court, and there remains in his hands, as the share of certain heirs of H. W. Glasscock now claiming a superior right to the same over plaintiff, more than sufficient to pay the balance due on the note. The interest of these heirs in the estate of H. W. Glasscock is three-tenths, he having left five children. Two of them, Frank Glasscock and Jennie Hays, afterwards died, leaving issue. In a divorce decree in favor of J. N. C. Glasscock against her husband, the said Frank Glasscock, before the latter's death, it was provided that he should retain title to one-half of his one-fifth interest in the estate of his father, and that title to the other half of the said fifth should vest in the said J. N. C. Glasscock and all the children of the parties to the divorce proceeding except one. J. N. C. Glasscock and the children thus favored are defendants here, as are also the children of Jennie Hays, whose interest in the estate was one-fifth.

The prayer of the complaint is for a decree correcting the mortgage, so that the same will conform to the intention of the parties at the time of its execution and read "northwest quarter of section fifteen," instead of "northeast quarter of section fifteen," that said mortgage be foreclosed, that plaintiff have judgment against defendants for the balance of his note, and that the same be decreed a lien upon the funds in the hands of G. O. Light, commissioner; or, if this be not done, then that the court ascertain what sum the said northwest quarter of section fifteen brought at said partition sale, and that his judgment be decreed a lien upon said funds.

To this complaint defendants filed their demurrer, setting up their grounds therefor in five paragraphs, as follows:

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

"2. That said complaint shows on its face that it is barred by the statute of limitations of five years.

"3. That said complaint shows upon its face that the note of H. W. Glasscock, deceased, was dated May 29, 1900, and that the same bore no credits of payment made by H. W. Glasscock or his administrator, made and paid under proper orders of the probate court.

"4. That said complaint shows upon its face that said note is long since barred by the statute of nonclaim.

"5. That said complaint shows upon its face that the defendant G. O. Light is a commissioner of this court, and that the fund sought to be impounded herein is still in his hands as such commissioner, appointed by the court in the case of Mabel Clare Glasscock *v.* A. H. Glasscock and others, defendants, and that said Light is still acting in such capacity, under the orders of the court duly made therein."

The court sustained the demurrer, and dismissed the complaint, plaintiff saving exceptions.

The decision of the chancellor was correct. One of the grounds of demurrer is that the complaint shows on its face that it is barred by the statute of limitations.

Can the defendant on demurrer interpose the statute of limitations in equity? In the case of *McGehee* v. *Blackwell,* 28 Ark. 27, the court said: "Sec. 111 of the Code provides for what matters demurrers may be interposed. If the interposition by demurrer of the statute of limitations is proper under the Code, it must be under the fifth clause of section 111, which reads as follows: 'That the complaint does not state facts sufficient to constitute a cause of action.' We see nothing in this clause otherwise than permission, at least, of the use of the demurrer in interposing such bar, where the cause of action appears upon the face of the complaint to be barred; for in such case there is in law no cause of action alleged. And this, we believe, is in strict analogy with the old chancery practice."

In equity, when the complaint shows on its face that the

cause of action is barred by the statute of limitations, and does not allege facts sufficient to remove the bar, the plea of the statute of limitations may be interposed by demurrer. This rule is announced and approved by all text writers on equity pleading and practice. See also *McGehee* v. *Blackwell, supra.*

The complaint shows on its face that the cause of action was barred, and it does not disclose facts sufficient to remove the bar. Section 5399 of Kirby's Digest reads as follows: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given." Then follows a proviso which is not pertinent to the issues involved in this suit.

In the case of *American Mortgage Company of Scotland* v. *Milam,* 64 Ark. 305, the court said: "Under this statute (referring to the one quoted) suits in equity to foreclose, as well as suits at law for the possession of the property mortgaged, must be brought within the period of limitation for a suit on the debt which the mortgage or deed of trust was given to secure. The purpose of the Legislature was, simultaneously with the barring of the debt, to extinguish every remedy under the mortgage or deed of trust securing it."

It is insisted that the period of limitation referred to, both in the statute and in the language of the decision *supra,* means the statute of limitation applicable to the debt had the mortgagor lived; and that it is not affected by the statute of nonclaim after his death.

In support of their contention they cite the cases of *Hall* v. *Denckla,* 28 Ark. 506, and *Pope's Heirs* v. *Boyd,* 22 Ark. 535. But these cases were decided before the statute in question was enacted, and with reference to the law as it then existed. The decisions of the court since the passage of the act are to the effect that, if the debt would be barred regardless of the mortgage, then the right to foreclose or to enforce the mortgage is also barred.

In the case of *Salinger* v. *Black,* 68 Ark. 449, the court, in discussing the statute with reference to the foreclosure of a mortgage, said: "The debt secured by the mortgage in this

case was evidenced by promissory notes, and the period of limitation within which the statute provides actions shall be brought on promissory notes is five years after the cause of action shall accrue. But if the maker of promissory notes shall die before an action upon the notes be barred, and letters of administration are granted upon his estate, the five-year statute ceases to run as to him, because, under the law, it is displaced at once by the two years' statute of nonclaim, which runs against all subsisting claims against the estate not barred, not from the accrual of the cause of action, but from the grant of letters upon his estate. In the case at bar the promissory notes secured by the mortgage were not barred by the statute of limitation at the death of Saul Salinger, their maker, and were duly probated within the time prescribed by the statute. After this no statute of limitation ran against them until after the close of the administration of the estate of the deceased, which was open at the commencement of this suit."

Again in the case of *Ross* v. *Frick Company,* 73 Ark. 45, which was a suit to foreclose a mortgage where one of the notes for which the mortgage was given to secure was due before, and the other after, the death of the mortgagor, the court said: "When Ross died, the statute of limitations ceased to run against the notes, and was succeeded by the two years' statute of nonclaim, which runs from the grant of letters of administration, and none were granted upon the estate of Ross before the commencement of this suit."

In the case of *McGill* v. *Hughes,* 84 Ark. 238, the court said: "In this case five years after the right of action accrued was the time within which the law provides that action upon the note should have been commenced. The right of action accrued on the first day of January, 1900, and was barred on the first day of January, 1905, unless the time for bringing the same was extended by payments or the death of McGill. He died before the expiration of the five years, and the statute of limitation then ceased to run against the note and mortgage, and was succeeded by the two years statute of nonclaim, which ran from the grant of letters of administration to Plumlee in January, 1905. The note and mortgage continued in full force and effect for two years after that day, or until they were paid or satis-

fied. *Ross* v. *Frick Co.*, 73 Ark. 45. The decree of the mortgage was rendered on the 20th day of February, 1906, within two years. They were not barred."

The effect of these decisions is to hold that, if the debt which the mortgage is given to secure is barred, then the right to foreclose or to enforce the mortgage is also barred.

In the case of *Ross* v. *Frick Co., supra,* Ross, the mortgagor, died on June 14, 1885. One of the notes which the mortgage was given to secure became due April 1, 1885, and the other, August 1, 1885. No payments had been made on the notes. The suit was commenced on the 20th of November, 1890. The notes had not been probated against the estate of Ross; for letters of administration had not been granted when the suit to foreclose was commenced. If the statute of five years, unaffected by the statute of nonclaim, governs, it is evident that the court would have held that the right to foreclose was barred.

In the case of *McGill* v. *Hughes, supra,* the record does not disclose that the notes were probated against the estate of McGill, and it affimatively showed that no payments had been made on the notes. Therefore, if the period of limitations of five years, unaffected by the statute of nonclaim, governs, the court would have held that the right to foreclose was barred. This view is borne out by the decision in the case of *Salinger* v. *Black, supra.* If the period of five years, unaffected by the statute of nonclaim, governs, the court would not have held that the time to foreclose the mortgage was extended by the probation of the claim within the two years after grant of letters of administration upon the mortgagor's estate to the time in which the debt itself would have been barred had no mortgage been given to secure it.

It is not necessary to probate the evidence of debt against the estate of the decedent, for the reason that the mortgagee has the absolute right to satisfy his debt out of the mortgaged property; but he must do this within the period of time which the law allows him to proceed against the debtor, or against his estate, had no mortgage been given. In other words, the statute fixes the lapse of time which shall bar a suit to foreclose a mortgage, the same as upon the evidence of debt for

which it is given to secure. In short, when the debt is barred, the right to foreclose the mortgage is barred.

The complaint alleges that H. W. Glasscock, the maker of the note which the mortgage in question was given to secure, died on February 25, 1901, and that on March 9, following, M. F. Collier was appointed administrator of his estate; but it does not disclose that the note was probated against his estate within two years after grant of letters of administration upon his estate. The present suit was instituted on May 15, 1908.

It necessarily follows from the views we have expressed that plaintiff's right to enforce his mortgage is barred. Having reached this conclusion, it is useless for us to consider the other special causes of demurrer.

We find no error in the record, and the decree will be affirmed.

McCULLOCH, C. J., (dissenting). The complaint alleges a payment by the administrator within the five-year period of limitation. If the payment was not authorized by an order of the probate court, this could have been pleaded by answer, but the complaint was good on demurrer, for, from the allegation that the payment was made by the administration, it should be inferred, in testing the sufficiency of the complaint on demurrer, that the alleged payment was an authorized one.

The mortgage debt matured May 22, 1902; Glasscock, the debtor, died February 25, 1901; payment was made by the administrator November 9, 1905, and this action was commenced May 15, 1908. The action was not barred by the five-year statute of limitations.

I do not think the statute of nonclaims operates to bar a right of foreclosure which is not barred by the general statute of limitations. We have held that, on the death of a mortgage debtor, the statute of nonclaims displaces the general statute of limitations for the purpose of extending the period within which suits to foreclose a mortgage may be instituted. *Salinger* v. *Black,* 68 Ark. 449; *Ross* v. *Frick Co.,* 73 Ark. 45; *McGill* v. *Hughes,* 84 Ark. 238. But it is an entirely different question as to whether the statute of nonclaims operates for the purpose of shortening the period within which a mortgagee is given under the gen-

eral statute of limitations to foreclose his mortgage. Prior to 1889 the statute of limitations as to an action on the debt secured by a mortgage on land had no application to an action to foreclose a mortgage, and seven years' adverse possession of the mortgaged lands was necessary to bar an action to foreclose. *Ringo* v. *Woodruff*, 43 Ark. 469. This court had also held that "the statute of nonclaims has no application to a debt secured by a deed of trust, where the creditor seeks to subject the trust property to a payment of his debt, which he may do without authentication and exhibition of his claim to the administrator of his debtor." *Pope's Heirs* v. *Boyd*, 22 Ark. 535.

In this state of the law, the Legislature enacted the statute of March 25, 1889, which provides that "in suits to foreclose or enforce mortgages or deeds of trust it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given."

It is evident to my mind that the Legislature, in passing this statute, had reference to the general statutes of limitations, and not to the statute prescribing the time within which claims against the estates of deceased persons must be probated. It is by this court—and correctly, I think—held in the cases just cited that, as the statute of nonclaims keeps alive a debt not barred at the time of the death of a debtor, it also keeps alive the right of action to foreclose the mortgage, notwithstanding it would be barred by the general statute of limitations. But it should not be held that the statute of nonclaims shortens the time which a mortgage may be foreclosed under the general statutes of limitation, when it is evident that the Legislature did not in the act of 1889 have any reference to the statute of nonclaim.

SNYDER v. SLATTON.

Opinion delivered November 29, 1909.

1. ANIMALS—SERVICE FEE OF STALLION—EFFECT OF TRADE.—A mare was sold with reservation of title in the vendor until the purchase money should be paid, and the vendor consented that the vendee should

have the mare bred to a stallion; the contract for such stallion's service provided that the service should become due whenever the mare became in foal or was traded; the vendee, while part of the purchase price was unpaid, and during the period of gestation, exchanged the mare for a mule belonging to the vendor, and paid the balance due on the price. *Held,* that this amounted to a "trade," and that the service fee was due. (Page 532.)

2. SAME—LIEN FOR STALLION'S SERVICE—PRIORITY.—Where the vendor of a mare sold conditionally with reservation of title until the price is paid authorized the vendee to have the mare bred, he will be held, so far as the lien for the stallion's services is concerned to have waived any superior title to the mare. (Page 533.)

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

Huddleston & Taylor, for appellant.

Defendant was entitled to a judgment *non obstante veredicto.* 6 Ark. 264; *Id.* 443; 17 Ark. 71; 19 Ark. 194. Where there are more issues than one, and a verdict on only one, there can be no final judgment, but a *venire facias de novo* will be awarded. 9 Ark. 62; 4 Ark. 526; 5 Ark. 193; 18 Ark. 248. If these motions fail, then the remedy is reached by motion for a new trial. 119 Ind. 273; 21 N. E. 735; 4 L. R. A. 549.

FRAUENTHAL, J. The plaintiff below, D. W. Slatton, instituted this suit against the defendant, Wm. Snyder, to recover for the service of a stallion, and to enforce a lien upon the mare, which was then in possession of the defendant J. P. Stepp; alleging that she had been traded since the service. The contract of service provided that a colt was insured, and that the debt was due when the fact was ascertained that the mare was in foal or the mare traded. The right to recover and to the lien was denied upon the ground that the mare was not with foal, and that she had not been traded; that the mare had only been taken back by Stepp from Snyder, who held her under a conditional sale. The uncontroverted testimony shows that J. P. Stepp sold the mare to Wm. Snyder on April 3, 1908, for $65, taking a note therefor due November 1, 1908, in which the title to the mare was reserved in him until payment of the note. The service sued for was performed in May, 1908. Thereafter Snyder paid to Stepp on the note in money and property

the sum of $23. When the note matured, Snyder was preparing to haul some logs, and Stepp suggested that the mare was too light to do the work. Stepp was the owner of a mule at the time; and it was agreed between them that Stepp would sell the mule to Snyder, and in payment therefor Snyder would turn back the mare to Stepp and pay him an additional sum. This was done. The testimony also tended to prove that before the service was performed Stepp told Snyder to have the mare bred to a stallion. This suit was instituted after the time that it is alleged that the mare was traded to Stepp, and during the period of gestation; and neither at that time nor at the time of the trial was it definitely known whether the mare was in foal.

At the conclusion of the evidence each of the parties asked for a peremptory instruction. The court thereupon submitted to the jury the following interrogatory: "Did Stepp authorize the service?" and said to the jury: "You will answer yes or no; and this will be your verdict." Upon the return of the verdict of the jury answering the above interrogatory in the affirmative, the defendants asked for judgment in their favor notwithstanding the verdict; and also that the issues be submitted to the jury as to whether or not the mare was with foal, and whether or not the mare had been traded, exchanged, sold or disposed of by Snyder. The court refused their requests, and thereupon entered judgment in favor of the plaintiff, and against defendant Snyder for the amount of the debt, and sustained the attachment upon the mare.

It is contended by the appellants that by the reservation of the title in the mare Stepp remained the owner thereof, and that, upon the maturity of the note and the same being unpaid, he only took back the mare, and that Snyder did not trade, exchange or otherwise dispose of the mare. But under the contract of sale made by Stepp to Snyder of the mare Snyder obtained an interest in the mare. He had paid a part of the purchase money on the note, and he had an interest in the mare which he could mortgage (*Sunny South Lumber Co.* v. *Neimeyer Lumber Co.*, 63 Ark. 268), or sell (*McRae* v. *Merrifield*, 48 Ark. 160), or exchange for other property (*Dedman* v. *Earle*, 52 Ark. 164). Under a contract of sale of a chattel with reser-

vation of title in the vendor until the payment of the purchase money, the mere omission of the purchaser to pay the purchase money at maturity would not operate as a forfeiture of his rights. *Nattin* v. *Riley,* 54 Ark. 30.

Upon the maturity of the debt under such a contract the vendor of the chattel, upon default in the payment thereof, may retake the property and thus in effect cancel the debt; or he may still affirm the sale and thus waive the reservation of title. He may do this by suing to recover the debt or by any act by which he recognizes the interest of the vendee in the property; for until a demand for the property is made the vendee has still the right to pay the purchase money and thus obtain entire title thereto. *Butler* v. *Dodson,* 78 Ark. 569; *Nattin* v. *Riley, supra.*

In this case the defendant Stepp still recognized that Snyder had an interest in the mare when he let him have the mule therefor. At that time a substantial payment had been made upon the purchase money of the mare; and in effect Snyder traded to Stepp the mare for the mule, and Stepp exchanged with Snyder the mule for his interest in the mare and the payment of an additional sum. In this way Stepp affirmed the sale of the mare to Snyder, and dealt with him as the owner thereof, and did not take back same under his reservation of title. This amounted to a trade, within the terms of the contract for the service, so as to make the debt due; and was such an exchange and disposition of the mare under the provisions of the statute as to entitle the plaintiff to sustain his attachment thereon. *Pitchcock* v. *Donnahoo,* 70 Ark. 68.

Under the undisputed evidence in the case, therefore, the mare was traded, and the debt was due. Under the further evidence it was found that, prior to the performance of the service, Stepp authorized the same. Where a vendor, under a conditional sale of a chattel reserving title in the vendor, has authorized or consented to the vendee executing a mortgage on the chattel, this court has held that such vendor was not entitled to recover the chattel as against the mortgagee. *Hyatt* v. *Bell,* 83 Ark. 360. And so in this case by authorizing the service Stepp has waived any superior claim or right that he may have had in the mare by reason of the reservation of title thereto.

Under the uncontroverted testimony and the finding of the jury in this case, the court was correct in entering a judgment in favor of the appellee.

The judgment is affirmed.

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

Opinion delivered November 29, 1909.

APPEAL AND ERROR—EXCESSIVE DAMAGES—REMITTITUR.—An error in the admission of testimony which might have misled the jury into allowing plaintiff $10 damages more than he was entitled to was cured by a remittitur of a sum exceeding that amount.

Appeal from Hot Spring Court; *W. H. Evans,* Judge; affirmed.

Kinsworthy & Rhoton and *Jas. H. Stevenson,* for appellant.

Appellee should not have been permitted to testify to what his wife had told him. 86 Ark. 450; 83 Ark. 331; 78 Ark. 225.

John C. Ross, for appellee.

The evidence was competent because it was the best evidence obtainable. But if the admission of the testimony in question was error, this court will not reverse if the judgment upon the whole case was right. 10 Ark. 9; 19 Ark. 667; 23 Ark. 115; 33 Ark. 811; 43 Ark. 296; 44 Ark. 556; 46 Ark. 542.

HART, J. This is an appeal by the defendant, St. Louis, Iron Mountain & Southern Railway Company, from a judgment against it in favor of the plaintiff, J. M. Williams, for damages alleged to have been sustained on account of the negligent failure of the defendant to stop its passenger train at a flag station to receive plaintiff as a passenger.

Only one assignment of error is asked to be considered by us. Hence it will be unnecessary to make a statement of the case except such as will properly present the point relied upon for a reversal.

The plaintiff was a physician. He testified that, on account of the failure of the defendant to stop its train at the flag station in response to the signal, he was delayed in reaching home about three hours. That when he reached home his wife told him that a Mr. Cunningham had come for him to visit his sick wife in the country, but had gone for another physician when he had found out that plaintiff would be delayed in arriving home. That he would have made ten dollars by making the call. It is contended by counsel for defendant that this evidence was hearsay. Considering this to be true, defendant is in no attitude now to complain.

The case was tried before a jury, and a verdict was returned in favor of the plaintiff for $135. The defendant filed a motion for a new trial, and the error now complained of was one of the grounds embraced in its motion.

Upon hearing the motion for a new trial, the court ordered a remittitur of $67.50, which was agreed to by the plaintiff. The motion for a new trial was then overruled. It will be observed that the error complained of involves an amount less than that ordered remitted.

It will be presumed that the court considered the error now complained of in passing upon the motion for a new trial, and eliminated it by ordering the remittitur to be entered.

This court will only reverse for errors that are prejudicial to the rights of the complaining party, and, the prejudice having been removed by the action of the court in entering the remittitur, the judgment will be affirmed.

LASATER v. CRUTCHFIELD.

Opinion delivered November 29, 1909.

1. AGENCY—LIABILITY OF AGENT.—An agent who without authority contracts in the name of his principal will be personally liable to the other contracting party. (Page 538.)
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's findings of fact will not be disturbed on appeal unless it is against the preponderance of the evidence. (Page 538.)

Appeal from Clay Chancery Court, Western District; *W. W. Bandy,* Special Judge; affirmed.

Basil Baker, for appellant.

G. B. Oliver, for appellee.

The findings of a chancellor on conflicting evidence will not be disturbed by this court. 83 Ark. 524; 87 Ark. 593; 114 S. W. 1181; 120 S. W. 843; 62 Ark. 611; 72 Ark. 67; 73 Ark. 489; 117 S. W. 765.

HART, J. J. N. Crutchfield began this suit in the Clay Circuit Court for the Western District against H. W. Lasater, and Ferguson & Wheeler Land, Lumber & Handle Company to recover the sum of $296.25 and interest alleged to be due for surveying lands. Plaintiff alleges in his complaint that H. W. Lasater represented that he was agent and manager of a corporation known as the Western Handle Company, organized and existing under the laws of the State of Missouri, and that as such agent he employed the plaintiff to survey a large amount of land located in Western District of Clay County for the Western Handle Company, and that he performed said work and did said surveying for and on behalf of the said Western Handle Company at the request and employment of the said Lasater. Plaintiff alleges further that the Western Handle Company was dissolved in June of 1908; that all of its assets of every kind were assigned and transferred to the Ferguson & Wheeler Land, Lumber & Handle Company, upon a consideration that the last-named company agreed to and did assume payment of all the debts and liabilities of the said Western Handle Company, and that the debts and liabilities amounted to less than the assets so transferred.

Defendants answered, denying the indebtedness, and asked that the cause be transferred to equity for the reason that plaintiff is seeking to subject the assets of the Western Handle Company now in the hands of Ferguson & Wheeler Land, Lumber & Handle Company to the payment of his claim. The cause was transferred to the chancery court. The chancellor found in favor of the plaintiff for the sum of $317.72, the amount of the account and interest against the defendant H. W. Lasater, and a

decree was entered in accordance with his finding. The defendant H. W. Lasater has appealed.

The sole question raised by the appeal is as to the correctness of the chancellor's finding on the facts.

The plaintiff, Crutchfield, in his own behalf, testified that the defendant Lasater employed him to do the surveying; and wrote out and gave to him the numbers of the land that he wanted surveyed. That he understood that Lasater was acting for the Western Handle Company. That after he had surveyed a part of the lands he met Lasater, who said: "Did you mark the lines plain?" And he says: "I want those lines marked plain, so the boys won't get over them." Plaintiff told him that Blunk said it was all right, and Lasater replied that if Blunk said so it was all right. He then asked plaintiff when he was going to do the rest of the surveying, and plaintiff replied that he would commence the next morning. The lands to be surveyed belonged to Ferguson & Wheeler. Lasater was bookkeeper and manager of the store of Ferguson & Wheeler, and also did some work for the Western Handle Company. Blunk was an employee of the Western Handle Company, and was engaged in buying and measuring timber for it. This company had bought the timber off the lands which were surveyed, and was engaged in removing it.

George B. Wheeler, of the firm of Wheeler & Ferguson, was the secretary and treasurer of the Western Handle Company. He was also the brother-in-law of the defendant Lasater. He was a witness in the cause, and denied that he had employed the plaintiff, or authorized any one else to do so.

Blunk testified that he knew that Crutchfield was doing the surveying. That he talked with Lasater about it during the progress of the work, and that Lasater told him that he did not know who employed plaintiff. The defendant Lasater admitted that he knew that the plaintiff was doing the surveying, but denied that he employed him to do the work. He admits that he spoke to him about making estimates as to the cost, but says that the matter was dropped there. He says that when he heard that plaintiff was doing the work he supposed that Geo. B. Wheeler had employed him. Testimony was also adduced in favor of the defendants tending to show that plaintiff

did not present his bill for the work for several months after it was done. Plaintiff testified as to the correctness of his account, and that it was due and unpaid.

The chancellor found against the defendant Lasater alone. It necessarily follows that he found from a preponderance of the testimony that Lasater did employ the plaintiff to do the surveying; but that in so doing he was acting beyond the scope of his employment with the Western Handle Company, and on that account became individually liable. An agent who contracts in the name of his principal without authority, so that the principal is not bound, will be personally liable to the other contracting party. *Dale* v. *Donaldson Lumber Co.*, 48 Ark. 188.

On appeal, an equity case is tried *de novo* upon the record made in the chancery court; but it has been repeatedly held by the court that the finding of fact made by the chancellor will not be disturbed unless it is against the preponderance of the testimony. It does not appear to us in this case that the finding of the chancellor was against the weight of the evidence.

The decree will therefore be affirmed.

JUNCTION CITY LUMBER COMPANY *v.* SHARP.

Opinion delivered November 29, 1909.

1. NUISANCE—INJURY TO RESIDENCE.—Anything that materially and substantially lessens or destroys the use and enjoyment of one's homestead constitutes a nuisance. (Page 541.)
2. SAME—RIGHT TO USE ONE'S PROPERTY.—While every one has the right to the reasonable enjoyment of his own property, this right must be so exercised as not to violate the rights of others. (Page 542.)
3. SAME—CINDER PIT.—Where a lumber company constructed its sawdust or shaving pits and burnt its shavings and sawdust in a place where the smoke, cinders, soot and ashes were blown into a dwelling house, so as to cause a necessary and material annoyance to the owner, it will be liable as for a nuisance. (Page 543.)
4. SAME—MEASURE OF DAMAGES.—Where an injury to real estate by the maintenance of a nuisance is of a permanent nature, the measure of damages is the depreciation in the market value of the land; but if

the injury is not of a permanent nature, the depreciation in its rental value is the measure of damages. (Page 545.)

Appeal from Nevada Circuit Court; *Jacob M. Carter,* Judge; reversed.

McRae & Tompkins and *D. L. McRae,* for appellant.

He who uses his legal right harms no one. 59 Miss. 116; 9 N. Y. 444. One living in a city must necessarily submit to the inconveniences of city life. 78 Ky. 400; 188 Mass. 6; 118 N. W. 768; 23 Mich. 448. The measure of damages, unless the injury is permanent, is the depreciation in rental value during the continuance of the nuisance. 118 S. W. 786. The damages should at most be only nominal. 58 L. R. A. 390; 14 *Id.* 229; 74 Ia. 169; 86 Ala. 515.

J. O. A. Bush, for appellee.

Appellee's right to recover did not depend upon who owned the land where the nuisance was operated, nor the negligence of appellant in operating its plant. 85 Ark. 553; 27 L. Ed. 739. The right to enjoy property is as much a matter of legal concern as the property itself. 73 Ind. 293; 108 U. S. 328. The measure of damages is compensation for the physical discomfort sustained by appellee. 67 Ill. App. 443; *Id.* 351.

FRAUENTHAL, J. The plaintiff below, H. G. Sharp, is the owner of a lot in Prescott, Arkansas, which is occupied by him as a residence.

The defendant, the Junction City Lumber Company, owns a block in the same city near the plaintiff's dwelling house, upon which it has erected and operates a planing mill. The plaintiff alleged that the defendant in the operation of its plant created and maintains a nuisance, which disturbs, annoys, and injures him in the use and enjoyment of his property; and he instituted this suit for the recovery of the damages which he claims he has sustained thereby. The plaintiff is a carpenter, and at the time he bought his lot and built his dwelling thereon the land now occupied by the defendant was then occupied by a furniture factory. This furniture factory was destroyed by fire, and the defendant thereafter purchased the property; and after the erection and occupancy by plaintiff of his dwelling the defendant built its planing mill on the land acquired by it. This was three

or four years prior to the institution of this suit. At the same time the defendant built on this property a shaving pit, which is situated 375 feet from the plaintiff's house. The plant of the defendant employs about fifty men, and has a capacity of about 30,000 feet of lumber per day. The defendant delivers into the shaving pit by means of a blow pipe large quantities of shavings and sawdust, which are there burned; and these burning shavings and sawdust emit smoke, ashes and cinders, which envelope the plaintiff's residence, causing discomfort and annoyance in its use and enjoyment. The evidence on the part of the plaintiff tended to prove that the fires have been kept burning for the greater part of each year continuously during the past three years; that his house was situated in a northeastwardly direction from the pit, and that the winds in that locality blow from the southwest and blow the smoke and ashes towards and upon his property; that the ashes and cinders soil the clothes of his family, and the smoke injures the use and enjoyment of his residence by reason of its discomfort and annoyance. At the request of the plaintiff, the court gave the following instruction: "If you find from the evidence that the defendant built or constructed its sawdust or shaving pits and burns its shavings or sawdust in a place where the smoke, cinders, soot or ashes are blown in on plaintiff's house in such a manner as to reasonably annoy him and his family and disturb them in the peaceable use and comfortable enjoyment of the same, you will find for the plaintiff."

"2. If you find for the plaintiff, you will assess his damages at such a sum as will in your judgment be a fair compensation for such annoyance, inconvenience and discomfort as the proof may show he and his family have suffered, if any; and in arriving at the amount you are told that the law lays down no rigid rules, but you are to be governed by your good judgment and reason and sound discretion based on the evidence in the case."

At the request of the defendant the court gave the following instructions:

"5. You are further told that one who chooses to reside in a city or town near manufacturing establishments cannot be heard to complain of the noise, smoke and confusion incident

thereto in the prosecution of a lawful business in a reasonably careful way. For these annoyances they are compensated by the attendant advantages. So in this case, if you believe from the evidence that the defendant is lawfully making a reasonable use of its property, so as to occasion no unnecessary damage to plaintiff, your verdict should be for the defendant.

"6. You are further told that, in passing upon the question as to whether the defendant is liable for damages, if the alleged annoyance is only occasional and not such as to annoy a reasonable person, the defendant would not be liable, although it might in fact annoy the plaintiff."

The court refused to give the following instructions asked for by the defendant:

"3. You are told that the defendant has the right to run a saw mill or planing mill and to use steam as a motive power, and to burn the shavings; and if in constructing and in using the property it has been guilty of no negligence, your verdict should be for the defendant."

"4. You are further told that if you find from the evidence that at the time plaintiff bought the property and built his residence thereon he knew that the lots and block upon which defendant's mill is built were appropriated and used for manufacturing purposes and establishments, he cannot be now heard to complain of the annoyance which arises necessarily from the lawful use of said property for such purposes."

The jury returned a verdict in favor of the plaintiff for $250; and from the judgment entered thereon the defendant presents this appeal.

1. This action is based upon the right of the plaintiff to recover damages to his property caused by an alleged nuisance maintained by the defendant upon its property. The plaintiff is the owner of a lot upon which is located his residence, and the value of his ownership depends upon the use and enjoyment of it as a residence. Anything that materially and substantially lessens or destroys that use and enjoyment impairs the value of the property and thus damages the plaintiff. Such acts create a nuisance, and the party who so maintains them to the injury of another is responsible in damages.

In the case of *Baltimore & Potomac Rd. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, Mr. Justice Field says: "That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him." Any injury to lands or houses which renders them less useful or comfortable is a nuisance. Joyce on Nuisance, § 2; Hilliard on Torts (4th Ed.), 584.

All acts done by one which render the dwelling house of another less fit for habitation, or which materially and substantially prevents its enjoyment in as full and ample a manner as before, will constitute a nuisance. Joyce on Nuisances, § 22; 2 Greenleaf; Ev. p. 427.

The use and enjoyment of property is the essential and valuable element of the right of ownership; and, wherever the property may be located, its owner has a right to be protected in that use and enjoyment, and to receive damages for an injury thereto. The locality may be considered in determining the extent of that injury, but anything which palpably and substantially annoys and disturbs one in the possession of his property works an injury for which he is entitled to redress, wherever it may be located. Every owner has a right to this protection. It is true, as is claimed by the defendant, that it has also the right to the use and employment of its property. And to obtain that use and employment it has the right to build and maintain on its property any business it may desire, which is lawful; but that right must be so exercised and the business prosecuted that it does not destroy the right of the neighboring owner to the enjoyment of his property. As is said in the case of *Bohan* v. *Port Jarvis Gas Light Co.,* 9 L. R. A. 711: "Every one has a right to the reasonable enjoyment of his own property; and so long as the use to which the he devotes it violates no rights of others, there is no legal cause of action against him. The wants of mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business; and, so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. * * * * But where the damage is the necessary consequence of just what the defendant is doing,

or is incident to the business itself or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies." In 2 Cooley on Torts, 1243, a Maryland case is quoted with approval which says: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business is lawful and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business." *English* v. *Progress Elect. Light & M. Co.,* 95 Ala. 256; Joyce on Nuisance, § 85.

Every one has the right to the reasonable use of his own property, but it is not a reasonable use of it if it deprives the adjoining owner of the lawful use and enjoyment of his property. And no locality can be considered as convenient for carrying on a business which is a nuisance, and which causes a substantial injury to the property of another. *Eller* v. *Koehler,* 68 Ohio St. 51.

This court has quoted from *Ross* v. *Butler,* 19 N. J. Eq. 294, the following with approval: "The law, then, must be regarded as settled that when the prosecution of business, of itself lawful, in the neighborhood of a dwelling house renders the enjoyment of it materially uncomfortable, by the smoke and cinders and noise or offensive odors produced by such business, although not in any degree injurious to health, the carrying on such business there is a nuisance." *Durfey* v. *Thalheimer,* 85 Ark. 544; *Terrall* v. *Wright,* 87 Ark. 213.

It follows therefore that the above instruction number 1 given on the part of the plaintiff is substantially correct. In this instruction it is said that if the smoke, soot and ashes are blown on the plaintiff's house in such a manner as to "reasonably" annoy him, etc. It would be more correct to use the expression "necessarily and materially annoy," instead of "reasonably" annoy. We presume that by the word "reasonably" in this connection is meant the ordinary and necessary result

of the smoke, cinders and ashes. But if there should be any uncertainty in that regard in said instruction, it was made clear by instruction number 5 given on the part of the defendant wherein it says that if the acts complained of were such as "to occasion no unnecessary damage to plaintiff," the defendant would not be liable.

We are therefore of the opinion that no prejudicial error was committed in giving the instruction number 1 on the part of the plaintiff, and in refusing instructions numbers 3 and 4 asked for by the defendant.

2. But in an action for damages for the injury caused by the continuance of a nuisance the recovery is limited to the actual damages sustained. The damage that is recovered is not for an injury to the person, but to the property and to the use and enjoyment of the property. If the injury is of a permanent nature, the measure of damages would be the depreciation in the market value of the land; but if the injury is not of a permanent character, then the diminution in the rental value or the depreciation in its use would be the measure of recovery. The object of the law is to give compensation for the injury done. If the nuisance is maintained maliciously, or if some peculiar and special damage is shown, that should be taken in consideration in fixing the amount of the damages. But where the nuisance results in the course of the lawful business, with no malice and with no special injury, except to the enjoyment and use of the property, then the depreciation in the rental or usable value of the property would give a just and full compensation for the injury, if it is only temporary.

In the case of *Swift* v. *Broyles,* 58 L. R. A. 390, the Supreme Court of Georgia, in a well considered case involving the question of the measure of damages that should be recovered for the annoyance and discomfort occasioned by another by the maintenance of a nuisance on premises adjacent to a dwelling house, says: "It is not the policy of the law that the jury shall be permitted to act arbitrarily in the matter. On the contrary, they are expected to observe the cardinal rule that only actual damages can lawfully be recovered by the injured party. To the end that they may be enabled to arrive at a just and reasonable conclusion as to the amount of compensation to be awarded

him, the courts have with marked unanimity held that the jury may consider proof of and adopt as the measure of his damages the depreciation in the rental value of his property caused by the discomforts to which its use has been subjected. One who himself occupies premises of which he is the owner cannot, it is true, logically be said to have suffered any actual loss of rent by reason of a tortious interference with the enjoyment of his home. The decisions just cited are not, however, based upon any such erroneous theory, but rest upon the perfectly rational doctrine that the owner of the property of a given rental value is entitled, if he elects to be at once his own landlord and tenant, to get an amount of enjoyment out of it equal to the sum he would be obliged to pay as rent for premises of a like rental value belonging to another." 2 Wood on Nuisances, § 867; 4 Sutherland on Damages, § 1047.

In the case of *Czarnecki* v. *Bolen-Darnall Co.*, 91 Ark. 58, decided by this court, the question of damages incurred by the owner of a dwelling house from the injury caused by a nuisance was involved. In that case the court quoted with approval from Joyce on Damages the following rule as to the measure of damages in such cases: "Where a nuisance causes a permanent injury to the property, the measure of damages will be the depreciation in the value of the property, that is the difference between its value before and after the injury. If, however, the injury is not a permanent one, but only temporary or removable, the measure of damages will then be the depreciation in the rental value of the property during the time of its maintenance or up to the time of the trial."

In the case at the bar it is not claimed that any injury was caused to the health by the maintenance of the nuisance, or that there was any special damage of any kind, other than to the use and enjoyment of the property. There was no testimony indicating the character of the property or the size of the dwelling thereon, or the value of the property or of its rental or usable value. The jury were permitted without any pecuniary guide to arbitrarily fix the amount of the damages. So far as the testimony shows, it may be that the sum of $250 recovered is the full value of the entire property, or more than the full value. The damages in this case should be compensatory only. And

in our opinion the rule laid down in the Czarnecki case is a just and reasonable one for arriving at the amount of such compensation.

It follows therefore that the court erred in giving instruction number 2 on the part of plaintiff, which relates to the measure of damages.

For the error in giving said instruction the judgment is reversed, and the cause remanded for a new trial.

LONOKE v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered November 29, 1909.

1. NUISANCES—POWER OF MUNICIPAL CORPORATIONS.—A municipal corporation cannot declare that a nuisance which upon investigation is found not to be such. (Page 550.)
2. SAME—POWER OF MUNICIPAL CORPORATIONS.—In the absence of any ordinance, a municipality may proceed in equity to secure the abatement of a public nuisance. (Page 551.)
3. MUNICIPAL CORPORATIONS—POLICE POWER.—By virtue of its police power a municipality is authorized to adopt such measures for the protection of the lives and property of its citizens as are reasonable and legal. (Page 551.)
4. NUISANCES—DEFINITION OF PUBLIC NUISANCE.—A public nuisance is that which affects the people and is a violation of a public right, either by a direct encroachment upon public property, or by doing some act which tends to a common injury, or by the omission to perform a duty. (Page 551.)
5. SAME—CONSTRUCTION OF RAILROAD IN STREET.—A railroad constructed across and along the public streets of a town under authority of law is not a nuisance *per se*, though it may become such by reason of its circumstances or location or surroundings. (Page 552.)
6. MUNICIPAL CORPORATIONS—ESTOPPEL.—Where a town has for forty years acquiesced in the use of its streets by a railroad company for track and depot purposes, it will be estopped to deny the rightful authority so to use and occupy the streets. (Page 552.)
7. NUISANCE—BURDEN OF PROOF.—In order to obtain an injunction against or the abatement of an alleged nuisance, the complaining party must show a clear and strong case supporting his right to such relief. (Page 552.)

8. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—Where the finding of a chancellor upon the facts is not against the preponderance of the testimony, it will not be disturbed. (Page 553.)

Appeal from Lonoke Chancery Court; *John E. Martineau,* Chancellor; affirmed.

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

One cannot erect a nuisance upon his own land adjoining vacant lands owned by another, and thus control the use to which the vacant lands may be subjected in the future. 63 N. Y. 568; 20 Am. R. 568. Brick burning is not a nuisance *per se,* but may become so by reason of the manner of operation. Wood on Nuisances, 727. The depot and cotton platform are a nuisance, and should be abated. 70 Ark. 12; Joyce on Nuisance, pp. 299, 243. If an obstruction is unnecessarily created or safety in the streets is unnecessarily impaired, a nuisance is created. 36 N. Y. Supp. 863. And such obstruction is not excused by the fact that it is necessary for the convenience of the railroad company. 77 Ia. 442; 95 N. C. 602; 59 Me. 189. A business strictly lawful may be so conducted as to be a nuisance. 86 Ind. 117; 73 Ind. 184. A railroad cannot acquire by prescription a right to maintain a nuisance. 91 Tenn. 445; 78 Ga. 271; 73 N. Y. Sup. Ct. 241; 107 N. Y. 360; 103 N. Y. 77; 37 Barb. 301; 53 Barb. 629. The town had a right to regulate the use of the streets. Kirby's Dig., § 5456; 58 Pa. 254; McQuillin on Mun. Ord., § 358; 111 Cal. 25; 36 Ind. 552; 15 Mich. 54; 62 Tex. 715. Anything which renders the use of a street hazardous is a nuisance. 39 Ga. 725; 40 Ill. 428; 44 Hun 219; 95 N. Y. 83; 29 Hun 105. A wooden building within a district in which such buildings are prohibited may be removed by ordinance. 117 Pa. 326; 11 Met. 55; 2 Rawle 262; Kirby's Dig., § 5439. The unreasonableness of the ordinance must be clearly shown. 31 Minn. 402. And inconvenience to the railroad company is not sufficient for that purpose. 45 N. Y. 154.

John T. Hicks and *Thos. S. Buzbee,* for appellee.

The ordinance was void because not adopted at a lawful meeting. The action of the city council in destroying appellee's property was not authorized by law.

FRAUENTHAL, J. The appellee, the Chicago, Rock Island & Pacific Railroad Company, owns and operates a line of railroad which passes through the town of Lonoke, Arkansas. In about the center of the business portion of the town are located its depot grounds. These depot grounds extend about 250 feet from the northern to the southern boundary thereof, including the streets, and upon the eastern boundary is what is known as Center Street and on the western boundary Richwood Street. These two streets run north and south across the right of way and railroad tracks of appellee, and are about 300 feet apart. Upon these depot grounds the appellee has built and maintained for at least forty years a passenger and freight depot, platforms and structures referred to in this litigation. The right of way and railroad track of the appellee runs from east to west through about the middle of these depot grounds. Its passenger depot is situated north of the track. South of the railroad track and adjacent to it are located its freight depot and platform and other structures, which extend practically from Center to Richwood Street. Upon the southern extremity of the depot grounds are located business houses which are 125 feet distant from the railroad track, and these are located nearer the track and freight depot than other buildings in the town. In 1907 a number of citizens made complaint to certain officials of appellee that the freight depot and platform and structures south of the railroad track were dangerous to the health and convenience of the citizens, and that they tended to obscure the view of the crossing at Center Street, and that consequent upon their location the switching of trains at that crossing, in placing the cars at the depot for unloading, made dangerous and unsafe to the people the crossing at Center Street, over which a great per cent. of the people passed. And they requested the removal of the freight depot, platform and structures located south of the track. The railroad officials promised to remedy the conditions. No action being taken by the appellee in that regard, the council of the town of Lonoke on August 19, 1908, passed an ordinance declaring said freight depot, platform and structures to be nuisances, and ordered the appellee to remove them, under a penalty for failure to do so; and in event it did not do so it ordered the town marshal to remove them. There-

upon the marshal and officials of the town of Lonoke threatened under and by authority of said ordinance to move the said freight depot and structures, and the appellee then began to remove them itself to a point upon its right of way and about 200 or 300 yards west of its present location. This proposed place of removal was located in front of and near the residence property of J. H. Melton; and he and a great number of the citizens of Lonoke objected to and protested against the removal of said freight depot and structures from their present location.

On October 6, 1908, the said J. H. Melton instituted this suit in the chancery court against the appellee, alleging that it was erecting said freight depot and structures adjacent to his residence, which would injure him in the enjoyment and comfort of his home, and would constitute a nuisance; and he sought to enjoin the appellee from erecting and maintaining the said freight depot and structure at said proposed location. The appellee in its answer to said bill asked that the town of Lonoke and its marshal and other officers be made parties to the suit; and against them it brought a cross complaint in which it alleged that the marshal and officers of the town of Lonoke, acting without right or authority, were threatening and proceeding to destroy said freight depot, platform and property of appellee and to remove same from their present location on its depot grounds; and it sought to enjoin the said marshal and officers of the town from doing said alleged wrongful acts, and from destroying its property. The town of Lonoke and its officers made answer to this cross-complaint. They denied that they were proceeding to destroy the property of appellee without proper authority. They set forth the above ordinance, declaring said property to be a nuisance, and alleged that they were proceeding themselves to abate the same. They alleged that the said freight depot and structures were a public nuisance because they were injurious to the health of the people of the town, because they increased the hazard by fire to the property of the people of the town, and because in connection with the movements of its cars at the said crossing at Center Street appellee made that crossing dangerous to the lives and persons of the people who passed over the same; and in their

answer they prayed "that the cross-complaint be dismissed for the want of equity; that the said buildings and platforms aforesaid in the cross-complaint be declared to be a nuisance, and that the same be abated."

Upon the trial of the cause in the chancery court the witnesses appeared in person and gave oral testimony. A great number of witnesses testified on behalf of the parties to the suit, and the evidence presented before the chancellor is quite voluminous. The chancellor found that the said ordinance was not legally passed, and that it was invalid and void. He further found that the said freight depot, platform and other structures were not a nuisance, and that the acts of the appellee in the manner in which it maintains its property did not constitute a nuisance. It dismissed the complaint of J. H. Melton. It permanently enjoined the town of Lonoke and its officers from destroying or removing the said depot and platform, and from interfering with the railroad company in restoring same. From that decree the town of Lonoke and its officers have appealed to this court.

The town of Lonoke and its officers were proceeding to tear down and destroy the freight depot and other structures of the appellee located upon its depot grounds by the authority of an ordinance of that town declaring the same to be a nuisance and ordering the abatement thereof. It is contended that said alleged ordinance is invalid for the reason that it was not legally passed; that the ordinance was passed at a called meeting of the town council, and that one of the members of the council was not present at that meeting, and had no notice thereof. But we do not think that it is necessary to determine whether or not this ordinance was legally enacted, because the legality or illegality of the passage of said ordinance cannot affect the equitable rights of the parties in this litigation and the subject-matter thereof. If it should be determined that said ordinance was legally passed, that would not necessarily make an actual nuisance the structure and things complained, if in law and in fact they do not come within the legal notion of a nuisance. In the case of *Yates* v. *Milwaukee,* 77 U. S. 497, Mr. Justice Miller says: "But the mere declaration by the city council that a certain structure was an encroachment or

obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character." A municipal corporation cannot declare that a nuisance which upon judicial investigation is found not to be. *Arkadelphia* v. *Clark,* 52 Ark. 23; *Gaines* v. *Waters,* 64 Ark. 609; *Waters* v. *Townsend,* 65 Ark. 613; Ex parte *Foote,* 70 Ark. 12.

Upon the other hand, if it should be determined that said ordinance was not legally passed, still if the matters complained of do in law and in fact constitute a public nuisance, the municipality of Lonoke may proceed in equity in behalf of the people for their abatement. Joyce on Nuisances, § 439; 29 Cyc. 1235; *Harvey* v. *Dewoody,* 18 Ark. 252; *Philadelphia* v. *Thirteenth & Fifteenth Street Railway Co.,* 8 Phila. 648.

It is true that a municipality has the power, as one of the subordinate agencies of the State, to adopt and enforce all necessary measures for the protection of the lives and property of its citizens by virtue of the general supervision and control which it has over the police protection of its respective jurisdiction. But in the exercise of this police power it can only adopt those regulations and measures that are reasonable and which are legal. 2 Abbott on Municipal Corporations, § 854; *Chicago, R. I. & P. R. Co.* v. *Joliet,* 79 Ill. 25-43.

A municipal corporation, through its proper officers, is a proper party, and has the right in a court of chancery to seek the abatement of that which is a public nuisance. The sole question therefore that is involved in this case is whether, under the law and the facts of this case, the structures and the acts complained of by the appellants are a public nuisance. A common or public nuisance has been defined to be "that which affects the people and is a violation of a public right, either by a direct encroachment upon public property or by doing some act which tends to a common injury or by the omitting of that which it is the duty of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct, working an obstruction or injury to the public and producing material annoyance, inconvenience, and discomfort founded upon a wrong." *Bohan* v. *Port Jervis G. L. Co.,* 122 N. Y. 18, 32; Joyce on Nuisances, § 5; Ex parte *Foote,* 70 Ark. 12.

The act done or the structure erected may be a nuisance *per se,* or the act or use of the property may become a nuisance by reason of the circumstances or location or surroundings. In the one case the thing becomes a nuisance as a matter of law; in the other it must be proved by evidence to be such under the law.

A railroad is not a nuisance *per se;* and the mere construction of a railroad track across a public highway or street under authority of law is no nuisance. *Northern Central Ry. Co.* v. *Com.,* 90 Pa. 300; Joyce on Nuisances, § 248; 29 Cyc. 1180.

In this case the railroad company had owned its line of railroad and operated same through Lonoke for at least forty years. During all that time it owned its depot grounds and maintained thereon such structures as it deemed necessary to the conduct of its business; and during all that time its tracks and trains lay upon and passed over the streets of this town. The town of Lonoke during all this time has recognized these rights. The appellants never have made, and in this case do not make any contention that the appellee does not have these rights; and it will be presumed that it has these rights from this long continued exercise thereof under these circumstances. In the case of *Harvey* v. *Aurora & G. R. Co.,* 186 Ill. 283, it is said: "Where a city has acquiesced in the use for twenty years by a railroad company of its streets, and has seen its construction and improvements made thereon, it is estopped to deny the rightful authority to so use and occupy the streets."

The appellee has therefore the lawful authority to have its tracks upon and to run its trains across these streets, and the right to have and maintain the structures upon its depot grounds, and to manage and conduct its business as to it may seem best, if it does not in fact create and maintain a public nuisance. For "a railroad may become a nuisance by reason of the manner in which it is operated in the location, condition and use of its appurtenant structures." 29 Cyc. 1180.

It then becomes in this case a question of fact as to whether or not in the maintenance of said structures and the conduct of its business, which are herein complained of by appellant, the appellee has created and does maintain a public nuisance. Where the thing complained of is not a nuisance

per se, the burden is upon the complaining party to show that it is a nuisance in fact. In order to authorize an injunction in such case, the evidence must be determinate and satisfactory, and it must clearly show that the things complained of do constitute a nuisance. 29 Cyc. 1244, 1246. In 29 Cyc. 1225 it is said: "In order to obtain an injunction against or the abatement of an alleged nuisance, the complaining party must show a clear and strong case supporting his right to such relief," and this declaration of law is supported by numerous author-
constitute a nuisance. 29 Cyc. 1244, 1246. In 29 Cyc. 1225 it is
is held that a court of equity will not interfere to grant an injunction in a case of an alleged nuisance where the testimony as to the facts relied on to establish the allegation is conflicting.

In the case at bar a great number of witnesses have given their testimony. Upon the one hand, a great number of these witnesses have testified that the structures maintained by appellee on its depot grounds are not injurious to health, and do not increase the hazard of fire to property; that the danger to life or person at the crossings of the street over the railroad, as now maintained, are not as great as they would be if the conditions should be moved to other localities in the town, and that the conditions are not now so unsafe or dangerous at the crossings as to constitute a public nuisance. On the other hand, a great number of witnesses testified to the contrary. These witnesses appeared in person before the chancellor and gave their testimony *ore tenus.* From that evidence he found that the acts done by the appellee and the structures maintained by it upon its depot grounds did not constitute a public nuisance. We have examined all this testimony, and we cannot say that the finding of the chancellor is against the preponderance of the testimony in this case. And it has been repeatedly held by this court that where the finding of the chancellor is not against the preponderance of the testimony, it will not be disturbed. *Sulek* v. *McWilliams,* 72 Ark. 67; *Hinkle* v. *Broadwater,* 73 Ark. 489; *Reed* v. *Reed,* 62 Ark. 691; *Craig* v. *Craig,* 90 Ark. 40.

The decree is accordingly affirmed.

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

Opinion delivered November 1, 1909.

1. APPEAL AND ERROR—FORMER OPINION AS LAW OF CASE.—Upon a second appeal the principles of law determined upon the first appeal are binding and must stand as the law of the case; and if the testimony upon the second trial is substantially the same as on the first trial, then the decision on the first appeal upon all questions of law involved in the case must be followed on the second appeal. (Page 557.)
2. MASTER AND SERVANT—DEFECTIVE APPLIANCE.—Where a railroad company neglected to furnish an automatic coupler on its cars, or to repair a defective one, as required by the safety appliance act of Congress of March 2, 1893, and a brakeman was injured thereby, a *prima facie* case of negligence at least was established. (Page 558.)
3. SAME—DEFECTIVE APPLIANCE—LIABILITY OF MASTER.—A railroad company is liable for an injury caused by the defective condition of a car coupler where the evidence shows that the coupler was broken so that it would not work, and that the defect was discoverable by proper inspection, and that the railroad company did not exercise reasonable care to discover the defect or to repair same after such discovery. (Page 558.)
4. SAME—CONTRIBUTORY NEGLIGENCE—ACTING IN EMERGENCY.—Where a servant was required to act quickly in an emergency, he cannot be held guilty of contributory negligence as matter of law because he failed to exercise the best judgment; it is a question for the jury in such case whether he acted as a prudent and careful person would have done under the same circumstances. (Page 559.)
5. SAME—CONTRIBUTORY NEGLIGENCE—EFFECT OF CUSTOM.—Where it was the custom for defendant railroad company's brakemen to go between slowly moving cars to couple and uncouple them, it was properly left to the jury to determine whether plaintiff's deceased was negligent in so doing. (Page 561.)
6. SAME—CONTRIBUTORY NEGLIGENCE—VIOLATION OF MASTER'S RULES.—Proof that a servant violated the master's rules will not establish negligence on the servant's part if it does not appear that he knew of the rules, or if the rules were being violated with the master's knowledge. (Page 563.)

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

Kinsworthy & Rhoton and *Jas. H. Stevenson*, for appellant.

Where one elects the more dangerous of two methods of performing an act and is injured while so doing, no recovery

should be allowed. 128 Fed. 529; 82 N. E. 675; 79 N. E. 1040. Going between the cars was the proximate cause of the injury. 79 N. E. 1040; 83 N. E. 343. One should not adopt the more dangerous of two methods of doing a thing. 149 Mich. 126; 129 Fed. 347. The Safety Appliance Act of Congress does not abolish the doctrine of contributory negligence. 117 Fed. 462. A recovery can be had in such cases only when defendant is guilty of using such couplers as are prohibited by the act. 4 Penn. (Del.) 80. Therefore, if plaintiff contributes to the injury by his own negligence, he cannot recover. 129 Fed. 347. The defense of contributory negligence is as available after as before the passage of the act. 113 N. W. 1120; 147 Mich. 454. The difference between the defenses of "assumed risks" and "contributory negligence" is clearly defined in 88 Ark. 243; 205 U. S. 1; 129 Fed. 347. The conscious negligence of a servant in doing or omitting to do an act is not assumed risk. 20 Tex. Civ. App. 161; 105 S. W. 1149. In selecting the least dangerous of two or more methods of doing an act, the servant should not ignore defects. 128 Fed. 529.

William H. Arnold, for appellee.

Upon a second appeal the court will not review or correct its former decision, even though it be erroneous in point of law or based upon a misconception of fact. 56 Ark. 170; 55 Ark. 609. The question is narrowed to one of contributory negligence. 86 Ark. 244; 82 Ark. 11; 205 U. S. 1; 138 Ala. 487. The question of negligence does not arise in the act of an employee going between the cars. 205 U. S. 1. Congress, by the act in question, intended to make the duty of the railroad company absolute. 210 U. S. 281. A litigant should not be permitted to urge other grounds of objection to an instruction than were urged in the trial court. 83 Ark. 61; 66 Ark. 46; 75 Ark. 76; 75 Ark. 325; 56 Ark. 602; 69 Ark. 637; 82 Ark. 391; 73 Ark. 594; 81 Ark. 190; 65 Ark. 54; 65 Ark. 255. The absolute duty of the defendant to furnish automatic couplers is not satisfied by the use of ordinary care. 163 Fed. 517; 162 Fed. 775; 168 Fed. 175; *Id.* 236; 169 Fed. 407. The fact that a car can be repaired more conveniently at another place does not justify its being moved in a defective condition. 169 Fed. 372; 71 Ark. 445; 83 Ark. 591; 86 Ark. 244; 162 Fed. 145; *Id.*

403. It is the duty of one desiring a more specific instruction to request one in proper form. 88 Ark. 225. If the employees constantly and notoriously violated the rules of the company for a long period of time, this amounts to an abrogation of the rules by the custom. 77 Ark. 405.

Kinsworthy & Rhoton and *Jas. H. Stevenson,* in reply.

If the lever on one side of the car fails to work, the employee should go to the other side; and if, instead of doing so, he goes between them to uncouple them, he is guilty of contributory negligence. 108 Fed. 747. The Safety Appliance Act abolishes the defense of assumed risks only; and does not apply to the defense of contributory negligence. 106 S. W. 441; 91 Fed. 229; 10 Am. Neg. Rep. 166.

FRAUENTHAL, J. This was an action instituted by A. B. York, as administrator of the estate of J. C. York, for the benefit of his estate and next of kin against the St. Louis, Iron Mountain & Southern Railway Company, the defendant below, for the alleged negligent death of said J. C. York. Upon a former trial in the circuit court a verdict was directed in favor of the defendant. This court reversed the judgment rendered upon that verdict and remanded the cause for a new trial. The report of the opinion of this court upon that appeal will be found in 86 Ark. 244. Upon a second trial of the cause in the circuit court a verdict was returned in favor of the plaintiff for $9,950; and from the judgment entered thereon the defendant now prosecutes this appeal.

The testimony in the case tended to prove the following facts: J. C. York was a brakeman in the employ of the defendant on one of its freight trains, running from Knobel, Arkansas, to Memphis, Tennessee. Upon the arrival of the train at Wynne, which was a junction of several branch lines of defendant's railway, it became necessary to set out upon the side track a box car loaded with flour and bound over one of those branch lines for Helena. The engine attached to a coal car, and this box car was backed in on the side track; and York was sent to uncouple the box car, while making a flying switch. He proceeded on the proper side of the box car to make the uncoupling with the lever, but the lever which worked

the coupler was out of order and did not work, and he then went between the cars to lift the pin with his hand. The cars were moving slowly, and he walked along with them slowly backward as he uncoupled the cars. In getting out from between the cars after making the uncoupling his foot was caught in some way just on the outside of the rail, presumably in the unblocked frog or by the guard rail which was between the track upon which the cars were moving and a track intersecting it. The cars were somewhat wider than the track, and when his foot became thus detained he was thrown down by the moving car, and the oil boxes of the coal car crushed him between them and the ground, breaking his spine and otherwise injuring him in such a manner that he suffered intense agony for six weeks and then died from the effects of the injury. The coupler on the box car was out of repair. The chain which connected the pin with the pin lifter was broken, so that no uncoupling could be made with the lever attached to this coupler. Upon the opposite side of these cars and on the end of the coal car there was a lever attached to the coupler on the coal car, by which the cars could have been uncoupled, but this could only be reached by going around or over the cars. There was also testimony showing that the cars could have been stopped by the brakeman giving a signal to the engineer.

The above is in effect the same testimony that was introduced in the cause on its first trial in the circuit court, and upon which the former decision was rendered by this court. The same witnesses testified on the two trials, and their testimony on the material issues involved in this case was substantially the same. The matters which were adjudicated by this court upon the former appeal cannot be retried in the circuit court nor can they be reviewed upon this second appeal by this court. The questions of law there determined became the law of this case on this subesquent trial and appeal, whether we may now believe them to be right or wrong. The finding of the facts upon the former appeal cannot be binding as to the finding of the facts in this second trial, because the testimony on the second trial might be different from or additional to that given on the first trial. But the principles of law determined and announced upon the former appeal are binding, and must stand

as the law of this case; and if the testimony upon this second trial is substantially the same as on the first trial, then the former decision of this court upon all questions of law involved in this case must be followed on this appeal. *Porter* v. *Doe,* 10 Ark. 186; *Scott* v. *Fowler,* 14 Ark. 427; *Perry* v. *Little Rock & F. S. Ry. Co.,* 44 Ark. 383; *Taliaferro* v. *Barnett,* 47 Ark. 359; *Vogel* v. *Little Rock,* 55 Ark. 609; *Dyer* v. *Ambleton,* 56 Ark. 170; *Fordyce* v. *Edwards,* 65 Ark. 98; *Heard* v. *Ewan,* 73 Ark. 513; *St. Louis, I. M. & S. Ry. Co.* v. *Neal,* 83 Ark. 591; 3 Cyc. 492.

Upon the former appeal this court determined that the proximate cause of the injury was not the unblocked frog in which York's foot may have been caught, but was the failure of the company to furnish a coupler which would enable the brakeman to uncouple the cars without going between them. The duty to provide such a coupler was a statutory duty imposed by the act of Congress of March 2, 1893.

The evidence upon this second appeal shows that the defendant failed to furnish such a coupler in working order as was required by the said act of Congress; and that the failure to furnish such a coupler in working order was the direct and proximate cause of the injury. Usually, the master is only bound to exercise ordinary care to provide suitable appliances and tools for the servant, and is liable for damages caused by defective machinery only where the evidence shows that he neglected to repair the defect after having notice thereof, or when by the exercise of ordinary care he would have known that the same was defective. But where the statute requires the master to furnish a particular safe appliance, and he violates that statutory duty, and injury is caused thereby, the rule is different. In such event the violation of the statutory duty from which the injury results makes out a *prima facie* case of negligence, if not an absolute case.

It is urged by counsel for plaintiff that the duty imposed by the act of Congress to furnish the particular character of a coupler and in effective working condition, is an absolute duty, and that no kind of exercise of care on the part of the railroad company will relieve the company from liability for the damages that ensue from an injury caused by a failure to actually

furnish such a coupler and in good working order. And to sustain that position they refer to the following cases: *Schlemmer* v. *Buffalo, Rochester, etc., Ry. Co.*, 205 U. S. 1; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; *United States* v. *Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States* v. *Atchison, T. & S. F. Ry. Co.*, 163 Fed. 517; *United States* v. *Southern Pac. Ry. Co.*, 169 Fed. 407.

But we do not think that it is necessary to pass upon that question in this case.

By the said Safety Appliance Act of Congress the duty was imposed upon defendant to furnish the character of coupler named in that act for the safety of its servants in coupling and uncoupling its cars; and a coupler out of repair so that it would not work was not such a coupler. The evidence in this case shows that the coupler was broken so that it would not work, and that this defect was discoverable by proper inspection, and that the defendant did not exercise or use ordinary and reasonable care by proper inspection to discover this defect, or to repair same after such discovery.

The defendant in this case failed to keep in repair the coupler required by the act of Congress, and this failure was the proximate cause of the injury. In fact, there was no testimony that the defendant had made any inspection of this coupler at any time before the injury; and therefore there was no evidence of the exercise of ordinary care on the part of the defendant in the premises. *St. Louis, I. M. & S. Ry. Co.* v. *Rice*, 51 Ark. 467; *St. Louis, I. M. & S. Ry. Co.* v. *Holmes*, 88 Ark. 181; *St. Louis, I. M. & S. Ry. Co.* v. *Wells*, 82 Ark. 372.

From the above it follows that the court was correct in refusing to give all such instructions asked for by the defendant as were based on the theory that the unblocked frog was the proximate cause of the injury, and also in refusing all the instructions asked by the defendant which advanced the theory that the evidence must show that the defendant had notice of the defect in the coupler or was negligently ignorant of same.

It is urged by counsel for defendant that the undisputed evidence shows that York was guilty of contributory negligence, because he failed to cross over to the other side of the track and use the lever on the end of the coal car or to give

a signal to stop the train, and then make the uncoupling. But it cannot be said as a matter of law under the circumstances of this case that York was guilty of contributory negligence on this account. That was a question for the jury to determine, and not one of law for the court to decide. The facts of this case show that there was great necessity for rapid and immediate action by him in uncoupling the cars. The main body of the freight train upon which York was working was upon the main track, and a passenger train was rapidly approaching on that track; another passenger train was standing on a side track; and another freight train was standing on a side track. All these trains were waiting the movement of the freight train, upon which York was working, from the main track; and that movement was awaiting the action of York in uncoupling the box car that was to be set out from his train on the side track. Under these circumstances, which required immediate action, an emergency was thus presented, and York was required to decide quickly what course to pursue. Through the negligence of the defendant he was placed in a situation where he had to adopt an alternative. It has been held by this court that when one is required to act quickly in an emergency he cannot be held to be guilty of contributory negligence, as a matter of law, if he failed to exercise the best judgment or did not take the safest course. The question is then for the jury to determine whether under all the circumstances of the case he acted as an ordinarily prudent and careful person would have done under similar circumstances in adopting the course he did, even though it proved to be the more dangerous. *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11; *Kansas City S. Ry. Co.* v. *Henrie,* 87 Ark. 443.

Under such circumstances, before it can be said that he was guilty of contributory negligence in going between the cars to make the uncoupling, as was said in the case of *Choctaw, Oklahoma & Gulf Rd. Co.* v. *Thompson, supra,* "it must appear that the danger was so obvious that a person of ordinary prudence and care would not have attempted to make the coupling in the way that he did." *Kansas City So. Ry. Co.* v. *Henrie,* 87 Ark. 443.

It has been held by this court that "it is not negligence *per se* for a brakeman to go in between moving cars in order to couple them together; * * * whether it was negligence to do so under the circumstances of the case was a question for the jury." *Choctaw, O. & G. Rd. Co.* v. *Thompson, supra.*

In this case it was shown that the cars were moving slowly, and that it was the custom of the brakemen at that time in defendant's employ to go between the slowly moving cars to couple or uncouple them, and that this had been the custom for some years. It then became a question for the jury to say whether deceased acted as an ordinarily prudent person would have done and used such care as an ordinarily prudent and careful person would have used under the circumstances. If he did, he was not guilty of contributory negligence. In the case of *Narramore* v. *Cleveland, etc., Ry. Co.*, 37 C. C. A. 499, Circuit Judge Taft expressed the principle as follows:

"Assumption of risk and contributory negligence approximate when the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of negligence if, having in view the risk assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences."

Under the circumstances of this case, we do not think it was negligence as a matter of law for York to have adopted the course of going in between the cars, instead of giving the signal to stop the cars or going around to the lever on the other side of the coal car, although the course he adopted did not prove the safest; nor was it negligence *per se* for him to have gone between the slowly moving cars.

It is urged that the court committed error in giving instruction number 1 on behalf of plaintiff, on the ground that it takes from the jury the question as to whether or not York was negligent in going between the cars. That instruction is as follows:

"1. You are instructed that it is made unlawful by an act of Congress for a common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars; and it is further provided by said act of Congress that any employee of any such common carrier who may be injured by any car in use contrary to the provisions of said law shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of said car had been brought to his knowledge. And in this case if you believe the deceased, J. C. York, was injured by reason of the coupler of one of the cars of the defendant being out of repair, contrary to the provisions of said law, and that said car was in use by said defendant in moving interstate traffic, that the deceased attempted to uncouple the cars by means of the lever of said coupler, and that it would not perform its functions by reason of said coupler being out of repair, as alleged in the complaint, and that in order to uncouple said car the deceased went in between the cars, then you are instructed that he did not assume the risk incident thereto, and you may find for the plaintiff—if you further find that he used the caution of a reasonable prudent person in the line of business."

We do not think that the objection to this instruction is well founded. It only provided that, notwithstanding the default of the company, the performing of the work should not be taken as an assumption of risk; and the fair purport of it was still to leave to the jury for its determination the question as to whether York was guilty of contributory negligence either in going between the cars or in his conduct thereafter under all the circumstances at the time.

The defendant also contends that the court committed error in refusing to give instruction number 11 asked by the defendant. That instruction was as follows:

"11. If the jury believe from the evidence that deceased knew and appreciated the danger of going between the cars to uncouple, then, and with that knowledge, went in between moving cars to uncouple the same, and was injured on account

of being between said cars while the same were in motion, you will find for the defendant."

The effect of this instruction would be to make it negligence *per se* for a brakeman to go between moving cars to perform the duty of uncoupling. As above stated, we think this view is not correct, but that it was under the circumstances of this case a question for the jury to determine whether the acts of the deceased were negligent. It was not error to refuse this instruction.

Nor do we think that the right of plaintiff to recover herein was affected by any rule of the company. As we understand the rules introduced in evidence, the deceased under the testimony did not violate any of their provisions. And, if he did, there is no testimony showing that he had any knowledge of them, and there is ample evidence that they were being violated with the knowledge of the company, which in effect abrogated them. *St. Louis, I. M. & S. Ry. Co.* v. *Caraway,* 77 Ark. 405; *Choctaw, O. & G. Rd. Co.* v. *Thompson,* 82 Ark. 11; *St. Louis, I. M. & S. Ry. Co.* v. *Holmes,* 88 Ark. 181; *St. Louis, I. M. & S. Ry. Co.* v. *Puckett,* 88 Ark. 204; 1 Labatt on Master & Servant, § 232.

The appellant does not contend that the verdict of the jury is excessive. We have examined carefully the evidence and the instructions in this case, and we do not find any reversible error committed in the trial of this cause.

The judgment is therefore affirmed.

MISSOURI & NORTH ARKANSAS RAILROAD COMPANY *v.* BRATTON.

Opinion delivered December 13, 1909.

1. APPEAL—NECESSITY OF OBJECTION TO EVIDENCE.—Testimony introduced without objection in the trial court cannot be objected to on appeal. (Page 569.)
2. EMINENT DOMAIN—ASSESSMENT OF DAMAGES.—Where a railroad has been completed through plaintiff's land before an action is brought to recover damages for land appropriated for the right of way, plaintiff is entitled to recover the damages to plaintiff's land, if any, caused by closing the natural outlet for water at high water season. (Page 569.)

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

W. B. Smith, J. Merrick Moore and *H. M. Trieber,* for appellant.

Speculative testimony of probable damage tends to divert the mind of the jury from the real damage. 23 Wend. 434. The elements entering into the estimate of damages for a right of way must not be of a remote or speculative character. 39 Ark. 167; 16 Barb. 196; *Id.* 100; 13 Barb. 169; 53 Barb. 457; 35 N. H. 134; 10 Cush. 385; 12 Cush. 605; 27 Pa. St. 99; 33 *Id.* 57; 34 Ia. 353; 128 N. Y. 465; 6 Wis. 636. It is not competent for a witness to draw a conclusion of fact from the evidence in the case. 185 Mo. 239; 191 Mo. 347; 57 Mich. 512; 208 Ill. 608; 13 N. D. 432; 181 N. Y. 33. Prospective or speculative damages do not constitute an element to be paid the owner of land by a railroad condemning it for a right of way. 41 Ark. 431; 54 Ark. 540; 34 Ia. 458.

William Gilmore and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

Where a railroad is so constructed as to cause land to overflow, the owner may recover for the injury. 45 Ark. 253; 44 Ark. 360; 54 Ark. 140; 62 Ark. 360; 71 Ark. 189; 72 Ark. 127.

BATTLE, J. This was an action brought by the owner of property entered upon and appropriated by the appellant for a right of way, for damages for such appropriation.

The amended complaint, filed August 12, 1907, is as follows:

"The defendant is a corporation organized and doing business in the State of Arkansas. The plaintiff is the owner of the north half of the northwest fourth, section 13 in township 13 north, range 14 west, in Van Buren County, Arkansas. The defendant constructed a railroad over said land, and in so doing located it dangerously near to the buildings and well on the land; appropriated about five and three-fourths acres of the same to their own use as right-of-way; destroyed his private road leading to the land, and forced plaintiff to use a much poorer road and to climb a part of the mountain to reach said road, which climb was not required by his former road; con-

structed a fill from the railroad bed (in the wagon road) across a low swag where the water formerly passed around in high water season; and so constructed the grade of the railroad bed that the water can not find an outlet around his cultivated land when the Red River is at high stages, as it formerly did, but will throw a damaging current over part of his cultivated land, and will undoubtedly cause the destruction of between five and fifteen acres thereof. By blocking said outlet for high water, the whole force of the current of Red River, which crosses the land, will be directed against the bank of the portion of elevated land near the river where plaintiff's buildings are located, and is likely to undermine said buildings and destroy more of his land. In making the elevated grade for roadbed it caused deep curves to be made near the buildings, and so made the excavations that there is no outlet for the water, and said excavations retain stagnant water at all seasons, which water renders the habitation unsanitary and dangerous to health.

"In constructing said railroad the defendant located it so as to enter the southwest corner of his field, and follow the highest part of the land, and pass out about the middle of the north side of the field and so curve about that it leaves him two irregular, inconvenient shaped fields, requiring short turning in middle of the former field; and that the defendant located only one crossing over the railroad, which crossing is near the middle of the field and requires a roadway over and along more land to go and return from work, and is an unending annoyance and injury to the tiller of the land.

"Plaintiff states further that the land is almost all river bottom land, and is very productive, and is also very easily affected by water currents, and that he had about 40 acres in cultivation, and that he is damaged as follows: by land taken in right-of-way, $400; by injury to balance of land by cutting into irregular shapes and inconvenient fields, $600; by inconvenience in crossing, $200; by danger of fire to buildings and other property and annoyance of trains, $150; by damages from overflow and changing course of river at high water stages, $500; by damages from taking former roadway and change of road, $250; injury from stagnant water near buildings, $200; interest on the money since injury done, $175."

The action came on for trial in the Van Buren Circuit Court, and Ambrose Bratton, the plaintiff, testified in his own behalf that the defendant constructed its railway across his land and appropriated for its right-of-way more than five acres of land, which was worth one hundred dollars an acre; and built it through a field on the land, consisting of fifty acres, and so divided the field as to leave it in an inconvenient shape to cultivate, and thereby impaired its value in the sum of $650, and made it inconvenient and difficult to cross the railroad from one part of the field to the other, and thereby damaged him in the sum of $150, and constructed its railroad track within one hundred feet of his barn, and a little further from his residence, and brought them within range of sparks and cinders escaping from passing engines, and endangered stock on his premises, and by such proximity impaired the value of his farm in the sum of two hundred dollars. (For the purpose of explanation we say here that the land in question is on Little Red River, and that is the river referred to in the testimony of plaintiff.)

Plaintiff further testified, in part, in response to interrogations, as follows:

"Q. Now, state whether or not there is any damage or probable damage the water will have on the land there? A. Just like I stated the other day, the river has a square turn there that comes from the west, due east, and runs squarely against the bank. It is low, and next to the mountain, where the wagon road comes, it runs and makes a sharp turn, and the force of the water for two hundred yards comes square against that bank. At a high time it runs over there before the road was put there. I saw it three feet or more deep where the roadbed is now. There were two big white oaks there that had the ground set with roots that kept the ground from washing. As soon as the roots rot, it will cut that, and keep cutting it on the wagon road, and it will run over the foot of the wagon road where they have built that dump, and cut it out just like a snow ball. That will run it into the ditch next to the railroad where the borrow pits are. The water will go right through there. Q. Is there any part of your land that has been subject to back water? A. Five acres there that gets water at a high time. The water will run on to it as soon as the water

gets high. Some of it will run around. If that dump stands there, it will force all of that water around on my land. Q. How many acres of that is there? A. Five, and maybe six. Q. Now, what do you estimate the probable damage will be for the flowing of that water over your land? A. Five hundred dollars. Q. In case that dump they have built there does withstand this water and turn it, is there any other effect that is apparent that you see by the turning of this water? A. It will keep cutting out that bank there against my barn and knock it out into the river. Q. Do you mean for your estimate to amount to $500 from the effect of the water? A. Of course; on July 31, three years ago, it was three feet deep around there. It was all over the field, and the current run around there. They have filled it in over this way to try to prevent that. If it stands, it will throw it around here, and if it don't stand, it will throw that through the field, and make a river where them borrow pits are. That is the reason I say it would be worth $500. Q. What effect will it have on those five acres there? A. It will cause it to wash. The force of the river will turn the current and throw it against the bank. Q. In the matter of turning the river, will it have any other effect on the bank at the turn? A. It will eat out this bank here by the barn; it isn't but about thirty feet from the bank. Q. Now, then, how does this land drain in particular? A. This part of it will drain back to this low land. Q. How wide is that road? A. About seven feet on top. Q. What kind of material is it? A. Sand; all loose sand. Q. The force of the river when it gets there—is it strong enough to stand the force of the river? A. No, sir."

One witness, Thomas, testified that the land appropriated for right-of-way was worth one hundred dollars an acre; that the farm of plaintiff was damaged by the shape the railroad left it $500, and by the difficult and inconvenient crossing of the railroad track, in the field as located, $150, and by the proximity of the railroad track to barn and residence, $130.

Much other testimony than that stated was adduced.

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

"In assessing the damages to the land in controversy you will consider all the evidence in the case, and determine the value of the land taken, the injury to the remaining land by inconvenient shape of fields for cultivation, the lessening of value by closing of natural outlets for water at high water season, if any, danger of fire to buildings, if any, annoyance of trains operating, if any, inconvenience of private crossing because of its location, if any, damage by reason of the changed condition of plaintiff's private road, if any, damage by reason of stagnant pools, if any, and interest on same since the taking of said land at the rate of six per cent. per annum."

And instructed them at request of the defendant as follows:

"The jury are instructed that, in determining the damages to be assessed in favor of the plaintiff, you will first consider what the fair market price value of the land actually taken by the railroad company was at the time the defendant entered upon the land and began to construct its road, about two years ago; and second, the damage, if any, sustained to the adjoining land of the plaintiff by reason of the construction of the road across it. In determining the fair market value of the land actually taken you will be governed by the price at which you believe the land would have sold on the market in the ordinary course of sale at the time the defendant entered upon the land as above stated, if the owner desired to sell it and there was a purchaser who desired to buy it. In determining the market value of the land you are warranted in considering, in connection with all the other evidence in the case, the location of the land, its productive qualities, and its rental value. You are instructed that you cannot consider any damages caused to the plaintiff's property by the probability of overflow caused by the construction of defendant's roadbed or the wagon road dump on plaintiff's land, if you believe that such overflows could not occur except through an unusual or unprecedented condition or rise in the stream."

The jury returned a verdict in favor of the plaintiff for $1,250.

The defendant moved for a new trial, because the court erred in allowing plaintiff to introduce in evidence the questions and answers to them copied in the opinion; and because the court erred in giving the instructions asked for by the plaintiff.

The motion was overruled; judgment was rendered according to this verdict, and the defendant appealed.

No exception to the questions and answers mentioned in the motion for a new trial was preserved in the bill of exceptions. The defendant objected to a part of them, but, before the court ruled upon his objection, withdrew it until later, saying it would reserve its right therein. But it never renewed it unless it be in the instruction given at its request, which seems to apply. Without this testimony the damage done by the appropriation of land, by the division of the farm into two parts of inconvenient shape, by the crossing of the railroad track, and by the proximity of the railroad track to residence and barn, was shown by the undisputed evidence, at the least estimate, to exceed the amount of the verdict. So appellant does not have any cause to complain, on this account, of the admission of the testimony in question.

The objection to the instruction is in these words: "the lessening of value by closing of natural outlets for water at high water season, if any." This objection is not tenable. The railroad in this case was completed across appellee's land at the time this action was commenced. According to decisions of this court, damages caused by such obstructions before the bringing of an action for damages on account of the appropriation of land for the building of a railway are recoverable in such action. *Springfield & Memphis Railroad* v. *Rhea,* 44 Ark. 262; *Springfield & Memphis Railroad Co.* v. *Henry,* 44 Ark. 360; *Bentonville Railway Co.* v. *Baker,* 45 Ark. 253; *Newgass* v. *Railway Company,* 54 Ark. 145; *St. Louis, I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360.

Judgment affirmed.

CENTRAL ARKANSAS & EASTERN RAILWAY COMPANY *v.* GOELZER.

Opinion delivered December 13, 1909.

1. RAILROADS—LIABILITY FOR FIRES—VALIDITY OF STATUTE.—The act of April 18, 1907, making railroad corporations liable in damages for loss of or injury to any property by fire, caused by operation of trains, is a valid statute. (Page 572.)

2. SAME—FIRE—SUFFICIENCY OF EVIDENCE.—In an action against a railroad company to recover damages for destruction of plaintiff's property by fire alleged to have started from defendant's locomotive, evidence that sparks of fire were seen flying from defendant's locomotive towards plaintiff's property just before the property was burned, and that there was no other explanation of the fire, was sufficient to justify the jury in inferring that the fire was caused by sparks from defendant's engine. (Page 572.)

3. EVIDENCE—SIMILAR FACTS.—Where it was in dispute whether defendant's engine could emit sparks, testimony of witnesses that they had seen it do so two or three weeks prior to the time of the fire alleged to have been caused by such engine was competent. (Page 573.)

4. SAME—QUALIFICATION OF EXPERT.—Where a witness, offered to prove the reasonableness of an attorney's fee in a case, testified that he had discussed the matter with "other attorneys" and was familiar with the customary fees in such cases, he was competent. (Page 573.)

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

STATEMENT OF THE COURT.

On February 12, 1909, A. H. Kaufman and I. S. Kaufman, partners as Kaufman & Company, brought suit in the Lonoke Circuit Court against the Central Arkansas & Eastern Railway Company, alleging that said railway company, while operating a locomotive over its line of railroad, negligently set fire to their barn containing corn and other products, and that the same was destroyed by the fire. They asked judgment in the sum of $513.

On the same day George Goelzer instituted a similar suit against the defendant railway company, and asked judgment for $599.20.

The defendant answered in each case, and denied all liability.

By consent the cases were consolidated and tried together.

The facts, according to the plaintiff's witnesses, briefly stated, are as follows:

The barn burned consisted of some stables and two cribs with a hallway between six feet wide. Both of the cribs were filled with corn. One was estimated to contain 700, and the other 600 bushels, which was worth 75 cents per bushel. The barn was situated 53½ feet from the center of the track of

the defendant's railroad, and was destroyed by fire between 7 and 8 o'clock in the evening of November 19, 1908. The fire, when discovered, was in the roof of the barn on the side nearest to the railroad of the defendant company. The weather was dry, and it had been some time since any rain had fallen in that locality. The neighbors, who gathered there, were unable to put out the fire. They testify that the ground between the barn and the railroad was hard and clear except for few rows of popcorn. They did not discover any fire between the barn and the railroad. They say that the defendant company had only one locomotive on its line of railroad, and some of them stated that they had seen it emit sparks before the day the fire occurred. They estimated the time which elapsed from the passing of the engine to the occurrence of the fire variously from 15 to 20 minutes to one hour. They say that the engine was emitting sparks when it passed and one witness said that the sparks were going pretty high that evening, but were going at ordinary speed. The witnesses for the plaintiffs all say that the time at which the train usually left England was uncertain, but one witness testified that the train passed the place opposite where the fire occurred about 6:30 o'clock on the evening the barn was burned. Other witnesses stated that it passed 15 or 20 minutes before the fire was discovered, but do not remember the exact time.

The witnesses for the defendant say that the train left England about 6 o'clock, and that it would take it 8 or 10 minutes to run to the place where the fire occurred, and that the fire in question did not occur until after 8 o'clock P. M.

The engineer testified that he was burning coal the day the fire occurred; that the engine was equipped with a spark arrester, and was in proper running order; that the spark arrester would not let sparks out as large around as a lead pencil, and that they have no substance to them. That it was impossible for sparks to have been emitted, and to have been wafted 53 feet from the railroad track and then set fire to the barn.

The jury returned a verdict for $400 in the Goelzer case, and for $250 in the Kaufman & Company case. From the judgment rendered upon the verdict the defendant has appealed.

T. C. Trimble, for appellant.

The evidence was insufficient to show that the locomotive caused the fire. 98 Mo. App. 330; *Id.* 291; 121 Fed. 924; 85 N. Y. S. 497; 105 Ill. App. 25; 70 S. W. 999; 63 Ark. 686. It does not appear that the witness was qualified to express an opinion as an expert as to the value of the services of an attorney. Ency. of Ev., vol. 2, 165; 6 Col. 56; 52 Mo. App. 1. If the witness be a lawyer, he must qualify as an expert. Ency. of Ev., vol. 2, 170, note 12.

Jas. B. Gray, for appellees.

The jury were justified in drawing the conclusion that the fire was caused by sparks from the engine. 77 Ark. 436; 76 Ark. 132; 79 Ark. 12; 80 Ark. 292; 82 Ark. 3.

HART, J., (after stating the facts.) The act of April 18, 1907, makes railroad corporations liable in damages for the loss of or injury to any property, which may be caused by, or result from, the operation of its train, and provides that in such action the railroad corporations may not plead or prove as a defense thereto that the loss or injury was not the result of negligence or carelessness on the part of such defendant or its employees. In the case of *St. Louis & San Francisco Rd. Co.* v. *Shore,* 89 Ark. 418, this act was held to be constitutional.

In the case at bar the principal contention of the defendant is that there is not sufficient evidence to support the verdict. It is true that in this case the engineer in charge of the locomotive alleged to have caused the fire testified unequivocally that the engine was properly equipped with a spark arrester, and was properly operated, and that in such condition it was impossible for sparks as large around as a lead pencil to be emitted from the engine, and that these sparks could not have been thrown 53 feet from the railroad tracks and have set fire to the barn.

On the other hand, plaintiff's witnesses were equally positive that sparks did come from the engine on the evening in question, and that they were flying high. This testimony tended to contradict the engineer, and to show that sparks did come from the engine and fly through the air towards the barn. The testimony on the part of the plaintiffs also tended to show that the fire occurred a short time after the engine passed; and there was no other explanation of the origin of the fire.

This was sufficient evidence from which the jury might have inferred that the fire was caused by sparks emitted from defendant's engine. *St. Louis Southwestern Ry. Co.* v. *Trotter,* 89 Ark. 273.

We cannot invade the province of the jury by attempting to pass upon the credibility of the witnesses and the inferences which the jury may have legitimately drawn from the evidence are conclusive upon us. We think the jury might have found, from all the facts and circumstances adduced in evidence, that the fire was caused by sparks emitted from defendant's engine, and therefore we will not disturb the verdict.

Counsel for defendant also insists that the testimony of plaintiff's witnesses to the effect that they had seen sparks flying from the engine within two or three weeks prior to the time of the fire was not competent. The witnesses had testified that defendant operated only one engine on its line of railroad, and we think this testimony was competent as tending to show that sparks were emitted from the engine, and thus contradict defendant's engineer.

Counsel for defendant also contends that the testimony of Joe Gates as to the attorney's fees was incompetent because he did not testify that he was a lawyer. The witness testified that $100 was a reasonable attorney's fees in each case. He stated that he had discussed the matter with "other attorneys" and was familiar with the customary prices in such cases. We think this was sufficient to enable him to testify on the question. The jury assessed a fee of $50 in each case.

We do not find any prejudicial error in the record, and the judgment is affirmed.

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

Opinion delivered December 13, 1909.

1. CARRIERS—CONNECTING LINES—LIABILITY OF INITIAL CARRIER.—In the case of an interstate shipment of cattle, the initial carrier, regardless of any contract, is liable, under the Hepburn Act, for all damage to

the cattle directly and proximately due to the negligent delay of itself or of its connecting carriers in transporting them. (Page 577.)

2. SAME—NOTICE OF SPECIAL DAMAGES.—Where a carrier had notice that cattle were being shipped with a view to an auction sale at the destination on a particular day, it is liable for the damage caused by the negligence of itself or its connecting carriers whereby the cattle fail to reach their destination by the agreed time. (Page 578.)

3. SAME—DELAY IN TRANSPORTATION—MEASURE OF DAMAGES.—The damages recoverable from a railroad company for negligently failing to transport cattle by a certain day whereby an opportunity of sale was lost is the difference between what they would have sold for on that day and what they would have brought in the same market after they reached their destination. (Page 578.)

4. SAME—NEGLIGENCE—PROXIMATE CAUSE.—Where the failure of a railway company to transport cattle within the time it had agreed to do so was due to negligent delay upon its part concurring with the act of God in washing away a bridge, and where the latter cause would not have occasioned delay but for the prior delay in transportation, the railway company is liable for the damage sustained by the delay. (Page 579.)

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

STATEMENT OF FACTS.

The appellee sued appellant for damages which he alleged resulted to him by reason of the negligent failure of appellant to deliver a carload of Hereford cattle at Brady, Texas, on or before April 18, 1908. Appellee alleged that, before entering into the contract with appellant to deliver the cattle at Brady, he notified appellant that it was necessary for the cattle to be a Brady on or before the 18th of April, 1908, in order that they might be sold at a public auction sale to take place on that day, and that appellant, with full knowledge of the purpose for which the shipment was being made, contracted with appellee to transport and deliver the cattle. The appellee alleged that the negligent failure of appellant to comply with its contract caused appellee to lose the high market arranged for, and provided by the auction sale, and that by reason thereof appellee was damaged in loss of value of the cattle amounting to $1,200.

The appellant denied the material allegations, and set up in defense that the cattle were shipped under a contract which provided that appellant should not be liable for any loss or

damage to the cattle that did not occur on appellant's line; that the cattle were not to be transported within any specified time, nor delivered at destination for any particular market, and that in case of loss appellant would be subjected only to a limited liability set forth in the contract.

The evidence on behalf of appellee tended to show that in the year 1907 he, with a number of breeders of Hereford cattle in Texas, decided to hold an auction sale at Brady, Texas, which is located in the Middle Plains country, and is distinctly a cattle country; that they advertised this sale extensively over four or five counties to take place on the 18th day of April, 1908; that he contributed to this sale ten (10) pure bred and registered bulls and two (2) heifers; that he put these animals up in the previous September, and fed and carefully cared for them all through the previous winter; that they were in fine condition, and weighed from 1,200 to 2,100 pounds; that when the time approached for the sale he wrote to the agent of the defendant, stating that he wished to ship his cattle from Booneville, Arkansas, to Brady, Texas, and ordered a car for them, and explained in detail the purpose and necessities of the shipment, and selected the route they should travel, and he and the agent, after a full discussion of all the details relative to this shipment, agreed that the cattle should leave Booneville on Monday, the 13th, and by so doing they would reach Brady by the following Friday; that he explained to Mr. Briggs, the agent of the defendant, that he was unwilling to ship his cattle on a limited liability contract, and that he did not sign or authorize anybody else to sign for him any such contract; that the contract he had with the railroad company was an oral contract entered into by himself with the company; that he entered into no written contract; that Mr. Briggs, the agent of the defendant, agreed to put these cattle in Brady, Texas, in time for the sale; that he would not have shipped them if this agreement had not been made; that the agent of the defendant told him the cattle would get to Brady Wednesday morning or Wednesday night before the sale on Saturday; that he shipped his cattle from Booneville by way of Holdenville, Oklahoma, and Fort Worth, Texas, to Brady, Texas; that the cattle failed entirely to reach Brady until more than a week after the sale;

that his cattle were worth in that market and at that sale an average of $200 apiece; that he had no market at his home in Arkansas for these cattle, and that, after said cattle failed to reach Brady in time for the sale, he managed to sell them at private treaty, and without the purchaser seeing them, at $100 apiece.

There was evidence tending to show that the cattle did not reach Brady on the day specified because of the negligent delays in shipment by appellant and connecting carriers; that but for such delay the cattle would have passed the place in route and have been delivered before the unprecedented floods came that washed away a bridge, which thereafter rendered it impossible to deliver the cattle at the place of destination in time for the auction sale.

The testimony on behalf of appellant tended to show that the cattle would have reached their destination on the Saturday morning of the day that the auction sale took place, but for the fact that a certain bridge was washed away by unprecedented floods, which delayed their transportation for several days. The testimony for appellant tended to show that the written contract was the one entered into with appellee covering the shipment.

The appellant introduced a written contract of shipment, signed by Briggs, appellant's station agent at Booneville, and by O. L. Miles. The evidence showed that the name of O. L. Miles was signed by J. T. Moore, who testified that he was to look after the shipment, that Miles sent him to deliver the cattle to the railway company and to look after them while they were being transported. He signed Mr. Miles's name to the contract and paid the freight charges, Miles having furnished him the money; that Miles never instructed him to sign a contract limiting the liability of the company for the loss of the cattle, etc.

The contract contained a provision that each carrier's liability under the contract ceased upon delivery by it to its connecting carrier and exempting the appellant as the initial carrier from loss occurring beyond its own line. It also contained a provision that cattle were not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market. There were provi-

sions limiting the liability in case of loss to an amount not exceeding the sum named. There were also provisions by which the owner waived any cause of action for damages under any prior verbal contract, and acknowledging that he had had the option between the contract at carrier's risk and the contract made.

The court gave instructions on its own motion, to which appellant duly excepted, and refused prayers for instructions presented by appellants, and to the court's ruling in this particular appellant excepted. The law of the case will be commented on in the opinion.

The jury returned a verdict for $1,036. The judgment was entered accordingly, and this appeal followed.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

The damages in such cases are such as may be considered to arise naturally from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. 9 Exch. 355. It was appellee's duty to make the damages as small as possible. Suth. Dam., § 90; 22 Mich. 117; 102 Mass. 132. The damages were caused by the act of God, and appellant is not liable. 115 Mass. 304; 10 Wall. 176; 20 Pa. St. 171; 76 Miss. 885; 101 Va. 778; 88 S. W. 117; 67 S. W. 129; 62 Mo. 527; 93 S. W. 851; 139 U. S. 237; 58 Ark. 157; 23 O. St. 523; 13 Am. R. 264.

Robert J. White, for appellee.

Where the negligence of the carrier concurs with the act of God in producing a loss, the carrier is not exempted from liability by showing that the last cause of damage was the act of God.

WOOD, J. (after stating the facts). 1. It is wholly immaterial, under the evidence in this case, whether the cattle were shipped under an oral or written contract. For in either case appellant would be liable for any damages to appellee caused through its negligence or the negligence of connecting carriers. If appellant or connecting carriers failed to exercise ordinary care in the transportation of the cattle, resulting in delays by reason of which the cattle failed to reach their destination in a reasonable time after they were delivered to appellant for shipment, then appellant would be liable to appellee in damages

for whatsoever injury the latter sustained as the direct and proximate result of such negligence. *St. Louis S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154.

2. The court did not err in admitting the evidence of appellee as to the amount of his damages by reason of the failure of appellant to deliver the cattle at Brady on the 18th day of April, 1908.

Appellant had notice of the day of the sale, and of all the circumstances in detail as to why the sale was planned and fixed for that day. The sale was for a special purpose, and was extensively advertised for that day. Appellant, according to the evidence of appellee, had notice of all this, and made its contract with full knowledge that it was necessary to get the cattle to Brady for the sale on that day if appellee was to secure the benefit of that sale. Appellant had no right to assume that the sale would continue from day to day, or would be as profitable to appellee if made on some other day. No other day was thought of. That was the particular and only day. Having notice of the special damage that would result to appellee if he failed to get his cattle to that auction sale, and having contracted with appellee after such notice to deliver them for that sale, appellant can not be heard to say that the damages that appellee sustained by reason of the loss of that particular sale were not in contemplation of the parties to the contract. *Hadley* v. *Baxendale,* 9 Exch. 341. See *Western Union Tel. Co.* v. *Hogue,* 79 Ark. 33; *Western Union Tel. Co.* v. *Raines,* 78 Ark. 545.

The damages in such case is the difference in the value of the cattle as measured by what they would have sold for on the market at the auction sale, had the same occurred, and what they would have brought on the market at the same place and on the same day when not sold at auction. The proof is positive that the sale of the cattle that were on hand for the auction did not exhaust the demand for them when sold by that method. And that appellee's cattle were above the average of those that were sold at auction on that day at $183 per head, and that his cattle, considering their superior quality, would have brought $200 per head at the auction sale. But, when sold on the market at private sale, he could only obtain $100 per head for

them. The facts bring the case well within the rule announced by the Supreme Court of Massachusetts and approved by this court in *Chicago, R. I. & P. Ry. Co.* v. *Planters' Gin & Oil Company,* 88 Ark. 87, 88, as follows:

"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."

The court gave the jury a correct guide in ascertaining the measure of damages, and the evidence warranted a larger sum than the jury found.

3. In the case of *St. Louis S. W. Ry. Co.* v. *Grayson, supra,* we held that under the Hepburn act the initial carrier is liable for damages to an interstate shipment of freight undertaken by it, whether the loss occurred on its own line, or on the lines of connecting carriers. See also recent case of the *Kansas City Southern Ry. Co.* v. *Carl,* 91 Ark. 97, where we held that the Hepburn act "renders invalid all stipulations limiting liability for losses caused by the carrier's negligence."

These decisions rule the case at bar on the question of limited liability under the written contract, conceding that the cattle were shipped under such contract, and, in view of the above decisions, the instructions of the court on this issue were more favorable to appellant than it was entitled to, and therefore it cannot complain.

4. The court in effect told the jury that, even if the cattle would have reached Brady in time for the auction sale but for the act of God, still if they were negligently delayed before reaching the obstruction, and but for such negligent delay would have passed beyond the point of obstruction before the obstruction occurred, the appellant would be liable.

In the cases of *Martin* v. *Railway Company,* 55 Ark. 510, and *James* v. *James,* 58 Ark. 157, there was a destruction of cotton by fire, an unavoidable accident, or, we may say, an act of God, and in those cases we said the failure to ship in the one case, and the failure to gin in the other, were of a series of

events without which the loss would not have happened, but they were not the direct and proximate cause of the loss. But such is not the case here. The direct cause of the loss of the market of April 18, 1908, to appellee was the delay, as the evidence tended to show, of appellant. For, but for such delay, the cattle would have reached Brady in time for the sale. True, it may be said that they, having passed the river before the flood came, also would have reached Brady but for the act of God in washing away the bridge. The cattle were not destroyed by the flood, as in the case of the cotton, *supra.* In cases where there is a destruction of property by fire or flood, it is literally true that these agencies are the direct cause of the loss. Here the loss to the market was due to the delay of the cattle in reaching their destination in time. The two things that contributed to that delay were the negligence of the company and the act of God. Both combined in the case to produce the delay in getting the cattle to their destination in time. Both were the direct and proximate cause of the delay which resulted in the loss. The one was not the proximate and the other the remote cause of the loss. But the one concurred with the other in producing the delay in getting the cattle to the market, and this delay, continued until and after the day of sale, was the direct and proximate cause of appellee's loss and injury. The rule applicable here is announced in 1 Am. & Eng. Enc. of Law, 595, 596, as follows: "Where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, the carrier is still responsible." See cases cited in note. See also Elliott on Railroads, § 1488. This is a typical case of concurring or commingling direct and proximate causes. See Hutchinson on Carriers (3d Ed.) § 297 (193), *et seq.,* where the varying views are stated and the authorities to sustain them are cited. See by analogy *Marcum* v. *Three States Lumber Co.,* 88 Ark. 28-37; *Chicago Mill & Lumber Co.* v. *Cooper,* 90 Ark. 326. In *Rogers* v. *Missouri Pac. Ry. Co.,* 88 Pac. Rep. 885, a carrier delayed the transportation of corn an unreasonable length of time, and after the corn reached its destination it was destroyed by an unprecedented flood. The Supreme Court of Kansas, in an exhaustive and able review of the authorities by Mr. Justice Burch, held that the carrier was not

liable, that the intervening act of God was the direct and proximate cause of the loss. That case and the many cases cited by him to support the doctrine announced are exactly in line with our own decisions of *Martin* v. *Railway Company* and *James* v. *James, supra,* where there was a total destruction of or injury to the property by the act of God operating upon it, and where the negligent delay was a mere incident, but not the direct cause, of the loss. These cases are correct, for in such cases it cannot be reasonably anticipated, when the contract is entered upon, that a negligent delay would bring the property within the operation of an act of God that would damage or destroy it. Such occurrence could not be reasonably foreseen and guarded against, and therefore there is no liability in such cases, because the loss is produced by the intervening act of God as the direct and proximate cause. But in cases like this, where the party contracts to deliver property at a certain time, the delay on his part that actually causes the result that the parties had expressly contracted should not take place, as in the case at bar the loss of the market, is certainly a direct and proximate cause of that result, and not a mere incident or remote cause of it. And it matters not that there may be also other concurring or commingling causes that also contributed directly to produce the delay. For it must not be forgotten that the loss of this market was caused by the delay, and not by the act of God. In all such cases as the Martin, James and Rogers cases, *supra,* the loss is caused directly by the act of God, and not by the delay.

Judgment is affirmed.

BATTLE, J., (dissenting). The following statements of facts is made by the court: "There was evidence tending to show that the cattle did not reach Brady on the day specified because of the negligent delay in shipment by appellant and connecting carriers; that but for such delay the cattle would have passed the place en route and have been delivered before the *unprecedented floods* came that washed away a bridge which thereafter rendered it impossible to deliver the cattle at the place of destination in time for the auction sale. The testimony on behalf of appellant tended to show that the cattle would have reached their destination on the Saturday morning of the day that the auction sale took place but for the fact

that a certain bridge was washed away by *unprecedented floods,* which delayed their transportation for several days."

It is stated in the opinion of the court: "The court in effect told the jury that, even if the cattle would have reached Brady in time for the auction sale but for the act of God, still if they were negligently delayed before reaching the obstruction and but for such negligent delay would have passed beyond the point of obstruction before the obstruction occurred, the appellant would be liable." This court sustained this instruction.

I think that the "unprecedented floods" were the proximate cause of the loss sustained by appellee, and that the appellant was not liable for losses on account of delay, which was not the proximate cause.

Wharton says: "Negligence is the juridical cause of an injury when it consists of such an act or omission on the part of a responsible human being, as in ordinary, natural sequence immediately results in such injury. Such, in fact, we may regard as the meaning of the term 'proximate cause,' adopted by Lord Bacon in his Maxims. The rule, as he gives it in Latin, is '*In jure non remota causa sed proxima spectatur,*' which he paraphrases as follows: 'It were infinite for the law to consider the causes of causes, and their impulsions one of another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking for any further degree.'" Wharton on Negligence (2 ed.), § 73.

Chief Justice COCKRILL, speaking for this court, in *Railway Company* v. *Neel,* 56 Ark. 279, 287, said: "In actions of this description the injury complained of must be shown to be the direct consequence of the defendant's negligence. This is the only practical rule which can be adopted by courts in the administration of justice. It is not enough that the act charged may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened. *Hoadley* v. *Transportation Co.,* 115 Mass. 304. The rule is illustrated by a variety of cases, and is sustained by an unquestioned line of authority. *Little Rock Railway Co.* v. *Talbot,* 47 Ark. 97; *Martin* v. *Railway,* 55 *Ib.* 510; *St. Louis, etc. Railway* v. *Commercial Insurance Co.,* 139 U. S. 223; *Dubuque Wood Co.* v. *Dubuque,* 30 Iowa 176."

In *Atchison, T. & S. F. Rd. Co.* v. *Stanford,* 12 Kan. 377, Justice Valentine said: "In law, proximate and remote causes and effects do not have reference to time, nor distance, nor merely a succession of events, or to a succession of causes and effects. A wrongdoer is not merely responsible for the first result of his wrongful act, but he is also responsible for every succeeding injurious result which could have been foreseen, by the exercise of reasonable diligence, as the reasonable, natural, and probable consequence of his wrongful act. He is responsible for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events, provided they all necessarily follow from the first wrongful cause. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, but, if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result is to be considered in law as the proximate result of the first wrongful cause. *But, whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence would not have happened, then such injurious consequence must be deemed to be too remote to constitute the basis of a cause of action.*"

Wharton on Negligence says: "Even when the rule is that *casus* must be 'meritable' to be a defense, the tendency of authority is to treat as inevitable such disasters caused by storms and sudden extremes of temperature as could not have been averted except by an intensity of diligence beyond that which is usually exerted by a common carrier who brings to the duties in question experience and capacity adequate to their discharge." He gives many illustrations of this rule. Wharton on Negligence (3 ed.), § 558.

After giving many illustrations of what constitute concurring causes he says: "At the same time it has been ruled that when a loss is attributable to a peril from which the carrier is by law exempt, liability is not imposed on him by the fact that

the goods would not have been exposed to the peril but for his negligent delay." *Ib.* § 559.

In *Rodgers* v. *Missouri Pacific Railway Co.* (Kan.), 88 Pacific Reporter, 885, the "plaintiff sued the railroad company for the value of a car load of corn. The right to recover was predicated upon the defendant's negligence. The corn was delivered to the company at Frankfort on May 22, 1903, for transportation and delivery to the plaintiff's agent at Kansas City, Mo. The loaded car stood on the track at Frankfort until May 28, when it was hauled to its destination only to be overtaken and destroyed by the unprecedented flood of May 30, 1903, before it was delivered by the defendant. The delay was protracted through the negligent omission of the company to move the car. The flood was an act of God." The court, after a review of authorities at great length, said: "The court is of the opinion that the negligent delay of a carrier in moving goods intrusted to it for transportation, not so unreasonable as to amount to a conversion, will not render it liable for the loss of such goods after they have been carried to their destination, if they are destroyed by an act of God before delivery." The authorities referred to in the opinion are here cited.

In *Morrison* v. *Davis & Co.*, 20 Pa. St. 171, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by the defendant delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood. *Railway Company* v. *Reeves,* 10 Wall. 190; *Denny* v. *New York Central R. Co.*, 13 Gray 481.

In *Martin* v. *Railway Company,* 55 Ark. 510, the defendant contracted with a compress company to transport all cotton brought by its owners to the warehouse of that company in Little Rock to its compress in Argenta, but neglected to do so until a large quantity of cotton accumulated at the warehouse and in an adjoining street and caught fire and destroyed plaintiff's cotton. He sought to recover of the defendant the value of his cotton so destroyed. This court said: "The mere failure of the defendant to perform its contract with the com-

press company was in no wise the juridical cause of the fire. There was no direct connection between the neglect of the defendant to furnish transportation according to the contract, and the fire. The failure to furnish cars was one of a series of antecedent events without which, as the result proves, the fire probably would not have happened, for if the cotton had been removed there might have been no fire. But it was not the direct and proximate cause, and did not make the defendant responsible for losses caused by the fire. *St. Louis, etc. R. Co.* v. *Commercial Ins. Co.,* 139 U. S. 223."

In *James* v. *James,* 58 Ark. 157, appellees delivered to the appellant cotton, which he agreed to gin on the following Monday. He failed to do so and on the following Thursday the cotton was destroyed by fire. This court held that the failure to gin the cotton within the time agreed was not the proximate cause of its destruction. Justice WOOD, delivering the opinion of the court, said: "True, we might say if the cotton had been ginned on Monday, and carried away on Tuesday, it would not have been burned on Thursday. To use language similar to that employed * * * in the case of *Martin* v. *Railway Co.,* 55 Ark. 521, the failure to gin on Monday, was one of a series of antecedent events without which the loss would not have occurred, but such failure was in no sense the proximate cause of the loss"

In *Martin* v. *Railway Company* and *James* v. *James,* cited above, there was no causal relation between the negligence charged and the loss sustained. The delay in the first two cases did not produce the fire, and the delay in the last case did not produce the flood. In the first two the delay was not the juridical cause of the fire, and in the last it was not the juridical cause of the flood. The fires and flood were not the consequences of the delay. They were unconnected with and independent of the delay. The delay was no more the concurring cause with the fire in causing loss in the two cases than it was with the flood in causing the loss in the case at bar. All that can be said in the two cases in this connection is, that if there had been no delay the fire would not have destroyed the cotton, and the flood would not have prevented the delivery of the cattle in time; and so it might be said that if Miles had shipped his cattle at an earlier day they would have been de-

livered in time, and he would have incurred no loss. But this, we have seen, is not sufficient.

The total loss of the cotton and the loss sustained in the market value of the cattle do not determine the proximate cause. As the opinion of the court seems to say or imply in distinguishing the case at bar from the two cases in which cotton was destroyed by fire. The damages or the extent of them did not produce the proximate cause, but the proximate cause produced the damages.

For the reasons given I dissent from the opinion of the court.

WILEY v. STATE.

Opinion delivered December 13, 1909.

1. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—Where there is any evidence of a substantial character to sustain the finding of the jury as to a question of fact, it will not be disturbed on appeal. (Page 590.)
2. LARCENY—POSSESSION OF GOODS RECENTLY STOLEN.—The possession of goods recently stolen, if unexplained, affords presumptive evidence of guilt, and if, in connection with the other facts and circumstances proved in the case, it induces in the minds of the jury a belief, beyond a reasonable doubt, of the guilt of the defendant, it becomes sufficient to warrant a conviction. (Page 590.)
3. SAME—WHEN GOODS RECENTLY STOLEN.—In determining whether the theft of property was recent or remote, not only the lapse of time should be considered, but also the nature of the property alleged to have been stolen, the actions of the defendant and the nature of his claim thereto, if he subsequently made an assertion of title, and all the circumstances surrounding the particular case. (Page 591.)
4. EVIDENCE—ACTS OF CONSPIRATOR.—The rule that the acts, conduct and declarations of one conspirator after the consummation of the conspiracy are inadmissible as evidence against another conspirator cannot be extended to exclude the evidence of the subsequent finding of the fruits of the crime in the possession of one of the conspirators. (Page 592.)
5. SAME—PROOF OF CONSPIRACY.—Proof that a lot of goods were stolen upon one occasion, and that a portion of them was found in the possession of the accused, and that the remainder was in the possession

of another, was competent to show that the two acted together in stealing the goods. (Page 593.)

Error to Franklin Circuit Court; *Jeptha H. Evans,* Judge; affirmed.

Sam R. Chew, for appellant.

The presumption that stolen property was found on the thief is not conclusive, and, of itself, is not sufficient for a conviction. 34 Ark. 443; 68 Ark. 529. The act or declaration of a co-conspirator made after the transaction or enterprise is incompetent. 20 Ark. 216; 45 Ark. 132; *Id.* 165; *Id.* 328; 57 Ark. 1; 59 Ark. 422.

Hal L. Norwood, Attorney General, and *C. A. Cunningham,* Assistant, for appellee.

Possession of recently stolen property is evidence to go to the jury for what it is worth. 34 Ark. 443; 44 Ark. 39; 54 Ark. 621; 55 Ark. 244; 58 Ark. 576; 62 Ark. 494.

FRAUENTHAL, J. The defendant, Will Wiley, and one Tom Trotter, Jr., were jointly indicted by the grand jury of Franklin County, and charged with the crimes of burglary and grand larceny. In the first count of the indictment these parties were charged with burglarizing the store house of L. J. Stockton, and in the second count they were charged with taking, stealing and carrying therefrom a lot of goods and merchandise, the property of said Stockton. The goods and merchandise alleged to have been stolen consisted of a lot of calico, lawn, gingham, percale, chambray, ribbon, elastic, shirts, hose, slippers, scissors, tobacco, etc.; and each item of the goods is set forth in the indictment, together with the value thereof. There was a severance of the trial of the two parties, and the defendant, Wiley, was in this case placed upon separate trial. The defendant was acquitted of the charge of burglary, but was convicted upon the count of the indictment charging him with grand larceny, and his punishment was fixed at one year's imprisonment in the penitentiary. From this conviction the defendant presents this appeal.

The evidence adduced upon the trial of the case tended to establish the following facts: L. J. Stockton was the owner

of, and was conducting a small mercantile business in, a country store house situated at the forks of two public roads in Franklin County. On the night of Saturday, May 1, 1909, the store house was broken into by an entry being made through a window, and the goods and merchandise set out in the indictment were taken therefrom and stolen. The burglary and larceny were discovered by Stockton on the evening of the following day, and he and his daughter, who was assisting him in attending to the business, made a list of the goods that had been taken from the store on said night. On May 1, 1909, the defendant and said Tom Trotter, Jr., were living and working upon a bottom farm about four miles from the store house; and at that time they lived about 150 yards from each other. They were close friends, and about one year and a half or two years prior to this time they lived near each other in Oklahoma. Trotter returned from Oklahoma to Franklin County in December, 1908, and the defendant at an earlier date during that year. Some time after May 1, 1909, these parties moved from the bottom land, and in July, 1909, lived about one mile apart and nearer the locality in which the store house was situated. On July 23, 1909, under and by virtue of a search warrant, certain officers and L. J. Stockton went to the house of said Trotter, and there searched for the goods and merchandise alleged to have been stolen. They found in Trotter's house a lot of new calico, lawn, chambray, and other goods which were identified by Stockton as goods that had been in his stock, and that were taken therefrom on May 1, 1909. These goods were found in the bottom of a trunk, and were covered with other goods that were not new and some bed clothes. The officers then proceeded in company with Stockton and went to the house of defendant, Wiley. In this house they found also a lot of goods and merchandise which Stockton identified as owned by him and as having been in his stock and taken therefrom on said May 1. These goods were found in a clothes press upon which were piled other goods that were not new, and also quilts. Amongst the property taken from Stockton's store were three large scissors which had the mark or brand thereon of "Empress." A pair of scissors similar to these was found at the house of Trotter, and one pair of scissors also similar to these was found at the house of the defendant, and Stockton identified

these scissors as his property which was taken from his house on the night of May 1. While the goods were being identified and claimed by Stockton and taken possession of by the officers, the defendant made no explanation of how he obtained them; but on his trial he said the reason that he made no explanation at that time was that he did not care to do so because he knew where he had gotten them and could show his innocence. While the defendant was living on the bottom land, there was located near his home a cave or hole in a bluff; and a short time after the store house of Stockton was burglarized a young boy saw the defendant and his wife at this place in the bluff with two sacks, and under circumstances indicating that he was hiding property in this cave or hole in the bluff. The defendant claimed, in explanation of this, that he was only at the time hunting a mule.

The defendant introduced the evidence of his relatives and himself by which he endeavored to prove that the goods found in his possession were purchased from time to time from merchants; and he introduced evidence showing that other merchants at the towns in Franklin County kept in their stocks of merchandise for sale goods similar to those alleged to have been stolen. He introduced Tom Trotter, Jr., as a witness who claimed to have purchased the goods found in his possession from merchants principally in Fort Smith and Oklahoma.

We do not think it necessary to further detail the facts and circumstances adduced in the evidence in this case. The above presents sufficiently the character of the case that was made out against the defendant and the questions that are presented upon this appeal for determination. The chief question of fact involved in the case is whether or not the goods and merchandise that were found in the possession of Trotter and the defendant were the property of L. J. Stockton and the goods which he claimed were stolen from the store house. For, if they were the property of Stockton, then the explanation of the defendant of how he obtained them must necessarily have been fabricated and false; and this, taken in connection with the other facts and circumstances adduced in evidence, is, we think, sufficient evidence to sustain the verdict of the jury.

It is earnestly urged by able counsel for the defendant that there is not sufficient evidence to sustain the finding that these goods and merchandise found in the possession of the defendant and Trotter were the property of L. J. Stockton. These goods and merchandise were presented in evidence, and Mr. Stockton and his daughter in the presence of the jury picked out and identified the goods as his property and as the goods which were taken from his store. The defendant and his witnesses testified that he had the property some time before the date of the burglary. These witnesses appeared before the jury, who were the exclusive judges of their credibility and also the judges of what weight to give to the testimony of Stockton and his daughter. This, therefore, was peculiarly a question of fact and especially a matter within their province to determine. As to that question of fact, we are of the opinion that there was some evidence to sustain the finding of the jury; and this court has uniformly held that where there is any evidence of a substantial character to sustain the finding of the jury as to a question of fact, it will not be disturbed. *Hubbard* v. *State,* 10 Ark. 378; *Chitwood* v. *State,* 18 Ark. 453; *Dixon* v. *State,* 22 Ark. 213; *Harris* v. *State,* 31 Ark. 196; *Holt* v. *State,* 47 Ark. 196; *Williams* v. *State,* 50 Ark. 511; *Gunter* v. *State,* 79 Ark. 432.

It thus being determined that these goods and merchandise were the property of L. J. Stockton and the goods which were stolen, the possession of them by the defendant was a fact from which his complicity in the larceny might be inferred. The possession of property recently stolen and unexplained affords presumptive evidence of guilt. Such possession is a circumstance which may be proved and taken into consideration by the jury, and if, in connection with the other facts and circumstances proved in the case, it induces in the minds of the jury a belief, beyond a reasonable doubt, of the guilt of the defendant, it becomes sufficient to warrant a conviction. Rapalje on Larceny and Kindred Offenses, § 162; *Boykin* v. *State,* 34 Ark. 443; *Shepherd* v. *State,* 44 Ark. 39; *Denmark* v. *State,* 58 Ark. 576; *Gunter* v. *State,* 79 Ark. 433; *Douglass* v. *State,* 91 Ark. 492.

The question as to whether or not the possession of stolen property is recent does not depend wholly upon the lapse of

time. The nature of the property alleged to have been stolen, the actions of the defendant and the nature of his claim thereto, if he subsequently makes an assertion of title, and all the circumstances surrounding the particular case should be taken into consideration in determining whether the possession of the property was at a time after it was recently stolen, or whether it was so remote that it should not be considered that it was recently stolen. 8 Enc. of Evidence, 101; *State* v. *Miller,* 45 Minn. 521; *Commonwealth* v. *Montgomery,* 11 Metc. (Mass.) 534.

In the case at bar the merchandise was stolen and secreted; and some time after it was discovered in the possession of the defendant he made a distinct assertion of title to it. Subsequently he claimed to have acquired possession of the property at a time long before the date when they were alleged to have been stolen from Stockton, the owner. He could not have obtained them therefore innocently from any other person. It then became a question of fact for the jury to determine as to whether or not his claim of title was made honestly and in good faith, or whether it was false and fabricated. For, if the claim made by him that he acquired and was in possession of the property prior to the date that it is alleged that it was stolen from Stockton was false and based on fabricated testimony, then the inference of his guilt was strengthened. The possession of the property by defendant under the circumstances of this case was not too remote, therefore, from the date that they were alleged to have been stolen to deprive it of its probative effect as a fact from which an inference of the guilt of the defendant could be drawn by the jury. This inference, taken in connection with the other circumstances in the case and the false and fabricated claim of the acquisition of the property by the defendant, is sufficient, we think, to sustain the verdict of conviction.

It is urged by counsel for defendant that the court erred in permitting evidence to be introduced that part of the alleged stolen goods were found at the house of Trotter. It is contended that such evidence could only be admissible on the ground that it was in the nature of the declaration, act and conduct of a co-conspirator. It is urged that there is no testimony showing any combination or conspiracy between the defendant and

Trotter to commit this alleged crime; and, inasmuch as these acts and conduct of Trotter occurred and the possession of the goods was discovered at Trotter's house in the absence of the defendant and long after the criminal enterprise, if any, was ended, the testimony was not admissible.

It is well settled that, before evidence of the acts, declarations or conduct of an alleged conspirator can be introduced, the conspiracy must first be shown by evidence *aliunde,* and must be done or made while the conspiracy continues. The general rule of law is that when the deed is done and the criminal enterprise is ended the criminating conduct or declarations of one conspirator are inadmissible against his co-conspirator. Rapalje on Larceny and Kindred Offenses, p. 732; 12 Cyc. 439; *Clinton* v. *Estes,* 20 Ark. 216; *Rowland* v. *State,* 45 Ark. 132; *Polk* v. *State,* 45 Ark. 165; *Foster* v. *State,* 45 Ark. 328; *Vaughan* v. *State,* 57 Ark. 10; *Gill* v. *State,* 59 Ark. 422.

But this rule does not apply when the possession of the goods that were stolen at the same time are found in the possession of such party. The fact that each of the parties is found to possess portions of the stolen goods which were taken at the same time is itself competent to establish a conspiracy and to implicate each in the commission of the crime. The fact that the several portions of goods made in the aggregate the amount of goods that it is proved were taken would be a circumstance to identify the goods, although the separate portions were found at different places, and such evidence would also be competent for that purpose. In the case of *Clark* v. *State,* 12 S. W. 729, it was held that the rule that the acts, conduct and declarations of one co-conspirator after the consummation of the conspiracy are inadmissible as evidence against another conspirator cannot be extended to exclude the evidence of the subsequent finding of the fruits of the crime in the possession of one of the conspirators.

In the case of *Fisher* v. *State,* 73 Ga. 395, freight cars had been broken in and entered and goods stolen therefrom. The defendant in that case and several other parties were jointly indicted charged with the commission of the crime, and the defendant was placed upon his separate trial. In that case the court held that the fact that the same class of goods missed

from the broken and rifled cars were found in the possession of each of the parties was clearly competent, not only to establish a conspiracy, but to implicate the defendant in the guilt of his associates. Rapalje on Larceny and Kindred Offenses, p. 733; 12 Cyc. 444.

In the case at bar a lot of merchandise was taken from the store house of Stockton upon one occasion. A part of these stolen goods was found in the possession of Trotter, and a part thereof was found in the possession of the defendant. That was a fact that was competent to go to the jury to show that the two had acted together in securing these goods, and that the defendant was implicated in thus securing them. At the time this testimony was introduced, the court, upon objection being made thereto, stated that any declaration or action of Trotter would not be admitted, and that the only testimony that was admissible was as to the fact that these goods were found in the possession of Trotter. And that was the extent of the testimony admitted relative to any act or conduct of Trotter, and there was no testimony as to any declaration that was made by him. We think that the testimony thus admitted was relevant and competent.

We have carefully examined the instructions that were given by the court, and we find that they fully and correctly presented the law that was applicable to the facts of this case. It was peculiarly the province of the jury under these instructions to determine from the facts and circumstances adduced in evidence as to whether or not the defendant was guilty of the charges preferred in the indictment.

They found from the facts and circumstances that he was guilty, and convicted him of grand larceny. We cannot say that there is no substantial evidence to sustain that verdict; and therefore the verdict should not be disturbed.

The judgment is affirmed.

EWING-MERKEL ELECTRIC COMPANY v. LEWISVILLE LIGHT & WATER COMPANY.

Opinion delivered December 13, 1909.

EQUITABLE SET-OFF—UNLIQUIDATED DAMAGES—NONRESIDENCE OF PLAINTIFF.—In a suit upon contract by a nonresident against a resident of this State, the defendant will be allowed in equity to set-off a claim for unliquidated damages growing out of the breach of an independent contract between the same parties.

Appeal from LaFayette Chancery Court; *J. M. Barker,* Chancellor; affirmed.

T. M. Pierce, Paul W. Farley and *Bradshaw, Rhoton & Helm,* for appellant.

The counterclaim does not arise out of the contract set forth in the complaint, nor is it connected with the subject of the action. 87 Ark. 166; 66 Ark. 400; 32 Ark. 281; 48 Ark. 396; 40 Ark. 75; 57 Ark. 606; Kirby's Dig., § 6099. The statute is plain, and has been applied frequently. 22 Ark. 409; 27 Ark. 489; 55 Ark. 312; 57 Ark. 312; 60 Ark. 400. In a suit on contract damages cannot be set off. 27 Ark. 489; 30 Ark. 50; 4 Ark. 527. Unliquidated damages is not a subject of set-off, even in equity. 1 Ark. 31; 29 Mich. 341; 3 Johns. Ch. 351; 8 Paige, Ch. 503; 118 Ill. 612; 48 Mich. 218; *Id.* 615; 54 Ark. 187. The chancellor should not have assumed jurisdiction. 87 Ark. 211; 73 Ark. 462; 74 Ark. 484; 65 Ark. 503; 56 Ark. 391.

Warren & Smith, for appellee.

The chancery court was the proper forum. 11 S. W. 2; 4 L. R. A. 858; 9 *Id.* 108; 6 Am. & Eng. Cas. 718; Bispham, Eq., § 27; 4 Metc. 175; 57 Ark. 606. Appellant is liable on its warranty, although it did not know the machinery to be defective. 22 Ark. 454; 53 Ark. 155; 88 S. W. 122; 77 S. W. 1011, 42 S. W. 1020.

BATTLE, J. Ewing-Merkel Electric Company, a corporation organized under the laws of the State of Missouri, sold to the Lewisville Light & Water Company, a corporation organized under the laws of the State of Arkansas, an alternating current generator complete and switch board transformers, for an electric light plant, for $1,150, all second-hand machinery,

but guaranteed to be in strictly first-class order and in good operative condition. The sale was made under a written contract, dated May 10, 1904. The Lewisville Light & Water Company purchased of the Ewing-Merkel Electric Company sundry items of merchandise between July 1 and October 1, 1904, amounting to $488.04, and on the 5th of October, 1904, paid thereon $300, leaving a balance of $188.04.

On the 13th day of July, 1905, the Ewing-Merkel Electric Company brought an action against the Lewisville Light & Water Company, in the Lafayette Circuit Court, for $188.04.

The defendant answered, and admitted that it purchased the merchandise mentioned in the complaint, and that the sum of $188.04 remains unpaid. "But by way of set-off and cross-bill defendant states that on the 10th day of May, 1904, it entered into a contract with plaintiff for the purchase of certain goods, machinery and material for an electric light plant. That the said machinery and appliances were guaranteed to be in strictly first-class order as set out in the complaint, and defendant agreed to pay the sum of $1,150, and plaintiff guaranteed the machinery to be in good operative condition. That plaintiff knew at the time of the contract of purchase that defendant desired to use them solely for the purpose of operating an electric plant, and guaranteed it to be in first-class order for that purpose. That defendant bought and paid for said machinery, relying solely upon plaintiff's representations and guaranty as to its quality and condition. Defendant was inexperienced in the matter of such machinery, which plaintiff knew, and defendant relied on plaintiff's representations.

"That after defendant had installed said machinery it was found to be defective and unsound, and not in strictly first-class order, nor in good condition. The armature in the generator was worthless and burned out, and the insulation rotten, and the machinery utterly worthless for the purpose of the defendant. That because of the defective condition of the machinery it was not worth more than $100, and the defendant had been damaged in the sum of $1,050. The plaintiff is a non-resident of the State, and has no agent upon whom service can be had, nor any property in the State, and that it has no adequate remedy at law, and prays for the recovery of the damages,

and asks that the cause be transferred to the chancery court of Lafayette County for hearing, and prayed for judgment."

On October 9, the defendant filed an amendment to its answer and cross-bill, as follows:

"That the exciter purchased from plaintiff failed to excite the fields and armature and thus rendered it impossible to operate the said machine. The bearings on the dynamo were worn and rubbed, and caused the boxes to heat, so that it was impossible to operate the machinery. The transformers were not in first-class order, nor in good operative condition, but were worn and worthless."

On motion of the defendant the cause was transferred to the Lafayette Chancery Court.

The plaintiff answered the cross-complaint of the defendant and denied the allegations.

Much evidence was adduced by both parties; and the court found upon hearing that plaintiff is a non-resident, and has no property in this State; that the defendant is indebted to plaintiff on the account sued on in the sum of $188.04, and that the plaintiff is indebted to the defendant "on account of damages for breach of warranty in the contract for the sale of machinery and appliances, as alleged in the defendant's answer and cross-bill, in the sum of $1,050; that defendant is entitled to judgment for said sum, and that the amount found for plaintiff should be set off against the amount found for defendant *pro tanto*, leaving due defendant the sum of $861.96, and rendered judgment for that amount in favor of the defendant; and plaintiff appealed.

The evidence was sufficient to sustain the findings of fact by the court. At law appellee was not entitled to set up in this action, by way of set-off or counterclaim, the $1,050 damages suffered by it by a breach of contract made by appellant. Was it entitled to set it up as an equitable set-off?

In 2 Story's Equity Jurisprudence, § 1437, it is said: "It has already been suggested that courts of equity will extend the doctrine of set-off and claims in the nature of set-off beyond the law in all cases when peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration."

In *Rolling Mill Co.* v. *Ore & Steel Company,* 152 U. S. 596, 616, it is said: "By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference. * * * In addition to insolvency, it is held by many well-considered decisions, including those of Illinois, that the non-residence of the party against whom the set-off is asserted is good ground for equitable relief. *Quick* v. *Lemon,* 105 Illinois, 578; *Taylor* v. *Stowell,* 4 Met. (Ky.) 175; *Forbes* v. *Cooper,* 88 Kentucky 285; *Robbins* v. *Hawley,* 1 T. B. Mon. 18; *Edminson* v. *Baxter,* 4 Hayw. (Tenn.) 112; *Davis* v. *Milburn,* 32 Iowa 163."

In *Forbes* v. *Cooper,* 88 Ky. 285, it is said: "It is certainly unconscientious for an insolvent party to coerce the payment of his claim when he is owing the other party an equal or larger sum, and thus leave the latter remediless; nor should a non-resident be allowed, under like circumstances, to enforce through the agency of the courts the collection of his debt, and compel the other party to seek a foreign jurisdiction for relief, and then perhaps find the debtor insolvent. If the object of litigation be the attainment of justice, assuredly such results should be prevented. Indeed, the doctrine of equitable set-off, to the extent it was formerly applied, was based upon moral justice, and to meet such cases as the above, thus preventing wrong. It was then not uncommon to stay an insolvent or non-resident debtor in the collection of his claim until damages, to which the complainant might be entitled to against him, were liquidated under the order of the chancellor, and then apply them in satisfaction of his independent debt."

In *Quick* v. *Lemon,* 105 Ill. 578, it is said: "It would seem to be inequitable to require the corporation to go to another State to collect its demand in an action at law, and we are inclined to hold that the non-residence of the complainant, in connection with the fact that he calls upon a court of equity to enforce his judgment, is sufficient to allow the defendant corporation to prove and set-off its demand set up in the cross-bill against the judgment of the complainant."

To the same effect, see *Porter* v. *Roseman* (Ind.) 6 Am. & Eng. Annotated Cases, 718, and note to that case and cases cited.

The rule announced in these cases is a just rule, and should be enforced. We see no good reason for sending a citizen of this State to a foreign jurisdiction to obtain justice when the courts of this State can afford relief. They are as fully competent to afford relief to the citizen as to the non-resident. Why should one in cases like this be accorded greater rights than the other?

Decree affirmed.

KING v. BLACK.

Opinion delivered December 13, 1909.

1. APPEAL AND ERROR—WAIVER OF EXCEPTIONS.—Error of the trial court in excluding evidence is waived by failure to make the exclusion a ground of the motion for new trial. (Page 599.)
2. SAME—BRINGING UP INSTRUCTION.—The error of giving an instruction cannot be insisted upon on appeal where the bill of exceptions fails to show that such an instruction was given. (Page 600.)
3. SALES OF CHATTELS—RESERVATION OF TITLE.—Where the undisputed testimony in a replevin case shows that the personal property in question was sold with reservation of title in the vendor until the purchase money was paid, it was not error to instruct the jury that the plaintiff (who was the vendor) was entitled to recover if any of the purchase money was unpaid. (Page 600.)

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

D. L. King, for appellant.

When appellant turned over five bales of cotton in the fall of 1904, it was a full and complete settlement. 112 S. W. 402. Abbie Warren was a competent witness. 119 S. W. 837.

Warren & Smith, for appellee.

HART, J. Dick Black brought suit in replevin in a justice of the peace court against Daniel Warren to recover possession of an iron grey mule, valued at $90.

The plaintiff gave bond as required by the statute, and the sheriff took charge of the mule. Thereupon the defendant gave a cross-bond, and regained possession of the mule.

D. L. King interpleaded for the mule. A trial was had, which resulted in a verdict and judgment for the intervener. The plaintiff appealed to the circuit court. In the circuit court the death of Daniel Warren was suggested and admitted. D. L. King was appointed administrator *ad litem,* and the suit revived in his name as such administrator.

The trial in the circuit court resulted in a verdict for the plaintiff in the sum of $50. From the judgment rendered on the verdict an appeal has been taken to this court. The principal contention of appellants is that the verdict is not supported by the evidence. The undisputed facts show that Dick Black sold the mule in controversy to Daniel Warren with the understanding that the title was not to pass to Warren until he had paid for it. The sale was made in January, 1904, and during that year Warren traded at the store of Black. Some time in the fall Warren delivered to Black 5 bales of cotton. The testimony of appellants tends to show that the cotton was received by Black as payment in full both of his account and of the purchase price of the mule. The testimony of appellee tends to show that the cotton was delivered to him to be held for a rise in price, and that, when sold, the proceeds were to be applied first to the payment of Warren's store account. That the 5 bales of cotton were small, and that, when sold, they were hardly sufficient to pay the store account of Warren. That it was agreed that the proceeds of the cotton should be applied to the payment of the store account. That Warren was given permission to retain the possession of the mule for another year.

D. L. King claimed the possession of the mule by virtue of a mortgage executed to him by Warren. The jury under proper instructions of the court have passed upon this conflict in the evidence, and their verdict is conclusive upon us.

Counsel for appellants also rely for a reversal upon the failure of the court to allow Abbie Warren, the widow of Daniel Warren, deceased, to testify, but he did not embody his objection to the ruling of the court in his motion for a new trial, and, under the settled rules of the court, it cannot be consid-

ered on appeal. Error in excluding evidence is waived by failure to make the exclusion a ground of motion for a new trial: *St. Louis, I. M. & S. Ry. Co.* v. *Deshong,* 63 Ark. 443; *Ince* v. *State,* 77 Ark. 418; *Gibbs* v. *Dickson,* 33 Ark. 107.

One of the appellants' grounds for a new trial is "because the court erred in giving instruction requested by the plaintiff that if there was anything due on the mule they must find for the plaintiff."

The objection is not well taken because the transcript does not show that any instruction was given at the request of the plaintiff. Besides, there was no error in it. The undisputed evidence shows that the mule was sold by Black to Warren with the distinct understanding that the title should remain in the vendor until the purchase price was paid, and that the only ground upon which plaintiff's right of recovery was sought to be defeated was that Warren had paid for the mule by delivering to Black certain bales of cotton. The question as to the payment of the purchase price of the mule was the only disputed issue of fact. Hence there was no error in giving the instruction. *Faisst* v. *Waldo,* 57 Ark. 270.

We find no error in the record, and the judgment will be affirmed.

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

Opinion delivered December 13, 1909.

1. STATUTES—REPEALS BY IMPLICATION—For a statute to repeal a prior statute by implication, either there must be a plain repugnancy between their provisions, or the later act must cover the whole subject of the earlier statute and embrace new provisions plainly showing that it was intended as a substitute therefor. (Page 602.)

2. SAME—WHEN REPEAL IMPLIED.—Where the Legislature takes up a subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intends it as a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new. (Page 603.)

3. CARRIERS—PASSENGER RATES—REPEAL OF STATUTE.—The act of April 4, 1887, fixing the maximum charge for carriage of passengers by railroads and prescribing a penalty for an overcharge (Kirby's Digest, § § 6611, 6620), was not repealed by the act of March 11, 1899 (Kirby's Digest, § 6802), creating the railroad commission, and authorizing the commission to make reasonable and just rates of passenger tariffs. (Page 603.)

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

Thos. S. Buzbee and *John T. Hicks,* for appellant.

The act of March 11, 1899 (Kirby's Dig., § 6787 *et seq.*) covers every feature of the act of 1887 (Kirby's Dig., § § 6611-12-13-14-15 and 6620). The two acts are wholly inconsistent, and cannot stand together. The later act repeals the earlier. Art. XVII, § 10, Const. as amended; Acts 1899, § § 1 to 8, 9, 11, 14, 18, 31; 60 Ark. 221; 82 Ark. 302; 88 Ark. 324. The use of the word "remedies" in that part of the act providing that they shall be regarded as cumulative does not include penalties as distinguished from remedies. Kirby's Dig., § 6826.

W. D. Brouse, for appellee.

The act of 1899, § 30, expressly provides that the remedies therein prescribed shall be cumulative, and that the act shall not be construed as repealing any statute giving such remedies. The two acts are not inconsistent, the purpose of the Legislature evidently being to accomplish different ends. 82 Ark. 302. Repeals by implication are not favored. 11 Ark. 103; *Id.* 496; *Id.* 47; 28 Ark. 317-325 and cases cited; 4 Ark. 410; 23 Ark. 307-8; 60 Ark. 61; 53 Ark. 418. The word "remedies," used in the statute, may include penalties. Bouvier's Law Dict., "Remedy," "Cumulative Remedies;" 12 Cyc. 993; 7 Enc. Pl. & Pr. 373; 22 Ark. 231; 8 Am. & Eng. Enc. of L., 2d Ed. 493.

MCCULLOCH, C. J. The General Assembly of 1887 passed an act which fixed a maximum rate of three cents per mile on

all lines over 75 miles in length for transportation of passengers by railroads in this State, and which prescribed against such carriers charging or receiving a greater rate a penalty of not less than $50 nor more than $300, to be recovered in a suit at law by the person aggrieved—which of course means the passenger who is compelled to pay the overcharge.

In 1899 the General Assembly passed the act creating the Railroad Commission and prescribing its powers and duties, among other things providing that "said commission will make reasonable and just rates of freight, express and passenger tariffs to be observed by all persons and corporations operating any railroad," etc. Acts of 1899, § 9; Kirby's Dig., § 6802. The latter act further provides (§ 14) that double the damages sustained by reason of any violation may be recovered from the carrier by any person suffering the damage, and that (§ 18) for each violation a penalty of not less than $500 nor more than $3,000 may be recovered by the State in an action instituted by the prosecuting attorney for the commission. But the act expressly provides (§ 30) "that the remedies hereby given shall be regarded as cumulative, and this act shall not be construed as repealing any statute giving such remedies." The question involved in the present case is, whether or not the act of 1887 was impliedly repealed by the act of 1899, there being no express repeal.

Appellee recovered below a penalty for $50 assessed against appellant railroad company under the former statute. The question has never been raised here before, and the court has not passed on it, though there are two recent cases in which penalties were sought to be recovered under the old statute. *Clark* v. *Jonesboro, L. C. & E. Rd. Co.*, 87 Ark. 385; *Jonesboro, L. C. & E. Rd. Co.* v. *Brookfield*, 87 Ark. 409. In those cases the question of the repeal of the statute was not suggested, either by court or by counsel, though in each case the court proceeded to construe the statute, and in both instances a conclusion was reached favorable to the contention of the railroad company.

The question of implied repeals has often received the attention of this court, beginning with the case of *Pulaski County* v. *Downer*, 10 Ark. 589, and coming down to the recent case of *Welch Stave & Merc. Co.* v. *Stevenson, ante* p. 266. Little, if any-

thing, on the subject not found in the former cases can be said. In *Coats* v. *Hill,* 41 Ark. 149, Mr. Justice SMITH, speaking for the court, said: "Repeals by implication are not favored. To produce this result, the two acts must be upon the same subject, and there must be a plain repugnancy between their provisions; in which case the later act, without the repealing clause, operates, to the extent of repugnancy, as a repeal of the first. Or, if the two acts are not in express terms repugnant, then the later act must cover the whole subject of the first and embrace new provisions, plainly showing that it was intended as a substitute for the first."

To this must be added the further statement of the law in nearly all of our cases to the effect that "where the Legislature takes up a whole subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intends it as a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new."

In the last case on this subject we quoted with approval the following from Sutherland on Statutory Construction: "There must be such a manifest and total repugnance that the two enactments cannot stand. The earliest statute continues in force unless the two are clearly inconsistent with and repugnant to each other, or unless in the later statute some express notice is taken of the former, plainly indicating an intention to repeal it; and where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication (Sec. 247, Lewis' Suth. Stat. Const.)

Is there any necessary repugnance between the two statutes? We conclude that there is none, and it is our duty to harmonize them and to give effect to both if that can reasonably be done, as the Legislature has not in express terms manifested any intention to repeal the old act. The first act fixes a *maximum* rate of charges for transportation of passengers; the latter act empowers the Railroad Commission to "make *reasonable and just rates* of freight, express and passenger tariffs," that is to say, reasonable and just rates within the limits of the maximum rates already fixed by law. In other words, the later act em-

powers the Railroad Commission to lower rates, if necessary to make them reasonable and just, but not to raise them above the maximum fixed by law. Thus viewing the statute, there is no inconsistency nor lack of harmony between them, and both stand in full force and no rules of construction are violated.

Now, if the substantive rights prescribed by the act of 1887 are not repealed by the later statute, the remedy is not abolished, for the later statute expressly preserves all such remedies, and declares those in the new act to be cumulative.

Judgment affirmed.

VANDEVENTER v. DAVIS.

Opinion delivered December 13, 1909.

1. BILLS AND NOTES—PAROL EVIDENCE OF SURETYSHIP.—Parol evidence is admissible to prove that one whose name appears on a note as maker was in fact a surety, but the burden is upon him to prove such fact. (Page 605.)
2. MARRIED WOMEN—POWER TO BORROW MONEY.—A married woman may borrow money for her separate use, and her agreement to repay same is binding upon her, whether the money was used for her benefit or not. (Page 606.)
3. SAME—LIABILITY ON NOTE.—Where the evidence was in conflict as to whether a married woman signed a note as maker or as surety, it was error to direct a verdict in her favor upon the theory that she was a surety, and therefore not liable. (Page 606.)

Appeal from Conway Circuit Court; *Hugh Basham,* Judge; reversed.

Wm. L. Moose, for appellant.

Appellee's coverture is no defense to this action. A married woman may borrow money to lend or give to her minor children (as is the case here), or to use for any other purpose, and is liable upon her promissory note given for such borrowed money. 62 Ark. 146; 43 Ark. 163; 70 Ark. 5; 78 Ark. 275.

Sellers & Sellers, for appellee.

The testimony of all the witnesses, except that of appellant herself, goes to show that Mrs. Davis signed the note as surety only. Appellant's statement that she loaned the money to Mrs. Davis is a mere conclusion. Whether or not appellee signed as principal or surety is to be determined from all the facts and circumstances surrounding the transactions. 16 Am. Dec. 617. The statement of Charles Davis, if made, that appellee wanted to borrow the money is wholly incompetent as against her. 38 S. W. 432. Appellant can recover only upon the theory that Charles Davis was appellee's agent. His declaration, made in the absence of appellee, is incompetent to prove such agency. 31 Ark. 212; 33 Ark. 251; *Id.* 316; 44 Ark. 213; 46 Ark. 222; 78 Ark. 320; 80 Ark. 228. No presumption arises that appellee signed as principal from the fact that her name appears first in the signatures. 16 Am. Dec. 620; 32 Cyc. 39; 82 S. W. 1007; 49 S. W. 334.

McCULLOCH, C. J. Mrs. Vandeventer sued Mrs. Davis on a promissory note for $1,000, executed by the latter jointly with her two sons, Charles and Lawrence Davis. On the face of the paper all three appeared as joint makers, the signature of Mrs. Davis being first. But she claims that she executed the note as surety for her sons for money lent by Mrs. Vandeventer to them, and she pleaded her coverture as a defense against liability as such surety. Mrs. Vandeventer testified in substance that she lent the money to Mrs. Davis to use in establishing her sons in business; that the negotiations were carried on between her and Charles Davis, who brought the note to her signed by himself and the other two (his mother and brother), and represented that his mother had authorized him to borrow the money. She paid the money over to Charles Davis when he delivered the note. She also testified that Mrs. Davis stated to her, before the money was paid over, that "she was going to use the money to set her sons up in business." Mrs. Davis and her two sons each testified that the money was loaned by Mrs. Vandeventor to the boys, and that Mrs. Davis executed the note as surety. The court directed the jury to return a verdict in favor of Mrs. Davis, and plaintiff appealed.

It was competent to prove by parol evidence that Mrs. Davis executed the note as surety, though her name appeared

as joint maker; but the burden of proof was upon her to establish this fact. *Vestal* v. *Knight,* 54 Ark. 97.

The evidence was conflicting, but that adduced by plaintiff was sufficient, if accepted by the jury, to justify the conclusion that the money was lent to Mrs. Davis for use in establishing her sons in business, and that she executed the note as maker, and not as surety. If that fact be established, she is liable on the note, notwithstanding her coverture. *Sidway* v. *Nichol,* 62 Ark. 146; *Arnold* v. *McBride,* 78 Ark. 275.

In *Sidway* v. *Nichol, supra,* Judge RIDDICK, speaking for the court, said: "Our conclusion is that a married woman has, under our law, the right to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed becomes her separate property. Her contract to pay for the same is a contract in reference to her separate property, and creates a personal obligation, valid in law and equity, and this without regard to whether she owned any additional property or not. * * * To hold otherwise would be to say that, although the statute gives a married woman the right to acquire and hold property, yet, if she undertakes to acquire it by contract, the law will treat such contract as of no validity."

In *Arnold* v. *McBride, supra,* where a married woman borrowed money and directed its payment, except a small part thereof, to other persons, we said: "It is unimportant what use she made of the money after she received it, as the lender was not bound to see that she actually used it for her own purposes and benefit. All that is necessary is that the money shall have passed to her as her own property to do with it as she pleases."

In the present case, we add, it is not essential, in order to make a contract binding on a married woman, that any part of the money borrowed be paid over to her; for it is sufficient if it is lent to her, though paid to some one else on her direction. Her direction to the lender to deliver the money to some other person constitutes an assumption of dominion over it, and her dominion is for the time as complete as if it was paid into her hands and by her delivered to some one as a gift or otherwise. When she directs the money to be paid into the hands of another, she thereby constitutes such person her agent for

the purpose of receiving it from the lender, and the act of delivery in this manner transfers the title to her and through her to the person for whose use she intends it. The title to the money does not pass directly from the lender to the person into whose hands it is paid on directions of the borrower, for there is no privity of contract between them, and theoretically the title passes to the borrower, even though it is intended as a gift to the person into whose hands it is paid.

So in the present case, if Mrs. Vandeventer's statement of the facts be true, she lent the money to Mrs. Davis for the use of the latter in establishing her sons in business, and she paid it over to one of the sons on the implied directions of Mrs. Davis. According to Mrs. Vandeventer's statement, Mrs. Davis told her that "she was going to use the money to set her sons up in business;" and, according to the undisputed evidence, she entrusted to her sons a promissory note payable to Mrs. Vandeventer which she had signed *prima facie* as joint maker. On the faith of this note, and what Mrs. Davis had said to her, Mrs. Vandeventer lent the money and paid it over to Charles Davis.

We think that the question ought to have gone to the jury, to decide whether Mrs. Davis was a maker of the note, or merely a surety. This testimony also had a tendency to prove that Charles Davis was authorized by his mother to act as her agent in the negotiations, and it rendered admissible his statement made to the plaintiff in the line of his apparent authority during the pendency of the negotiations.

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

SENNETT v. WALKER.

Opinion delivered December 13, 1909.

APPEAL AND ERROR—FINAL JUDGMENT.—A decree declaring in general terms the right of a trustee to receive into his possession the property of certain minors not already expended in their behalf, and referring the case to a master to ascertain the amount of such property, but without

providing for the enforcement of the decree until after the master reports, is not final, and therefore is not appealable.

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

White & Altheimer, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

PER CURIAM. This is a suit in equity instituted by appellee, R. W. Walker, against Mrs. Beulah Sennett, widow of Joseph W. Walker, deceased, to enforce provisions of the last will and testament of the said Joseph W. Walker, deceased, in favor of his children. The prayer of the complaint is that "he be appointed by this court to be trustee of this estate for the said minor heirs, and be invested with authority to take into his possession all their estate, both personal and real, and that he be directed to administer same in accordance with the provisions contained in said will; that said will be construed, and that he be decreed to be entitled to recover from the said Beulah Sennett three-fourths of the entire estate, both real and personal, and including said insurance money, for the use and benefit of said heirs at law of the said Joseph W. Walker; that the said Beulah Sennett be required to disclose any and all of the assets left by the said Joseph W. Walker and which came into her hands, and that she be required to account to him as such trustee for three-fourths of the value thereof, and for such other and further relief as he may be entitled to and as the court may decree to be proper, in order to make effective the trust created by said will, and to carry out the provisions therein."

On the 27th day of August, 1909, the case came on to be heard before the chancellor, and he rendered a decree finding that said Joseph W. Walker at the time of his death was the owner of a large amount of real estate and personal property in Jefferson County, Ark., and that there was insurance upon his life standing in the name of the defendant, Beulah Sennett, to a large amount; that he died leaving a will as set out in the complaint, and that by the terms of the will three-fourths of the property should be delivered to the plaintiff, R. W. Walker, in trust for the minor children (naming them) of said testator. M. E. Bloom was appointed special master, and the cause was

referred to him to take testimony and report to the court the property belonging to the estate of said Joseph W. Walker, real and personal, which came into the hands of said Beulah Sennett, and also the amount of insurance money collected by her on the policies on the life of said Joseph W. Walker, to the end that one-fourth in value of the entire estate of Joseph W. Walker may be assigned to said Beulah Sennett, and three-fourths to the appellee as trustee for the minor children. Said master was also directed to ascertain what portions of the personal estate and insurance money had been converted by the appellant to her own use, to the end that the share of the personal property converted belonging to the minor children might be charged on that portion of the real estate going to appellant, if not otherwise collectable. He was also directed to compute interest on three-fourths of the personal property and insurance money going to the minor children from the date when appellant remarried and forfeited her interest therein, and to ascertain the value of the rents of three-fourths of the real estate since the date of such marriage with interest at six per cent., to the end that they might be charged against the portion of the real estate going to appellant, if not otherwise collectable. He was also directed to report what amounts appellant had paid since her marriage for the support or education of the minor children or for taxes on their share in the property or for necessary repairs thereon.

From this decree the defendant, Mrs. Sennett, has prosecuted an appeal; and a motion is now filed to dismiss the appeal on the ground that the decree was not final. It will be noted that the decree does not purport to award to appellee any particular property. It merely declares in general terms his right to receive into his possession, as trustee for the minor children of Joseph W. Walker, three-fourths of the property of the estate not already expended on behalf of the minors. Reference is made to a master to ascertain the amount of property, and no provision is made for enforcing the decree until after thr master reports.

The decree falls squarely within the rule announced by this court in *Davie* v. *Davie,* 52 Ark. 224. There Crief Justice COCKRILL, speaking for the court, said: "In this case, while the

decree takes the form of a final order in adjudicating the parties' proportionate interests in the land, it is apparent that the court has not fully adjudicated that branch of the cause. The relative interests of the parties in the land have been ascertained and determined, but the cause is retained with a reference to a master who is directed to report at a subsequent term, and the court is yet to determine, upon the coming in of the report, what amounts shall be charged as liens upon the several interests, and whether there shall be a sale of some of the interests to satisfy the same. The decree does not direct its execution, but looks to further judicial action before that event. The plaintiffs can suffer no injury by awaiting the termination of the litigation."

This subject has received the attention of the court in the later cases of *Hargus* v. *Hayes,* 83 Ark. 186, and *Brown* v. *Norvell,* 88 Ark. 590.

The case of *Young* v. *Rose,* 80 Ark. 513, which is relied on by learned counsel for appellant to sustain the right of appeal from this decree, does not conflict with the views here expressed nor with the other cases just referred to. In that case plaintiff had purchased the interest of defendant's co-partner in a saloon business, and asked the court to set aside a sale and repurchase by defendant of the partnership property, claiming said sale and repurchase was a fraud on his (plaintiff's) rights. The court in its decree denied the relief sought by plaintiff, upheld the sale and repurchase made by defendant, ascertained the amount to be accounted for, and referred the case to a master to ascertain the state of the account between the parties, so that the amount could be distributed. The plaintiff did not appeal until after the report of the master came in, and we held that the first decree was final. The decree in that case was against the contention of the plaintiff, and denied him the relief prayed. It was therefore final, and we so held, notwithstanding the fact that the court retained control of the case and appointed a master for the purpose of ascertaining the state of the account, so that the amount fixed by the decree could be distributed.

In the present case the decree only fixed the rights of the parties in general terms, but deprived defendant of no specific property. It was necessary to await the incoming of the master's report before it could be determined what prpoperty would

be awarded to the plaintiff and taken from the defendant, and the court made no direction for the execution of the decree until that time, but, on the contrary, it looks to further judicial action before the execution of the decree is contemplated.

This court is of the opinion that the decree is not final, so the appeal is therefore dismissed.

FLOWERS v. REECE.

Opinion delivered November 1, 1909.

1. ADMINISTRATION—SALE OF LAND FOR EXPENSES.—An order of the probate court for the sale of lands of an estate which shows on its face that it was made to pay expenses of administration, and not debts of the decedent, without showing that the expenses of administration were incurred in the course of administering the estate to pay debts due personally by the decedent, is void, and no rights can be acquired under it, although the sale is afterwards confirmed. (Page 614.)
2. SUBROGATION—PAYMENT OF DEBTS BY ADMINISTRATOR.—An administrator who is compelled to refund to the widow of his intestate assets with which he has paid debts of the estate will be subrogated to the creditor's rights, and may resort to any remedy which the creditor may have against the unadministered assets. (Page 615.)
3. JUDGMENTS—PROBATE COURT—CONCLUSIVENESS.—The probate court is a court of superior jurisdiction, and within its jurisdictional limits its judgments import absolute verity. (Page 616.)
4. SAME—PRESUMPTION.—Where the record of a judgment of the probate court is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed on collateral attack that the court acted within its jurisdiction. (Page 616.)
5. SAME—COLLATERAL ATTACK.—Where the purchasers of property at an administrator's sale, on being sued for the purchase money, set up that the judgment of the probate court ordering the sale was void for want of jurisdiction, this constituted a collateral attack on the judgment. (Page 616.)

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

STATEMENT BY THE COURT.

This is an action instituted by John H. Reece, administrator of the estate of King B. Flowers, deceased, against Matt Picchi, Vincent Picchi, Dominick Picchi, B. C. Truman and Amanda Truman upon bonds alleged to have been executed by them as the purchase price for real estate purchased by them at administrator's sale.

Josephine Flowers, a minor and the sole heir at law of the said King B. Flowers, deceased, and Linnie Blewett, the mother and guardian of said minor, were also made defendants to the suit.

The defendants answered, and by way of cross complaint set up facts which, briefly stated, are as follows: King B. Flowers died May 6, 1898, and Henry Flowers was appointed administrator of his estate. King B. Flowers left surviving him his widow, Linnie Flowers, now Linnie Blewett, and his daughter, Josephine Flowers, born after his death. Henry Flowers purchased the unassigned dower interest of said widow while he was administrator of said estate. Afterwards he was removed as administrator, and John H. Reece was appointed administrator to succeed him.

King B. Flowers, deceased, had in his lifetime executed a mortgage on a part of his real estate to one J. R. White. After his death the mortgage was foreclosed, and the property was sold for $3,830.07 more than the amount of the mortgage debt and costs of foreclosure, and this sum was paid over to said John H. Reece as administrator.

Henry Flowers instituted suit in the Garland Chancery Court against the widow, then Linnie Simons, Josephine Flowers, the only child, and John H. Reece, the administrator of the estate of King B. Flowers, deceased, to recover and have assigned to him the dower interest of said widow in said estate. The defense was interposed that the conveyance of the said dower interest was procured by fraud. The chancery court granted the prayer of the complaint and made an allotment of dower. The cause was appealed to this court, and the decree in that respect was affirmed. A report of the case will be found in 84 Ark. 557 (*Flowers* v. *Flowers*). In addition to certain

tracts of land allotted to him, the chancery court decreed to said Henry Flowers one-third of the residue of the proceeds of sale under the White mortgage for the life of the widow of said King B. Flowers, deceased.

On February 29, 1908, the probate court of Garland County ordered certain town lots belonging to the estate of King B. Flowers, deceased, to be sold by John H. Reece, administrator of said estate, for the purpose of paying the balance due Henry Flowers for the dower interest in the funds arising from the sale under the White mortgage foreclosure and for the purpose of paying certain costs allowed the said Henry Flowers in the proceedings to allot dower.

At the administrator's sale Matt and Vincent Picchi bid off and became the purchasers of one tract, and asked that the deed be made in the name of Dominick Picchi, and executed a bond for the purchase price, and B. C. Truman bid off and became the purchaser of the other tract, and asked that the deed be made in the name of Amanda Truman, and executed a bond for the purchase price.

The sale was confirmed by the probate court, and deeds ordered to be made and delivered to the purchasers upon payment of the purchase price. The purchasers refused to pay the purchase price on the ground that the probate sale of the lands was void, and offered to restore possession of the lands to the administrator. To the answer and cross complaint the plaintiff interposed a demurrer, which was by the court sustained, and, the defendants refusing to plead further, a decree was entered dismissing the answer and cross complaint for want of equity and rendering judgment in favor of the plaintiff for the amount of the bonds.

The defendants have appealed.

J. A. Stallcup and *A. J. Murphy,* for appellant.

An order of the probate court for the sale of lands of an estate which shows on its face that it was made to pay expenses of the administration, and not debts of decedent, without more, is void. 74 Ark. 81; 129 U. S. 86; 58 L. R. A. 641. The lands, if sold at all, must be sold for the purpose of paying debts. 58 L. R. A. 641; 23 O. St. 520; 52 Pa. St. 370; 24 Mo. 16; 2 Barb.

Ch. 161; 49 Ill. 465; 79 Ill. 473; 2 Mass. 150; 4 Mass. 354; 52 Ark. 320; 51 Miss. 206.

Geo. G. Latta, for appellee.

The order of sale is presumed to be regular, and is not subject to collateral attack. 70 Ark. 88. A sale of real estate made under an order without notice is not void, and will upon its confirmation divert title from the heirs. 31 Ark. 74. The same is true in case of failure to appraise. 38 Ark. 17. A sale of a deceased person's real estate under an order of court conveys the legal title, although the proceedings were irregular. 13 Ark. 117; 23 Ark. 121.

HART, J., (after stating the facts.) This case is ruled by the case of *Collins* v. *Paepcke-Leicht Lumber Co.*, 74 Ark. 81. In that case it was held (quoting syllabus):

1. "Under Kirby's Digest, § 186, providing that 'lands and tenements shall be assets in the hands of every executor or administrator for the payment of debts of the testator or intestate,' if there are no debts due by the decedent, there can be no sale of his real estate to pay expenses of administration thereon, unless it appears that the expenses were incurred in the course of administering the estate to pay debts due personally by the decedent.

2. "While the probate court is a superior court, its judgments are void if they show on their face that the court was acting beyond its jurisdictional limits.

3. "An order of the probate court for the sale of lands of an estate which shows on its face that it was made to pay expenses of administration, and not debts of the decedent, without showing that the expenses of administration were incurred in the course of administering the estate to pay debts due personally by the decedent, is void, and no rights were acquired under it, although the sale was afterwards confirmed."

In the present case the assignee of the widow of decedent was allotted dower in the proceeds arising from a sale under a foreclosure of a mortgage made by King B. Flowers in his lifetime, which were in the hands of his administrator. Certain costs were also allowed the assignee of the widow in the suit for the allotment of dower. The order of sale affirmatively shows that it was made for the purpose of paying these amounts.

It was not a sale to pay debts or to pay expenses of administration incurred in the course of administering the estate to pay debts due personally by the decedent. Hence it was void, and the purchasers at the sale acquired no rights under it. It follows that there was no consideration for the bonds, and that the court erred in sustaining the demurrer to the answer and cross-complaint.

For this error the decree is reversed, and the cause is remanded with directions to overrule the demurrer, and for such other proceedings not inconsistent with this opinion as the parties in equity are entitled to.

ON REHEARING.

Opinion delivered December 6, 1909.

HART, J. 1. Counsel for appellee insists that the court erred in holding that the judgment of the probate court ordering a sale of the real estate belonging to the estate of King B. Flowers, deceased, showed affirmatively that the court was acting beyond its jurisdictional limits, and that the judgment was therefore void. A majority of the judges think the contention is well taken. Both the judgment of the probate court and the petition upon which it was procured are set out in the abstract of the record; but they contain a long and almost interminable recitation of matters pertaining to the administration which have no relation to the jurisdiction of the probate court to order a sale of the lands in question. For this reason it will not be set out herein. It is sufficient to state that we have again carefully read and considered both the petition and the judgment of the probate court, and have come to the conclusion that the judgment does not show on its face that it was made for the sole purpose of paying the costs incurred in the administration of the estate. On the contrary, the court is of the opinion that the judgment on the face shows that a part of the surplus from the foreclosure of the White mortgage, which was decreed to the assignee of the widow in the proceedings to allot dower, was used by the administrator in payment of debts probated against the estate of his decedent, and that the order of sale was made for the purpose of reimbursing the administrator for the amounts so paid, and also for the purpose of paying

other debts probated against the estate. In the case of *Crowley* v. *Mellon,* 52 Ark. 1, the court, speaking through Chief Justice COCKRILL, said: "In so far as the administrator has paid a debt of the estate with assets which he is compelled to refund to the widow, he will be subrogated to the rights of the creditor of his intestate, and may resort to any remedy the creditor would have against the assets of the estate that remain unadministered." See also *Wells* v. *Fletcher,* 17 Ark. 581.

Besides, this is a collateral attack on the judgment. "The probate court is a court of superior jurisdiction, and within its jurisdictional limits its judgments import absolute verity, the same as other superior courts." *Collins* v. *Paepcke-Leicht Lumber Co., supra.* The rule is that where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction. *Clay* v. *Bilby,* 72 Ark. 101. Therefore, a majority of the judges are of the opinion that the judgment of the probate court was valid, and that the motion for a rehearing should be granted. Their opinion becomes the opinion of the court.

I agree with the propositions of law laid down by the court, but cannot agree with the conclusions reached. I believe that the petition for the sale of the real estate and the judgment of the probate court ordering a sale thereof, while they contain useless and to some extent ambiguous recitations of matters concerning the administration, and while they contain some apparent contradictions, may be fairly held to show that the dower in the surplus arising from the foreclosure under the White mortgage was used by the administrator to pay the expenses of administration and not debts of the decedent. In which event the court had no jurisdiction to order a sale of the real estate of the decedent, and such judgment is void.

2. It is contended by counsel for appellant that the land embraced no part of the land attempted to be sold, but they have not sustained their contentions in this behalf. The property was divided into two parts for the purpose of sale, and the description of the two parts is accurate; and, when combined, they make up the whole of the property ordered sold.

The motion for a rehearing is therefore granted, and the decree of the chancellor is affirmed.

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

Opinion delivered December 13, 1909.

DAMAGES—EXCESSIVENESS.—Where there was evidence tending to prove that plaintiff's deceased in his lifetime was contributing $600 per annum to his father as his next of kin, and the father's expectancy of life was 13.47 years, a verdict for $5,000 was not excessive.

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

Kinsworthy & Rhoton, Horton & South, G. D. Henderson and *James H. Stevenson,* for appellant.

Crump, Mitchell & Trimble, Jones & Seawel and *Hamlin & Seawel,* for appellee.

The amount awarded appellee is supported by substantial evidence, and is not excessive. The uncontradicted evidence shows that deceased contributed from $50 to $60 per month—$600 to $720 per annum. A finding by the jury, the judges of the weight and sufficiency of the testimony, on any disputed fact should not be disturbed. If he contributed $50 per month, a verdict for $5,124.60 would not have been excessive. 55 Ark. 384; 73 Ark. 377; 76 Ark. 326; 23 Ark. 131; 46 Ark. 141; 51 Ark. 467; 70 Ark. 512; 76 Ark. 478; *Id.* 233; 77 Ark. 1; 79 Ark. 179.

BATTLE, J. On the 8th day of December, 1907, O. L. King was in the employment of the St. Louis, Iron Mountain & Southern Railway Company, and was serving as fireman on one of its freight trains, and while serving in such capacity was killed. He had been working for that company in that capacity for about five or six months, and previous to this employment was a fireman on a railroad at Miami, Louisiana. He was an unmarried man at the time of his death. His mother was dead, and his father was living. W. F. Gordon administered upon his estate, and brought an action against St. Louis, Iron Mountain & Southern Railway Company to recover the sum of $25,000 damages suffered by his father, James N. King, and his sister, Ethel King, his next of kin, on account of his death, and re-

covered $5,000 damages for the father. The only question in the case presented for our consideration is, are these damages excessive?

Is there any evidence to sustain the verdict? Three witnesses, Will King, the brother, J. M. King, the father and Ethel King, the sister of the deceased, testified that from the time he went to work in Louisiana as a fireman on a railroad train up to the time of his death he contributed from $50 to $60 per month to the support of his father.

The defendant attacked their testimony, and endeavored to show that the contributions of the deceased to his father's support were much less. But the value of their testimony was for the jury to determine.

The deceased was a young man and in the line of promotion, with prospect of increased wages. His father's expectancy of life was 13.47 years. At his father's age an annuity of $5,124.60, according to tables showing value of annuities, would yield at six per cent per annum $600 annually, the amount contributed to his support annually at $50 per month. He recovered $5,000. The damages were not excessive.

Judgment affirmed.

CONDITT v. HOLDEN.

Opinion delivered December 13, 1909.

1. LIMITATION OF ACTIONS—FRAUDULENT CONCEALMENT.—Where there has been a fraudulent concealment of a cause of action, the statute of limitations does not begin to run until the discovery of the fraud. (Page 621.)
2. SAME—FRAUDULENT CONCEALMENT OF ESTRAY.—In a suit to recover an animal alleged to be held as an estray evidence that defendant took up the animal without any *bona fide* claim of title, and kept it for more than three years without complying with the statute with reference to estrays, and that plaintiff brought replevin soon after he discovered where the animal was, would justify a finding that defendant fraudulently concealed the cause of action from plaintiff. (Page 621).

Appeal from Jackson Circuit Court: *Charles Coffin,* Judge; reversed.

Manning & Emerson, for appellant.

Appellees, having failed to comply with the law with reference to the taking up of estrays, are not entitled to relief under the statute of limitations, and will not be heard to say that the statute began to run in 1904. Kirby's Dig., § § 7833 to 7856, inclusive. The bar of the statute is postponed or avoided by fraud in the defendant committed under such circumstances as to conceal from the plaintiff all knowledge of the fraud, and thus prevent him from asserting his rights. 68 Ark. 455; 25 Cyc. 1173. The statute runs only from the time the fraud is discovered. 61 Ark. 527; 139 Ind. 545; 91 S. W. 866; 90 S. W. 884; 112 N. W. 184; 89 Pac. 317; 85 S. W. 761; 2 App. D. C. 387; 9 L. R. A. 764; 31 Me. 448; 82 N. E. 505.

Joseph W. Phillips and *Gustave Jones,* for appellees.

The mule was never concealed nor hidden, but was taken possession of by appellees at a public gathering, under the belief and claim that it was their property, and was held as such, openly and notoriously, continuously thereafter. There is no evidence of fraud. By inquiry appellant could have learned at any time that appellees had taken up and claimed the mule as their own. "The statute begins to run with the possession." 44 Ark. 30. See also 10 Ark. 238.

McCULLOCH, C. J. This is an action to recover possession of a mule. In the trial below plaintiff introduced testimony tending to show that he was the owner of the property in controversy, and that defendants' possession was wrongful. Defendants introduced no testimony, but the court instructed the jury peremptorily to return a verdict in favor of defendants on the ground that they had been in possession of the mule for more than three years, and that plaintiff's right of action was barred. The testimony introduced by plaintiff was sufficient to establish the following state of facts:

Plaintiff, who is a farmer living at Tuckerman, in Jackson County, Arkansas, owned the mule in controversy. In the fall of 1903, when the mule was less than two years old, it was on the range near what is known as the Hale Place, in Jackson County, with other mules owned by plaintiff. The Hale Place is about three miles distant from the defendants' farm. He

lost trace of the mule, and did not see it again until he found it in possession of defendants in June or July, 1908. He identified the mule by its color and size, and by the brand "RC" on its left shoulder, which he had put there when the mule was a colt. Defendants claimed to have purchased the mule from a man named O'Neal, but there is testimony tending to show that this is untrue, and that, when confronted with the fact that the mule bought from O'Neal had died, they claimed that they got this one from a man named Yelvington. The defendants refused to give up the mule, and this action was commenced on July 22, 1908.

Dave Conley testified that in March, 1904, a mule of the same description as the one in controversy followed his mare out of a deadening near the Hale Place, and followed the mare when he rode her over to a log rolling on defendants' farm; that when he hitched the mare at the log rolling the mule grazed nearby. He said that one of the defendants "sorter quizzed" him about the mule, asked who owned it, where it came from, whether or not it was branded, etc., and finally caught the mule and carried it off. Other witnesses identified the mule as the one which followed Dave Conley's mare to the log rolling, and all testified that the mule was branded "RC" at that time. Plaintiff testified that between the time he first found the mule in the possession of defendants and the trial the brand on the mule had been tampered with in an attempt to change it.

The evidence adduced at the trial, which, for the purpose of testing its sufficiency to support a verdict, we must accept as true, shows that the mule in controversy was and is the property of plaintiff; that it became an estray in the year 1904, and was taken up by defendants and converted to their own use without posting the animal in the manner prescribed by statute. They laid claim to the animal as their own when they took it up, but the evidence shows that this claim was entirely unfounded, and that it was not made in good faith. The statutes of this State provide that a person taking up an animal which is an estray shall immediately post it, examine the records for corresponding marks or brands, report it to a justice of the peace, cause it to be appraised, and exhibit it in the stray pen of the county between the hours of eleven o'clock A. M. and three

o'clock P. M. on the first day of the next succeeding term of the circuit court. The statute also provides that "if any person shall fail to advertise any estray according to law, he shall be deemed guilty of a misdemeanor," etc. Kirby's Digest, § 7867.

The defendants did not attempt to comply with the statute, but on the contrary they wrongfully and unlawfully claimed the mule as their own, and kept it on and about their farm for over four years, until the true owner claimed it. This conduct not only rendered them guilty of a criminal offense, but it was a fraud on the plaintiff's rights which amounted to a fraudulent concealment from plaintiff of his right of action against them for the recovery of his property. Under these circumstances they cannot invoke the benefit of the statute of limitation, which began to run against plaintiff only from the time of his discovery of the fraud.

A section of our statute of limitations provides that "if any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented." (Kirby's Dig., § 5088.) This court has held that the statute just quoted applies to one who has fraudulently concealed the existence of a cause of action against him. *McKneely* v. *Terry,* 61 Ark. 527. Similar statutes have been so construed by other courts. *Traer* v. *Clews,* 115 U. S. 528; *Eising* v. *Andrews,* 66 Conn. 58. But, apart from that statute, and without it, it is generally held that where there has been a fraudulent concealment of a cause of action, the statute of limitations does not begin to run until the discovery of the fraud. *McKneely* v. *Terry, supra;* 25 Cyc. 1173; *Dorsey Mach. Co.* v. *McCaffrey,* 139 Ind. 545; *Carrier* v. *Chicago, R. I. & P. Ry. Co.,* 79 Ia. 80; *Faust* v. *Hosford,* 119 Ia. 97; *Wear* v. *Skinner,* 46 Md. 257.

The question of ownership, as well as the question of fraudulent concealment from plaintiff of his right of action, should have been submitted to the jury. There was sufficient evidence to sustain a verdict in favor of plaintiff on both issues. The evidence established his title to the mule beyond question, and all the circumstances proved, when considered together, tended

to establish the fraudulent concealment of the right of action.

Reversed and remanded for new trial.

BLOOMER v. CONE.

Opinion delivered November 22, 1909.

1. APPEAL—PRESUMPTION IN ABSENCE OF EVIDENCE.—Where a record in chancery shows that the case was determined upon oral as well as written testimony, the presumption, where that oral testimony is not preserved, is that the finding of the chancellor is supported by the evidence. (Page 623.)
2. SAME—SUFFICIENCY OF ABSTRACT.—Under Rule 9 requiring the appellant to set forth in his abstract the facts and documents upon which he relies, he should set forth a succinct statement of the facts themselves, rather than his opinion of what the facts show. (Page 624.)
3. SAME—PRESUMPTION IN FAVOR OF DECREE.—Where the decree appealed from recites that the cause was heard upon evidence which is not brought up in the transcript, it will be presumed on appeal that the chancellor's decree was warranted by the evidence. (Page 625.)

Appeal from Chicot Chancery Court; *Zachariah T. Wood,* Chancellor; affirmed.

James C. Norman, for appellants.

Robert E. Craig, for appellees; *E. A. Bolton* and *William Kirten,* of counsel.

The decree should be affirmed for failure of appellant to preserve and abstract the oral testimony heard at the trial, and has omitted from his abstract more than half of the depositions read on the part of the plaintiff. 63 Ark. 513; 72 Ark. 22; 79 Ark. 86; *Id.* 185; *Id.* 263; 80 Ark. 20; *Id.* 259; 80 Ark. 579; 86 Ark. 369; 88 Ark. 449.

HART, J. This action was brought in the Chicot Chancery Court by the plaintiffs, Cone & Company, against the defendants, N. K. and Julia Bloomer, to foreclose a mortgage executed by the latter in favor of the former on certain lands in said Chicot County. This is the second appeal in this case. The former was an appeal from a *nunc pro tunc* decree of a special chancellor.

The decree was reversed and the cause remanded because the chancellor abused his discretion in refusing a continuance for the purpose of allowing plaintiff to procure testimony on the question of whether the decree had ever been granted. The case is reported in 85 Ark. 334 (*Cone* v. *Bloomer.*)

On remanding the cause, the chancellor, on November 6, 1908, after hearing the evidence, found that no final decree had been rendered in the cause, and overruled the motion for a *nunc pro tunc* decree. On motion of the defendants the cause was continued until January 6, 1909. On January 9, 1909, the chancellor found in favor of plaintiffs for $1,798.50, the full amount of their debt, and a decree of foreclosure was entered. The defendants have appealed.

It is insisted by counsel for plaintiffs that the decree must be affirmed because the transcript does not contain all the evidence upon which the cause was heard, and because counsel for defendants, in preparing their abstract of facts, have not complied with Rule 9 of the court.

The decree of the court of November 6, 1908, upon the motion of defendants for a *nunc pro tunc* decree, recites that the issues were submitted and determined on oral testimony and upon depositions. The oral testimony is not, by bill of exceptions or otherwise, brought in the record. "Where a record in chancery shows that the case was determined by the chancellor upon oral as well as written testimony, the presumption, where that oral testimony is not preserved, is that the finding of the chancellor is supported by the testimony." *Jones* v. *Mitchell,* 83 Ark. 77, and cases cited. Again in the case of *Beecher* v. *Beecher,* 83 Ark. 424, it was held: "Where a chancery cause was heard upon written and oral evidence, and the latter is not brought up on appeal, it will be presumed that the oral testimony justified the decree." See also *Meeks* v. *State,* 80 Ark. 579.

The mortgage sought to be foreclosed is made an exhibit to the complaint. It contains the following: "The sale is on condition that whereas the said N. K. Bloomer is indebted unto the said Cone & Company in the sum of one thousand dollars, evidenced by note of even date—also an account on Cone & Company's books—said note being due 30 days from date and said account being due January 1, 1905."

The mortgage bears date of December 5, 1904.

The complaint alleges that N. K. Bloomer has made divers payments on the said account, which have been duly credited thereon, and that there remains due and unpaid the sum of $1,798.50 upon said note and account. The note and account are referred to as exhibits to the complaint. The final decree recites that the cause "is submitted to the court upon the substituted complaint and exhibits and substituted answer, and the depositions heretofore taken and filed in this case, towit: the depositions of W. T. Cone and George A. Franklin, and the original books of account and the accounts filed and properly verified and the notes executed and upon the depositions of N. K. and Julia Bloomer, Lafayette Allums, J. C. Norman and J. W. Brady."

The court found that the defendant, N. K. Bloomer, was indebted to plaintiffs, W. T. Cone, J. H. Cone and G. A. Franklin, doing business as Cone & Company, in the sum of $1,798.50, and that the same was due on the 1st day of January, 1905, and a decree of foreclosure against the lands embraced in the mortgage was entered.

Counsel for appellant has not abstracted the testimony. He does set out his conclusions of the effect of the testimony, but this is not a compliance with rule 9 of the court.

In the case of *Siloam Springs* v. *Broyles*, 87 Ark. 202, in which numerous cases of the court applying the rule are cited, the court said: "It is the counsel's duty in the abstract of facts to show that the court was in error by a succinct statement of the facts themselves, rather than by his opinion of what the facts show." It is urged by counsel for plaintiffs that the abstract of defendants is fatally defective in this respect, and we think his objection well taken. For an illustration of the application of the rule, see *Jett* v. *Crittenden*, 89 Ark. 349.

But it is insisted by counsel for defendant that the account of the plaintiffs, duly verified, shows that the decree was erroneous. It is true that what purports to be this account is set out in defendants' abstract, but it nowhere appears in the transcript, and hence can not be considered on appeal. The decree recites that the cause was heard upon the "original books of account and the accounts filed and properly verified," neither of which is brought in the transcript.

"Where the decree appealed from recites that the cause was heard upon evidence which is not brought up in the transcript, it will be presumed on appeal that the chancellor's decree was warranted by the evidence." *Brown* v. *Nelms,* 86 Ark. 369, and cases cited *supra* on this question.

We find no error in the record, and the decree will be affirmed.

CARROLL *v.* CARROLL.

Opinion delivered October 11, 1909.

1. LIMITATION OF ACTIONS—MONEY HAD AND RECEIVED.—Where a mother died, leaving a homestead, a husband and minor children, a suit by the children to hold the surviving husband liable for rents of the homestead during their minority is barred unless brought by them within three years after reaching their majority. (Page 627).
2. INFANCY—ESTOPPEL.—Where a minor, who was one of the plaintiffs in a suit, petitioned that the suit be dismissed as to him, and his petition was not withdrawn after reaching his majority, but remained in the record for nearly two years thereafter and until final decree was rendered, he will be held to have abandoned the suit and cannot complain of the decree dismissing it. (Page 627).

Appeal from Logan Chancery Court; *J. Virgil Bourland,* Chancellor; affirmed.

Robert J. White, for appellants.

Anthony Hall, for appellee.

HART, J. On December 20, 1905, Jerry Carroll, instituted an action in unlawful detainer against his son, J. D. Carroll, in the Logan Circuit Court for the Northern District to recover possession of certain lots in the town of Paris, Logan County, Arkansas.

On the 23d day of December, 1905, J. D. Carroll, Walter L. Carroll, a minor, by his next friend, J. D. Carroll, and May Davis, born Carroll, instituted an action in equity against Jerry Carroll, their father, and Sue Misner, born Carroll, in Logan Chancery Court for the Northern District. The complaint alleges in substance that the plaintiffs and the defendant, Sue Misner, are the children and heirs at law of Mrs. Mollie Car-

roll, who died intestate in Logan County, Arkansas, on the 8th day of July, 1887. That at the date of her death Mrs. Mollie Carroll was the wife of the defendant Jerry Carroll, and was the owner of certain lots in the town of Paris, Logan County, Arkansas, which comprised her homestead. That she had about $1,600 in cash and a mortgage on certain real estate situated in said Logan County executed in her favor by Charles Wood for several hundred dollars. That the defendant Jerry Carroll took possession of this personal property and also of the homestead. They ask that the defendant Jerry Carroll be required to account to them for the money that came into his hands at the death of their mother; to account for the Wood mortgage and for the rents of the homestead. They state that Sue Misner is made a party defendant in order that her rights may be preserved.

On January 4, 1906, J. D. Carroll filed his answer to the unlawful detainer suit, denying the rental contract and claiming title in himself and the other heirs. He also filed a separate answer and petition as next friend of Walter Carroll, asking that he be made a party defendant, setting up substantially the same allegations as those in his complaint in the chancery suit, and in addition that said J. D. Carroll was holding possession of the homestead under petitioner Walter Carroll, and not under said Jerry Carroll.

By consent the unlawful detainer suit was transferred to equity and consolidated with the chancery suit.

At the February term, 1906, of the chancery court, Jerry Carroll filed his answer, in which he denied all the allegations of the complaint, except that he admitted that the title to the homestead was in his wife at the date of her death, but averred that his right to curtesy therein was paramount to the homestead interest of his children. He pleaded the three-year statute of limitations against the plaintiffs, J. D. Carroll and May Davis.

Sue Misner filed an answer disclaiming any interest, and asked that it be dismissed as to her.

At the February term, 1906, of said chancery court, Walter Carroll filed a petition, in which he stated that he signed an instrument authorizing the suit against his father, Jerry Carroll, without understanding its purport, and stated that he did not

the statute of limitations against them, and his plea must be sustained.

Of course, it is well settled in this State that the statute of limitations does not affect the rights of the *cestuis que trust,* so long as the trust relation continues, but in this case the father was not their trustee in collecting rents from the homestead, and the statute of limitations began to run when they reached the age of 21 years, and barred so much of their cause of action as asked for an accounting of the rents collected from the homestead. Walter Carroll was born November 1, 1885, and the decree in this case was entered on September 30, 1908, at which time he only lacked two months of being 23 years of age.

He had during the period of his minority filed his petition. asking that the suit against his father be dismissed. This petition was not withdrawn after he became of age, but remained as a part of the record for nearly 2 years thereafter, and until the final decree was rendered. After filing his petition to dismiss the action, he took no further part in the prosecution of the suit. After reaching the age of 21, he had the legal right to have his cause of action dismissed. He exercised that right by abandoning the prosecution of it, and is now in no attitude to complain of the decree of the court.

Appellants adduced evidence tending to show that, while Jerry Carroll and Mollie Carroll lived in Texas, she had inherited some money. That afterwards they removed to Arkansas, and that her money was used in conducting a business at Paris, Arkansas, where they resided from 1880 to the date of her death in 1887. That the money and mortgage in controversy was the proceeds of that business.

The appellant J. D. Carroll testified substantially that these facts were admitted to him by his father immediately after his mother's death, and that his father told him that the money would be invested for the benefit of his children, who were then minors. On account of his confidence in his father, he states that no attempt was made to collect from him this money until the year 1904.

Jerry Carroll testified in his own behalf. He admitted that his deceased wife received $500 from her brother and guardian while they lived in Texas, but says that, on account of misfortune overtaking them, they spent this for medical bills and other

intend to authorize the bringing of suit in his name. His petition further states that he has no knowledge of his own as to what property his mother owned at her death, but does not believe that his mother was the owner of the money and mortgage which was the foundation of the chancery action. He states that he believes that his father's claim of ownership thereof is true, and asks that the suit be dismissed, in so far as he is concerned.

The case was heard before the chancellor upon the pleadings and depositions filed in the cause. The chancellor found that the town lots which comprised the homestead, though purchased by Jerry Carroll with his own means, were intended as a gift to his wife, Mollie Carroll, and that the legal title to the same was vested in her by deed from the grantor; and that the legal effect of which was to devolve by descent the reversionary interest in the said children, dependent upon and postponed by the estate by curtesy of her husband, the defendant Jerry Carroll. The chancellor further found that Mollie Carroll, deceased, was not the owner of the money or mortgage debt, which is a part of the subject-matter of this litigation. That J. D. Carroll occupied the homestead under a rental contract from the defendant, Jerry Carroll, and there was due and unpaid thereon the sum of $240. A decree was therefore entered in favor of the defendant, Jerry Carroll; and the case is here on appeal.

It is insisted that the homestead of the mother descended to the minor children under the Constitution of 1874 for the reason that the acquisition of the land and the death of the mother occurred after the Constitution of 1874 was adopted, and that their father's right to curtesy must yield to their superior right of homestead. Conceding this to be true, it does not help them. The appellants, J. D. Carroll and May Davis, were born respectively on November 19, 1874, and May 25, 1879. They commenced this suit on the 23d day of December, 1905, and at that time were aged respectively 31 and 26 years. Hence they do not contend that they were entitled to the possession of the homestead, but do insist that their father should account to them for the rents thereof during the period of their minority after the death of their mother. But their father has pleaded

family expenses; that soon after they came to Arkansas the last of it was spent; that in June, 1871, he went to work for a railroad company as lineman, and by the time they moved to Paris in 1880 he had accumulated between $1,200 and $1,300 as a result of the savings from his labor; that he purchased the homestead for $500, and had the title taken in the name of his wife for the protection of herself and their children; that he went into business with the remainder; that the business prospered, and the money and mortgage in controversy were the proceeds of that business; that he was for the most part a hardworking and careful business man, but would sometimes get on a spree, which would last 2 or 3 days, and on this account made his wife the custodian of his money. For the same reason he said that the Wood mortgage was taken in her name, but there was no intention that it should be her separate property, but it was understood that it was to remain his property; that, when she realized that she was soon to die, his wife returned to him the money and the Wood mortgage.

Other testimony was adduced by both parties to corroborate their respective contentions, but it is not necessary to state it in detail.

The chancellor found the issues in this respect in favor of appellee Jerry Carroll, and a careful consideration of the testimony leads us to believe that his finding was correct. It seems to us that Jerry Carroll made a plain and reasonable statement of how he acquired the property in controversy, and of the struggles made in acquiring it. The only substantial contradiction to it is his admissions to the contrary, as testified to by his son, J. D. Carroll. These admissions are denied by Jerry Carroll, and his denial is corroborated by other circumstances adduced in evidence.

The evidence also shows that in June, 1905, J. D. Carroll rented the homestead from the agent of Jerry Carroll, and agreed to pay as rent therefor the sum of $6 per month. The rent amounted in the aggregate to the sum of $240, for which amount judgment was correctly rendered against J. D. Carroll in favor of Jerry Carroll.

We find no prejudicial error in the record, and the decree is therefore affirmed.

SCROGGIN v. RIDLING.

Opinion delivered October 18, 1909.

TAXATION—TAX SALE—EFFECT OF COLLECTOR'S MISTAKE.—Where the owner of land in good faith attempted to pay the taxes on all of his land, but by the collector's mistake the taxes on a part of it were not paid, the owner will be entitled to redeem the land.

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

Sellers & Sellers, for appellant.

The one issue raised by the pleadings and proof is whether appellee *paid* the taxes and the collector by mistake improperly applied the payment to the wrong tract. On this issue he must fail because of this stipulation: "It is agreed that the defendant, Ridling, paid the amount of money shown by his tax receipt for 1904; that the receipt included twenty acres of land assessed at $30.00 not owned by him, to-wit: S. ½ S. W.¼, N. E.¼ 28-8-16 W., and the land in controversy not included in the receipt was assessed at $100." The receipt shows that taxes were paid upon this $30 valuation, and not upon the $100 valuation. No payment less than the full amount is sufficient. 36 Fed. 874; 35 Ark. 509. An offer to pay, or tender, must be of the entire amount due, or the tax lien will not be discharged. 20 Ark. 277; 52 S. W. 1082. Appellee's description of the land is too vague and indeterminate to bring him within the rule that the taxpayer must "himself appropriate in some manner the money paid to the particular lands he wishes to clear." 35 Ark. 510.

William L. Moose, for appellee.

Appellee's direction to collector was clear, definite, unmistakable. His attempt in good faith to pay the taxes on the land was payment. In the case relied upon by appellant, 35 Ark. 505-9-10, the question was whether the owner's agent intended to pay on the omitted tract, not whether enough money had been paid to cover the taxes; and the court held that there was no sufficient proof of intention to pay. The title was held void for another reason. Black on Tax Titles, § 162; *Id.* 5th Ed., § 717; *Id.* § 725; *Id.* § 820; 2 Cooley on Taxation, 802; 70 Ark. 500.

HART, J. O. O. Scroggin brought suit in ejectment in the Conway Circuit Court against H. L. Ridling to recover possession

of the N. E. ¼ of the N. E. ¼ of Sec. 20, Twp. 8 N., R. 16 West, in Conway County, Arkansas. He relied on a tax title to maintain his action. Ridling filed his answer and motion to transfer the cause to the chancery court, in which he set up that he had attempted to pay the taxes in apt time, but that through the mistake or fault of the collector of taxes the land was not properly described in the tax receipt given him, and that he did not discover the mistake until the present suit was brought. Ridling asked that he be allowed to redeem the land, and that a decree be entered cancelling Scroggin's tax deed as a cloud upon his title. By consent the cause was transferred to the chancery court, and the chancellor found the issue in favor of Ridling, allowing him to redeem upon payment of five dollars, the taxes, penalty and costs for which the land was sold.

Thereupon Ridling offered to pay to Scroggin said sum of five dollars, which was refused in open court, and a decree was entered cancelling Scroggin's tax deed as a cloud upon Ridling's title. Scroggin has appealed to this court.

The sole question raised by the appeal is as to the validity of the tax title of Scroggin. It is conceded that a *bona fide* attempt to pay all the taxes, frustrated by the mistake or fault of the collector, is equivalent to actual payment, and this was the rule announced in the case of *Gunn* v. *Thompson*, 70 Ark. 500.

We think the facts of this case bring it within the rule. Ridling received a deed for the land in 1902, and in 1903 he got some one to go to the collector's office to pay the taxes for him. In 1904 he went himself to the collector to pay the taxes, but did not have the deeds with him. He wished to pay taxes on 180 acres of land, and gave the description of it to Albert Stover, deputy collector in the sheriff's office. Ridling testified as follows: "I told him beginning at the northeast corner of the section with the Fonville land, the Fonville forty at the northeast corner. Then I told him going three-fourths of a mile south, the next forty the house was on, and the forty still south of that, and then beginning at the section line and running east and west north of these three forties and running one-quarter and one-half quarter south."

The Fonville forty is the one in controversy. Ridling further stated that he could not tell from examining the tax receipt

whether or not it correctly described the land, and that he did not even have sufficient education to discover the mistake by comparing the tax receipt with his deed. He supposed his tax receipt was correct, and paid taxes on the land during the ten subsequent years until this suit was brought, not knowing that it had been sold for taxes. The suit was commenced September 21, 1908.

The collector made a plat of the 180 acres from the description given him by Ridling. All the land described except the 40 acres in controversy was correctly written in the tax receipt. Ridling's decription began with the 40 acres in controversy, and the other lands were decribed with reference to it. No mistake having been made with reference to them shows that the mistake was made through the fault of the collector. Ridling correctly described the land to the collector, and in good faith paid him the amount of taxes claimed to be due.

We think the facts uphold the finding of the chancellor, and it is ordered that the decree be affirmed.

APPENDIX

CASES DISPOSED OF ON MOTION.

Kissire Brothers *v.* Queen of Arkansas Insurance Company; Conway Chancery Court; Jeremiah G. Wallace, Chancellor; appeal dismissed, October 25, 1909, for noncompliance with rule nine; *per curiam.*

Devey Hensley *v.* State; Van Buren Circuit Court; Brice B. Hudgins, Judge; appeal dismised for noncompliance with rule nine, November 1, 1909; *per curiam.*

People's Laundry Company *v.* Watkins Laundry Company; Garland Chancery Court; Alphonzo Curl, Chancellor; appeal dismissed for noncompliance with rule nine, November 1, 1909; *per curiam.*

T. N. Sloat *v.* William McLaughlin; Sebastian Circuit Court, Fort Smith Division; Daniel Hon, Judge; affirmed on motion for noncompliance with rule nine, November 8, 1909; *per curiam.*

J. A. Mickelberry *v.* M. J. Mickelberry; Poinsett Chancery Court; Edward D. Robertson, Chancellor; appeal dismissed on appellant's motion, November 8, 1909; *per curiam.*

Arkansas Midland Railroad Company *v.* A. T. Lynch; Monroe Circuit Court; Eugene Lankford, Judge; affirmed on motion for noncompliance with rule nine, November 8, 1909; *per curiam.*

Arkansas & Louisiana Railway Company *v.* J. W. Gammill; Howard Circuit Court; James S. Steel, Judge; affirmed, with penalty, as a delay case, November 15, 1909; *per curiam.*

Mena Lumber Company *v.* Hall & Brown Wood Working Machine Company; Polk Chancery Court; James D. Shaver, Chancellor; appeal dismissed by consent, November 15, 1909; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* May Taylor, Administratrix; Franklin Circuit Court, Ozark District; Jeptha H. Evans, Judge; settled and appeal dismissed, November 15, 1909; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* J. D. Campbell; Desha Circuit Court; Antonio B. Grace, Judge; appeal dismissed for noncompliance with rule nine, December 6, 1909; *per curiam.*

Mary A. Gibbons *et al. v.* John W. Nelson *et al.*; Phillips Circuit Court; Hance N. Hutton, Judge; appeal dismissed on appellant's motion, December 13, 1909; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Z. A. Clark *et al.;* Clark Chancery Court; James D. Shaver, Chancellor; decree rendered in accordance with stipulations filed, December 13, 1909; *per curiam.*

INDEX

ACTIONS:

error in transferring law case to equity waived when. *Blake* v. *Scott,* 46.
action brought prematurely should be abated. *Jones* v. *Dyer,* 460.

ADVERSE POSSESSION:

actual possession of part of tract is constructive possession of remainder when. *Johnson* v. *Elder,* 30.
effect of possession under tax deed for two years. *Id.*
agreement to attorn insufficient to give constructive possession. *Id.*
or to render landlord's possession adverse. *Id.*
enclosing land with three-wire fence is sufficient to put owner on notice. *McComb* v. *Saxe,* 321.
when continuity of possession not broken. *Id.*

ADMINISTRATION:

conclusiveness of confirmation of administrator's settlement. *Beckett* v. *Whittington,* 230.
effect of confirming final settlement. *Id.*
when such settlement reopened in equity. *Id.*
probate court can not reopen final settlement by appointing administrator in succession. *Id.*
order of sale of land not amendable at subsequent term when. *Bouldin* v. *Jennings,* 299.
order for sale of land for expenses of administration void when. *Flowers* v. *Reece,* 611.
administrator paying debts subrogated to creditor's rights when. *Id.*
conclusiveness of probate judgment. *Id.*

AGENCY:

authority of agent not proved by his declarations. *Latham* v. *First Nat. Bank of Ft. Smith,* 315.
duty to ascertain agent's powers. *Id.*
liability of agent acting without authority. *Lasater* v. *Crutchfield,* 535.

ANIMALS:

penalty of special stock law of May 23, 1901, is exclusive. *Rowe* v. *State,* 155.
effect of agreement that service fee of stallion shall be due when mare is "traded." *Snyder* v. *Slatton,* 530.
priority of lien for stallion's service. *Id.*

APPEAL AND ERROR: SEE INSTRUCTIONS.

conclusiveness of chancellor's finding. *Johnson* v. *Elder*, 30; *Lasater* v. *Crutchfield*, 535.
conclusiveness of court's findings of fact. *France* v. *Shockey*, 41.
presumption where abstract does not contain all of testimony. *Id.*
act of 1909 regulating time of appealing held prospective. *State* v. *St. Louis & S. F. Rd. Co.*, 74.
court will not determine moot question. *Mabry* v. *Kettering*, 81.
order reviving case against executor of deceased defendant not appealable. *Blum* v. *Pulaski County*, 101.
conclusiveness of jury's verdict. *Ferguson* v. *State*, 120.
presumption from incompleteness of appellant's abstract. *Smith* v. *Scott*, 143.
sufficient if bill of exceptions shows inferentially that all evidence is brought up. *Walker* v. *Noll*, 148.
pleadings treated on appeal as amended to conform to oral admissions. *Caruthers* v. *Greer*, 167.
error held to be harmless when. *Id.*
order directing accounting of rents and profits not final. *McDonald* v. *Rankin*, 173.
practice upon reversal of case involving title to land. *Id.*
presumption where abstract fails to set out evidence. *Davis* v. *Spann*, 213.
appeal dismissed in case growing out of senatorial election contest where the senate has decided the contest. *Young* v. *Boles*, 242.
costs of appeal unnecessarily taken adjudged against appellant. *Id.*
presumption where court's instructions were not abstracted. *McAbee* v. *Wiley*, 245.
general assignment in motion for new trial held insufficient. *W. T. Adams Machine Company* v. *Castleberry*, 310.
appeal in chancery cause determined on competent evidence. *Latham* v. *First Nat. Bank*, 315.
former opinion as law of case. *St. Louis, I. M. & S. Ry. Co.* v. *Reed*, 350.
conclusiveness of master's report. *Carr* v. *Fair*, 359.
when chancellor's finding set aside. *Id.*
when abstract instruction as to damages harmless. *St. Louis, I. M. & S. Ry. Co.* v. *Oliver*, 432.
effect of plaintiff appealing from erroneous judgment in action prematurely brought. *Jones* v. *Dyer*, 460.
appellant complaining of exclusion of evidence should show what it was. *Russell* v. *Brooks*, 509.
error of allowing excessive damages cured by remittitur. *St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 534.
conclusiveness of chancellor's findings. *Lonoke* v. *Chicago, R. I. & P. Ry. Co.*, 546.

APPEAL AND ERROR—*Continued.*

former opinion as law of case. *St. Louis, I. M. & S. Ry. Co.* v. *York,* 554.
necessity of objection to introduction of evidence. *Missouri & N. A. Rd. Co.* v. *Bratton,* 563.
conclusiveness of jury's finding. *Wiley* v. *State,* 586.
error in excluding evidence waived by omission from motion for new trial. *King* v. *Black,* 598.
erroneous instruction given must appear in bill of exceptions. *Id.*
decree referring case to master not final or appealable when. *Sennett* v. *Walker,* 607.
presumption where evidence heard by chancellor was not brought up. *Bloomer* v. *Cone,* 622.
appellant should set forth statement of facts, not his opinion of what facts prove. *Id.*

ASSAULTS: SEE HOMICIDE.

ATTORNEY AND CLIENT:

attorney's indorsement on judgment of claim of fee not expunged when. *Osborne* v. *Waters,* 388.
interest in judgment acquired by attorney. *Id.*

BAILMENT:

vendee of chattel with reservation of title not a bailee. *Settles* v. *State,* 202.
bailee defined. *Id.*

BANKS AND BANKING:

directors liable for breach of statutory duties. *Bailey* v. *O'Neal,* 327.
when directors liable for negligence of officers of bank. *Id.*
liability of directors for cashier's reckless course of dealing. *Id.*

BASTARDY:

sufficiency of mother's uncorroborated testimony. *Qualls* v. *State,* 200.
period of gestation question for jury. *Id.*

BILLS AND NOTES:

maker of note not affected with notice of fraud in consideration when. *Beebe Stave Co.* v. *Austin,* 248.
one who signed note as maker may be shown by parol to be surety. *Vandeventer* v. *Davis,* 604.
burden on him to prove such fact. *Id.*

CARRIERS:

evidence held to establish negligence on carrier's part. *Prescott & N. W. Ry. Co.* v. *Morris*, 365.
and to support finding that injured passenger was not negligent. *Id.*
duty as to maintaining vestibuled trains. *St. Louis, I. M. & S. Ry. Co.* v. *Oliver*, 432.
degree of care required in regard thereto. *Id.*
duty to keep trap doors closed. *Id.*
right of passenger to pass between cars. *Id.*
liability of initial carrier of cattle for negligence of connecting carrier. *Chicago, R. I. & P. Ry. Co.* v. *Miles*, 573.
sufficiency of notice of special damages to be caused by delay in shipment. *Id.*
measure of damages caused by delay. *Id.*
proximate cause of delay. *Id.*
statute fixing maximum charge for carriage of passengers not repealed by act creating railroad commission. *Chicago, R. I. & P. Ry. Co.* v. *McElroy*, 600.

CIRCUIT COURTS:

have jurisdiction of suit to enforce lien on land involving less than $100. *Naylor* v. *McNair*, 345.

CLOUDS ON TITLES:

plaintiff must recover upon strength of his title. *Johnson* v. *Elder*, 30.
when suit for removal of cloud barred by laches. *Chancellor* v. *Banks*, 497.

CONSTITUTIONAL LAW:

Constitution permits special legislation when. *Missouri & N. A. Rd. Co.* v. *State*, 1.
act unconstitutional in part enforced as to residue when. *Parkview Land Co.* v. *Road Improvement Dist. No.* 1, 93.

CONTINUANCES:

continuance asked for absent witness properly refused when. *McCrae* v. *State*, 28.

CONTRACTS:

contract for making railroad ties held to contemplate delivery within reasonable time. *Smith* v. *Weatherford*, 6.
may be implied from acts and from words used. *Blake* v. *Scott*, 46.
when presumed. *Id.*
new contract held to abrogate old when. *Ozark & Cherokee Central Ry. Co.* v. *Ferguson*, 254.

CORPORATIONS:

liability of directors of insolvent corporation. *Bailey* v. *O'Neal*, 327.
liability of president and directors for filing false certificate. *O'Neil* v. *Eagle Generator Co.*, 416.
such officers liable jointly and severally. *Id.*
stock subscription not contradicted by parol evidence. *Collins* v. *Southern Brick Co.*, 504.

COUNTERCLAIM AND SETOFF:

right of defendant to setoff unliquidated damages in equity against nonresident plaintiff. *Ewing-Merkel Electric Co.* v. *Lewisville Light & Water Co.*, 594.

COURTS: SEE MUNICIPAL CORPORATIONS.

necessity of affidavit on appeal from probate court. *Walker* v. *Noll*, 148.
sufficiency of paper purporting to be affidavit. *Id.*

COVENANTS FOR TITLE:

effect of covenant against incumbrances. *Naylor* v. *McNair*, 345.

CRIMINAL LAW: RAPE; LARCENY; HOMICIDE.

affidavit for appeal unnecessary in appeals from justice of peace. *Potts* v. *State*, 165.
indictment not defective for failure to allege date of offense. *Grayson* v. *State*, 413.
when former conviction no defense. *Id.*
burden of proof of former conviction on defendant. *Id.*
proof of other crimes admitted when. *Ross* v. *State*, 481.
not error to refuse to charge finding of indictment raises no presumption of guilt. *Ross* v. *State*, 481.

DAMAGES: SEE SALES OF CHATTELS.

damages awarded for personal injuries held not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *Reed*, 350.
measure of damages of nuisance to residence. *Junction City Lbr. Co.* v. *Sharp*, 538.
award for personal injuries held not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *Gordon*, 617.

DEEDS:

effect in equity of conveyance to partnership. *Spaulding Mfg. Co.* v. *Godbold*, 63.
grantee entitled to receive subsequent rents. *Latham* v. *First Nat. Bank of Fort Smith*, 315.
condition that if grantee fails to pay purchase money he shall be liable as for rent held repugnant and void. *Levy* v. *McDonnell*, 324.

DEFINITION:

bailee. *Settles* v. *State*, 202.
interpleader. *Chicago, R. I. & P. Ry. Co.* v. *Moore*, 446.
bill in nature of interpleader. *Id.*
public nuisance. *Lonoke* v. *Chicago, R. I. & P. Ry. Co.*, 551.

DEPOSITIONS:

party may not read deposition taken by adversary when. *Maryland Casualty Co.* v. *Chew*, 276.

DOWER:

how allotted where land can not be divided. *Johnson* v. *Johnson*, 292.

DURESS:

attornment to avoid lawsuit held no duress. *Johnson* v. *Elder*, 30.

EJECTMENT:

plaintiff must recover on strength of his own title. *Maney* v. *Burke*, 84.
payment of taxes no evidence of title. *Id.*

ELECTIONS: SEE MUNICIPAL CORPORATIONS.

Kirby's Digest, § 1667, held repealed by act of March 4, 1891. *Campbell* v. *Samples*, 79.

EMBEZZLEMENT:

delivery of chattels under conditional sale held not bailment within statute punishing embezzlement by bailee. *Settles* v. *State*, 202.

EQUITY: SEE LIENS.

jurisdiction to administer complete relief. *McDonald* v. *Shaw*, 15.
he who seeks equity must do equity. *McDonald* v. *Rankin*, 182.
equity regards that as done which ought to be done. *Spaulding Mfg. Co.* v. *Godbold*, 66.
conclusiveness of master's report. *Carr* v. *Fair*, 359.
chancellor's finding set aside if against preponderance of evidence. *Id.*

ESTOPPEL: SEE INFANCY.

EVIDENCE: SEE RAPE; LARCENY.

burden of proof as to matter of defense. *Smith* v. *Weatherford*, 6.
burden on defendant to prove compromise. *Id.*
admissions of one not in privity not evidence. *Murphy* v. *St. Louis, I. M. & S. Ry. Co.*, 159.
interrogatories prepared by appellant's counsel not evidence against him when. *Id.*

EVIDENCE—*Continued.*

general objection to all of testimony of witness properly overruled when. *Nichols* v. *State,* 421.
self-serving declaration inadmissible. *Hamburg Bank* v. *George,* 472,
when proof of other crimes admitted in criminal cases. *Ross* v. *State,* 481.
Stock subscription not contradicted by parol evidence. *Collins* v. *Southern Brick Co.,* 504.
burden of proof to establish a nuisance. *Lonoke* v. *Chicago, R. I. & P. Ry. Co.,* 546.
proving a fact by similar facts. *Central Arkansas & E. Ry Co.* v. *Goelzer,* 569.
sufficiency of qualification of expert. *Id.*
acts of conspirator admissible when. *Wiley* v. *State,* 586.
how conspiracy proved. *Id.*

FALSE IMPRISONMENT:

arrest by virtue of legal writ in due form does not constitute. *Campbell* v. *Hyde,* 128.

FRAUD:

will not be presumed. *Russell* v. *Brooks,* 509.
may be proved by circumstances. *Id.*
personal property procured by fraud may be recovered without tendering consideration received. *Id.*

FRAUDS, STATUTE OF:

agent to sell land may have verbal authority. *Davis* v. *Spann,* 213.
contract for personal services not within statute when. *Arkansas Lbr. & Contractors' Supply Co.* v. *Benson,* 392.
defense waived by failure to plead. *Id.*

FRAUDULENT CONVEYANCES:

inadequacy of price insufficient to indicate fraud. *Beebe Stave Co.* v. *Austin,* 248.

GUARDIAN AND WARD:

conclusiveness of confirmation of guardian's settlement. *France* v. *Shockey,* 41.
compensation may be allowed to guardian in final settlement, though none made previously. *Id.*

HOMESTEADS:

right of minor children not affected by widow's abandonment. *Smith* v. *Scott,* 143.
probate court not authorized to vest homestead in widow and children. *Id.*

HOMESTEADS—*Continued.*

waste for widow and minor heirs to open mines when. *Cherokee Construction Co.* v. *Harris,* 260.
agreement to alienate homestead, made before entry, held illegal. *Hardy* v. *Samuels,* 289.

HOMICIDE:

intent necessary in murder in first degree. *Ferguson* v. *State,* 120.
blow held to be juridical cause of death when. *Gilmore* v. *State,* 205.
what may be considered in determining whether assault was made in self-defense. *Derrick* v. *State,* 237.

HUSBAND AND WIFE:

liability of husband for slander committed by wife. *Jackson* v. *Williams,* 486.
power of married woman to borrow money. *Vandeventer* v. *Davis,* 604.
error to direct verdict in married woman's favor where it was uncertain whether she signed note as principal or as surety. *Id.*

IMPROVEMENT DISTRICTS: SEE ROADS AND HIGHWAYS.

IMPROVEMENTS:

right of purchaser at invalid judicial sale to recover improvements. *McDonald* v. *Rankin,* 173.
payment of value of improvements as condition of recovery. *Id.*

INFANCY: See NEGLIGENCE.

infant estopped by dismissal of suit when. *Carroll* v. *Carroll,* 625.

INJUNCTIONS:

use of photograph of accused not restrained when. *Mabry* v. *Kettering,* 81.
vendor of standing timber not restrained from cutting it at vendor's instance when. *Burnside* v. *Union Sawmill Co.,* 118.

INSANITY:

evidence held insufficient to justify submitting issue as to. *Jackson* v. *Williams,* 486.

INSTRUCTIONS:

ambiguous and misleading instruction properly refused. *Smith* v. *Weatherford,* 6.
request for instruction must be correct in every particular. *Id.*
when abstract instruction not prejudicial. *Id.*
duty to ask correct instructions. *Jackson* v. *State,* 71.

INSTRUCTIONS—*Continued.*

appellant can not complain of general charge when. *Kirchman* v. *Tuffli Bros. Pig Iron & Coke Co.*, 111.
giving of ambiguous instruction harmless when. *Derrick* v. *State*, 237.
giving of erroneous instruction harmless when. *Arkansas Lbr. & Contractors' Supply Co.* v. *Benson*, 392.
should be applicable to evidence. *Id.*
oral charge summing up issues held harmless. *Id.*
not error to refuse instruction already covered. *Ross* v. *State*, 481.
former decision as law of case. *St. Louis, I. M. & S. Ry. Co.* v. *Hill*, 484.

INSURANCE:

officers required to file annual statements. *Welch Stave & Mercantile Co.* v. *Stevenson*, 266.
instruction ignoring evidence tending to prove defense held erroneous. *Maryland Casualty Co.* v. *Chew*, 276.
error for instruction to assume total disability when. *Id.*
one insured by accident policy may not aggravate injury. *Id.*
indemnity policy insuring light company against liability to employees construed. *Maryland Casualty Co.* v. *Little Rock Ry. & El. Co.*, 306.
effect of assignment of such policy. *Id.*
payment of excessive premium under mistake held not to extend terms of policy. *Id.*
premium paid under mistake of law may not be recovered. *Id.*
soliciting agent not authorized to give renewal receipt. *Pacific Mut. L. Ins. Co.* v. *Carter*, 378.
liability of company for holding one out as general agent. *Id.*
when forfeiture waived by general agent. *Id.*
statute allowing penalty and attorney's fee applicable to mutual accident insurance companies. *Id.*
when penalty and attorney's fee disallowed. *Id.*

INTERPLEADER:

definition. *Chicago, R. I. & P. Ry. Co.* v. *Moore*, 446.
bill in nature of. *Id.*
authority of court first acquiring jurisdiction. *Id.*
conclusiveness of decree. *Id.*

JUDGMENTS:

effect of taking judgment in name of partnership. *Spaulding Mfg. Co.* v. *Godbold*, 63.
no presumption in favor of judgment on direct attack, as on appeal. *Walker* v. *Noll*, 148.
amended *nunc pro tunc* when. *Bowldin* v. *Jennings*, 299.
power of court to make amendments. *Id.*

JUDGMENTS—*Continued.*

when order of sale of land not amendable. *Id.*
court has no jurisdiction after term to expunge from record indorsement on record of claim of attorney's fee. *Osborne* v. *Waters,* 388.
conclusiveness of judgment of probate court. *Flowers* v. *Reece,* 611.
what constitutes a collateral attack on a judgment. *Id.*

JUDICIAL SALES:

how rental value of land ascertained where sale set aside. *McDonald* v. *Rankin,* 173.
liability of heirs of purchaser for rents. *Id.*
when improvements set off against purchase money. *Id.*
right of purchaser to recover purchase money on amendment of sale. *Id.*
purchaser at such sale not accountable for insurance money recovered. *Id.*
purchaser at such sale entitled to reimbursement of taxes and interest. *Id.*
also to reimbursement for improvements. *Id.*
how value of improvements determined. *Id.*

JUSTICES OF THE PEACE:

procedure on appeals from justices of the peace in criminal cases. *Potts* v. *State,* 165.

LANDLORD AND TENANT:

becoming a tenant by attornment. *Johnson* v. *Elder,* 30.
when agreement to attorn without consideration. *Id.*
administratrix who in leasing her own property describes herself as "administratrix" may sue thereon in her own name.. *Pine Bluff Aerie No.* 209, *F. O. E.,* v. *Dreyfus,* 284.

LARCENY:

refusal to charge as to intent of taking is error when. *Bailey* v. *State,* 216.
rejection of evidence as to threats by prosecuting witness error when. *Id.*
possession of goods recently stolen as evidence of guilt. *Wiley* v. *State,* 586.
when theft sufficiently recent. *Id.*

LEVEES:

who may sue to recover for permanent injury to land caused by levee obstructing drainage. *Board of Directors, etc.,* v. *Barton,* 406.

LIBEL AND SLANDER:

libelous *per se* to charge one with fornication. *Jackson* v. *Williams,* 486.
words used to be taken in natural meaning. *Id.*

LIENS:

enforced in equity on proceeds of property subject to lien when. *Beebe Stave Co.* v. *Austin,* 248.

LIMITATION OF ACTIONS:

void tax deed as color of title. *Johnson* v. *Elder,* 30.
effect of actual possession of part of tract under color of title to whole. *Id.*
effect of possession of land for 2 years under tax deed. *Id.*
amendment of complaint not a new suit when. *Smith* v. *Scott,* 143.
statute does not run against right of adult child to recover homestead until youngest child reaches majority. *Id.*
when statute runs against suit to enforce lien of tax purchaser for taxes paid. *Carwthers* v. *Greer,* 167.
vendor's lien reserved in deed is barred when debt is barred. *Benedict* v. *Griffith,* 195.
statute not affected by declarations of defendant's grantor when. *Id.*
part payment held to stop running of statute. *McAbee* v. *Wiley,* 245.
effect of part payment by agent. *Id.*
when action for money had and received not barred. *Wilson* v. *Shocklee,* 370.
statute begins to run against action for obstructing drain. *Board of Directors of St. Francis Lev. Dist.* v. *Barton,* 406.
when statute runs against railroad for obstructing drainage of surface water. *Kelly* v. *Kansas City So. Ry. Co.,* 465.
statute must be pleaded. *Id.*
statute applicable to actions for obstructing drainage. *Id.*
defense raised by demurrer when. *Mueller* v. *Light,* 522.
when mortgage barred. *Id.*
statute applicable to mortgage where mortgagor dies. *Id.*
statute held not to run during fraudulent concealment of cause of action. *Conditt* v. *Holden,* 618.
effect of fraudulent concealment of estray. *Id.*
when action by infant to hold father liable for rents of deceased mother's homestead barred. *Carroll* v. *Carroll,* 625.

LOGS AND LOGGING:

one who purchases growing timber verbally, pays price, enters upon and cuts timber is equitable owner. *Davis* v. *Spann,* 213.

MALICIOUS MISCHIEF:

three-fold damages recoverable by owner not payable into county treasury nor in county warrants. *Baker* v. *Nanny*, 91.

MASTER AND SERVANT:

evidence held to show negligence on master's part. *St. Louis, I. M. & S. Ry. Co.* v. *Corman*, 102.
when employee held not to have assumed risk. *Id.*
extent to which servant assumes risks. *Id.*
whether servant held to know whether particular device has been installed. *Id.*
effect of concurring negligence of master and fellow servant. *Id.*
when master liable for furnishing vicious animal to work. *Arkansas Smokeless Coal Co.* v. *Pippins*, 138.
how master's knowledge of animal's vicious nature proved. *Id.*
as to what is proximate cause of injury. *Id.*
duty of master as to furnishing safe appliances. *Id.*
duty of master to furnish safe appliances and keep in repair. *St. Louis, I. M. & S. Ry. Co.* v. *Reed*, 350.
duty to make inspections. *Id.*
when negligence proved by circumstances. *Id.*
duty to exercise care in selecting inspectors. *Id.*
effect of payment of wages of discharged servant upon accrued penalty. *St. Louis, I. M. & S. Ry. Co.* v. *Bryant*, 425.
such penalty not merged in judgment when. *Id.*
effect of offer of further employment upon running of penalty. *Id.*
liability of master for negligence of fellow servant. *Soard* v. *Western Anthracite Coal & Mining Co.*, 502.
fellow servant's act applies to all corporations. *Id.*
when contributory negligence question for jury. *Id.*
burden of proof as to contributory negligence. *Id.*
liability of railway company for furnishing defective car coupler. *St. Louis, I. M. & S. Ry. Co.* v. *York*, 554.
when master liable for defective appliance. *Id.*
whether servant guilty of contributory negligence in acting in emergency. *Id.*
whether servant negligent in making car coupling in usual way. *St. Louis, I. M. & S. Ry. Co.* v. *York*, 554.
whether servant negligent in violating master's rules. *Id.*

MAXIMS: SEE EQUITY.

res inter alios acta alteros nocere non debet. *Hamburg Bank* v. *George*, 476.
in jure non remota causa sed proxima spectatur. *Chicago, R. I. & P. Ry. Co.* v. *Miles*, 582.

MERGER:

right of servant to recover statutory penalty for discharge without paying wages not merged in judgment when. *St. Louis, I. M. & S. Ry. Co.* v. *Bryant,* 425.

MORTGAGES:

appropriation of proceeds of foreclosure sale where mortgage secured several notes. *Cook* v. *Collins,* 291.

MUNICIPAL CORPORATIONS:

liability of abutting owner for constructing sidewalk. *Blake* v. *Scott,* 46.
mode of filling vacancy in mayor's office. *Hogins* v. *Bullock,* 67.
who may not complain of irregularities in municipal elections. *Id.*
jurisdiction of mayor of town or city of second class in criminal cases. *Barnett* v. *Malvern,* 483.
power to declare nuisances. *Lonoke* v. *Chicago, R. I. & P. Ry. Co.,* 546.
right to proceed against nuisances. *Id.*
extent of police power. *Id.*
whether railroad in street is nuisance. *Id.*
when town estopped to deny railroad company right to use streets. *Id.*

NEGLIGENCE:

standard for judging of minor's conduct. *Garrison* v. *St. Louis, I. M. & S. Ry. Co.,* 437.

NEW TRIALS:

sufficiency of evidence raised by assignment that verdict is contrary to evidence *Naylor* v. *McNair,* 345.
motion for new trial for newly discovered evidence must be sustained by affidavits. *Jones* v. *Gaines,* 519.

NUISANCES:

when injury to residence a nuisance. *Junction City Lbr. Co.* v. *Sharp,* 538.
limit to the right to use one's property. *Id.*
when cinder pit a nuisance. *Id.*
measure of damages from nuisance. *Id.*
power of municipal corporations to declare nuisances. *Lonoke* v. *Chicago, R. I. & P. Ry. Co.,* 546.
municipal corporation may proceed in equity to abate. *Id.*
definition of public nuisance. *Id.*
railroad in street not a nuisance when. *Id.*
burden of proof of establishing. *Id.*

OFFICES AND OFFICERS: See MUNICIPAL CORPORATIONS.

PARTIES:

right of widow and children to sue for negligent killing of husband and father in Indian Territory. *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 102.

PARTNERSHIP:

effect of taking judgment in favor of partnership by name. *Spaulding Mfg. Co.* v. *Godbold,* 63.
effect of conveyance to partnership as such. *Id.*
execution deed to partnership reformed when. *Id.*
in case of difference of opinion will of majority controls. *Cotton Plant Oil Mill Co.* v. *Buckeye Cotton Oil Co.,* 271.

PAYMENT:

made under mistake of law may not be recovered. *Maryland Casualty Co.* v. *Little Rock Ry. & El. Co.,* 306.

PLEADING:

variance as to date of agreement held immaterial. *Smith* v. *Weatherford,* 6.
how performance of contract pleaded. *Kirchman* v. *Tuffli Bros. Pig Iron & Coke Co.,* 111.
items of damages need not be pleaded. *Id.*
pleadings treated on appeal as amended to conform to oral admissions. *Caruthers* v. *Greer,* 167.
when failure of one defendant to answer waived. *Ward* v. *Blythe,* 208.
remedy for indefiniteness of pleading. *Stoneman-Zearing Lbr. Co.* v. *McComb,* 297.
error of overruling demurrer waived by pleading over. *Id.*
exhibits referred to for explanation of allegations of pleading. *Bouldin* v. *Jennings,* 299.
not error to permit complaint to be amended after introduction of evidence when. *St. Louis, I. M. & S. Ry. Co.* v. *Goss,* 372.

PLEDGES:

effect of giving note as collateral. *Wilson* v. *Shocklee,* 370.
measure of damages for conversion of pledge. *Hamburg Bank* v. *George,* 472.

PRINCIPAL AND SURETY:

sureties on building contractor's bond not released for want of notice of principal's default when. *Jones* v. *Gaines,* 519.

PROBATE COURTS: SEE COURTS.

PUBLIC LANDS:

how title to unsurveyed land determined. *Johnson* v. *Elder*, 30.
deed of Commissioner of State Lands *prima facie* evidence of title. *Maney* v. *Burke*, 84.

RAILROADS:

act requiring particular railroad to fence right of way upheld. *Missouri & N. A. Rd. Co.* v. *State*, 1.
act not invalid as singling out particular road. *Id.*
purpose of penalty imposed by act. *Id.*
statute requiring keeping of water at station upheld. *State* v. *St. Louis & S. F. Rd. Co.*, 74.
such statute not discriminatory. *Id.*
question of railroad company's negligence in killing stock properly submitted to jury when. *St. Louis, I. M. & S. Ry. Co.* v. *Goss*, 372.
duty of traveler to look and listen at crossing. *Chicago, R. I. & P. Ry. Co.* v. *Hamilton*, 400.
open gate as invitation to cross. *Id.*
duty of traveler at crossing to look and listen. *Garrison* v. *St. Louis, I. M. & S. Ry. Co.*, 437.
negligence of minor driving upon track question for jury when. *Id.*
grant of right of way no authority to obstruct drainage. *Kelly* v. *Kansas City So. Ry. Co.*, 465.
liability for fires caused by operation of trains. *Central Arkansas & E. Ry. Co.* v. *Goelzer*, 569.
evidence held to justify finding of liability. *Id.*

RAPE:

when immoral character of prosecutrix provable. *Jackson* v. *State*, 71.
whether jury may consider failure of prosecutrix to make outcry. *Id.*
so as to her failure subsequently to make complaint. *Id.*

REFERENCE:

conclusiveness of master's report. *Carr* v. *Fair*, 359.

REFORMATION OF INSTRUMENTS:

mistake in execution deed may be reformed. *Spaulding Mfg. Co.* v. *Godbold*, 63.

ROADS AND HIGHWAYS:

act for formation of road improvement districts held unconstitutional so far as it authorizes entire county to be formed into district. *Parkview Land Co.* v. *Road Imp. Dist. No.* 1, 93.

SALES OF CHATTELS:

vendor absolved from duty to tender or ship chattels when. *Kirchman* v. *Tuffli Bros. Pig Iron & Coke Co.*, 111.
effect of vendee notifying vendor that he would not accept the goods. *Id.*
damages recoverable for breach of sale. *Id.*
place of delivery. *Id.*
market value of goods sold determined how. *Id.*
when contract executory. *American Jobbing Assoc.* v. *Wesson*, 287.
right to rescind executory contract. *Id.*
damages recoverable by vendee for breach of warranty. *W. T. Adams Machine Co.* v. *Castleberry*, 310.
what expenses recoverable. *Id.*

SALE OF LAND:

agent may be authorized to sell land verbally. *Davis* v. *Sloan*, 213.

SEDUCTION:

extent of corroboration of prosecutrix required. *Nichols* v. *State*, 421.
sufficiency of corroboration by circumstantial evidence. *Id.*

STATUTES: See CONSTITUTIONAL LAW.

validity of special act. *Missouri & N. A. Rd. Co.* v. *State*, 1.
necessity for statute in particular instance for Legislature when. *Id.*
rule as to implied repeal of statutes. *Cherokee Construction Co.* v. *Harris*, 266.
rule as to repeals by implication. *Chicago, R. I. & P. Ry. Co.* v. *McElroy*, 600.
when repeal implied. *Id.*

STATUTES CITED:

CONSTITUTION OF UNITED STATES:
amendment 14 3

REVISED STATUTES OF UNITED STATES:
§ § 5214, 5219..... 337

ACTS OF CONGRESS:
51 Cong., § 31, p. 94.... 107
1893, March 2..... 558

CIVIL CODE OF ARKANSAS:
§ 111 525

MANSFIELD'S DIGEST:
§ 5763 34

KIRBY'S DIGEST:
§ § 46-7..... 236
140 234
186 614
492 202
837 ..... 267, 269
841 ..... 329, 332
845 ..... 417, 420
848 .....268-9, 270, 329
858 269
859 ..... 269, 329
862 329
863 ..... 329, 332, 418, 420
864 .....329, 332
1227-8 243-4

KIRBY'S DIGEST—*Continued.*

§ 1348 151
1667 ..... 79, 80
1689 516
1766-7 124
1839 ..... 204, 205
1854 488
1892-3 91
2043 423
2230 416
2447-8 157
2707 294
2754 183
2755 ..... 183, 191
2756-7 183
2777-80 70
2790 70
2729-3016 98
3792 45
3828 46
4347 269
4349 ..... 269, 270
4458 391
4666 ..... 166, 167
4966-7 462
5064 471
5075 471
5088 621
5399 526
5415 314
5432 69
5433 69
5581 69
5589 69
5612 69
6013 458
6093 65
6133 118
6219 521
6289-90 106
6312, 6313, 6315.... 101, 102
6622 76

KIRBY'S DIGEST—*Cont'd.*

6629 485
6649 428
6802 602
6902 339
6919-24 .....339, 340
7085 212
7112 170
7223-7358 98
7867 621
8020 ..... 20, 90

CONSTITUTION OF 1874:

art. 5, § 25..... 4
6, § 23..... 69
7, § 28.....95, 98
7, § 35..... 151
7, § 42..... 166
9, § 6..... 263
12, § 3..... 69

OTHER STATUTES:

1868, July 23, § 72..... 170
1869, April 12.....327
1873, p. 430..... 166
1889, March 25..... 530
1891, March 4, § § 38, 43, 44 ..... 80, 81
1899, § § 9, 14, 18, 30.... 602
1901, May 23, p. 305.... 156
1905, p. 152, § 10..... 413
p. 307 387
p. 375 166
p. 538 428
p. 798 328
c. 165, § § 1, 2, 5..2, 3
1907, March 8.....503, 504
c. 247..95, 96, 97, 99, 100
1909, p. 636..... 78
May 12, p. 764.... 493

STOCK LAW: See ANIMALS.

TAXATION: See LIMITATION OF ACTIONS.

failure of clerk to attach certificate to delinquent list held fatal. *Johnson* v. *Elder*, 30.

right to redeem where by mistake the taxes on part of land were not paid. *Scroggin* v. *Ridling*, 630.

TAXATION—*Continued.*

right of tax purchaser at void sale to be reimbursed for taxes paid. *Caruthers* v. *Greer,* 167.
how invalidity of tax sale determined. *Id.*
right of purchaser at void judicial sale to reimbursement of taxes. *McDonald* v. *Rankin,* 173.
failure to publish delinquent tax list for two weeks in succession held to render tax sale void. *Byrne* v. *Less,* 211.
State may tax shares of national bank. *First Nat. Bank, etc.,* v. *Board of Equalization,* 335.
mode of taxing same. *Id.*
general powers of State Tax Commission. *Bank of Jonesboro* v. *Hampton,* 492.
not authorized to equalize individual assessments. *Id.*

TELEGRAPHS AND TELEPHONES:

when addressee of telegram not entitled to recover damages for mental anguish for its nondelivery. *Western Union Tel. Co.* v. *Archie,* 59.
liability for special damages for negligence in transmitting telegram. *Western Union Tel. Co.* v. *Askew,* 133.
measure of damages in such case. *Id.*
sufficiency of notice of special damages from face of telegram. *Western Union Tel. Co.* v. *Griffin,* 219.
when damages for mental anguish recoverable. *Id.*
who may sue to recover such damages. *Id.*
basis of recovery for nondelivery of message. *Id.*

TENDER: See FRAUD.

when insufficient to stop interest or costs, etc. *St. Louis, I. M. & S. Ry. Co.* v. *Bryant,* 425.

TIMBER: See LOGS AND LOGGING.

TRIAL:

argument of prosecuting attorney not prejudicial when. *Ferguson* v. *State,* 120; *Derrick* v. *State,* 237.
not error to permit prosecuting attorney to exhibit article identified by witness. *Derrick* v. *State,* 237.
asking peremptory verdict held not waiver of right to submit other questions to jury. *Pacific Mut. L. Ins. Co.* v. *Carter,* 378.
when error to direct verdict. *Russell* v. *Brooks,* 509.

TRUSTS:

when trust *ex maleficio* enforced. *Bragg* v. *Hartney,* 55.

VENUE:

of action for causing death is transitory. *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 102.

WASTE: See HOMESTEADS.

WATERS:

riparian rights upon non-navigable lake. *Johnson* v. *Elder*, 30.

WILLS:

when election under will required. *McDonald* v. *Shaw*, 15.
as to when election is necessary. *Id.*
purpose to require election must appear from will. *Id.*
when election made for infant by court. *Id.*
extent that election is necessary. *Id.*
will not affected by failure to mention unborn great grandchild. *King* v. *Byrne*, 88.
sufficient if grandchild is named by class. *Id.*

WITNESSES:

error to permit unsworn witness to testify. *Walker* v. *Noll*, 148.
bookkeeper not impeached by proof of mistake in account of another. *McCown* v. *Wilson*, 152.
foundation must be laid for impeachment of witness. *Murphy* v. *St. Louis, I. M. & S. Ry. Co.*, 159.
discretion of court to permit leading questions. *Derrick* v. *State*, 237.
discretion of court to permit prosecuting attorney to ask witness as to testimony before grand jury. *Derrick* v. *State*, 237.